1-1-2008

Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities

Matthew J. Mitten
Marquette University Law School, matt.mitten@marquette.edu

Timothy Davis

Publication Information
Matthew J. Mitten & Timothy Davis, Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities, 8 Va. Sports & Ent. L.J. 71 (2008)

Article

Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities

Matthew J. Mitten* and Timothy Davis**

* Professor of Law and Director, National Sports Law Institute, Marquette University Law School. Professor Mitten dedicates this article to the memory of Coach Fred Beier, his football and wrestling coach at St. John's Jesuit High School in Toledo, Ohio, who taught him the importance of mental toughness and inspired him to always do his best.

** John W. and Ruth H. Turnage Professor of Law, School of Law, Wake Forest University.

The authors are grateful to Paul Anderson, Bruce Burton, Gary Johansen, Mike Lenard, Jim Nafziger, Hayden Opie, Steve Ross, John Ruger, and Ken Shropshire for their thoughtful review and comments of earlier drafts of this article, and to Megan Ryther (Marquette Law School, Class of 2007), Brian Conley, and David Ginzer (Wake Forest School of Law, Class of 2009) for their research assistance.

INTRODUCTION

This article compares and examines the existing legal frameworks governing athletic eligibility rules and dispute resolution processes for Olympic, professional, college, and high school sports from both private and public law perspectives.

At all levels of sports competition, monolithic sports leagues and governing bodies[1] establish eligibility requirements and conditions that must be satisfied for an individual to participate. Most governing bodies have broad, exclusive authority to regulate a single sport or group of sports on an international, national, or statewide basis, which provides the corresponding power to exclude or limit athletic participation opportunities. In some instances, unilaterally established eligibility rules either completely preclude an individual from athletic participation or condition his or her right to participate on compliance with several requirements.

Participation in organized competitive sports provides several significant tangible and intangible benefits to athletes, while unifying members of an increasingly racially, culturally, and religiously diverse

[1] Athletes often have no alternative opportunities to participate in a sport at the subject level of competition. For example, the National Football League was found to be the sole purchaser of the services of major league professional football players in the United States. USFL v. NFL, 644 F. Supp.1040, 1042 (S.D.N.Y. 1986), aff'd, 842 F.2d 1335 (2d Cir. 1988). The International Olympic Committee has "supreme authority" over Olympic sports competition, and its recognized international federations are the worldwide governing bodies for their respective sports. International Olympic Committee, Olympic Charter, Rul. 1 at 13 (2007), available at http://multimedia.olympic.org/pdf/en_report_122.pdf (last visited Oct. 18, 2008). The National Collegiate Athletic Association has plenary nationwide governing authority over its 1,281 member universities and colleges and approximately 400,000 student-athletes. Each of the fifty state school athletic governing bodies has exclusive, broad authority to regulate interscholastic sports competition within its state.

populace.[2] At the professional and Olympic sport levels, athletic participation brings player contracts, prize earnings, and endorsement contracts, as well as psychological and social rewards. At the collegiate level, student-athletes receive athletic scholarships worth many thousands of dollars. Although relatively few of the more than seven million high school student-athletes or 400,000 National Collegiate Athletic Association student-athletes have the exceptional talent necessary to play a professional or Olympic sport, recent empirical research proves that they all derive important intangible benefits from organized sports competition, including educational and character development with life-long individual and social effects.[3]

Given the substantial benefits that athletes derive from athletic participation, this article assesses whether the developing discreet bodies of international, national, and state law appropriately regulate the promulgation and application of athlete eligibility rules by monolithic sports leagues and governing bodies with broad, plenary authority to oversee Olympic, professional, college, and high school sports. In conducting our analysis, we consider the effectiveness of athletes' voices and voting rights in the rule-making process; the nature and effect of the rules; and the nature and scope of judicial and arbitral review of the rules, their application, and their enforcement.

We begin Part I with an analysis of the international legal framework for resolving Olympic and international sports eligibility disputes. Although there is no general legal right to participate in athletic competition protected by international law or human rights agreements, the Olympic Charter expressly states that the "practice of sport is a human right."[4] Although this is no more than a conditional right to participate if an athlete complies with several eligibility requirements, the Olympic Charter prohibits class-based discrimination and the International Olympic

[2] See Rodney K. Smith, When Ignorance is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics, 61 Mo. L. Rev. 329, 341 (1996) (arguing that "in our diverse culture, characterized by a wide variety of ethnic, religious, socio-economic and other groups, there may well be no other force quite like sport, in terms of bringing people of diverse backgrounds together in pursuit of a common purpose").

[3] See infra notes 184-99 and accompanying text. Of course, if it is not properly managed and regulated, athletic participation can conflict with important values that the playing of sports is intended to promote, and thus has the potential to result in adverse social consequences. See Matthew J. Mitten, Timothy Davis, Rodney K. Smith & Robert C. Berry, Sports Law and Regulation: Cases, Materials, and Problems 6-8 (2005). It is nevertheless undeniable that substantial indirect and direct social benefits result from athletic participation.

[4] See infra notes 9-21 and accompanying text.

Committee Athlete Commission provides Olympic athletes with a voice in the promulgation of eligibility rules. The Court of Arbitration for Sport ("CAS"), an independent and impartial arbitral tribunal, conducts de novo review of the rules, interpretation, and application of the International Olympic Committee and other international sports governing bodies that affect an athlete's eligibility to participate in the Olympics and other international sports competitions.

We then explore how federal law, specifically the Ted Stevens Olympic and Amateur Sports Act, protects the participation opportunities for U.S. athletes who participate in Olympic and international sports by requiring "the swift and equitable" resolution of eligibility disputes pursuant to a de novo American Arbitration Association ("AAA") process.[5] Courts have only a limited role in resolving eligibility disputes, but we generally conclude that CAS and AAA arbitration are both independent and fair processes that effectively protect athletes' participation rights.

In Part II we examine the legal framework defining the parameters of permissible athlete eligibility requirements and protecting U.S. professional athletes' participation opportunities. The framework consists of a mix of federal labor, antitrust, and civil rights law, in addition to state contract law. Through the collective bargaining process, unionized professional team sport athletes have an effective voice in the establishment of eligibility requirements, limits on league and club disciplinary authority that affect their participation interests, and dispute resolution procedures (generally arbitration before a mutually acceptable person or panel). We conclude that professional team sport athletes possess legal protections that equal (or perhaps even exceed) those of Olympic sport athletes, while individual sport athletes have a lesser, but not necessarily ineffective, measure of protection.

We begin Part III by describing the significant and unique benefits derived by student-athletes who participate in intercollegiate and interscholastic athletics. In contrast to Olympic and professional athletes, college and high school student-athletes do not have an effective voice regarding eligibility rules, which are unilaterally established by sports governing bodies or their member educational institutions. Nevertheless, relying on the academic abstention doctrine, courts generally provide extreme deference to college and high school sports governing authorities and refrain from any more than minimal scrutiny of the merits of athletic eligibility disputes. Courts refuse to recognize a legally protected interest in

[5] See infra notes 85-103 and accompanying text.

college or high school athletic participation and, absent clear violation of an independent constitutional or civil right, apply only rational basis or arbitrary and capricious standards of review. We conclude that the judiciary's blanket exercise of such extreme deference, in at least some cases, deprives college and high school student-athletes of an effective external means of successfully challenging eligibility rules and adverse determinations by sports governing bodies and educational institutions. Moreover, this legal framework contrasts sharply with the generally adequate process and substantive legal protections afforded to Olympic and U.S. professional athletes.

Finally, in Part IV, we assert that the important individual and societal benefits of organized athletic participation supports greater legal recognition and enhanced protection of a student-athlete's opportunity to participate in intercollegiate and interscholastic sports competition. We acknowledge that public policy and practical considerations do not warrant providing several million student-athletes with the same nature and scope of legal protection accorded to a much smaller number of Olympic and professional athletes whose livelihood is elite sports competition. We conclude with a proposal for a heightened level of judicial scrutiny to be applied in athletic eligibility disputes—a level that recognizes the legitimate interests of sports governing bodies and educational institutions but also effectively protects the opportunities of student-athletes who participate in college and high school sports competition.

I. OLYMPIC AND INTERNATIONAL SPORTS COMPETITION

A. International Legal Framework

Global athletic competition is an essential part of the world's culture. The Olympic Games and Winter Olympic Games occur every four years, with thousands of participating athletes and hundreds of millions of worldwide spectators and viewers.[6] Despite geographical distance and language barriers among participating athletes and fans, sports provide a forum for maximizing unique physical talents and enhancing personal growth as well as for increasing understanding, appreciation, and respect among diverse

[6] World Cup competition in men's and women's soccer (or "football" as this popular game is called outside of the United States) is another major international sports competition that, like the Paralympic Games and Special Olympics, occurs every four years. Other major trans-national sports events, including, for example, the Asian Games, the Commonwealth Games, and the Pan American Games, are also regularly held.

cultures and societies.[7] Although the individual benefits of athletic participation and corresponding collective benefits to our global society resulting from widespread sports competition are generally acknowledged, there is no individual legal right to engage in sport under international human rights agreements or other international laws.[8]

1. A Fundamental Principle of Olympism: "The Practice of Sport Is a Human Right"—A Canard?

The Olympic Charter[9] codifies the fundamental principles, rules, and by-laws adopted by the International Olympic Committee ("IOC") that govern the Olympic Movement.[10] All members of the Olympic Movement, which comprises the IOC, international sports federations ("IFs"), national Olympic committees ("NOCs"), and national sports governing bodies or federations ("NGBs"), are bound by a series of interlocking agreements to comply with the Charter. The IOC, an international private non-profit organization domiciled in Lausanne, Switzerland, is the "supreme authority" of the Olympic Movement, and its interpretations of the Charter are final.[11] Each IF is a nongovernmental organization that functions as the worldwide governing body for a particular sport (or group of sports). For example, the International Amateur Athletic Federation governs track and field, and its member NGBs (e.g., USA Track & Field) have national regulatory authority over that sport in their respective countries. Each NOC (e.g., the United

[7] Willye White, an African-American woman who was a member of four U.S. Olympic teams that competed in international track and field competitions in more than 150 countries, said: "Before my first Olympics, I thought the whole world consisted of cross burnings and lynchings. The Olympic Movement taught me not to judge a person by the color of their skin but by the contents of their hearts. Athletics was my flight to freedom . . . my acceptance in the world. I am who I am because of my participation in sports." Fred Mitchell, Olympian's Finest Work Came Long After Games, Chi. Trib., Feb. 10, 2007, at 1.

[8] James A. R. Nafziger, International Sports Law at 126-27 (2d ed., Transnational Publishers, Inc. 2004).

[9] Olympic Charter, supra note 1. Currently, 41 of the IOC's 114 members (i.e., forty percent) competed in the Olympic Games. Most drafters of the Olympic Charter reside in civil law countries, the laws of which are primarily embodied in codes. See Official Website of the Olympic Movement, International Olympic Committee Members, available at http://www.olympic.org/uk/organization/ioc/members/#members (last visited Oct. 22, 2008).

[10] Paragraph 3 of the Fundamental Principles of Olympism defines the "Olympic Movement" as "the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism." Id. at 9. All organizations, athletes, and others belonging to the Olympic Movement must be recognized by the IOC and comply with the Olympic Charter. Id. at 11.

[11] Olympic Charter, supra note 1, Rul. 1, at 13.

States Olympic Committee) has exclusive authority regarding the representation of its country or IOC-recognized geographical territory in connection with the Olympic Games.

