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THE NCAA STATE ACTOR CONTROVERSY: MUCH ADO ABOUT NOTHING

Josephine R Potuto

THE 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

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[1] William Shakespeare,

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[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 are alike in predicting 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. er 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]

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[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 law college 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. John Gradwohl, Steve Willborn, and Rick Duncan read drafts of this article. Their teaching and research interests span education law, labor law, constitutional law, administrative law, statutory discrimination law, and arbitration. These diverse perspectives, and their overall good judgment, helped me think through content and thesis. My thanks to all.

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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

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[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 examples of the rich literature discussing 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, Cities and Homeowners Associations, 130 U.Pa.L.Rev. 1589 (1982); Ellickson, Cities and

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

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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 as well as 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 the state actor cases were decided between 1945 and 1970. See Varat, Cohen, Amar at 1209. 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);

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]

Terry v. Adams, 345 U.S. 461 (1953). The Court held that the Democratic Party effectively acted as an agent of the state; the fact patterns offered clear support for the holdings. 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 L.Ed. 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 12.

[19] Tarkanian, supra note 12. The Brentwood I Supreme Court, supra note 16, distinguished state high school athletics associations from the NCAA on the ground that all members of a state high school association are within the 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 16, at 298, 931.

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 "feel" of perceived circumstances, equities, and consequences. The arguments for state actor status go something 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 spending athletics departments,[24] prime targets of public, media, and government criticism;[25] it has 100 public institutions and only 17 private ones.[26]

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[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.

[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 Division I. 2009-10 NCAA Membership Report.

[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

- 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, in particular 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 implementing or changing NCAA bylaws and policies that affect them.[29]

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

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.

[25] NCAA Processes, supra note 6, at 261.

[26] 2009-10 NCAA Membership Report.

[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 12, 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 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).

- 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 a private association to chart their own course.[30]
- The NCAA should not be a state actor because such status would instigate regular and protracted litigation against it that would thwart if not subvert an overall NCAA scheme designed to maintain a level playing field among teams from competing member institutions and to advance core values. The impact would be particularly 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]

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[30] Tarkanian, supra note 12, at 199. See NCAA Processes, supra note 6, at 265 to 272. States outsource functions regularly. Such outsourcing does not make the private entity a state one, at least when the functions outsourced are not those traditionally performed by the state and the outsourcing is not done to avoid state action limits. See text at notes 12 to 18 supra.

[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 well come after a student-athlete has exhausted eligibility or left the institution. To deter institutions from colluding to permit student-athletes to compete, the NCAA has what is called a "restitution" bylaw. It covers circumstances in which a court injunction vacates NCAA action declaring a student-athlete ineligible to compete until the merits of that NCAA action are decided in litigation. It authorizes the NCAA to sanction a university that permits a student-athlete to compete during the duration of the court injunction if the injunction is stayed or reversed or if final court determination upholds the NCAA action. NCAA Bylaw 19.7.

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 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]

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[32] Notwithstanding the clear holding in Tarkanian, and even absent Supreme Court overruling it, there is a chance that the NCAA may be treated as a state actor through specific and substantial joint action with a state member institution. In a recent case, a due process claim against the NCAA survived a motion to dismiss. Cohane v. NCAA, 205 WL 2373472 (W.D.N.Y. 2005). The lawsuit was brought by a former head coach against the State University of New York at Buffalo. He claimed that joint interviews and other joint investigative efforts meant that the NCAA enforcement staff became an integral part of the campus decision to fire him and, thereby, a state actor with the university. On this theory, there also is potential for the NCAA to be treated as a state actor on a claim that a university imposed penalties, including termination of a coach, not through an independent assessment of its obligations as an employer or as a member of the NCAA with responsibility for administering a violation-free program, but because it believed such action would be treated as the type cooperation that would result in avoidance of more serious penalties imposed by the COI.

[33] The criticism focuses both directly on the Tarkanian decision as well as the general notion that the NCAA is not subject to 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 both directly on the Taranian decision as well as 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. POL'Y 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).

My purpose in 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 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 REMAIN 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 its bylaws and policies affording preferential treatment to women and racial and ethnic minorities,[38] a result unanticipated by NCAA critics and supporters alike. Otherwise, NCAA state actor status likely will have little or no impact on its regulation of intercollegiate athletics, including for those claimants and in those areas where NCAA critics most advocate for change.

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[37] Outside the scope of this article, therefore, is how state actor status might affect the NCAA as employer. Title VII, which governs workplace discrimination, applies to employers who have at least 15 employees without regard to whether the employer is a private or state actor. xxx U.S.C. ' dddd et seq. The NCAA currently is subject to Title VII and would continue to be subject to Title VII were it to be deemed a state actor.

[38] See text accompanying notes mmm to nnn infra.

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 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 is that there are few, if any, NCAA committee processes, bylaws, and policies that would fail to meet the constitutional requisites of equal protection (except preferential treatment[40]) and the first amendment. The same is true of due process:[41] those committee processes that even arguably have impact on non-members either already meet or exceed minimum due process requirements or could get there with very little tweaking. This may in part explain why state universities have experienced neither a spate of

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[39] See text accompanying notes ccc and yyy infra.

[40] See text accompanying notes xxx to yyy infra.

[41] Moreover, existing contract and associational rights already most likely offer the same or greater protection than that which would be provided by due process. NCAA Processes, supra note 6, at 278 to 280.

constitutional claims brought against them for enforcing NCAA rules nor a string of litigation defeats in lawsuits that have been brought.[42]

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,[43] by which a classification created for one purpose and in one context is treated as equally applicable to all other purposes and in all other contexts. The fallacy has "all the tenacity of original sin and must constantly be guarded against."[44] In any event, were the Supreme Court to extend state actor status to all incorporated Bill of Rights protections, the NCAA still would be relatively unaffected. Certainly it will not be sued for violating an individual's sixth amendment right to a jury in a criminal trial or for imposing cruel and unusual punishment prohibited by the eighth amendment.[45] The most likely additional claims to which the NCAA 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.

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[42] Cf. Brentwood I, supra note 16, at 12 (state-wide high school athletics associations "deemed" state actors have experienced no "wave of litigation").

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

[44] 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).

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

States qua states have an immunity from statutory and common law claims that is not available to private actors. In antitrust litigation, private actors on occasion have been treated as state actors for purposes of the state action antitrust exemption. Although there is little likelihood that a state actor NCAA will be covered by sovereign immunity or an antitrust exemption, I briefly discuss these doctrines so as to provide full context for the state actor issue and also to highlight an irony.[46] Should the NCAA be deemed a state actor for statutory and common law claims, it will end by having more, not less, legal protection than has a private actor NCAA. 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 arising out of a different legal structure and 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 those same violations.

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 calculate that fact finders will be skeptical of NCAA contentions and inclined to make large damage awards against it. In turn, they may expect to extract favorable

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[46] See text accompanying notes lll and www infra.

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.

II. 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 the only accountable entities when NCAA bylaw violations are alleged, their violations necessarily are committed by individuals – coach, student-athlete, etc. Similarly, although colleges and universities formally are the only entities to which NCAA action is directed, consequences nonetheless fall on individuals through an institution's compliance with NCAA directives addressed to it.

IV. DUE PROCESS

Procedural due process means that individuals with a constitutionally cognizable liberty or property interest[47] that may be abridged by official action must have notice of that action and a

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

reasonable opportunity to show an unbiased fact finder that the action should not be enforced against them (opportunity to be heard).[48] The constitutional adequacy of procedure varies by context according to how high the value placed on the particular substantive interest whose abridgement is at issue.[49] We tolerate error least in criminal trials – "it is better to let ten guilty men go free than let one innocent man be punished."[50] As a result, we provide the greatest degree of procedural protection to criminal defendants.[51] By contrast, prisoners in disciplinary hearings receive minimal protection and may even have their cases heard by fact finders employed by the prison system.[52] In proceedings dealing with student misconduct[53] or dismissals for failure to meet academic standards,[54] a student receives the process that is due when he has notice and an

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

[49] 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).

[50] 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).

[51] 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.

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

[53] Goss, supra note 44. The reported cases are those involving K-12 students, where courts have found that students have a right to a public education, because there is no equivalent constitutional right to a university education

[54] See text accompanying notes ccc and dddd infra.

opportunity to tell "his side of the story." [55] A formal hearing is not required. Instead, "an informal give and take" suffices.[56]

A. Due Process Claimants, Not?

Now begins a juggling act, necessitated by the fact that there are alternative reasons for the conclusion that due process challenges to NCAA bylaws, policies, and practices are unlikely to be successful. One reason is that the NCAA already does what minimum due process requires; later sections of this article focus on this reason. The other reason is independent of the merits of a due process challenge. Even if the NCAA acts in ways that offend minimum due process, there still needs to be a proper party due process claimant to bring a challenge. And therein lies the rub.[57]

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

[55] See cases cited at note 178 infra.

[56] Id.

[57] William Shakespeare, Hamlet, Hamlet's Solioquy, "To Be or Not To Be."

process protections may attach.[58] Coaches have a reliance property interest only to the extent that their contracts of employment give it to them;[59] in that case they also have a contract claim that likely affords equivalent and perhaps even greater protection than would procedural due process.[60] Other claims that might rise to the level of a cognizable property or liberty interest – injury to reputation, for example[61] – 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.[62]

The proceeding sections assume that a proper party due process claimant presents herself.

B. Notice

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[58] E.g., Bloom, supra note 54; 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).

[59] 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). At-will public employees may have a reliance property interest created by state law; in that case the due process clause will dictate the procedure to be applied. Swarthout v. Cooke, 131 S. Ct. 859 (2011). Given the nature of coaching and the regularity that coaches are fired or move to other positions notwithstanding contract language, there is little likelihood that state law will offer substantive protection independent of contract language.

[60] See NCAA Processes, supra note xxx, at cccc.

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

[62] 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. In fact, such a claim at least in theory might be thwarted by NCAA state actor status. See text accompanying notes xxx and llll infra.

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.[63] There are many Apressure@ points at which potential NCAA bylaws are evaluated before they are adopted. NCAA committees with different jurisdictional responsibility might officially support or oppose. The positions of "ancillary" associations such as those of coaches,[64] faculty athletics representatives,[65] and student-athletes[66] are solicited. Proposed bylaws also are vetted by NCAA legal counsel. In addition, the full text of reports of the COI and Infractions Appeals Committee as well as summaries of student-athlete reinstatement and secondary violations cases are posted on the NCAA website.[67] NCAA processes include a system for bylaw interpretation[68] and consultation with NCAA staff regarding scope and meaning of a bylaw in context.[69] In turn,

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

[64] Other groups are the National Association Of Athletic Compliance and the National Association of Collegiate Athletics Administrators.

[65] The 1A Faculty Athletics Representatives, comprised of FARs from DI FBS institutions is one such association. The author currently is its president.

[66] 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.

[67] The website address for major infractions cases is 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. Infractions reports also are summarized in the NCAA News.

[68] NCAA Bylaw 21.7.7.2. NCAA and Conference staff are available to member institutions to consult on the scope and meaning of bylaws. Official interpretations are posted on the NCAA web site.

[69] 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. NCAA staff periodically publish Ahot topic@ alerts on bylaws and interpretations.

institutional compliance staff provide regular NCAA rules education to staff members and student-athletes regarding bylaws that affect them. They also routinely respond to questions about bylaw import and scope. Finally, all student athletes and staff members agree in writing to comply with NCAA bylaws.[70] The full description of NCAA bylaw adoption and interpretation processes underscores how slim the chance that member institutions, or their coaches and student-athletes, credibly can claim that they neither knew, nor should be held to know, of the existence of a bylaw or its application.[71] This is assuredly so with regard to those bylaws whose breach is likely to trigger significant adverse consequences.

C. NCAA Committees

NCAA committee members are faculty and administrators at member institutions and conferences[72] appointed through formal procedures.[73] The scope of committee authority and likelihood of court challenge vary by committee. The COI and the SARC are directly charged with administration of bylaw violations.[74] These two, and committees vested with authority to

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[70] 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.

[71] NCAA Bylaw 22.2.1.2 (c) (Rules Compliance); NCAA Bylaw 30.3.1 (NCAA Rules Review). 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.

[72] NCAA Bylaw 21.7.1.

[73] NCAA Bylaw 21.7.3.

[74] 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.

grant waivers from the operation of particular bylaws,[75] would be the most likely to generate due process challenges should a proper due process claimant present herself. The focus of a due process claim would be either that committee action is unsupported by duly adopted bylaw or policy or that bylaw or policy is enforced in a discriminatory or arbitrary way.[76]

1. NCAA Bylaw Adoption

Procedural due process in rule making means that the substance of a rule must be within the jurisdiction of a rule-making body[77] and its adoption must have followed established procedures.[78] Because NCAA member institutions adopt the bylaws and policies to which they are bound,[79] NCAA legislation almost by definition is within its substantive authority. Not only

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[75] Decisions of the Student-Athlete Drug Testing Appeals Committee and NCAA Initial Eligibility Clearinghouse – NCAA national office staff who review the records of prospective student-athletes to assure compliance with academic and amateurism bylaws – also may generate legal challenges. For reasons of time, I do not separately discuss either. In addition, the general processes of the Drug Testing Appeals Committee mirror those of other NCAA committees and its protocol for specimen-collection and testing are those employed by the United States Olympic movement.

[76] See NCAA Processes, supra note xxx, at xxxxx; Horowitz, supra note 44. There also can be a challenge that the decision maker was biased against a claimant.

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

[78] See, e.g., Reuters Ltd. v. FCC, 781 F.2d 946 (D.C. Cir. 1986). The 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.

[79] 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

is it only theoretically possible for an NCAA bylaw to be adopted without full consideration or outside established NCAA channels,[80] therefore, but the NCAA can respond to legitimize any process defalcation by revising its procedures and then re-adopting a bylaw.[81]

1. Arbitrary or Discriminatory Enforcement

a. Committee Waivers

NCAA procedures permit institutions to request waivers from the regular operation of bylaws.[82] Due process does not require that an association that enforces rules must grant waivers from them.[83] The existence of a waiver process, therefore, both provides more process than need be due and underscores the unlikelihood of a successful procedural due process claim that a rule

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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.

[80] 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.

[81] This is what happened in the North Dakota mascot case described in note 70 supra.

[82] Particular committees have authority to grant waivers from the operation of particular bylaws. E.g., NCAA Bylaw 21.7.5.1.3.1; 21.7.5.1.3.2. The Subcommittee for Legislative Relief of the Division I 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.

[83] 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). The closest we come to requiring application of an exception are rare occasions involving the doctrine of independent and adequate state grounds when the Supreme Court has found a state procedural rule Aunduly harsh@ even though it meets minimum due process. Lee v. Kemna, 534 U.S. 362 (2002); Osborne v. Ohio, 495 U.S. 103 (1990).

duly adopted and regularly applied nonetheless fails due process in its regular application. By definition, a waiver process vests discretion to depart from the black letter of procedure. Necessarily, then, an exercise of discretion that declines departure from waiver guidelines is a long way from showing the type arbitrary or discriminatory treatment that would constitute a failure of procedural due process.[84]

b. 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 presentations and acts as a finder of facts. Historically it has been the prime focus of commentator agitation for NCAA state actor status. Its committee process led to Jerry Tarkanian's lawsuit against the NCAA.[85]

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

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[84] See cases cited at note 100 supra.

[85] Taranian, supra note 12.

institution misstated his case or pointed its finger at him to escape additional penalties levied against its athletics department.[86] 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.[87]

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 current enforcement[88] and infractions processes provide them,[89] not only to member institutions

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[86] Under the pre-Tarkanian COI hearing process, a coach's interests were represented by the member institution. Were a member institution before the COI to decide its coach committed no violations, in other words, then it had every interest in presenting that position effectively and cogently. Were the institution to decide its coach committed violations, then its obligations of membership were to report that conclusion.

[87] 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).

[88] 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 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.

[89] In fact, courts and commentators considered even the pre-Tarkania COI procedures to meet 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. POL'Y 71, 75 (1996). At least two courts pointed to the fact that COI members were law professors as demonstration 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

but also to coaches and institutional staff members.[90] Among other things, the opportunity to be heard afforded involved individuals such as Tarkanian[91] includes (i) a neutral and independent COI; (ii) a full opportunity to present their case,[92] including sufficient time to respond to allegations in writing[93] and presence at a COI hearing with counsel;[94] (iv) COI reliance on

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Athletic Ass'n, 560 F.2d 352, (8th Cir. 1977) ("distinguished panel of jurisprudential scholars. . . beyond reproach as an impartial decision making body").

[90] 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 through donations or other conduct. NCAA Bylaw 13.0.2.13. Booster misconduct is a continuing source of institutional violations and penalties imposed on institutions. 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. Boosters clearly have no cognizable due process liberty or property interest to make contributions, get Aperks,@ or have special access or insider institutional status. Their relationship with a program is far different than that of a coach or student-athlete. The NCAA has no authority beyond a disassociation directive to compel their cooperation. 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 claim to participate and also that their participation adversely may impact the truth-finding function. Not only may they create hearing delays and the potential of obstructive conduct, but, much more significant, 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 questioning. 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 provided 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 disassociation of a booster and loss of his contributions. 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.

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

[92] NCAA Bylaw 32.8.7.3 (Institutional or Involved Individual=s Presentation).

[93] NCAA Bylaws 32.6.5 (Deadline for Response); 32.6.6.1 (Extension): 32.6.8 (Deadline for Submission of Written Material); 32.8.7.4 (Type of Information).

[94] NCAA Bylaw 32.8.6 (Appearance of Individuals at Hearings). There also is the opportunity to have questions answered. NCAA Bylaw 32.8.7.6 (Committee on Infractions Questioning).

information only when that information has been provided to involved individuals and the source identified to them;[95] (v) COI fact-finding based exclusively on the record before it;[96] (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;@[97] (vii) a written COI report that sets forth the grounds for findings and penalties;[98] and (viii) the right to appeal adverse findings to a neutral and independent infractions appeals committee.[99]

c. The SARC

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[95] NCAA Bylaw 32.8.7.4.1 (Information from Confidential Source). Bylaw 32.8.7.4.1 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 under the bylaw if she is identified to an institution or any involved individual against whom her information would be used even though she is not identified to the COI. Id.