Pierre de Coubertin, the founder of the modern Olympic Games, said, "Sport is part of every man and woman's heritage and its absence can never be compensated for."[12] The fourth Fundamental Principle of Olympism embodied in the Charter expressly states, "The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play."[13] The fifth Principle states that "[a]ny form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement."[14] The "right" to practice sport codified in the Olympic Charter protects athletes only from being discriminated against on enumerated grounds by any member of the Olympic Movement.[15] Rule 45(2) of the Charter expressly states that "[n]obody is entitled to any right of any kind to participate in the Olympic Games."[16] An athlete may participate in the Olympic games only if he or she satisfies several requirements and conditions specified in the Charter's Eligibility Code.[17]

Among the more important eligibility requirements an athlete must satisfy are to abide by the Olympic Charter and the relevant IF rules (including the sport's specific eligibility criteria as applied by an IF, NOC, and NGB) as approved by the IOC; to be entered in the Olympic Games by his or her NOC; to respect the spirit of fair play and non-violence and behave accordingly; and to comply fully with the World Anti-Doping Code.[18] In

[12] Commission of the European Communities, White Paper on Sport, COM (2007) 391, at 2.

[13] Olympic Charter, supra note 1, at 11.

[14] Id. Age limits for Olympic Games competitors are prohibited unless prescribed in an IF's competition rules as approved by the IOC's Executive Board. Olympic Charter, supra note 1, Rul. 43, at 83. This Rule's predecessor prohibited age limits "other than as prescribed for health reasons in the competition rules of an IF," which appears to be a narrow ground for permissible age discrimination. Nafziger, supra note 8, at 126-27.

[15] Each NOC enters athletes into Olympic events based on the recommendations of the NGB for the particular sport in its country and has a duty to ensure no athlete is excluded for "racial, religious or political reasons or by reason of other forms of discrimination." Olympic Charter, supra note 1, Rul. 45(3), at 83.

[16] Olympic Charter, supra note 1, Rul. 45, at 83.

[17] Olympic Charter, supra note 1, Rul. 41, at 80-81.

[18] The Introduction to the World Anti-Doping Code states that one of its primary objectives is "[t]o protect the Athletes' fundamental right to participate in doping-free sport and thus

addition to these eligibility requirements, an athlete must be a "national of the country of the NOC" entering him.[19] The NOC shall enter only athletes "adequately prepared for high level international competition."[20] Notwithstanding an athlete's compliance with these requirements, the IOC has the discretion to refuse to accept entry of any athlete "without indication of grounds."[21] Although these detailed provisions seem to indicate that the broad language of the fourth Fundamental Principle ("sport is a human right") may be a canard, Olympic sport governing bodies do not have unlimited discretion because their athlete eligibility decisions are subject to independent review.

2. Athlete Eligibility Dispute Resolution Process

The Court of Arbitration for Sport ("CAS") is a private, specialized arbitral body based in Lausanne, Switzerland (and thus subject to Swiss law) that was established by the IOC on April 6, 1983, to resolve sports-related disputes.[22] Despite its name, the CAS, whose jurisdiction and authority as an arbitration tribunal is based on agreement of the parties, is

promote health, fairness and equality for Athletes worldwide." World Anti-Doping Agency, World Anti-Doping Code 1 (2003), available at http:www.wada-ama.org/rtecontent/document/code_v3.pdf (last visited Oct. 22, 2008).

[19] Olympic Charter, supra note 1, Rul. 42, at 81.

[20] Olympic Charter, supra note 1, Rul. 45(4), at 83.

[21] Olympic Charter, supra note 1, Rul. 45(2), at 83. This rule was added after the CAS ad hoc Division at the Olympic Winter Games in Salt Lake City determined that the IOC had no authority under the then-current Charter to refuse to allow an otherwise qualified athlete to compete in the Games. Based on its view that an IF's improper reduction of the athlete's doping sanction violated the WADA Code and was simply a device to enable him to compete in the Olympic bobsled competition, the IOC had declared him ineligible. Arbitration CAS ad hoc Division (O.G. Salt Lake City 2002) 001, Sandis Prusis v. IOC, award of 5 Feb. 2002 *in* Vol. 3 Digest of CAS Awards 2001-2003 573 (Matthiew Reeb 2004). See infra notes 42, 56-57 and accompanying text.

[22] The International Council of Arbitration for Sport ("ICAS"), a group of twenty high-level jurists that currently includes two U.S. members, Michael B. Lenard and Judge Juan R. Torruella, now oversees the CAS and appoints its member arbitrators. CAS arbitrators are representative of the world's continents and are appointed for four-year renewable terms by ICAS based on recommendations from the IOC, IFs, NOCs, and athletes' groups. They must have legal training and knowledge of sport, be objective and independent in their decisions, adhere to a duty of confidentiality, and have good command of at least one CAS working language (i.e., English or French). The ICAS is obligated to "wherever possible, ensure fair representation of the continents and of the different juridical cultures." Court of Arbitration for Sport, Code of Sports-Related Arbitration, S16, available at http://www.tas-cas.org/en/arbitrage_statuts.asp/4-0-1075-4-1-1/5-0-1089-7-1-1/ (last visited Oct. 22, 2008). The Code of Sports-Related Arbitration ("Arbitration Code"), which is drafted by ICAS, governs the organization, operations, and procedures of the CAS. The IOC, IFs, and NOCs fund the operations of ICAS and the CAS.

not an international court of law. It "provides a forum for the world's athletes and sports federations to resolve their disputes through a single, independent and accomplished sports adjudication body that is capable of consistently applying the rules of different sports organizations . . . ."[23] Its creation recognizes the need for international sports governance to be uniform and protective of the integrity of athletic competition, while also safeguarding all athletes' legitimate rights and adhering to fundamental principles of natural justice.[24]

To ensure "fast, fair, and free" resolution of disputes involving an athlete's eligibility to participate in the Olympic Games,[25] a CAS ad hoc Division operates at the site of the Games and provides expedited adjudication (usually within twenty-four hours of the filing of a claimant's request for arbitration),[26] which provides athletes with the procedural right to be heard before an independent tribunal. Rule 59 of the Olympic Charter states that all disputes "arising on the occasion of, or in connection with, the Olympic Games," including an athlete's eligibility to participate in the Olympics, must be submitted to the CAS ad hoc Division for final and binding resolution.[27] The substantive "law" governing an athlete's eligibility to participate in the Olympic Games consists of the Olympic Charter, relevant IOC rules, and general principles of law.[28]

The CAS also may resolve non-Olympic athlete eligibility disputes arising out of appeals from the final decisions of an IF pursuant to its appeals arbitration procedure.[29] These cases normally must be decided

[23] Richard H. McLaren, The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes, 35 Val. U. L. Rev. 379, 381 (2001).

[24] Tricia Kavanagh, The Doping Cases and the Need for the International Court of Arbitration for Sport, 22 UNSW L.J. 721 (1999).

[25] Statement of Michael B. Lenard, an ICAS member who was instrumental in the establishment of the first CAS ad hoc Division at the 1996 Olympic Games in Atlanta, Georgia. The CAS ad hoc Division was created so that "no athlete can be left knocking on the door to the gates of the Olympic village." Id. In other words, all IFs are bound by CAS ad hoc Division awards regarding an athlete's eligibility to participate in the Olympics. Final and binding arbitration in a single proceeding provides athletes with a legal process superior to multi-stage litigation in a national court, which even if successful, may not provide an effective legal remedy. See, e.g., Reynolds v. IAAF, 23 F.3d 1110 (6th Cir. 1994).

[26] See generally Richard H. McLaren, Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games, 12 Marq. Sports L. Rev. 515 (2001).

[27] Olympic Charter, supra note 1, R59, at 104. As a condition of participating in the Olympic Games, athletes must agree that all eligibility disputes will be finally resolved by the CAS.

[28] Court of Arbitration for Sport, Arbitration Rules for the Olympic Games, art. 17 (2004).

[29] Code of Sports-Related Arbitration, supra note 22, S20(b).

within four months after the filing of an appeal.[30] In athlete eligibility disputes other than those arising out of the Olympic Games, the relevant IF rules and the law of the country in which the IF is domiciled generally apply.[31]

In either CAS ad hoc Division or appeals arbitration, the involved athlete may be represented by counsel. A panel of three arbitrators (or, at times, a single arbitrator) adjudicates the athlete eligibility dispute by majority decision and issues a written award setting forth the reasons for the decision, which is final and binding on the parties and is usually publicly disclosed.[32] Regardless of its geographical location, the "seat" of all CAS arbitration proceedings is always Lausanne, Switzerland.[33] This ensures uniform procedural rules and substantive law for all CAS arbitrations, which provides a stable legal framework and facilitates efficient dispute resolution in locations convenient for the parties.

The Swiss Federal Tribunal ("SFT"), which has the exclusive authority to review all CAS awards and decisions,[34] has ruled that "the CAS is a true arbitral tribunal independent of the parties, which freely exercises complete juridical control over the decisions of the associations which are brought before it" and "offers the guarantees of independence upon which Swiss law makes conditional the valid exclusion of ordinary judicial recourse."[35] Subsequently, the SFT held that the CAS now is sufficiently independent from the IOC for its decisions "to be considered true awards, equivalent to the judgments of State courts."[36] It concluded that "[a]s a body which reviews the facts and the law with full powers of investigation and complete freedom to issue a new decision in place of the body that gave the previous

[30] Id. at R59.

[31] Id. at R58.

[32] For the appeals arbitration procedure, each party selects one arbitrator, and the President of the Appeals Arbitration Procedure appoints the third arbitrator who serves as the president of the panel. Code of Sports-Related Arbitration, supra note 22, R48, R53, and R54. Ad hoc Division arbitrators come from a pool of eleven or twelve CAS arbitrators chosen by ICAS for the Olympic Games. Arbitration Rules for the Olympic Games, supra note 28, art. 3 (2004).

[33] Code of Sports-Related Arbitration, supra note 22, R28.

[34] Court of Arbitration for Sport, Guide to Arbitration, R59, available at http://www.tas-cas.org/en/arbitrage_reglement.asp/4-0-1031-4-1-1/5-0-1089-7-1-1/ (last visited Oct 29, 2008).

[35] G. v. Federation Equestre Internationale (Swiss Federal Tribunal 1993) *in* Vol. 1 Digest of CAS Awards 1986-1998 561, at 568-69 (Matthiew Reeb 1998). For further explanation, see id. at xxv-xxvi.

[36] A. and B. v. IOC, (Swiss Federal Tribunal 2003) *in* Vol. 3 Digest of CAS Awards 2001-2003 674, at 689 (Matthiew Reeb 2004). For further explanation, see id. at xxix-xxx.

ruling . . . the CAS is more akin to a judicial authority independent of the parties."[37]

i. Emerging Principles of CAS Jurisprudence

Unlike common law judicial precedent, "[i]n CAS jurisprudence there is no principle of binding precedent, or *stare decisis*."[38] Nevertheless, although the CAS is an arbitral tribunal and the majority of its arbitrators have a civil law background, it is ironic that CAS awards are forming a body of *lex sportiva*.[39] In a manner similar to appellate courts, different panels of CAS arbitrators may reach varying conclusions regarding the meaning of a rule and its application in a particular case.[40] However, "a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel."[41] A developing *lex sportiva* is shaping the nature and scope of legal protection of an athlete's opportunity to participate in the Olympic Games and other international sports competitions, although our conclusions are necessarily tentative because all CAS awards currently are not generally available for review and analysis.

Whenever an athlete's eligibility to compete may be adversely affected, the CAS imposes an obligation on the IOC and other international sports governing bodies to provide the athlete with a fair opportunity to be heard. Thus, the CAS recognizes an athlete's procedural "right to be heard as one of the fundamental principles of due process."[42]

[37] Id. at 684-88.

[38] Arbitration CAS 2004/A/628, IAAF v. USA Track and Field & Jerome Young, award of 28 June 2004 ¶73 at 18 [hereinafter *Jerome Young*].

[39] Professor Jim Nafziger has observed that CAS awards "provide guidance in later cases, strongly influence later awards, and often function as precedent," which reinforce and help elaborate "established rules and principles of international sports law." James A. R. Nafziger, International Sports Law 48 (2d ed., Transnational Publishers, Inc. 2004). Professor Allan Erbsen asserts that "the gradual accretion of CAS precedent that is often labeled as Lex Sportiva can more helpfully be understood as comprising several distinct approaches to legal analysis that rely on diverse sources of governing principles." Allan Erbsen, The Substance and Illusion of Lex Sportiva, *in* The Court of Arbitration for Sport 1984-2004 at 452 (I.S. Blackshaw, R.C.R. Siekmann, and J.W. Soek, eds., 2006).

[40] See, e.g., Advisory Opinion CAS 2005/C/976 & 986, FIFA & WADA Advisory Opinion, 21 Apr. 2006, ¶84 at 31 (observing that different CAS panels may have a "different understanding" when applying same fault standard in doping cases).

[41] *Jerome Young*, supra note 38, at ¶73.

[42] Arbitration CAS 2000/A/317, A. v. Federation Internationale des Luttes Associees, award of 9 July 2001, *in* Vol. 3 Digest of CAS Awards 2001-2003 159, 162 (Matthiew Reeb 2004); Arbitration CAS ad hoc Division (O.G. Salt Lake City 2002) 001, Sandis Prusis v. IOC, award of 5 Feb. 2002 *in* Vol. 3 Digest of CAS Awards 2001-2003 573 (Matthiew Reeb 2004).

In reviewing a sports governing body's interpretation or application of rules affecting an athlete's eligibility to compete pursuant to the ad hoc Division or appeals arbitration procedure, the CAS conducts a de novo hearing.[43] If the athlete was denied due process in the governing body's internal proceeding, this violation is remedied by providing a full and fair opportunity to be heard during the CAS arbitration.[44] Moreover, to provide "a safeguard for athletes [that] substantially ameliorates the possibility of flawed or arbitrary decision-making"[45] by international sports governing bodies, "it is *the duty* of the [CAS panel] to make its independent determination of whether the Appellant's contentions are correct, not to limit itself to assessing the correctness of the award or decision from which the appeal was brought."[46] In other words, "it is to be a completely fresh rehearing of the dispute and not one narrowly focused on finding error in the original decision."[47]

In defining the nature and scope of an athlete's substantive participation rights, the CAS has not construed the Olympic Charter as creating an absolute right to participate in a sport. The CAS also has concluded that "there is no rule of 'fairness,' to be derived from the Olympic Charter's acknowledgment that the practice of sport is a fundamental human right, which would under circumstances create an outer time limit of Olympic ineligibility."[48] Rather than applying a "fairness" requirement in athlete eligibility disputes on a case-by-case basis, the CAS appears to provide a significant degree of deference to international sports governing bodies regarding their authority to establish eligibility rules, and it has not relied on this provision of the Olympic Charter to substitute its judgment for IOC or IF eligibility determinations. For example, one CAS panel concluded that, although a particular eligibility rule may work hardship in individual cases, it does not "prove the rule was not enacted in the pursuit of legitimate

[43] Guide to Arbitration, supra note 34, R57 (stating, with regard to appeals arbitration, that the CAS "shall have full power to review the facts and the law." Article 16, which applies to ad hoc Division arbitration, provides that "[t]he Panel shall have full power to establish the facts on which the application is based.").

[44] Id. See also Arbitration CAS 94/129, USA Shooting & Q. v. UIT, award of 23 May 1995, *in* Vol. 1 Digest of CAS Awards 1986-1998 187, 203 (Matthiew Reeb 2004).

[45] Arbitration CAS 2008/A/1574, D'Arcy v. Australian Olympic Committee, award of 7 July 2008 at 22.

[46] Id. at 18.

[47] Id. at 22.

[48] Arbitration CAS ad hoc Division (O.G. Sydney 2000) 001, USOC and USA Canoe/Kayak v. IOC, award of 13 Sept. 2000, *in* Court of Arbitration for Sport, CAS Awards - Sydney 2000, 13, 21 (2000).

general interest."[49]

The CAS has ruled that the monolithic position of an international sports governing body imposes a "duty of confidence" owed to athletes whose eligibility to compete may be adversely affected by its exercise of disciplinary authority.[50] This legal duty requires that the governing body not act in "bad faith," i.e., in a "completely arbitrary, blatantly, unsustainably, unreasonably or abusively manner."[51] The CAS determined that this duty is satisfied if the sports governing body fully complies with its own rules when making athlete eligibility determinations.[52] At the same time, CAS de novo review assures that athletes incorrectly ruled ineligible by governing board officials in a manner inconsistent with applicable rules will be reinstated.

The CAS has implicitly applied this standard by requiring that doping rules provide clear notice of the prohibited conduct[53] and that disqualification or suspension of an athlete must be an authorized sanction for the rule violation.[54] As a CAS panel explained:

[49] Id.

[50] Arbitration CAS 95/142, L. v. FINA, award of 14 Feb. 1996, *in* Vol. 1 Digest of CAS Awards 1986-1998 at 225, 243-44 (Matthiew Reeb 2004).

[51] Id. at 243.

[52] Id. at 244.

[53] See, e.g., Arbitration CAS ad hoc Division (O.G. Nagano 1998) 002, R. v. IOC, award of 12 Feb. 1998 *in* Vol. 1 Digest of CAS Awards 1986-1998 419 (Matthiew Reeb 2004) (overturning alleged doping violation because neither IOC nor international skiing federation rules banned athlete's usage of marijuana); Arbitration CAS 96/149, A.C. v. FINA, award of 13 Mar. 1997 *in* Vol. 1 Digest of CAS Awards 1986-1998 251 (Matthiew Reeb 2004) ("[I]t is incumbent both upon the international and the national federation to keep those within their jurisdiction aware of the precepts of the relevant codes."). Id. at 262. A full analysis of doping rules and the process for imposing sanctions for doping is outside the scope of this article. For scholarly commentary concerning these issues, see Hayden Opie, Drugs in Sports and the Law-Moral Authority, Diversity and the Pursuit of Excellence, 14 Marq. Sports L. Rev. 267 (2004). See also Michael Straubel, Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better, 36 Loy. U. Chi. L.J. 1203 (2005).

[54] See, e.g., USOC and Athletes v. IOC & IAAF, Arbitration CAS 2004/A/725, award of 20 July 2005 [hereinafter *USOC and Athletes*] (holding that disqualification of team's race results because one team member was ineligible to compete due to doping violation was not an authorized sanction under applicable IAAF rules); Arbitration CAS ad hoc Division (O.G. Sydney 2000) 010, Tzagaev v. IWF, award of 25 Sept. 2000 *in* Court of Arbitration for Sport, CAS Awards - Sydney 2000, 101 (2000) (holding that disqualification of entire weightlifting team, including innocent athletes, was not an enumerated sanction for other team members' doping violations). Sanctions for doping violations also must be proportional to an athlete's fault, see e.g., A. v. FILA, Arbitration CAS 2000/A/317, award of 9 July 2001 *in* Vol. 3 Digest of CAS Awards 2001-2003 159 (Matthiew Reeb 2004), the principle of which has been incorporated into the World Anti-Doping Code. World Anti-Doping Code, supra note 18, §10.5. The CAS has observed that the World Anti-

> The rationale for requiring clarity of rules extends beyond enabling athletes . . . to determine their conduct . . . by reference to understandable rules. . . . [C]larity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply.[55]

For example, in *Sandis Prusis v. IOC*,[56] a CAS ad hoc Division panel ruled that the Charter did not authorize the IOC to reject a Latvian bobsledder's entry into the Olympic Games. The athlete's three-month suspension for a doping violation ended before the bobsled competition in the XIX Winter Olympic Games began. Believing that the International Bobsleigh and Tobogganing Federation's reduction of his suspension from the normal two years for a first doping offense was improper, the IOC's Executive Board declared him ineligible to compete in the Games. Determining that the athlete was eligible to participate in the Games, the CAS panel explained:

> An athlete has a legitimate expectation that, once he has completed the punishment imposed on him, he will be permitted to enter and participate in all competitions absent some new reason for refusing his entry. . . . [a]s became clear from statements made by the IOC's representatives during the hearing, the effect of refusing Mr. Prusis entry was to impose a further sanction on him for the same offence.[57]

The CAS will construe ambiguous eligibility rules in favor of athletes, thereby requiring that a sports governing body's limits or conditions on an athlete's right to participate must be clearly defined. "If a text may be interpreted in two ways," the CAS will resolve any ambiguity "in favour of an athlete who is guilty of neither wrong-doing nor even negligence in terms of the Olympic Charter."[58] On the other hand, absent "clear proof of abuse or ill will," the CAS has declined to review a sports governing body's discretionary refusal to waive an unambiguous eligibility rule and permit an athlete to

Doping Agency ("WADA"), which is domiciled in Switzerland, did so to ensure that doping sanctions affecting athletes' eligibility to compete in Olympic and international sports competitions will be proportionate, which is required by Swiss law. See Mariano Puerta v. ITF, CAS 2006/A/1025, award of 12 July 2006.

[55] *USOC and Athletes*, supra note 54, at 23.

[56] Arbitration CAS ad hoc Division (O.G. Salt Lake City 2002) 001, Sandis Prusis v. IOC, award of 5 Feb. 2002 *in* Vol. 3 Digest of CAS Awards 2001-2003 573 (Matthiew Reeb 2004).

[57] Id. at ¶35.

[58] Arbitration CAS ad hoc Division (O.G. Sydney 2000) 005, Perez v. IOC, award of 19 Sept. 2000, *in* Court of Arbitration for Sport, CAS Awards - Sydney 2000, 53, 62 (2000).

compete in a sports event.

In *Miranda v. IOC* (*"Miranda I"*),[59] the CAS upheld the IOC's decision that Arturo Miranda, a national of both Canada (by becoming a citizen in 1999 after satisfying residency requirements) and Cuba (by birth),[60] was not eligible under Rule 46 to be a member of the Canadian diving team for the Sydney Olympics. Because Miranda previously represented Cuba in an international competition (e.g., the 1991 Pan-American Games) and had not been a Canadian national for three years, he was ineligible unless the Canadian Olympic Committee ("COC") agreed to waive this requirement. The COC refused to do so as an invariable matter of principle. Although the CAS recognized the "primacy of the interests of athletes in the Olympic Movement, avoidance of discrimination on political and other grounds, and the central concept that the Games are competitions among athletes rather than between countries,"[61] it rejected Miranda's appeal. The CAS explained that "the IOC is entitled to rely on the good faith of the NOCs to exercise their discretion, make decisions, and take actions in accordance with the principles laid down in the Olympic Charter."[62]

[59] Arbitration CAS ad hoc Division (O.G. Sydney 2000) 003, Miranda v. IOC, award of 13 Sept. 2000 *in* Court of Arbitration for Sport, CAS Awards - Sydney 2000, 29 (2000) [hereinafter *Miranda I*].