[96] 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 6, at 295.

[97] In making its findings, the COI considers with particular care 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 conducting its investigation and presenting information at the hearing. See NCAA Bylaw Chapter 19. The COI hears claims of procedural issues arising out of the investigative process. West Virginia Infractions case, supra note 68.

[98] NCAA Bylaw 32.9.1 (Infractions Report).

[99] NCAA Bylaw 32.11 (Appeal Hearings); NCAA Bylaw 19.2.1.1 (Composition of Committee). 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).

Student-athlete violations run the gamut from academic fraud,[100] gambling,[101] agent representation,[102] and receipt of large amounts of money[103] to what may be inadvertent violations such as receipt of recommended books on a book scholarship (when only required books may be provided),[104] retention of used athletic equipment,[105] and acceptance of a sandwich purchased by a booster.[106] The SARC deals with questions of "reinstatement" of competition eligibility because commission of violations automatically renders a student-athlete ineligible. Consequences for student-athlete violations run the gamut from permanent ineligibility[107] to reinstatement to eligibility with no restriction on competition opportunities.[108]

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[100] NCAA Bylaw 10.1.

[101] NCAA Bylaw 10.3

[102] NCAA Bylaw 12.3.

[103] NCAA Bylaw 16.0.2.3.

[104] 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 6, at 284 n. 112.

[105] NCAA Bylaw 15.2.3.

[106] NCAA Bylaw 16.0.2.3.

[107] See Division I SAR Committee guidelines, supra note 103. Permanent ineligibility happens only in about one percent of reinstatement cases. NCAA Bylaw 21.7.7.3; NCAA Student-Athlete Frequently Asked Questions, hereafter referred to as 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.

[108] Some violations are treated as sufficiently de minimus that there is no ineligibility consequence. E.g., extra benefits valued at less that $100.00; Reinstatement Guidelines, supra note 103; and receipt of recommended texts on a

SARC proceedings are more informal than those of the COI.[109] The SARC makes no independent decision whether or how a violation was committed, but instead relies on the position taken by the institution at which the student-athlete is enrolled.[110] Its sole job is to decide the degree of student-athlete culpability based on the facts presented to it and then to decide whether and under what conditions a student-athlete may be reinstated to competition eligibility, including, in particular, the duration of any period of competition ineligibility.[111]

A high volume of reinstatement decisions are processed annually.[112] 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, applying guidelines adopted by the

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book scholarship (only required texts may be provided), no matter the value. Although there is no withholding from eligibility, a student-athlete must disgorge himself of the benefit before being able to compete. Id.

[109] And informality does not a due process violation make. In Brentwood I, supra note xxxx, a member high school sued its association for enforcing a recruiting rule that allegedly violated its first amendment rights. The high school also claimed that the association's board violated its due process rights when, during deliberations, the board reviewed notes never provided to the high school and had ex parte discussion both with individuals who investigated the case and the individual who presided in earlier proceedings. The Supreme Court described as a "questionable holding" the district judge's determination that there was a due process violation. Brentwood II, supra note xxxx, at 303-04. The Court also decided that "even assuming" due process was violated, any error was harmless. Id.

[110] If an institution has a question whether conduct constitutes a violation, it may submit the question to NCAA staff for a decision. If it believes a waiver from the operation of a bylaw is warranted, it may make a waiver request to the committee with authority over the substantive bylaw. NCAA Processes, supra note 6, at 272 to 276.

[111] Reinstatement Questions, supra note 106, 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 flowing from what its student-athletes did.

[112] 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 106.

SARC.[113] Universities have a right of appeal to the SARC that includes a telephonic informal hearing.[114]

Because the reinstatement process relies on an institution both for the conclusion that violations were committed and an explication as to how, an institution can suffer no due process violation running to SARC's conclusion that there was a violation. Instead, an institution would need to prove that the SARC or its staff acted arbitrarily or discriminatorily either in deciding the degree of student-athlete culpability or in failing to depart downward from guideline conditions for reinstatement.[115]

Guideline reinstatement conditions are the product of SARC action. So long as the SARC acts within its jurisdiction, an institution will have no more success challenging a guideline condition than it would challenging a duly adopted NCAA legislative proposal. Successfully to challenge the SARC's refusal to depart downward from a guideline, an institution would need to show that the departure fits squarely within a SARC-articulated guideline exception; that, independent of articulated guideline exception, the SARC has an established pattern of exercising discretion to depart downward in circumstances similar to that of the student-athlete in the particular case; or that the facts warrant articulation of a new exception.

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[113] Reinstatement Questions, supra note 106.

[114] Reinstatement Questions, supra note 106, at 1.

[115] See note xxx supra.

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.[116] By contrast, if the challenge is to a SARC decision that the facts fail to fit within an articulated exception, the decision will offend due process only if it was arbitrary or discriminatory.[117] An institution also may argue that the facts in a particular case warrant creation of a new articulated guideline exception. Here too the battle is uphill, as generally there is no due process obligation to carve out exceptions.[118]

In proceedings dealing with misconduct by public school students, even when the potential consequence is expulsion,[119] the requisites of due process are met by an informal process whereby

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[116] See Harding v. United States Figure Skating Ass'n, 851 F. Supp. 1476 (D.Ore. 1994) (courts intervene in decisions of an association 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). The one exception would be if the SARC elects to disapprove of the guideline condition in the instant and all succeeding cases.

[117] A claim that the facts also would have supported a different decision most likely is not enough. An institution also may claim that denial of a downward departure offends due process because the facts of a particular case resemble those where the SARC has in the past granted the very outside-guideline departure now requested. At a minimum, the institution would need to show a track record of such SARC departures before it could hope to demonstrate that SARC's failure similarly to exercise discretion in the instant case is arbitrary or discriminatory. See cases cited at note xxxx infra. See also CITE FED JUR EXAMPLES.

[118] 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 within the purpose. In other words, legislation and rules may be both over- and under-inclusive without offending due process. See generally Tussman & tenBroek, "The Equal Protection of the Laws," 37 Cal. L. Rev. 341 (1949).

[119] 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).

a student has a chance to tell his story.[120] Although the NCAA is not an educational institution, it has been described as a "surrogate"[121] 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 trigger review by both.[122]

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 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.[123] This

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[120] See Goss, supra note 44; Tasby v. Estes, 643 F.2d 1103 (5th Cir. 1981). It need not offend due process for an administrator who initiated and investigated charges to serve as hearing officer on the charges. 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 conduct closed-door deliberations where the principal and superintendent who testified against the student were present and the attorney who presented the charges acted as advisor to the board. 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. POL'Y 71, 75 (1996). Even though student disciplinary proceedings may involve fact determinations by a hearing officer and students may face substantial suspension or expulsion, due process for students requires no more than an informal process whereby a student gets a chance to explain what happened. See text accompanying notes lll and mmm infra.

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

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

[123] Reinstatement Questions, supra note 67, at 3.

difference, however, is unlikely to provide student-athletes with a procedural due process claim even though it may impact the opportunity to be heard.

In the first place, typically a student-athlete's written explanation of the circumstances of a violation 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, a student-athlete's claim for reinstatement may be said to be subsumed in that of the member institution or, in any event, is no greater than that of the institution.[124] Athletics departments regularly advocate for student-athlete interests. They provide more assistance to student-athletes navigating campus processes than is provided to students generally.[125] They intervene when the media criticize their student-athletes.[126] Not only do athletics departments routinely advocate for student-athletes, but in almost every reinstatement case an institution's interests are co-extensive with its student-athlete's.[127] Both want the student-athlete to be eligible

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[124] Courts are beginning to treat student-athletes as third-party beneficiaries to the NCAA association "contract" among member institutions, thereby permitting student-athletes to raise in court the same claims that member institutions might raise. E.g., Bloom, supra note xxxxx. Even courts that do not formally find third party beneficiary status may assess the merits of a student-athlete's claim as if she were a third party beneficiary. Nonetheless, As third party beneficiaries, however, their claims are no broader than those of their member institutions, and they fail on the same grounds.

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

[126] 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).

to compete, and as soon as possible.[128] It is questionable, therefore, that student-athletes speaking independently would do better than their institutions speaking on their behalfs.[129]

The most compelling reason why student-athletes will be unable successfully to challenge a state actor NCAA, however, is unrelated to the adequacy of the SARC process afforded them. It is that they have no cognizable reliance interest in an opportunity to compete and, therefore, no due process claim to be made. State actor status by itself need neither impel the NCAA to revise reinstatement processes to provide direct and independent participation by student-athletes[130] nor to provide them enhanced opportunity to challenge an adverse reinstatement decision in court.

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[127] On occasion an institution will not have as strong an interest equivalent to its student-athlete. Among other things, there be others on the team able 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 coach may want to have younger student-athletes play. It is possible, therefore, that an institution will not petition for reinstatement. In these situations, it appears that a student-athlete clearly would 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 under NCAA bylaw does not equate with playing time; that decision is the coach's.