[60] Arbitration CAS ad hoc Division (O.G. Sydney 2000) 008, Miranda, COA and Canadian Amateur Diving Ass'n v. IOC, award of 24 Sept. 2000 *in* Court of Arbitration for Sport, CAS Awards - Sydney 2000, 83 (2000) [hereinafter *Miranda II*]. In *Miranda II*, the CAS rejected his contention that he became a stateless person in 1995 when he migrated from Cuba to Canada and thus satisfied Rule 46 under *Perez II*. Miranda's circumstances were factually different because he did not defect from Cuba, he had a Cuban passport, he traveled to Cuba on several occasions after moving to Canada, and he had not been deprived of any fundamental civic rights by the Cuban government. Id.

[61] *Miranda I*, supra note 59, at 39.

[62] Id. Although the CAS panel dismissed his appeal, it recognized that the COC's "inexplicable" decision imposed "considerable hardship" on Miranda, who was ineligible to compete for the Cuban Olympic team under FINA rules, because he did not reside in Cuba during the twelve months before the Sydney Olympics. Id. at 40. Characterizing Miranda's ineligibility to participate "in light of the principle that the interests of *athletes* 'constitute a fundamental element' of the Olympic Movement," the CAS requested that the IOC ask the COC to reconsider its decision. Id. at 40. The CAS also recommended that the IOC consider modifying Rule 46 to avoid unintended hardship to individual athletes in circumstances such as the present one. The IOC did so, which may reflect the ability of the CAS to influence IOC rule-making in the same manner that courts may affect the legislative process. Bylaw 2 to Rule 42 (formerly Rule 46) now provides that an athlete who changed his nationality or acquired a new one is eligible "to represent his new country [in the Olympic Games] provided that at least three years have passed since the competitor last represented his former country." Olympic Charter, supra note 1, R. 42, Bylaw 2, at 81-82.

ii. Swiss Federal Tribunal Review of CAS Awards

The Swiss Federal Code on Private International Law [63] provides for judicial review of a CAS arbitration award by the Swiss Federal Tribunal ("SFT") on very narrow grounds. The SFT will vacate an arbitration award if the CAS panel was constituted irregularly, erroneously held that it did or did not have jurisdiction, ruled on matters beyond the submitted claims, or failed to rule on a claim. An award also may be vacated if the parties are not treated equally by the CAS panel, if a party's right to be heard is not respected, or if the award is incompatible with Swiss public policy.[64]

To date, the SFT has reviewed very few CAS awards regarding athlete eligibility issues, most of which involve appeals of sports governing body disciplinary sanctions for violations of doping rules. It exercises judicial review because "suspension from international competitions is far more serious than simple sanctions designed to protect the smooth running of a sport and constitutes a statutory punishment that affects the legal interests of the person concerned."[65]

In *Canas v. ATP Tour*,[66] the SFT refused to enforce the Association of Tennis Professionals' insistence that athletes waive their right to appeal a CAS award as a condition of participating in any events organized or sponsored by the ATP Tour. The SFT initially found that the athlete's agreement to arbitrate a doping dispute before the CAS is enforceable, because it "promotes the swift settlement of [sports] disputes . . . by specialized arbitral tribunals that offer sufficient guarantees of independence and impartiality." However, the SFT observed that it is important to ensure that "the parties, especially professional athletes, do not give up lightly their right to appeal awards issued by a last instance arbitral body before the supreme judicial authority of the state in which the arbitral tribunal is domiciled." The SFT explained this apparent contradiction by stating, "[T]his logic is based on the continuing possibility of an appeal acting as a counterbalance to the 'benevolence' with which it is necessary to examine the consensual nature of recourse to arbitration where sporting matters are concerned." The SFT vacated the CAS award, which violated the athlete's right to a fair hearing by not providing a

[63] Switz.'s Federal Code on Private International Law available at http://www.tas-cas.org/useful-texts (last visited Dec. 3, 2008).

[64] Id. at art. 190(2). For further explanation, see The Court of Arbitration for Sport 1984-2004 at 37 (Ian S. Blackshaw et. al. eds., Asser Press 2006).

[65] A. and B. v. IOC, at 2.1 (1st Civil Chamber, May 27, 2003).

[66] 4P.172/2006, (1st Civ. Law Ct., Mar. 22, 2007).

reasoned decision for rejecting his arguments that his doping sanction violated United States and European Union laws.[67]

However, the SFT has uniformly rejected challenges to the substantive merits of a CAS panel's decision.[68] Although a CAS award may be challenged on the ground that it is incompatible with Swiss public policy, no athlete has ever successfully asserted this argument. The SFT has ruled that this defense "must be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states."[69] According to the SFT, "even the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings."[70] This standard is "more restrictive and narrower than the argument of arbitrariness."[71]

[67] On remand, the CAS panel briefly considered but rejected these claims in its award, while reaching the same decision. Guillermo Canas v. ATP Tour, CAS 2005/A/951, award of 23 May 2007, at 18.

[68] A CAS award also can be attacked if it is incompatible with procedural public policy which "guarantees the parties the right to an independent ruling on the conclusions and facts submitted to the arbitral tribunal in compliance with the applicable procedural law; procedural public policy is violated when fundamental, commonly recognized principles are infringed, resulting in an intolerable contradiction with the sentiments of justice, to the effect that the decision appears incompatible with the values recognized in a State governed by the rule of law." A. and B. v. IOC, at 4.2.1 (1st Civil Chamber, May 27, 2003).

[69] N., J., Y., W. v. FINA, 5P.83/1999 at 799 (2d Civil Court, Mar. 31, 1999). To achieve the desired objective of a uniform, world-wide body of law governing athlete eligibility disputes, a valid CAS award, which is a foreign arbitration award in all countries except Switzerland, should bar re-litigation of the merits of athlete eligibility disputes under national or transnational law in a judicial forum. See Slaney v. IAAF, 244 F.3d 580 (7th Cir. 2001), cert. denied, 534 U.S. 828 (2001) (holding athlete's state law claims seeking to re-litigate same issues decided by a valid foreign arbitration award are barred by the New York Convention on the Enforcement of Foreign Arbitration Awards, a treaty to which the United States is a signatory). But see Case C-159/04 P, Meca-Medina & Majcen v. Comm'n of European Communities, 2006 5 C.M.L.R. 18 (ECJ 3rd Chamber, 2006) (holding that despite final and binding CAS award not appealed to Swiss Federal Tribunal, European Court of Justice allows two Slovenian professional swimmers to challenge FINA sanctions for positive doping test at world championship in Brazil under European Union law).

[70] *FINA*, 5P.83/1999 at 779.

[71] G. v. Int'l Equestrian Fed'n (FEI), CAS 92/63, award of Sept. 10, 1992 (translation), *in* Digest of CAS Awards 1986-1998 115 (Matthiew Reeb, 1998). The SFT held that doping rules prohibiting the usage of substances that allegedly are not likely to affect a horse's racing performance do not violate public policy simply because "the norms prescribed by the regulations . . . might be incompatible with certain statutory or legal provisions." Id. at 575.

In *N., J., Y., W. v. FINA*,[72] the SFT confirmed a CAS award upholding two-year suspensions imposed on four Chinese swimmers for doping violations. The athletes claimed the CAS award failed to comply with the principle of proportionality[73] and thus was incompatible with Swiss public policy, because the disciplinary sanction was the maximum provided by the applicable rule and the quantity of the banned substance found in their urine was very low. Rejecting this argument, the court concluded that the CAS award did not "constitute an attack on personal rights which was extremely serious and totally disproportionate to the behavior penalized."[74]

A CAS award also may be attacked on the ground it violates the principles of good faith and equal treatment, which would be contrary to Swiss public policy. These principles require CAS panels to treat like cases alike, thus facilitating the development of a consistent body of *lex sportiva*. As illustrated by *Raducan v. IOC*,[75] materially different facts may justify different CAS awards without contravening these principles. In *Raducan*, the CAS found that a Romanian gymnast committed a doping violation by admittedly taking a cold tablet containing a banned substance, although there was a thirty-eight milliliter discrepancy between the quantity of urine she produced at the doping control station and that which arrived at the laboratory. Relying on a prior CAS award absolving an athlete of an alleged doping violation because a jar containing his urine sample was not properly closed and raised the possibility contamination, she asserted that the CAS panel should have found no doping violation in her case. However, the applicable rules defined doping as evidence of the use of a prohibited substance (which was proven by her admission), and the urine discrepancy did not materially affect test results showing the presence of a banned substance in her system. Because her case is "totally different from" the prior CAS award, the SFT found that her claim of equal treatment was unfounded.[76]

3. Analysis and Conclusions

The Olympic Charter's explicit statement that "the practice of sport is a human right" protects an athlete's opportunity to participate in the Olympic Games and other international sports competition *only if* several enumerated athlete eligibility requirements and other conditions are

[72] 5P.83/1999 (2d Civil Court, Mar. 31, 1999).

[73] See supra note 54 and accompanying text.

[74] N., J., Y., W. v. FINA, 5P.83/1999 at 780 (2d Civil Court, Mar. 31, 1999).

[75] 5P.427/2000 (2d Civil Court, Dec. 4, 2000).

[76] Id. at (G)(3)(b).

satisfied. The Olympic Charter does provide an essential safeguard by expressly prohibiting individual athletes from being excluded from participation in the Olympic Games because of class-based discrimination. Forty-one of the 114 current IOC members are former Olympians; they provide an important perspective in IOC rule-making and governance decisions affecting athletes' eligibility interests.[77] In addition, the IOC Athlete Commission provides a means for Olympic athletes to have a voice in IOC affairs.[78]

CAS arbitration provides an independent and impartial forum for quickly and finally resolving the often complex issues arising in athlete eligibility disputes by an international pool of arbitrators with specialized expertise in sports law, which increases the likelihood that fair and just resolutions will occur. The CAS ad hoc Division provides a fast, fair, and free on-site means of resolving eligibility disputes arising in connection with the Olympic Games. The CAS appeals arbitration process also provides an efficient and impartial means of adjudicating athlete eligibility issues arising in other international sports competitions. The costs of CAS arbitration are relatively low in comparison to litigation, which facilitates access to this method of dispute resolution for all athletes, including those with limited financial resources.[79]

The evolving *lex sportiva* suggests that CAS arbitration panels, while respecting governing bodies' authority to promulgate athlete eligibility

[77] See Official Website of the Olympic Movement, International Olympic Committee Members, http://www.olympic.org/uk/organization/ioc/members/#members (last visited Oct. 29, 2008). For example, IOC President Jacques Rogge was a three-time member of the Belgium Olympic Yachting Team, and IOC Members Anita DeFrantz, James Easton and Bob Ctvrtlik were U.S. Olympians. See id.

[78] This Commission, which was created on October 27, 1981, consists of eight elected athletes who participate in summer Olympic sports, four elected athletes who participate in winter Olympic sports, and seven athletes appointed by the IOC to ensure diversity by sport, geographical region, gender, and ethnicity. John W. Ruger, Athletes in Olympic Administration, Olympic Rev. (Dec. 1993), available at http://www.la84foundation.org/OlympicInformationCenter/OlympicReview/1993/ore313/ORE313zi.pdf (last visited Oct. 29, 2008).