[128] 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.

[129] There nonetheless is a benefit in the perception of fairness and the satisfaction that student-athletes would have in the process. 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).

[130] Doing so in SARC cases would involve difficulties not present in COI cases – number of reinstatement cases and time sensitivity would need to be accommodated.

For either or both to occur, the Supreme Court also would need to make a sharp turn in course and declare that student-athletes have a due process reliance interest in the opportunity to compete.[131]

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 a student-athlete can show significant disagreement between her and her institution as to the facts or her degree of culpability.[132] At the very least, it would enhance a student-athlete's perception of the fairness of the process[133] as well as that of NCAA critics. It is not my purpose, however, to describe here a SARC process that would include formal

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[131] SARC processes are more likely to change if student-athletes were found to have a cognizable due process reliance interest in the opportunity to compete, even were the NCAA not a state actor and, therefore, not subject to due process constraints. For discussion as to why, see text accompanying notes ccc and ddd infra. The Supreme Court has heed that 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 are not documents open to the media. Their recitation of the circumstances leading to a decision is brief. They are not posted in "real time," and, in any event name neither institution nor student-athlete. Although media accounts frequently describe student-athlete reinstatement cases and their resolution, their decision does not list names.

[132] Providing student-athletes such a formal opportunity to present a written statement would cure any potential due process violation that even arguably might exist. Amateur athletes have such an opportunity. The Ted Stevens Olympic and Amateur Sports Act governs national team amateur competition. 36 U.S.C. Section 220501 et.seq. The United States Olympic Committee administers competition and determines athlete eligibility for international competition. 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 of an adverse NGB decision. The Act grants amateur athletes no right to sue the USOC or NGBs. Instead, athletes are required to submit claims 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).

[133] See authorities cited at note xxx supra.

student-athlete presence, the possible practical obstacles to doing so, or the policy reasons in favor.[134] 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 a student-athlete's opportunity to raise a due process challenge in court to SARC processes from which he was excluded, or to prevail on the merits, even if he suffered permanent competition ineligibility and his interests and those of his institution were not consonant. For that to happen, student-athletes must have a cognizable due process interest in an opportunity to compete in varsity athletic competition.[135] Third, were a state (or, for that matter, private) 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

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[134] In a forthcoming article co-authored with Professor Matt Mitten, Director of the Marquette xxxxx, we compare NCAA committee processes with the processes employed by the United States Olympic Committee and the sports federations in each amateur sport. We there discuss a model to include in the SARC process a student-athlete voice in defined circumstances.

[135] There also is quite unlikely for there to be an cognizable injury to reputation as SARC reports name neither student-athletes nor their institutions.

against them to their disadvantage.[136] 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.[137] Finally came Supreme Court cases requiring that discrimination advantaging racial and ethnic minorities and women be treated with the same level of scrutiny[138] afforded discrimination disadvantaging them.[139] The end result is that state action focused on race or gender is constitutionally suspect, no matter the motive or beneficiary.

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

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

[137] 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).

[138] Strict scrutiny is the standard of review for equal protection claims made by racial and ethnic minorities; 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 the standard of review for gender discrimination claims. United States v. Virginia, 518 U.S. 515 (1996). The test for gender discrimination has been described as imposing strict scrutiny in gender cases, or something nearly so. See 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).

[139] Ricci v. DeStefano, 557 U.S. xxx (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).

institutions.[140] 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 so to discriminate.[141] The NCAA has no policy or bylaw that embodies purposeful adverse discrimination. Although its bylaws most directly relevant bylaws to admissions decisions, those setting initial eligibility requirements, give no preferential treatment to racial and ethnic minorities,[142] in its governance structure, the programs it administers, and the internal operation of its national office,[143] the NCAA is permeated with preferential treatment policies designed to expand opportunities for racial and ethnic minorities and women, including through the use of quotas.[144] All these are constitutionally suspect when the actor implementing them is a

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[140] 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 must give deference to university academic decisions due to Aimportant purpose of public education and the expansive freedom of speech and thought associated with the university environment@). 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@).

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

[142] Of course, 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.

[143] One example of potential NCAA liability is its affirmative action hiring program for the national office. NCAA Bylaw 31.8.1.1.

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

state actor, with quotas per se unconstitutional.[145] 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.[146] 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.[147] Similarly, the combined membership of the five remaining Division I cabinets also must include at least 20 percent ethnic minorities and 35 percent women.[148]

- NCAA committees also have quotas. For example, the COI must have at least two women among its ten members.[149]

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[145] 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 said to be subject to intermediate scrutiny, a test less rigorous than strict scrutiny. If so, then gender quotas might survive when race quotas would not. In its technical employment of intermediate scrutiny, however, the Court has said that discrimination on the basis of gender would require "an exceedingly persuasive justification." United States v. Virginia, 518 U.S. 515 (1996). The language has been interpreted as creating a roughly equivalent test for race and gender discrimination. 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).

[146] NCAA Const. Art. 4.02.5.

[147] Id.

[148] Id.

[149] NCAA Bylaw 19.1.1.

- Certain student-athlete leadership and other programs are open only to minority student-athletes; other programs preserve designated slots for minority student-athletes.[150]

- An obvious example of a quota involves the Senior Woman Administrator position (SWA) mandated at every NCAA member institution and conference.[151] The SWA is part of Conference governance and eligible to serve in NCAA governance. Only a woman may be an SWA.

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)[152] and 15-member Committee on Women's Athletics (committee may have no fewer than four male and four female members).[153] That these committees focus particularly on issues affecting minorities

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[150] A sampling of these programs includes the NCAA Post-Graduate Scholarship Program (set and equal number of scholarships to men's and women's student-athletes in all three NCAA divisions without regard to level of men's and women's qualifications); the Division III Ethnic Minority and women's Internship Grant Program (funds for Division III institutions to provide a 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 conference offices to create 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.

[151] NCAA Bylaw 4.02.4. The SWA is not a mandated employment position at member institutions. 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.

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

[153] NCAA Bylaw 21.2.10.

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.[154]

Unless the Supreme Court greatly expands the scope and reasoning of its higher education decisions or more generally reverses course on the constitutionality of preferential treatment, a state actor NCAA would have to eliminate any quotas it administers and most likely eliminate, or at least restructure, NCAA initiatives aimed at enhancing racial, ethnic, and gender diversity in athletics administration and coaching and in professional and graduate opportunities for student-athletes.[155] It is possible, of course, for the NCAA to proceed as before with its preferential treatment policies, policies which are an important underpinning to its operations, and wait to see

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[154] NCAA Manual, Figure 4-1.

[155] I assume for this discussion that the constitutional tests applied to colleges universities similarly would apply to the NCAA. If they do not, then NCAA preferential treatment bylaws and policies are even more constitutionally suspect. The impact on diversity initiatives, moreover, 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. See case cited at note 141 supra. With regard to race discrimination in programs receiving federal funds (Title VI; 42 U.S.C. ' 2000d) and gender discrimination in educational programs receiving federal funds (Title IX; 20 U.S.C. § 1681), the Supreme Court has upheld congressional limits on practices that have an adverse impact independent of purpose. Although all NCAA member institutions, private and state, are subject to Titles VI and IX, the NCAA is not. NCAA v. Smith, 525 U.S. 459, 119 S. Ct. 924 (1999); Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999), hereafter Cureton. As a private actor, the NCAA may choose voluntarily to 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, but not one subject to Titles VI and IX because not receiving federal funds, the NCAA may face constitutional obstacles to its compliance with statutory strictures that go beyond the fourteenth amendment in prohibiting discrimination with adverse discriminatory impact. Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L.Ed. 2d 854 (1989) (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.").

of litigants with standing are willing to challenge them. Given the importance of diversity to the missions of most colleges and universities, it may be that plaintiffs will not readily present themselves. Nonetheless, intentional and knowing flouting of clear constitutional principles is not action expected of institutions of higher education or an association to which they belong. To assume this posture by the NCAA, however, is to assume the willingness of an association of colleges and universities to ignore the prerogatives of the United States Constitution. This suspicion has been articulated by some commentators;[156] it is not one I share.

VI. THE FIRST AMENDMENT

A. Some General Principles

The first amendment covers a wealth of speech, expressive, and associational activities. To decide if a violation has occurred, the Supreme Court employs different operative tests to a multitude of variables. The Court looks at content[157] and viewpoint restrictions;[158] time, place, and manner restrictions; speech evaluated as conduct;[159] and conduct evaluated as speech.[160] The

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

158 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.

159 Feiner v. New York, 340 U.S. 315 (1951) (disorderly conduct); Criminal law case re conspiracy or another example such as false advertising or labeling or fraudulent sec offerings.

160 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.

Court considers the type speech – political speech;[161] obscenity;[162] commercial speech,[163] "fighting words;" hate speech;[164] libelous speech;[165] and speech that discloses private information.[166]

The situs of speech matters: the law permits least latitude for government regulation in traditional public fora for speech purposes[167] and a great deal of latitude to regulate speech at schools,[168] prisons,[169] and military bases, particularly speech by schoolchildren, and armed forces

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

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

[163] 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). With regard to advertisements, government may regulate 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).