[79] CAS ad hoc Division arbitration is free of charge to the parties. Arbitration Rules for the Olympic Games, supra note 28, art. 22. An athlete must pay the required fee to submit an appeal under the CAS appeals arbitration procedure, with the arbitrators determining how the costs of arbitration are apportioned among the parties as part of their award. Code of Sports-Related Arbitration, supra note 22, R.64.5. Athletes are responsible for paying the costs of their own legal representation, witnesses, experts, and interpreters, although the rules governing the appeals arbitration procedure authorize the arbitrators to grant the prevailing party a contribution towards its legal fees and other costs. Id.

rules, recognize the primacy of athletes' interests in the Olympic Movement and require international sports governing bodies to have clear rules that are fairly and consistently applied without discrimination. Although the CAS is authorized to provide de novo review of the merits of athlete eligibility decisions by the IOC or other international sports governing bodies,[80] it appears to actually apply no more than a deferential arbitrary and capricious standard of review. Because of the monolithic authority of the IOC and IFs and the importance of an elite athlete's opportunity to participate in world-wide sports events, we believe it would be appropriate for the CAS to provide closer scrutiny of sports governing body rules and decisions that adversely affect an athlete's eligibility to compete in the Olympic Games or other international sports competitions.

The Olympic Charter expressly states that "[t]he practice of sport is a human right"; therefore, it is important to ensure that athletic participation may be denied only if necessary to achieve a legitimate objective of international sports competition consistent with the Olympic spirit. For example, we applaud a recent CAS award ruling that Oscar Pistorius, a South African athlete who is a double amputee, is eligible to run in IAAF-sanctioned track events with "Cheetah" model prosthetic legs.[81] An IAAF rule prohibited the use of "any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device." The CAS panel rejected the IAAF's argument that the use of a technical device providing an athlete "with any *advantage*, however small, in any part of a competition . . . must render that athlete ineligible to compete regardless of any compensating disadvantages." It concluded that the use of a passive device such as the "Cheetah" prosthetic legs does not violate this rule "without convincing scientific proof that it provides him with *an overall net advantage* over other athletes." The panel concluded that, because scientific evidence did not prove that Pistorius obtained a metabolic or biomechanical advantage from using the "Cheetah" prosthetic legs, his exclusion would not further the rule's purpose of ensuring fair competition among athletes.

Athletes have the right to have an adverse CAS award reviewed by the Swiss Federal Tribunal although its scope of judicial review is very limited. Nevertheless, this appeal provides a means for judicially vacating a CAS

[80] Code of Sports-Related Arbitration, supra note 22, R.57, which applies to CAS appeals arbitration; Arbitration Rules for the Olympic Games, supra note 28, arts. 16 & 17, which apply to the CAS ad hoc Division.

[81] Pistorius v. IAAF, CAS 2008/A/1480, award of 16 May 2008.

award if an athlete's right to be heard is denied, if he or she is not treated equally and in good faith, or if the merits of the decision violate fundamental international legal or moral principles. Of course, all CAS appeals arbitration and ad hoc Division awards must be publicly available and readily accessible for athletes to exercise their right to be heard effectively and for their legal counsel to ensure they are treated equally.

B. United States Legal Framework

The United States Olympic Committee ("USOC") is the national Olympic committee authorized by the IOC to represent the United States in all matters relating to its participation in the Olympic Games. The USOC selects a national governing body as the governing authority for each Olympic sport within the United States, which is a member of the corresponding IF that governs the sport on a worldwide level. Pursuant to a series of hierarchical contractual agreements with the IOC and IFs, the USOC and its NGBs are required to adopt, apply, and enforce IOC and IF rules that determine or affect American athletes' eligibility to qualify for, or participate in, Olympic or other international sports competitions. For example, the USOC and NGBs must comply with the IOC Charter's athlete eligibility requirements and anti-discrimination provisions protecting athlete participation opportunities. They also must comply with CAS awards resolving issues concerning the eligibility of American athletes that arise in connection with the Olympic Games or in disputes with an IF or the World Anti-Doping Agency.

As previously discussed, CAS arbitration generally is the agreed forum for resolving eligibility disputes between a U.S. athlete and the IOC or an IF. The New York Convention on the Enforcement of Foreign Arbitration Awards[82] requires U.S courts to recognize and enforce valid foreign arbitration awards, including CAS awards. In *Slaney v. IAAF*,[83] the Seventh Circuit held that a valid foreign arbitration award precludes an American athlete from re-litigating the merits of an eligibility dispute in a U.S. court. The court concluded that "[o]ur judicial system is not meant to provide a second bite at the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they received."[84]

[82] 9 U.S.C. § 201 (2006).

[83] 244 F.3d 580 (2001).

[84] Id. at 591. A U.S. court may be unable to provide effective relief to an American athlete whose eligibility to participate in sports competition is adversely affected by an IOC or IF rule or decision, because its judicial authority is not binding on foreign sports governing bodies outside

1. Ted Stevens Olympic and Amateur Sports Act

The USOC, a federally chartered corporation created by Congress, and all NGBs must comply with the Ted Stevens Olympic and Amateur Sports Act ("Amateur Sports Act"),[85] which establishes a legal framework for protecting the participation opportunities of Olympic sport athletes. Although current Olympic athletes are not eligible to be members of the USOC, the Amateur Sports Act requires that an Athletes' Advisory Council be established to represent their interests and to ensure open communication with the USOC.[86] It also requires the USOC to ensure that athletes have at least twenty percent of the membership and voting power held by its Board of Directors[87] and committees[88] as well as each NGB.[89]

To be eligible to be recognized by the USOC as the NGB for an Olympic sport, an amateur sports organization must provide all amateur athletes with an equal opportunity to participate "without discrimination on the basis of race, color, religion, sex, age, or national origin."[90] Each NGB has an

its jurisdiction. Michels v. U.S. Olympic Comm., 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J. concurring) (noting that an IF "can thumb its collective nose" at the USOC and ask the IOC to disqualify the entire U.S. Olympic weightlifting team if the USOC placed an athlete suspended by the IF on the team); Gahan v. U.S. Amateur Confederation of Roller Skating, 382 F. Supp.2d 1127, 1124 n.4 (D. Neb. 2005) (observing that a U.S. court is unable to protect athletes from decisions of international sports governing bodies).

[85] 36 U.S.C. §220501 (2006). The USOC has a statutory obligation to ensure, directly or indirectly by delegation to the NGBs for the various sports, "the most competent representation possible" for the U.S. in each event of the Olympic, Paralympic, and Pan-American Games. 36 U.S.C. §220503(4) (2006). Its Mission is "[t]o support United States Olympic and Paralympic athletes in achieving sustained competitive excellence and preserve the Olympic ideals, and thereby inspire all Americans." United States Olympic Committee, Bylaws of the USOC, art. II, § 2.1 (2006). The Stevens Act also requires the USOC to encourage participation opportunities for women, racial and ethnic minorities, and disabled athletes and to provide assistance necessary to achieve this objective. 36 U.S.C. §220503(12)-(14).

[86] 36 U.S.C. §220504(b)(2) (2006). Members of the USOC Athlete Advisory Committee "must have represented the United States in the Olympic, Pan American, or Paralympic Games, World Championships, or an event designated as an Operation Gold event within the ten (10) years preceding election." Bylaws of the USOC, art. XII, § 12.3. The Council's members are elected by U. S. athletes who currently participate in international amateur athletic competition or did so within the past ten years. Id.

[87] 36 U.S.C. §220504(b)(2). Two members of the USOC's Board of Directors are selected from a group of individuals nominated by the Athletes' Advisory Council. Bylaws of the USOC, art. III, § 3.2.

[88] 36 U.S.C. §220504(b)(2).

[89] 36 U.S.C. §220522(a)(10) (2006).

[90] 36 U.S.C. §220522(a)(8). However, an NGB has no authority to regulate high school or college athletic competition. 36 U.S.C. §220526(a) (2006).

affirmative duty to encourage and support athletic participation opportunities for women and those with disabilities.[91] An NGB's eligibility and participation criteria for U.S. athletes to participate in the Olympic, Paralympic, and Pan American Games must be consistent with those of the IF for its sport.[92] Athletes must be allowed to compete in international amateur athletic competitions unless the organization conducting the competition does not meet the applicable sanctioning criteria.[93] The Amateur Sports Act requires the USOC to establish a procedure for investigating and resolving complaints by athletes alleging that an NGB has violated these requirements, which adversely affects her or her eligibility to compete.[94]

The Amateur Sports Act also mandates that the USOC establish a procedure for "swift and equitable resolution" of disputes "relating to the opportunity of an amateur athlete . . . to participate" in the Olympic, Paralympic, Pan-American Games, and world championship competitions (hereinafter "protected competitions").[95] The USOC is required to hire an athlete ombudsman to provide free, independent advice to athletes regarding resolution of disputes regarding his or her eligibility to participate in these competitions.[96]

Article IX of the USOC's bylaws creates some important procedural and substantive rights for the "amateur athlete,"[97] which also protect U.S. professional athletes who participate in the Olympic Games and other international sports competitions. No member of the USOC, such as an NGB, "may deny or threaten to deny any amateur athlete the opportunity to participate" in a protected competition.[98] An NGB is required to provide fair notice and an internal hearing before declaring an athlete ineligible to participate.[99] The USOC is required "by all reasonable means at its disposal" to "protect the right of an amateur athlete to participate if selected (or to

[91] 36 U.S.C. §220524(6)-(7) (2006).

[92] 36 U.S.C. §220522(a)(14) (2006).

[93] 36 U.S.C. §220524(5) (2006).

[94] 36 U.S.C. §220509 (a) (2006). If the USOC finds that an NGB is not in compliance, it is authorized to place the NGB on probation or revoke its recognition.

[95] Id.

[96] 36 U.S.C. §220509(b). John Ruger, a member of the 1980 U.S. Olympic biathlon team, currently serves as the USOC athlete ombudsman.

[97] An "amateur athlete" is defined as "any athlete who meets the eligibility standards established by the [NGB] or Paralympic Sports Organization for the sport in which the athlete competes." Bylaws of the USOC, art. I, § 1.3(c).

[98] Id. art. IX, § 9.1.

[99] Id.

attempt to qualify for selection to participate) as an athlete representing the United States" in any protected competition.[100] The USOC must conduct an investigation if an athlete alleges a denial of his or her participation rights by an NGB and promptly attempt to settle the matter.[101] The Act gives an athlete the right to submit an eligibility dispute with an NGB to final and binding arbitration in accordance with the Commercial Rules of the American Arbitration Association ("AAA") if it is not resolved by the USOC to his or her satisfaction.[102] The USOC's chief executive officer may also, in order to protect an athlete's rights, authorize legal action on the athlete's behalf or fund the athlete's legal action (including arbitration) against an NGB.[103]

2. Athlete Eligibility Dispute Resolution Process

A U.S. athlete has no federal constitutional right to participate in the Olympic Games.[104] The Amateur Sports Act[105] does not create any substantive athletic participation rights that athletes can enforce in a

[100] Id.

[101] Id. art. IX, § 9.2.

[102] Id. See also 36 U.S.C. §220522(a)(4)(B) (as a condition of being recognized as an NGB, it must agree to submit to binding arbitration in any dispute regarding an amateur athlete's opportunity to participate in a competition).

[103] Bylaws of the USOC, art. IX, § 9.9. However, the CEO's decision whether or not to do so "shall not be construed as an opinion of the [USOC] with respect to the merits of the athlete's claim." Id.

[104] In DeFrantz v. USOC, 492 F. Supp. 1181 (D.D.C. 1980), a group of athletes selected to be members of the U.S. Olympic team sought injunctive relief enabling them to compete in the 1980 Moscow Olympic Games. The Carter Administration urged a boycott of the Moscow Games to protest the Soviet Union's 1979 invasion of Afghanistan. Id. Faced with political pressure from the federal government, threatened legal action by President Carter, and the possible loss of its federal funding and federal tax exemption, the USOC decided not to enter an American team in the Moscow Games. The court found that, under IOC rules, the USOC has the exclusive and discretionary authority to decide whether to enter a U.S. team in Olympic competition. Id. The court held that, despite being federally chartered, the USOC is a private organization rather than a state actor; therefore, its conduct is not subject to the constraints of the U.S. Constitution. Id. Even if the USOC's decision constituted state action, athletes have no federal constitutional right to participate in the Olympic Games. The Supreme Court subsequently confirmed that the USOC is not a state actor. San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987). Consistent therewith, courts have held that an NGB also is not a state actor. Behagen v. Amateur Basketball Ass'n of U.S., 884 F.2d 524 (10th Cir. 1989).

[105] In 1998, the original Amateur Sports Act was renamed the Ted Stevens Olympic and Amateur Sports Act and, *inter alia*, amended to expressly provide that, although the USOC may sue and be sued in federal court, nothing in the Act "shall create a private right of action." 36 U.S.C. §220505(b)(9) (2006).

private litigation against the USOC or an NGB.[106] As one Seventh Circuit judge remarked, "there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games."[107]

Consistent with this view, federal courts have ruled that the Amateur Sports Act immunizes an NGB from antitrust liability for rules and decisions that adversely affect an athlete's eligibility to participate in a protected competition. In *Behagen v. Amateur Basketball Ass'n of United States*,[108] the Tenth Circuit noted that the statute expressly authorizes only one NGB to represent the United States within each IF and to recommend to the USOC individual athletes and teams to represent the United States in the sports it governs. It ruled that implied antitrust immunity is necessary because "[t]he Act makes clear that Congress intended an NGB to exercise monolithic control over its particular amateur sport, including coordinating with the appropriate international sports federation and controlling amateur eligibility for Americans that participate in sport."[109]

The Amateur Sports Act, which requires that all amateur athletes be given an equal opportunity to participate in protected competitions without discrimination, does not expressly nullify or supersede any applicable federal civil rights statutes that protect Olympic sport athletes against prohibited disability,[110] gender,[111] race,[112] and religious discrimination.[113] However, even if an award of damages against the USOC or an NGB is an appropriate remedy for civil rights violations, courts are reluctant to grant

[106] See, e.g., Slaney v. IAAF, 244 F.3d 580 (2001). Courts also generally hold that athletes had no private right of action under the Amateur Sports Act. See, e.g., Martinez v. U.S. Olympic Comm., 802 F.2d 1275 (10th Cir. 1986); Oldfield v. Athletic Congress, 779 F.2d 505 (9th Cir. 1985); *Michels*, 741 F.2d 155; Lee v. U.S. Taekwondo Union, 331 F. Supp.2d 1252 (D. Haw. 2004). But see Sternberg v. USA Nat'l Karate-Do Fed'n, Inc., 123 F. Supp.2d 659 (E.D.N.Y. 2000) (holding that an athlete allegedly excluded from participating in a protected competition because of her sex has an implied private right of action for damages against an NGB for violating the Stevens Act's prohibition against gender discrimination).

[107] *Michels*, 741 F.2d at 159 (Posner, J., concurring). See also Abdallah v. U.S. Ass'n of Taekwondo, Inc., WL 2710489 (S.D. Tex. 2007).

[108] *Behagen*, 884 F.2d 524 (10th Cir. 1989).

[109] Id. at 529. See also JES Properties, Inc. v. USA Equestrian, Inc., 458 F.3d 1224 (11th Cir. 2006); Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc., 213 F.3d 198 (5th Cir. 2000).

[110] Shepherd v. USOC, 464 F. Supp.2d 1072 (D. Colo. 2006), aff'd sub nom, Hollonbeck v. USOC, 513 F.3d 1191 (10th Cir. 2008).

[111] *Sternberg*, 123 F. Supp.2d 659.

[112] *Lee*, 331 F. Supp.2d 1252.

[113] Akiyama v. United States Judo Inc., 181 F. Supp.2d 1179 (W.D. Wash. 2002).

requested injunctive relief that would interfere with the USOC's exclusive jurisdiction regarding all matters regarding eligibility to participate in the Olympics or other protected competitions.[114]

Courts have ruled that the Amateur Sports Act preempts state law claims by athletes arising out of eligibility disputes regarding protected competitions except for a breach of contract action to require the USOC or an NBG to follow its own internal dispute resolution procedures.[115] American judges recognize the need for a uniform national procedure for resolving athlete eligibility issues, which is necessary to further Congress' "grant of exclusive jurisdiction to the USOC over all matters pertaining to United States participation in the Olympic Games."[116] Thus, "only a very specific claim will avoid the impediment to [a court's] subject matter jurisdiction" established by the Amateur Sports Act.[117]

In summary, courts hold that the Amateur Sports Act limits the nature and scope of judicial authority in athlete eligibility disputes. The role of the judicial system is to ensure that the USOC and NGBs follow their own rules and provide a minimum level of procedural due process consistent with this federal statute.[118] The merits of domestic disputes regarding a U.S. athlete's

[114] See, e.g., Gatlin v. USADA, 2008 WL 2567657 (N.D. Fla. 2008); *Lee*, 331 F. Supp.2d at 1260, n.2. As one court observed, although the Stevens Act requires the USOC and its NGBs to submit unresolved eligibility disputes to binding arbitration, the statute does not require an athlete to do so. *Sternberg*, 123 F. Supp. at 666. Although a court must give effect to both the Amateur Sports Act and a federal civil rights statute if they can be reconciled, judicial application of a federal civil rights law to resolve the merits of an eligibility dispute would conflict with the Stevens Act's grant of exclusive authority to the USOC in such matters. Arbitration, not judicial intervention, is the best means of finally resolving the merits of all athlete eligibility disputes in a timely and efficient manner.

[115] See Harding v. U.S. Figure Skating, 851 F. Supp. 1476 (D. Or. 1994) (vacated on other grounds), 879 F. Supp. 1053 (D. Or. 1995); *Slaney*, 244 F.3d 580 (2001).

[116] *Slaney*, 244 F.3d at 595 (2001).

[117] Id. at 595. In *Harding*, a federal district court held that judicial intervention in athlete eligibility disputes "is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in *serious* and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The court should not intervene in the merits of the underlying dispute." *Harding*, 851 F. Supp. at 1479.

[118] The Stevens Act, in relevant part, provides: "In any lawsuit relating to the resolution of a dispute involving the opportunity of an amateur athlete to participate in the Olympic Games, the Paralympic Games, or the Pan-American Games, a court shall not grant injunctive relief against [the USOC] within 21 days before the beginning of such games if [the USOC], after consultation with the chair of the Athletes' Advisory Council, has provided a sworn statement in writing . . . to such court that its constitution and bylaws cannot provide for the resolution of such dispute prior to the beginning of such games." 36 U.S.C. §220509(a). As one court observed, this

eligibility to participate in the Olympic Games and other protected competitions are to be resolved by AAA arbitration rather than by U.S. courts.

i. AAA Arbitration

Article IX of the USOC Bylaws gives an athlete the right to submit to binding AAA arbitration an eligibility dispute not resolved to his satisfaction. The athlete must submit a list of persons that he believes may be adversely affected by the arbitration (e.g., other athletes).[119] The AAA's Commercial Arbitration Rules govern, with an expedited procedure available to ensure that a timely award that will "do justice to the affected parties" can be made.[120] The dispute, which is an arbitration proceeding between the athlete and the NGB (the USOC receives notice but is not a party), is resolved by a single impartial arbitrator or panel of arbitrators with specialized expertise.[121] Like CAS arbitration, the AAA panel's review is de novo, and the award must include findings of fact and conclusions of law.[122]

Because the American Arbitration Association is bound by confidentiality obligations, historically it has not publicly released Article IX arbitration awards. We are unable to draw any general conclusions from such a limited sample, but some recent Article IX arbitration awards obtained from sources other than the AAA[123] illustrate that arbitration panels have required both that athletes have a fair opportunity to qualify for protected competitions[124] and that an NGB's selection procedures must be

statutory provision "is designed to prevent a court from usurping the USOC's powers when time is too short for its own dispute-resolution machinery to do its work." Lindland v. USA Wrestling Ass'n, 227 F.3d 1000, 1007 (7th Cir. 2000).

[119] Bylaws of the USOC, art. IX, § 9.3. This provision was added after the conclusion of multiple arbitration proceedings and subsequent litigation in *Lindland*, which illustrated the need for all affected athletes to have a fair opportunity to be heard in a single arbitration. *Lindland*, 227 F.3d 1000 (2000).

[120] American Arbitration Association Online Library, Sports Arbitration, Including Olympic Athlete Disputes ("AAA Sports Arbitration"), available at http://www.adr.org/si.asp?id=4135 (last visited Oct. 29, 2008).

[121] Id.

[122] Id. The arbitrator has no authority to review "the final decision of a referee during a competition regarding a field of play decision," which may determine or materially influence whether an athlete is selected to participate in a protected competition, unless it was outside the referee's authority to make or was "the product of fraud, corruption, partiality, or other misconduct." Bylaws of the USOC, supra note 85, § 9.12.

[123] Copies of these awards are on file with the authors.

[124] In the Matter of Arbitration between Sean Wolf and U.S. Rowing Association, Case No. 30 190

fair, reasonable, and consistently applied to all athletes.[125]

ii. Judicial Review and Enforcement of AAA Awards

A court will provide only limited scrutiny of an AAA arbitration award affecting an athlete's eligibility to participate in a sport, which is subject to review and enforcement under the Federal Arbitration Act.[126] In *Gault v. United States Bobsled and Skeleton Federation*,[127] a New York appellate court explained:

> Although we also may disagree with the arbitrator's award and find most unfortunate the increasing frequency with which sporting events are resolved in the courtroom, we have no authority to upset it when the arbitrator did not exceed his authority. However, a court will vacate or refuse

00635 02 (AAA, August 9, 2002) (finding that the NGB had granted a waiver to another rower who was unable to participate in one of the National Selection Regattas because he was taking a law school exam, the arbitrator ruled that the NGB improperly refused to grant claimant a waiver for a similar reason).

[125] In the Matter of Arbitration between Rebecca Conzelman, Case No. 30 190 404 04 (AAA, April 6, 2004) (concluding that time standards used to select U.S. competitors for World Cup cycling event have a rational basis and are valid).

There is a special arbitration process for resolving doping disputes that affect a U.S. athlete's eligibility to participate in protected competitions. See generally Anne Benedetti & Jim Bunting, There's a New Sheriff in Town: A Review of the United States Anti-doping Agency, 3 I.S.L.R. 19 (2003); Travis T. Tygart, Winners Never Dope and Finally, Dopers Never Win: USADA Takes Over Drug Testing of United States Olympic Athletes, 1 DePaul J. Sports L. & Contemp. Probs. 124 (2003). The United States Anti-Doping Agency ("USADA"), an independent anti-doping agency for Olympic sports in the United States, provides drug education, conducts drug testing of American athletes, investigates positive results, and recommends charges and sanctions for violations of the World Anti-Doping Code or an IF's doping rules. See United States Anti-Doping Agency, available at http://www.usantidoping.org/ (last visited Oct. 29, 2008). If a U.S. athlete is dissatisfied with the USADA Review Board's proposed disposition of an alleged doping offense, he or she may request a hearing before a single arbitrator or a panel of three arbitrators who are qualified as both AAA and North American CAS arbitrators. In this arbitration proceeding, USADA and the athlete are adversarial parties. Special AAA Supplementary Procedures apply to a USADA doping arbitration before the AAA/North American CAS panel. See Jacobs v. USA Track & Field, 374 F.3d 85 (2d. Cir. 2004) (rejecting athlete's petition to compel arbitration pursuant to AAA Commercial Rules). The arbitrators' decision is published and available on the USADA website. An athlete may appeal an adverse AAA/North American CAS arbitration award to a different panel of three CAS arbitrators, whose decision is final and binding. Although generally not parties to USADA doping arbitrations, the USOC and U.S. NGBs effectively are bound by the resulting awards pursuant to the Amateur Sports Act. Gahan v. U.S. Amateur Confederation of Roller Skating, 382 F. Supp.2d 1127 (D. Neb. 2005).