[164] 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).

[165] 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).

[166] 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).

[167] See text accompanying note 168 infra.

[168] Bethel School District v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines School District, 393 U.S. 503 (1969).

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

personnel.[170] There are distinctions made between speech of private citizens regulated by the government when acting as sovereign,[171] speech considered that of the government itself,[172] and speech by a government employee regulated by the government when acting as an employer.[173]

The most obvious 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 related to speech activities; and crowd control at athletics events.[174]

B. Coach Discipline

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

[171] Wooley v. Maynard, 430 U.S. 705 (1977).

[172] Rust v. Sullivan, 500 U.S. 173 (1991).

[173] E.g., U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973); Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); Board of Comm'rs, Wabaunsee County v. Umbehr, 518 U.S. 668, 679, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). With regard to an association enforcing rules against a member for speech of its employee, the Court analogized to the public employer speech cases and said that an association has an interest in managing an "efficient and effective . . . athletics league." Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 127 S. Ct. 2489 (2007); hereafter referred to as Brentwood II.

[174] 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.

The government qua government is subject to tight constitutional tests when it acts to prohibit or regulate citizen speech. In the interest of an "efficient and effective workplace,"[175] by contrast, the government as employer may sanction its employees for what they say in the course of their responsibilities as employees, even when they speak on matters arguably of public concern.[176]

The higher up the food chain is the government employee speaker, the more likely she will be perceived as speaking for it, and, in turn, the more likely that employer speech restrictions on her will be upheld. Coaches and athletics administrators are expected to be positive role models for student-athletes as well as for youth generally.[177] What coaches and athletics administrators 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.[178]

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[175] E.g., Pickering, supra note 152; Connick, supra note 152. 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.

[176] Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). 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.

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

[178] Cites to Penn State go here.

All conferences and the NCAA have rules penalizing 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.[179] All conferences and the NCAA also have rules penalizing coaches and athletics administrators for publicly criticizing game officials[180] or competitors.[181] 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.

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, then traditional first amendment protections would apply. But this is not the typical context in which coaches and administrators speak. When a coach criticizes an opposing coach after a game or an athletics administrator criticizes a Conference decision, they are speaking pursuant to their official

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[179] 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).

[180] E.g., 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).

[181] 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.

responsibilities. They therefore are subject to discipline by their employer institutions unobstructed by the first amendment. Similarly, if they use obscene or offensive speech they may be sanctioned:[182] a coach, after all, does not use obscenity or sexist speech to focus discussion on the appropriate parameters of speech regulation.

Managing an Aefficient and effective . . . athletics league@[183] is the reason the NCAA exists; all other roles are secondary to it. The NCAA regulates the conduct of coaches and athletics administrators through the obligation of its members to enforce its bylaws and policies. It does not, however, employ those coaches and athletics administrators, and, therefore, the public employee speech cases are not directly on point. In Brentwood II,[184] the Supreme Court extrapolated from these cases and used the public employee speech test to evaluate the constitutionality of a state high school association's rule restricting recruiting.

The Brentwood II Court began by acknowledging that Brentwood had a first amendment right to provide truthful information to prospective students to entice them to enroll. The Court then emphasized that Brentwood's right was cabined by its voluntary decision to join an athletics

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[182] The first amendment also 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).

[183] Brentwood II, supra note 133.

[184] Brentwood II, supra note xxx.

association and follow its rules.[185] The party before the Court was Brentwood, however, not the coach whose speech violated the rule.

Although not a foregone conclusion, it is extremely likely that the Court would come to the same conclusion as it did in Brentwood II were a coach to challenge the enforcement against him of an association's rule abridging his speech. The Brentwood II Court described the effect of enforcing the recruiting rule as preventing coaches from engaging in speech.[186] The Court also upheld the high school's obligation of associational membership to enforce the rule against its coaches. Equally significant, to forge a distinction between an institution and the individuals that act on its behalf provides an easy "end around" the operation of an association's rules. The Supreme Court described these rules as "nowhere near the heart of the first amendment" and needed for the administration of athletics competition.[187] So long as an association's rules are necessary for competition and removed from the first amendment's "heart," 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 formally agree to be bound by NCAA bylaws.

C. Student-Athlete Discipline

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[185] Brentwood II, supra note 133, at 299-300, 2495-2496. As the Court put it, "[F]ootball is a game. Games have rules." Brentwood II, supra note 133, at 300, 2496 (quoting the Brentwood circuit court opinion, 442 F.3d. 410, 444).

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

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

Discipline of student-athletes, including their speech, is the direct responsibility of the colleges and universities at which they are enrolled. The areas in which the NCAA is concerned with student-athlete speech are competitor expressive behavior during championship games[188] and prior to and at NCAA championship events.[189] At least two lines of cases support the conclusion that such NCAA regulation of student-athlete speech is constitutional: the public school speech cases, the public employee speech cases.

In the context of the first amendment, courts already give great deference to the needs and decisions of educators in maintaining discipline in grade and high schools.[190] These decisions are not focused on college-age students, admittedly. But they permit regulation of speech that is at the core of the first amendment[191] and to students for whom states are obligated to provide an

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[188] For example, the "excessive celebrating" rule in football. 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(unsportsmanlike conduct).

[189] E.g., NCAA Bylaws 31.02.3 (Misconduct includes unsportsmanlike conduct and unprofessional behavior); 31.1.10. See "Public Reprimand and Suspension Issued to Lehigh University Football Student-Athlete, NCAA.org (12/9/11).

[190] E.g., Tinker v. Des Moines Independent Community School, 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed. 2d 731 (restriction on speech permissible where speech would Amaterially and substantially disrupt@ academic environment). See Parrish v. NCAA, 506 F.2d 1028 (5th Cir. 1975). They similarly give great deference to university academic decisions. Grutter, supra note 131; 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@).

[191] E.g., Tinker v. (armbands protesting VietNam War). A distinction, however, is that the core first amendment activity occurred during the school day and on school grounds.

education. Aligned with these, there is little question that a university faculty member can restrict forms of expression in class so long as viewpoint neutral.[192]

As to the public employee cases, the expectation that the Brentwood II Court would have upheld the association's right as against an institutional employee plaintiff also seem applicable to regulation of student-athlete speech. A central function of competition administration and the orderly process of game management may be said to be regulation of the type and manner of comments that might be made by student-athletes. It also seems within the scope of competition regulation to regulate student-athlete speech closely identified with the competition (comments on opponents in days leading up to competition, etc.). Prohibiting student-athlete speech that deprecates other teams or student-athletes is directly related to promoting the goals of higher education and athletics competition as one aspect of it.

A final element in the conclusion that current NCAA regulations of student-athlete speech is constitutional derives from that part of the Court's assessment of the constitutionality of speech regulation that focuses on how government sanctions speech. Sanctions can include adverse personnel decisions, including termination of employment; fines; damages in civil lawsuits; criminal penalties; a license or other government permission in advance of the speech activity;[193]

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[192] On the theory that the classroom either is a nonpublic forum of a public forum designated for a particular purpose. CITE.

[193] A licensing or permit scheme must have clear standards for implementation to guide the exercise of discretion in granting or denying. 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;[194] injunctions;[195] or censorship.[196] The less impactful the sanction the more the court might uphold the regulations. 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 expel them from school. It does not require the return of scholarship funds provided to them. It does not seek damages from them for institutional consequences attendant on their violation of NCAA bylaws. It does not prevent them from enrolling in an NAIA[197] 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.

There are a number of other areas in which NCAA bylaws and policies also regulate speech and associational interests of student-athletes. These sit in the general area of amateurism.

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[194] Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973).

[195] E.g., 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).

[196] E.g., New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) (per curiam); Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

[197] For a description of the NAIA see note 7 supra.

NCAA bylaws regulate student-athlete relationships with sports agents, for example.[198] They prohibit student-athletes from marketing their names and likenesses, as another example.[199] It is unclear the extent to which 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. In addition, courts have been generally deferential to the NCAA's articulation of amateurism concerns in their enforcement of bylaws against student-athletes;[200] there is no reason to believe that such deference would change only because the NCAA now would be a state actor.

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 likely is embedded in litigation in state common law and federal statutory claims independent of the NCAA's status as a state actor. 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 change its rules to conform.

D. Recruiting

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[198] NCAA Bylaw 12.3.

[199] NCAA Bylaw 12.5.2.

[200] Bloom, supra note 54. But see, Oliver v. NCAA, 920 N.E. 2d 203 (Ohio Ct. Com. Pl. 2009).

Of all first amendment challenges, those to recruiting restrictions would present 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. In Brentwood II the Court signaled its understanding of the imperatives of recruiting. The particular recruiting issue concerned a high school coach at Brentwood who wrote personally to prospective student-athletes preliminarily committed to attend his school. The high school association determined that the letter violated its rule prohibiting the use of "undue influence" in recruiting. All but one member of the Court joined a holding that the recruiting rule was necessary to manage an efficient and effective athletics league.[201] The lone holdout, Justice Thomas, believed that the Court erred in Brentwood I in deeming the high school association a state actor.[202]

E. Crowd Management

The NCAA is responsible for crowd control only at NCAA championships. There are more than 85 NCAA championships,[203] most with two or even three preliminary rounds.[204] This

[201] Brentwood II, supra note 133, 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).