[126] 9 U.S.C. §1 et seq.

[127] Gault v. U.S. Bobsled and Skeleton Fed'n, 578 N.Y.S.2d 683, 685 (N.Y. App. Div. 1992).

to confirm an arbitration award that is the result of "corruption," "fraud," "evident partiality," or any similar bar to confirmation.[128]

3. Analysis and Conclusions

The Amateur Sports Act has several requirements that give U.S. athletes a voice and voting power regarding the domestic regulation of Olympic sports. To ensure that their interests are adequately represented, athletes are entitled to have at least twenty percent of the voting power held by the USOC's Board of Directors and committees as well as each NGB. An Athletes' Advisory Council, whose members are elected by Olympic athletes, maintains an open line of communication with the USOC and provides input on their behalf.

The Amateur Sports Act also establishes some important procedural safeguards and substantive protections against discrimination to protect U.S. athletes' opportunities to participate in (and qualify for) Olympic and other protected international amateur sports competitions. There is an athlete ombudsman who provides independent, free advice to athletes concerning eligibility participation disputes. Although there is no U.S. constitutional or Amateur Sports Act right to participate in the Olympic Games or other protected competitions, Article IX of the USOC's bylaws requires the USOC to investigate and attempt to promptly resolve an NGB's alleged denial of an amateur athlete's opportunity to participate in protected competitions. If dissatisfied with the USOC's proposed resolution, an athlete has the right to submit the dispute to final and binding AAA arbitration.

The AAA arbitration process enables impartial arbitrators with legal training and knowledge of the subject sport to resolve athlete eligibility disputes promptly. All athletes who may be affected by the AAA award have an opportunity to participate in the arbitration proceeding. The arbitrator conducts a de novo review of the dispute, and the award, which is binding on the NGB and USOC, must include findings of fact and conclusions of law. However, because AAA does not make Article IX awards publicly available, we are unable to express a definitive opinion whether this arbitration process effectively protects athletes' participation opportunities.

Courts have a very limited role in resolving athlete eligibility disputes. Although a court will not resolve the merits of the dispute, it will ensure that the USOC and NGBs follow their own rules and provide an athlete with the procedural due process protections required by the Amateur Sports Act and

[128] *Lindland*, 227 F.3d at 1003.

the USOC Bylaws. A court also will provide limited scrutiny of an AAA athlete eligibility award to ensure that the arbitrator did not exceed his or her authority and that it is not the product of corruption or bias.

II. PROFESSIONAL SPORTS: THE PRIMACY OF CONTRACT AND COLLECTIVE BARGAINING

Unionized professional athletes have an effective voice in the promulgation of athlete eligibility requirements.[129] In addition, de novo arbitration before independent arbitrators with specialized sports law expertise often is used to resolve athlete eligibility disputes arising in unionized professional team sports. Otherwise, the legal framework governing athlete eligibility issues and disputes arising in the U.S. professional sports industries[130] differs significantly from those for Olympic sports and other worldwide athletic competitions.

For most professional athletes, playing a sport is their primary occupation and source of income. In team sports, professional athletes generally are employees of their respective clubs who are paid an agreed salary, which is a multi-million dollar amount for most National Football League ("NFL"), Major League Baseball ("MLB"), National Basketball Association ("NBA"), and National Hockey League ("NHL") players.[131]

[129] In the major United States professional sports leagues (e.g., Major League Baseball ("MLB"), National Basketball Association ("NBA"), National Hockey League ("NHL"), National Football League ("NFL"), and Major League Soccer ("MLS")), players' unions represent athletes and possess exclusive authority to negotiate on behalf of athletes over terms and conditions of employment such as minimum salaries, pension benefits, playing conditions, eligibility rules, and grievance procedures. See Mitten et al., supra note 3, at 711. Negotiations between players' representatives and management representatives result in collective bargaining agreements.

[130] Professional team and individual performer sports are a very popular form of entertainment in the United States. The producers of professional sporting events such as sports leagues and other organizations have strong market incentives to create a brand of athletic competition that attracts elite, highly skilled athletes; is commercially appealing to the public; and is profitable. Major professional team sports such as the NFL, MLB, NBA, and NHL, as well as individual performer professional sports such as golf and tennis, collectively attract millions of event attendees and viewers and generate billions of revenues annually.

[131] For MLB the 2006 average player salary was $2.699 million and the minimum salary was $380,000. See mlbplayers.com, Frequently Asked Questions, http://mlbplayers.mlb.com/pa/info/faq.jsp#average (last visited Oct. 29, 2008). For the NBA the 2006-07 average player salary was $5.215 million, and the minimum salary was $412,718. See Larry Coon, NBA Salary Cap FAQ, http://members.cox.net/lmcoon/salarycap.htm (last visited Oct. 29, 2008); InsideHoops.com, NBA Minimum Salary, http://www.insidehoods.com/minimum-nba-salary.shtml (last visited Oct. 27, 2008). For the NFL the average player salary in 2006 was $1.4 million, and the minimum player salary was $285,000. See Larry Weisman, Expect NFL Salary Cap to Keep Going Through the Roof, USA Today, Jul. 7, 2006, available at http://www.usatoday.com/sports/football/nfl/2006-07-07-

Professional athletes who participate in individual sports such as golf and tennis usually are independent contractors who must satisfy the event organizer's qualifying criteria in order to participate in organized competitions. Their compensation is based on their respective individual performances in competitions.

In professional sports, the legal framework establishing the parameters of permissible athlete eligibility requirements and protecting an athlete's opportunity to participate is a mix of contract, labor, antitrust, and civil rights laws. In general, the legal relationship between a producer of professional sports competition and an athlete is established by the terms of their contract, with state contract law and federal labor, antitrust, and civil rights law limiting its boundaries. United States professional sports leagues and governing bodies are private entities that are not subject to the constraints of the United States Constitution;[132] therefore, they are not obliged to comply with, for example, the Due Process and Equal Protection Clauses. The Constitution's dormant Commerce Clause[133] precludes direct state regulation (other than by contract law) of the legal relationship between a professional athlete and a national or multi-state professional sports league or governing body.[134]

To satisfy public demand for competition among a sport's best athletes, producers and organizers of professional sports events have a strong economic incentive not to base eligibility requirements on factors other than an athlete's ability, skill, or proficiency. Historically, however, athletes

salary-report_x.htm (last visited Oct. 28, 2008); asktheCommish.com, Salary Cap FAQ, http://askthecommish.com/salarycap/faq.asp (last visited Oct. 29, 2008). For the NHL, the 2005-06 average player salary was $1.28 million, and the minimum player salary was $450,000. See NHL.com, Collective Bargaining FAQs, http://www.nhl.com/nhlhq/cba/index.html (last visited Nov. 27, 2007). See generally The Hockey News, Salaries, http://www.thehockeynews.com/salaries/team_listing.html (last visited Oct. 29, 2008).

[132] See, e.g., Long v. Nat'l Football League, 870 F. Supp. 101, 105 (W.D. Pa. 1994), aff'd, 66 F.3d 311 (3d Cir. 1994).

[133] See generally Erwin Chemerinsky, Constitutional Law Principles and Policies § 5.3 (Aspen Publishers 2d. ed. 2002); John E. Nowak & Ronald D. Rotunda, Principles of Constitutional Law § 8.1 (West 2d ed. 2005).

[134] See, e.g., Partee v. San Diego Chargers Football Co., 668 P.2d 674, 677 (Cal. 1983). An early case, Neeld v. American Hockey League, 439 F. Supp. 459 (W.D.N.Y. 1977), held that state human or civil rights laws such as those prohibiting disability discrimination can be applied to multi-state professional sports leagues. Today, a disability discrimination claim by a professional athlete against an interstate professional sport league or association is likely to be brought under the federal Americans with Disabilities Act. See, e.g., PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

with the requisite talents were denied an opportunity to participate in most professional sports solely because of their race or ethnicity. For example, for many years during the twentieth century, African-American,[135] Native American,[136] and Latino-American[137] athletes were excluded from professional sports. Such blatant discrimination is now clearly prohibited by federal civil rights laws,[138] and today a majority of professional football and basketball players are African-American.[139]

A. Team Sports

1. Initial Eligibility Requirements

In the past, professional team sport athletes successfully challenged on antitrust grounds league-wide eligibility requirements (other than medical/physical fitness requirements)[140] that prevented member clubs from employing them. For example, courts have enjoined a professional sports league from enforcing eligibility rules requiring that a prospective player attain a minimum age or that a specified number of years have elapsed from his high school graduation; these rules were found to unreasonably restrain trade in the market for player services.[141]

[135] See generally William C. Rhoden, Forty Million Dollar Slaves: The Rise, Fall, and Redemption of the Black Athlete (Crown Publishers 2006); Kenneth L. Shropshire, In Black and White: Race and Sports in America (New York University Press 1996); Arthur Ashe, A Hard Road to Glory: A History of the African-American Athlete Since 1946 (Warner Books 1988).

[136] Sally Jenkins, The Team That Invented Football, Sports Illustrated, Apr. 23, 2007, at 60.

[137] Latinos endured a double standard. During major league baseball's period of segregation, fair-skinned Latinos were permitted to play, while those with dark skin were not. Timothy Davis, Breaking the Color Barrier, *in* Courting the Yankees (Ettie Ward ed., Carolina Academic Press 2003), at 335, 339

[138] Americans with Disabilities Act, 42 U.S.C. §§ 12101-12300 (2006); See Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-2000(e)-4 (2006).

[139] Mitten, et al., supra note 3, at 741-42.

[140] See, e.g., Neeld v. American Hockey League, 439 F. Supp. 459 (W.D.N.Y. 1977) (upholding league rule prohibiting one-eyed player from playing for member clubs because its primary purpose and effect is to promote safety and has de minimis anticompetitive effect).

[141] Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977). See also Boris v. U.S. Football League, No. Cv. 83-4980 LEW (Kx), 1984 WL 894 (C.D. Cal. Feb. 28, 1984) (holding that league rule requiring player to exhaust college football eligibility or to earn college diploma or that at least five years elapse since he entered college unreasonably restrains trade). Other courts have enjoined a league and its member clubs from collectively refusing to employ players who formerly played for a defunct rival league. See Bowman v. Nat'l Football League, 402 F. Supp. 754 (D. Minn. 1975). Cf. Gardella v. Chandler, 172 F.2d 402 (2d. Cir. 1949) (holding that an alleged agreement among "organized baseball" clubs in United States not to employ player who played

In *Denver Rockets v. All-Pro Management, Inc.*,[142] the court granted a preliminary injunction against enforcement of a bylaw preventing a person from playing in the NBA until four years after he graduated from high school based on its finding of a substantial probability that the bylaw violated federal antitrust laws. Because it was undisputed that the plaintiff was well-qualified to play NBA basketball, the court observed that the challenged bylaw "is an arbitrary and unreasonable restraint upon the rights of [Spencer] Haywood and other potential NBA players to contract to play for NBA teams until the happening of an event . . . fixed by the NBA without the consent or agreement of such potential player."[143] Recognizing that professional basketball players generally have short careers, the court concluded that plaintiff would suffer irreparable harm if he was unable to play NBA basketball immediately because his physical condition and skills would deteriorate without high level competition. Consequently, a substantial part of his playing career would be lost.