[202] Brentwood II, supra note 133, at 306, 2499. Justice Thomas urged the Court to reverse its earlier decision deeming private state-wide high school association a state actor.

[203] 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

[204] 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,

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 should be responsible for any crowd control regulations that violate the first amendment. It could not claim immunity from its constitutional obligations merely by siting and administering a championship at a private venue.[205] A venue open to the public to watch athletic competition is public only for those purposes associated with watching the game, however. It is not a public forum that has, as "a principal purpose, . . . the free exchange of ideas,"[206] where speech regulation must meet a very high bar to pass constitutional muster.[207] Although a sports event means crowds of fans who shout and talk and bring placards and banners, it is a nonpublic forum for speech because its state actor host did not intend to create a forum for

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http://www.ncaa.com/brackets/baseball/d1/2011; and volleyball tournament, http://www.ncaa.com/brackets/volleyball-women/d1/2010.

[205] As one clear example, it could not lease a private arena to present a championship and then claim no responsibility should the arena management refuse to admit racial minorities. See, e.g., Burton v. Wilmington Parking Auth'y, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. 45 (1961).

[206] 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 xxxxxx supra.

[207] 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).

speech purposes.[208] As such, crowd expression may be regulated so long as the regulation is reasonable and viewpoint-neutral in application.[209]

Fans at a game administered by a college or university, whether supporting home or visiting team, may be equally unruly and equally use racial epithets or other offensive or sexually suggestive language. Institutions, and those enforcing crowd control at these events, may be naturally inclined to favor speakers and speech in support of the home team. As a result, control of crowd expressive behavior can be problematic for a state college or university, particularly if the guidelines for restricting speech vest too much discretion in crowd control staff because the guidelines are vague[210] or overbroad.[211] Unlike institutions, the NCAA has no interest in privileging one team's fans over another's. Any regulations it enforces would be evenhanded as between the two teams. The constitutional issue for the NCAA thus becomes the extent to which it may regulate the content of the speech, even when effected in an evenhanded and viewpoint-neutral way.

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[208] 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).

[209] 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).

[210] E.g., Grayned v. Rockford, 408 U.S. 104 (1972); Smith v. Goguen, 415 U.S. 566 (1974).

[211] E.g., 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).

No doubt the NCAA may act to prevent speech likely to incite to imminent violence.[212] It also clearly can prohibit speech that jeopardizes security or the ability to provide a safe atmosphere for all fans. So long as its articulation of its rules is neither vague nor overbroad, it should be able to enforce speech rules to create and maintain a game environment friendly to families with children as otherwise it will be held captive to fan behavior that drives to the lowest common denominator (read crude and very rude) exhibited by those attending games.

The fact that first amendment cases look to consequences imposed by the government adds to a conclusion that a state actor NCAA may regulate speech at events. The only consequence for a ticket holder is eviction from the game. This should insulate the NCAA, particularly if it announces its policy in advance and refunds the price of the ticket when it evicts a ticket holder.

VII. DRUG TESTING UNDER THE FOURTH AMENDMENT

The fourth amendment covers privacy interests in a number of contexts. The most likely challenges generated by NCAA action would be to its drug-testing program. Given the Court's decisions upholding random, suspicionless drug testing in various contexts, 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

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

require them to carry guns[213] and of railroad employees in specified circumstances.[214] Most pertinently, the Supreme Court has upheld such random, suspicionless drug testing of middle and high school students who seek to engage in athletics competition[215] or, for that matter, extracurricular activities such as team academic competition, Future Farmers of America, Future Homemakers of America, the band, choir, and cheerleaders.[216] Health and safety of schoolchildren is the governmental interest that justifies testing,[217] 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.[218]

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

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

[215] 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).

[216] Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 122 S.Ct. 2559, 2563 (2002).

[217] Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 824, 122 S.Ct. 2559, 2567-69 (2002).

[218] Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 824, 122 S.Ct. 2559, 2566-67 (2002).

The NCAA administers its drug testing program at least in part to oversee student-athlete well-being[219] so as to avoid injuries and other health consequences to student-athletes. Although any "parens patriae" responsibility is diminished with college age as compared to high school students,[220] the risk and degree of injury associated with intercollegiate athletics may be even a larger concern, particularly in contact sports, given that college athletes are bigger and faster than high school athletes and may devote more time to training and competition. The NCAA also has two additional, important, reasons for administering its drug testing program – maintaining a level-playing field for competition[221] and assuring that student-athletes and coaches adhere to the highest aspirations of athletic competition.[222]

In deciding that random testing was constitutional for middle and high school students, the Court also considered the drug protocol used and the consequences to the students attendant on a positive test. The protocol for NCAA drug testing is similar to the protocol described by the Supreme Court as only minimally intrusive, as are the consequences of a positive test.[223] Student-athletes consent in writing to random testing.[224] Should they test positive, they are

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[219] NCAA Const. art. 2.2.

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

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

[223] The NCAA publishes a list of banned drugs and notice of drug testing protocols; failure to follow testing protocol is grounds for challenge the result. NCAA Bylaws 18.4.1.2.5; 31.2.3.

[224] NCAA Bylaw 14.1.4. Olympic athletes similarly agree to be tested. CITE.

prohibited from competition for one year and lose a year of competition eligibility.[225] The NCAA neither publicly announces identifies student-athletes who failed a drug test nor reports positive drug test results to law enforcement agencies.[226] Student-athletes also are afforded procedural protection, including the opportunity to appeal the duration of competition ineligibility to the Committee on Medical Aspects of Sports.[227]

The reasons the NCAA employs drug testing are consonant with those reasons adverted to by the Supreme Court as justifying drug testing. So too is the protocol the NCAA uses for testing. A state actor NCAA likely meets fourth amendment requirements and should be able to continue its drug testing program.

VIII. THE NCAA AND ITS MEMBERS

Except for its preferential treatment bylaws and policies, NCAA policies and practices most likely meet constitutional requirements. Without regard to formal constitutional requirements, moreover, there are practical imperatives that substantially lessen any potential impact to the NCAA were it to be deemed a state actor.

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[225] NCAA Bylaw 18.4.1.5.1. See text accompanying notes xxx and yyy for a full list of consequences that do not attach to a student-athlete.

[226] Cite language in two drug testing cases.

[227] NCAA Bylaw 31.2.3.3. Student-athletes also may petition for reinstatement to eligibility. Id.

The great majority of NCAA Division I member institutions are state actors who are subject to constitutional constraints in enforcing NCAA bylaws and policies even though a non-state-actor NCAA is not. As an association, the NCAA obviously and 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.[228]

This is the lesson of Tarkanian. 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 handles investigations and the procedures applicable to infractions hearings.[229] The special committee also was charged with making recommendations

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[228] A few years ago students and faculty at the University of Illinois who disapproved of the university's use of Chief Illiniwek as a mascot decided to make contact with prospects to share their concerns. The NCAA limits the amount of correspondence that universities may send prospects. NCAA Bylaw XXXXXX. The chancellor attempted to require that they "pre-clear" any correspondence with the athletics director to avoid potential NCAA recruiting violations. The students and faculty sued. The Seventh Circuit applied the public employer speech test as applied to matters of public concern. It found the chancellor's action to constitute a prior restraint. The NCAA provided information to the Court that the correspondence would not violate recruiting bylaws. The Third Circuit indicated, however, it might have reached the same result even if the university had violated NCAA bylaws. Crue v. Ain, 370 F.3d 668 (7th Cir. 2004). See Thompson, "Due Process and the National Collegiate Athletic Association: Are Three Any Constitutional Standards?," 41 UCLA L. Rev. 1651, 1683 (1994).

[229] 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

for change in these policies and procedures. Thereafter, NCAA bylaws governing enforcement practices and infractions hearings were changed in ways to comport with minimum due process.

This also is the lesson of Cureton v. National Collegiate Athletic Association, a lawsuit brought by African-American student-athletes who claimed a Title VI[230] disparate impact violation in the inclusion of a required minimum standardized test score that prospective student-athletes had to meet to be eligible for competition upon enrollment after high school graduation.[231] The Cureton district court found that there was a disparate impact; the decision was vacated on appeal when the Third Circuit decided that the NCAA could not be sued under Title VI.[232] By contrast, every NCAA member institution, state and private, must meet the strictures of Title VI. Thereafter, NCAA bylaws governing initial eligibility were changed to eliminate the required minimum standardized test score.

Courts historically give great deference to institutions in the articulation of academic standards for admissions and continued matriculation; students rarely succeed in challenges to

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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.

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

[231] Cureton District Court , supra note 121. The plaintiffs claimed the minimum test score violated Title VI because of its disparate impact on minorities.

[232] Cureton , supra note 155. The Supreme Court had previously held that the NCAA is not a recipieint of federal funds for purposes of Title VII. NCAA v. Smith, 525 U.S. 924 (1999).

these decisions.[233] The Cureton district court acknowledged that the NCAA acts like an academic institution in setting initial eligibility and other standards and that its mission includes the academic performance of student-athletes.[234] The district court also evaluated the legality of NCAA initial eligibility requirements using the same test it would apply to educational institutions – whether there is a legitimate educational goal and whether it has ccccccccccc. There is a reasonably good chance that the Cureton district court holding on the merits would not have survived the litigation and that, therefore, NCAA initial eligibility standards ultimately would have been upheld in the face of a disparate impact challenge. But that is beside the point I make here, which is that an NCAA exempt from Title VI statutory requirements nonetheless revised its bylaws to comport with a district court holding to which its members institutions might be subject should a new court case be filed-- even though in renewed litigation against these member institutions the holding on the merits might well not have survived..

That a member association must act in ways that do not increase litigation risk for its members is obvious. That a member association must hold itself subject to legal requirements to

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[233] E.g., Horowitz, supra note 44; 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). Academic dismissals fare no better. 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 131.

[234] Cureton District Court, supra note 121, at 703.

which its member institutions are subject also is obvious. The Tarkanian and Cureton cases simply illustrate the obvious. In Tarkanian, the NCAA won, and it also changed the bylaws that Tarkanian challenged. In Cureton, the NCAA won and it also changed the bylaws that Cureton challenged.

To digress for a moment -- it could be argued with some justice that lawsuits grounded in constitutional and other legal challenges to NCAA bylaws and policies should be defended and paid for by the NCAA. Member institutions are liable for adhering to and enforcing NCAA bylaws, after all, only because the NCAA as an association adopted them. All member institutions should bear the costs and legal fees of these lawsuits, and any judgments awarded, not only the institution that happens to be singled out to be sued.

VIII. THE CONGRESS AS BOOGEYMAN

Perhaps the biggest imponderable in predictions as what the future holds for a state actor NCAA is whether Congress would be prompted to act.[235] There are two things worth noting here.

The first thing is that state actor status likely would be a two-edged sword. Consider subpoena power. Currently NCAA enforcement staff cannot compel the production of records or

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[235] State legislation may offend the interstate commerce clause if directed specifically at the NCAA. See NCAA Processes, supra note 6, at 270 to 272. Certain state statutes directed at intercollegiate athletics may not be a problem as they will 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).

other cooperation by individuals, including current and former coaches and other institutional staff.[236] A current constraint to the NCAA seeking legislatively-sanctioned subpoena power is a concern that such a request might prompt legislators to regulate the NCAA in other areas. Were the NCAA a state actor, the NCAA might believe that the possibility of legislative intervention has increased. In that event, the calculus would change and a push for subpoena power might be the result.

The second, and more fundamental, thing to note is that Congress currently has authority directly to affect NCAA processes and institutional athletics departments through, among others, its interstate commerce power; its authority under the spending power to condition funds provided to higher education institutions based on their compliance with federal mandates;[237] and its power to remove or condition tax exemptions colleges and universities currently enjoy.[238] Every so often the Congress holds,[239] or threatens to hold,[240] hearings on one or another subject related to

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[236] NCAA Processes, supra note 6, at xxxxx.

[237] E.g., 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).

[238] 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).

[239] 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

college athletics. Some are directed at institutional spending policy B coach salaries when tuition keeps rising, tax exempt sky boxes when tuition keeps rising.[241] NCAA officials even have been called to testify about the Bowl Championship Series (BCS), a conference operation conducted outside NCAA auspices and regulation.[242]

Despite rumblings[243] and an occasional hearing, however, Congress has declined to exercise the authority it currently has. Congress has eminently sensible reasons for not exercising its authority B political, practical, and policy-driven. Adopting and regulating a multi-varied code to administer intercollegiate athletics is time-consuming. It requires athletics expertise in a host of areas. It also requires close knowledge of campus life and at least close familiarity with, if not direct expertise in, higher education. The NCAA Division I manual contains bylaws that not only are multi-varied but that interrelate. Tinkering with one bylaw can be like pulling a string on

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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).

[240] 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).

[241] 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).

[242] For information about the BCS, consult http://www.bcsfootball.org.

[243] 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).

a sweater, with the result that the entire thing begins to unravel. It has been aptly said that sports in the United States is our secular religion.[244] Even the Congress intervenes at its peril.[245]

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

A. Additional Claims

A state actor NCAA for purposes of the fourteenth amendment need not be a state actor NCAA in other contexts. Each legal claim responds to different legal schemes and is governed by explicit statutory language or common law prerogatives that dictate the scope of the right. Each responds to different policy considerations. It is exceedingly unlikely that the NCAA will be treated as a state actor outside the context of Bill of Rights protections. Nonetheless, it is worth briefly considering some of these other contexts, both to suggest a fuller landscape of what state actor status might bring and also to amplify understanding of the legal protections afforded private actors. With the exception of open records laws, all of these other contexts provide less, not more, legal scrutiny for a state as compared to a private actor.

1. Antitrust Immunity

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

[245] 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.

The antitrust laws prohibit unreasonable restraints of trade by entities with sufficient market share to have an impact on the market whether by acting in concert (Sherman Act, Section One)[246] or by monopolizing (Sherman Act Section Two).[247] The NCAA periodically is sued under Sherman Section One. Its loss in one case, brought by the Universities of Georgia and Oklahoma,[248] foreclosed it from limiting university football team television appearances and has led to the extraordinary amounts of money now available to FBS football powers and the major conferences.[249] It has led, as well, to a host of other consequences, including a shift of authority from institutions to conferences and conference realignment.[250] Its loss in another case, Law v. National Collegiate Athletic Association,[251] underscored the inability of NCAA member institutions to control coach salaries through collective action and is partly responsible for the now

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

[247] Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 2.

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

[249] 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).

[250] 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.

[251] Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998).

routine multi-million dollar head coach salaries paid by NCAA Division I FBS institutions, [252] as well as the ever escalating salaries paid to coordinators and associate and assistant coaches.

The federal antitrust laws are inapplicable to action taken by a state=s legislature, supreme court, or high-level executive officer[253] and similarly inapplicable to private party action that is expressly authorized and foreseeable by a state and supervised by it to assure the advancement of state policy.[254] Given the way that NCAA bylaws and policies are adopted and implemented, the NCAA does not now meet the criteria necessary for private actors to qualify under the state action antitrust exemption.[255] Like most everything governed by antitrust, however, there is no bright-line test applied to decide when the exemption would apply to a private actor but, rather, a

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[252] 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).

[253] When acting as state qua state. 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).

[254] E.g., Parker v. Brown, 317 U.S. 341 (1943); Southern Motor Carriers Rate Conference, 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); Community Communications 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).

[255] It is possible, however, that the NCAA could meet the criteria by following a specialized process in the adoption of a particular bylaw and its implementation. Even so, a prime question would remain B the extent to which a state action exemption would be afforded a private actor acting on behalf of more than one state, even if the criteria for the exemption otherwise are met.

fact-dependent inquiry.[256] One question, then, is whether a change in status from private to state actor for purposes of the Bill of Rights would enhance the NCAA's opportunity to claim a state action antitrust exemption. Of all potential areas for state actor designation this is the one that the NCAA and member institutions would willingly embrace.

2. Torts and Contracts Immunity

A state does not always act in ways that only a sovereign can act. It sometimes engages in activities that are engaged in by private actors. But it is not similarly liable for alleged breaches of duty or injury caused. Instead, states have sovereign immunity. Their liability is dependent on the extent to which they choose to consent to be sued, in what type actions, and for how much.[257] States generally consent to tort actions brought against them, but the scope of the consent excludes intentional torts and those that embody discretionary functions.[258] While some states also waive their immunity from suit on contract claims, many do not.[259]

3. State Actor Immunity and What Might Be Wrought

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

[257] 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).

[258]See 28 U.S.C. ' 1346 (b). Most state tort claims acts are modeled on the federal.

[259]Ga. Code Ann. ' 50-21-1; Alaska Stat. 44.77.040 (c); Alaska Stat. 36.30.685. The United States consents, including claims based on express or implied contracts. 28 U.S.C. 1346 (a) (2), 1491 (a) (1); United States v. Mitchell, 463 U.S. 206, 216-17 (1983).

State sovereign immunity for tort and contract claims and the state action antitrust exemption would insulate the NCAA from liability for its bylaws, policies, and practices. I know of no case in which a private actor denominated a state actor by the Supreme Court attempted to use that status to insulate itself from a contract or tort suit brought against it, and I very much doubt that courts would declare that state sovereign immunity kicks in. I also doubt 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 exemption. But the absence of sovereign immunity protection and non-applicability of the state action antitrust exemption merely keep an NCAA state actor at private actor status quo ante. State actor status, then, has only upward opportunity to protect the NCAA from litigation risk. 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 to campus institutional processes. Institutional admissions files are confidential. So too are prospective student-athlete eligibility data submitted to the NCAA eligibility center.[260] Internal decision making by an institutional president and

[260] Determinations as to the amateur status of prospective student-athletes are handled by the NCAA Eligibility Center. NCAA Bylaw 12.1.1.1 (Amateurism Certification Process).

senior administrative staff is confidential. So too are NCAA administrative staff processes and decision making. Institutional hearings on student discipline and academic misconduct are confidential. So too are NCAA Reinstatement Committee 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 NCAA infractions hearings and appeals.

Required openness of records is one area where state actors are subject to state legal requirements from which private actors are immune. This, therefore, also is one area where at least in theory the NCAA would be more at risk for suit. There are at least three reasons, however, why this might not be so.

First. State open records laws[261] explicitly or by necessary implication cover only official state agencies and departments of the state that enacted the statute. Were a state statute to purport to cover out-of-state state entities (Florida public records law covering Indiana Department of

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[261] 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. There are strong policy reasons for not subjecting NCAA records, particularly enforcement/infractions records, to an open records statute. See text accompanying notes ccc and vvvv supra. State courts are the last word on the scope and meaning of their statutes. That said, it appears that the better reading of statutory language would not subject NCAA records to state open records laws. A state could avoid interpretative hurdles by rewriting its statute to cover private actors denominated state actors by its own or the United States Supreme Court, but it cannot thereby avoid extraterritoriality problems or problems with a state attempting to focus policy decisions directly on a private multistate association. For purposes of interstate compacts, moreover, courts have held that particular state open records laws do not apply to compact records. Tripolitsiotis, supra, note113 at 444.

Transportation, for example), the statute likely would be unconstitutional in its extraterritorial effect.[262]

Second. The wording of state statutes explicitly speaks to official state entities, not private actors treated as state actors. At the very least, then, these statutes would have to be amended to attempt to cover private actors deemed state actors. Not only that, they would have to be amended to cover private actors deemed state actors under the law of another jurisdiction (federal for purposes of the fourteenth amendment).

Third. State statutes already include private actors within their purview when they are custodians of records belonging to a state actor; whether rightly or wrongly, the Florida courts on theory treated COI records as those of the state.[263] A typical case is one in which a state institution employs a search firm to locate candidates for an administrative position. In such a case, the search firm works for and at the specific direction of the state institution. In such a case, records created or compiled by it are records created or compiled for and on behalf of the state institution. In such a case it is no great analytical leap to make records in the hands of the search firm records subject to public disclosure through a state open records act.

Were a state open records law to apply to the NCAA, whether state or private actor, the NCAA would be compelled to provide records only to the extent the particular state statute

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[262] Id.

[263] Florida case.

required[264] and federal law did not prohibit.[265] There are good reasons why NCAA documents should not be within the reach of a state open records act. The theory for how its documents are covered -- whether because the NCAA is a state actor or is a private actor included under a state open records act because a state actor had access to them in the course of its official business – is not important.

In an NCAA infractions case involving Florida State University,[266] Florida State appealed penalties imposed on it by the COI to the Infractions Appeals Committee. The NCAA enforcement staff established a secure website by which Florida State could read the COI's response to its appeal, so long as Florida State agreed not to disclose information on the web site.[267] On a challenge by news media, a Florida trial court ruled that NCAA enforcement staff

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[264] Records not subject to disclosure obligations include medical records, trade secrets, library records, internal affairs investigations of police departments, and criminal investigation records. See FOIA, 5 U.S.C. ' 552(a)(3)(E) (b) for a full list of federal exempt records. Exempt records most pertinent to NCAA processes are personnel records. Id. Some records are protected from disclosure in that a state actor could not choose to release them. There likely are common law privacy protections running to personnel records, for example.

[265] Federal law prohibits the release of individually identifiable student education records without a student=s consent. The Family Educational Rights and Privacy Act, 20 U.S.C. ' 1232g (hereafter referred to as FERPA). The statute reaches all NCAA member institutions because its coverage is triggered by receipt of federal funds. FERPA=s focus is on institutions with a policy or practice of releasing student records. It is enforced through investigations and adjudication by the Secretary of Education. Funds may be terminated only on findings that an educational institution is in substantial noncompliance and will continue so. See, e.g., Gonzaga University v. Doe, 536 U.S. 273, 122 S.Ct. 2268 (2002).

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

[267] 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 could attempt to resolve the problem by maintaining all files in NCAA headquarters in Indianapolis and only permitting state actors to access documents there. This would be inconvenient at best for those needing access. It also would not be even-handed. An involved individual or private university would not need to be so confined it their access to NCAA investigative documents.

infractions documents maintained on a secure website are public records in Florida because a state entity (Florida State) had access to them for official purposes.[268] SHEPARDIZE

The reach of the Florida open records act is extremely broad and implicates constitutional privacy concerns as, taken to its logical extreme, it would treat as a public record any written material held by a citizen but reviewed by a state agency.[269] The impact on NCAA investigations of a secure web site open to the public has serious negative consequences.[270] But the impact happened with an NCAA private actor. The Florida court did not need a state actor NCAA to render its decision reaching NCAA records.

B. Additional Private Actors

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[268] Associated Press v. Florida State Univ. Bd, 2009 WL 2762352 (Fla.Cir.Ct. August 28, 2009) (Cooper, Leon Cty Circ. Judge). Open records statutes in other states do not cover NCAA investigative files. Kneeland v. NCAA, 850 F.2d 224 (5th Cir. 1988) (Texas); Combined Communications Corp. V. Bolger, 689 F. Supp. 1065 (W.D. Okla. 1988). The Office of the Texas Attorney General recently affirmed that NCAA investigative files involving an open investigation are not subject to disclosure under the Texas statute. Texas Attorney General Opinion OR-2009-12569, ID # 354425 (PIR #CC-09-052) (September 4, 2009), on file with the author.

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

[270] There will be fewer witnesses willing to provide information and the integrity of an investigation may be compromised as leaks can alert those suspected of violations as to what story to tell and which individuals they might prevail upon 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 chase after public interest stories. At about the same time the media pursued litigation in Florida regarding the NCAA secure web site, another story involving an NCAA member – Michigan – was the subject of media coverage. The media relied on reports from several football players who were not identified. The reason given for withholding the information? The players Adid not want to be identified because they feared repercussions . . . .@ Rosenberg and Snyder, Free Press Investigation: Michigan Football Program Breaking NCAA Regulations, Detroit Free Press (August 29, 2009).

Should the Supreme Court deem the NCAA a state actor, it would do so because it has a large state actor membership and makes decisions that have significant impact on non-members. Depending on how it articulated the rationale for its holding, its decision might raise questions about the private actor status of athletics conferences and even private institutions.

State actor analysis of athletics conferences tracks the same type state actor analysis that would be employed in designating the NCAA as a state actor.[271] But there are important differences between the NCAA and athletics conferences relevant to whether the conclusion would be the same. To the extent NCAA state actor status is predicated on its size and multistate character, athletics conferences clearly are different as no athletics conference comes anywhere close to the size of the NCAA, or even of Division I. Although conference realignment means that athletics conference may now span the geographical United States,[272] no athletics conference has a presence in all 50 states or even a majority of them. More fundamentally, athletics conferences do not enforce a large body of regulations. Instead, they leave to the NCAA the predominant coverage of institutional conduct; conference rules are supplementary and interstitial.

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[271] 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).

[272] For competition in football, the Big East Conference now spans four time zones and includes teams from the west (San Diego State) and northwest (Boise State). Brett McMurphy, "Big East: Different Look, but Same Name," CBSSports.com (12/7/2011)

With few rules enforced, there are few areas of conference activity to give rise to litigation and even fewer that would implicate constitutional principles.[273]

State actor analysis of whether a private university should be deemed a state actor follows the prototypical analysis for state actor cases, an analysis that led the Tarkanian Court to hold that the NCAA was not a state actor. Under this analysis, a private actor becomes a state actor if it performs a traditional state function[274] or its particular conduct is state-enforced, state-financed, directly state-endorsed or -coerced.[275] Should the NCAA be deemed a state actor, will the degree of control it exercises over member institutions in turn be sufficient under the more typical state actor analysis to warrant deeming private institutions state actors with regard to NCAA policies and practices. If so, then a private actor NCAA denominated a state actor would, once so denominated, end by making its private members state actors too.[276]

The Tarkanian Court observed that a state actor member institution could withdraw from NCAA membership. That observation was criticized as ignoring reality. It is even less likely to

[273] 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.

[274] 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.

[275] See text accompanying note xxxx supra.

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

be a viable option in this situation. A private university that leaves the NCAA to avoid attaining state actor status could not avoid the designation if it joined an equivalently large athletic association, even if one existed, because that association, too, would become a state actor on the same analysis that led the NCAA to become one. One possible option would be for private institutions to form an association of exclusively private institutions. Depending on the Supreme Court's rationale for finding the NCAA a state actor, however, even that solution might not work

Were conferences or private institutions to be denominated state actors for all activities (conferences) or for NCAA activities (private institutions), it is not clear what would change for them. 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.

IX. CONCLUSION

What everybody knows to be true often is false.[277] 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 on challenges to NCAA decisions adverse to them. A host of "becauses" explains why:

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[277] 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.

- 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[278] 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.
- 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.

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