Similarly, in *Linseman v. World Hockey Association*, the court found that "the loss of even one year of playing time is very detrimental."[144] It preliminarily enjoined the World Hockey Association from enforcing a rule prohibiting its clubs from drafting players who were not at least twenty years old. Characterizing the rule as "a blanket restriction as to age without any consideration of talent,"[145] the court found "no need for concerted action as to which specific players will be employed," because the "determination, under our free market system, ought to be left up to each individual team."[146]

It is significant that the player eligibility requirements successfully challenged in *Denver Rockets* and *Linseman* were unilaterally established by a league and its member clubs. These rules were not agreed to by a union representing the league's players during collective bargaining negotiations. Currently, MLB, NFL, NBA, NHL, and Major League Soccer ("MLS") players are unionized. Their respective unions have both the exclusive authority to represent all players in collective bargaining negotiations with the leagues

professionally in Mexico contrary to reserve clause states antitrust claim because conduct "unreasonably forbids any one to practice his calling").

[142] 325 F. Supp. 1049 (1971).

[143] Id. at 1056. But see discussion of a collective bargaining agreement's effect on the legality of age restrictions *infra* note 173 and accompanying text.

[144] *Linseman*, 439 F. Supp. at 1319.

[145] Id. at 1323.

[146] Id. at 1321.

and a duty to do so fairly.[147] All current and prospective players are bound by the terms of the union's collective bargaining agreement with the league, which has led to litigation by some players not yet members of the union who have asserted that the union did not adequately protect their interests by agreeing to terms that harmed them.[148]

In *Clarett v. National Football League*,[149] the Second Circuit held that the non-statutory labor exemption immunizes from antitrust scrutiny player eligibility requirements that are the product of a lawful collective bargaining process. Claiming an antitrust violation, Maurice Clarett, a star football player in his sophomore year at Ohio State University, challenged an NFL rule stipulating that players are eligible to be drafted only if "three full college seasons have elapsed since their high school graduation."[150]

The Second Circuit ruled that the union has the exclusive authority to negotiate the terms and conditions of prospective NFL players' employment. Eligibility rules are a mandatory subject of collective bargaining between the league and the players' union because they pertain to players' "wages, hours, or terms and conditions of employment."[151] As part of its effort to obtain a collective bargaining agreement providing the best overall deal for all NFL players, federal labor law gives the union "the ability to advantage certain categories of players over others, subject . . . to [its] duty of fair representation."[152] For example, the union may "favor veteran players over rookies . . . and can seek to preserve jobs for current players to the detriment of new employees and the exclusion of outsiders."[153]

Although the eligibility rule temporarily excluded Clarett from the NFL regardless of his ability and readiness to play professional football, the Second Circuit held that "the NFL and its players' union can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices . . . or discrimination . . . ."[154]

Clarett, although binding precedent only in the Second Circuit,[155] is

[147] Steele v. Louisville & Nashville Railroads, 323 U.S. 192 (1944).

[148] See, e.g., Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987).

[149] Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004), cert. denied, 544 U.S. 961 (2005).

[150] *Clarett*, 369 F.3d at 128.

[151] Id. at 132.

[152] Id. at 139.

[153] Id.

[154] Id. at 141.

[155] Nevertheless, so far it is being followed by other circuit courts. See, e.g., Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462,474 (6th Cir. 2005) (citing *Clarett*,

consistent with general labor law principles providing a union with exclusive and plenary authority to negotiate all terms and conditions of its members' employment, including restrictions and limits favoring existing workers over those initially seeking to work for a unionized employer.[156] It also is consistent with *Brown v. Pro Football, Inc.*,[157] in which the Supreme Court held that the non-statutory labor exemption bars an antitrust challenge to an employment term that is a mandatory subject of collective bargaining – even by players who are not currently eligible for membership in the union. In other words, antitrust liability cannot be imposed for agreements or conduct that is permitted by federal labor law. In addition, *Clarett* follows Second Circuit precedent that broadly construes the scope of the non-statutory labor exemption as applied to professional sports.[158]

On the other hand, *Clarett* fails to consider that there is only one major professional league (i.e., source of employment) for each sport in the United States. Because football, basketball, hockey, baseball, and soccer each have only one major U.S. professional league, blanket eligibility requirements wholly unrelated to individual skill and ability may have much greater exclusionary and economically detrimental effects on team sport professional athletes than those on employees in other industries. For example, electricians, plumbers, and carpenters have the option of seeking employment with non-union employers. Other courts, including the *Clarett* district court,[159] have recognized that professional athletes may not have any alternative employment that is a reasonable substitute for a U.S. major professional sports league.[160] Because most professional athletes have very short playing careers, even short-term league-wide exclusion for reasons

369 F.3d 124, with approval).

[156] See Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426 (1989); Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[157] 518 U.S. 231 (1996).

[158] See Caldwell v. American Basketball Ass'n, 66 F.3d 523 (2d Cir. 1995); NBA v. Williams, 45 F.3d 684 (2d Cir. 1995); Wood v. NBA, 809 F.2d 954 (2d Cir. 1987). See also Zimmerman v. Nat'l Football League, 632 F. Supp. 398, 405 (D.D.C 1986) ("Not only present but potential future players for a professional sports league are parties to the bargaining relationship."). In contrast, the *Clarett* district court relied on Eighth Circuit authority, Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), adopted by two other circuits, in ruling that the NFL's draft eligibility requirement is not immune from antitrust scrutiny. Clarett v. NFL, 306 F. Supp. 2d 379, 391 (S.D.N.Y. 2004).

[159] "[T]he NFL represents an unparalleled opportunity for an aspiring football player in terms of salary, publicity, endorsement opportunities, and level of competition." *Clarett*, 306 F. Supp. 2d at 384.

[160] *Denver Rockets*, 325 F. Supp. at 1053; *Linseman*, 439 F. Supp. at 1319.

not reasonably related to individual skill and ability or health and safety may cause irreparable harm to athletes' ability to use and develop their unique talents.[161]

On the other hand, however, in the future, due to the increasing globalization of sports labor markets, major league professional sports employment options may be more readily available (e.g., European basketball for U.S. athletes who do meet the NBA's minimum age requirements).

In *Brown*, the Supreme Court conceded that professional athletes, unlike most unionized workers, often have unique individualized talents and skills. Nevertheless, the Court refused to characterize professional sports as "special in respect to labor law's antitrust exemption"[162] or to provide professional athletes with an antitrust remedy not available to employees in other industries. Thus, athletes excluded from participating in unionized professional sports generally are limited to labor and civil rights law remedies,[163] which may not adequately protect their athletic participation interests in individual circumstances.

A labor union has a duty to fairly represent all current and prospective players, but only conduct that is "arbitrary, discriminatory, or in bad faith" breaches this duty.[164] In *Air Line Pilots Association International v. O'Neill*, the Court held that this standard applies to the collective bargaining process and explained:

> Congress did not intend judicial review of a union's performance to permit

[161] For example, Maurice Clarett, despite being drafted in the third round of the 2005 NFL draft by the Denver Broncos, was unable to make the club. Denver Done With Clarett; Broncos Cut Ties With Ex-Ohio State RB; Their 3rd-round Pick, Chi. Trib., Aug. 29, 2005, at 6. Being ineligible to play NFL football during the 2004 season (combined with his suspension that precluded him from playing college football for Ohio State during the 2003 season) likely caused his playing skills to deteriorate significantly, with corresponding irreparable harm to his once-promising potential career as an NFL player. Clarett currently is serving a prison term for armed robbery. See *Denver Rockets*, 325 F. Supp. at 1057 (finding player will suffer irreparable injury from being excluded from NBA for one year because "a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high level competition.").

[162] *Brown*, 518 U.S. at 248 (1996).

[163] However, a player may have an antitrust remedy if it he can satisfy the difficult burden of proving that a professional league's minimum age limits or de facto equivalents are the product of conspiracy with an economically interested third party not part of the collective bargaining relationship, such as the NCAA. *Boris*, 1984 WL 894 at *3; *Denver Rockets*, 325 F. Supp. at 1063-64; See also *Linseman*, 439 F. Supp. at 1320.

[164] Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985).

> the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. . . . For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness."[165]

In determining employment eligibility, the union has a duty not to agree to arbitrary or irrational terms that constitute "invidious" discrimination against some individuals it represents.[166] An exclusionary eligibility requirement does not breach a union's duty of fair representation unless it discriminates illegally against a protected class. For example, collective bargaining terms allowing exclusion from employment based on one's race violate this union duty.[167] On the other hand, labor law precedent permits a union to agree to seniority-based employment eligibility preferences.[168]

Because professional athletes have different playing skills and experience and compete among themselves for a limited number of jobs, a players' union needs wide latitude in determining how to further the players' collective best interests. Agreeing to initial employment eligibility requirements based on a prospective player's minimum age or the passage of a particular period of time, as a method of allocating a limited number of jobs in a professional sports league, does not violate the union's duty of fair representation. In *Clarett*, the Second Circuit, applying well-established labor law principles, observed that the union "may, for example, favor veteran players over rookies . . . and can seek to preserve jobs for current players to the detriment of new employees and the exclusion of outsiders."[169]

Under existing law, a minimum age eligibility rule (or a de facto equivalent) for professional athletes is not a form of prohibited discrimination that breaches a players' union's duty of fair representation.

[165] Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 78 (1991).

[166] *Id.* at 79-82.

[167] Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944). See also *Air Line Pilots Ass'n*, 499 U.S. at 73-78 (summarizing judicial development of labor union duty to represent all members' interests without hostility or discrimination).

[168] *Air Line Pilots Ass'n*, 499 U.S. 65; *Ford Motor Co.*, 345 U.S. 330; Local 357, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American v. NLRB, 365 U.S. 667 (1961).

[169] *Clarett*, 369 F.3d at 139.

The federal Age Discrimination in Employment Act of 1967 ("ADEA")[170] protects only persons who are at least forty years old. Although the ADEA "forbids discriminatory preference for the young over the old," it does not prohibit "favoring the old over the young."[171] Therefore, although eligibility rules categorically exclude young athletes for reasons unrelated to their individual talent, skills, and maturity, these rules do not violate federal labor or civil rights laws.

In some individual cases, league-wide minimum age rules or their functional equivalent appear unfair and arbitrary when applied to extraordinarily talented young athletes who have both the physical skills and maturity to play a major professional sport. They may have no other options to participate in a sport at a comparable level of competition and no effective means of legal redress under current law.[172] On the other hand, a minimum age eligibility requirement is only a temporal limitation or restriction. Such eligibility restrictions exclude relatively few athletes having the requisite current ability and skills to play a professional sport. All things considered, the establishment of threshold eligibility standards by collective bargaining between the players' union and league representatives (the parties that are most knowledgeable about the relevant factors to consider) is superior to case-by-case antitrust adjudication by non-expert courts, which only have authority to invalidate player eligibility rules found to be unreasonable rather than to establish "reasonable" eligibility rules.

2. Disciplinary Sanctions Affecting Athlete Eligibility and Dispute Resolution Process

Disciplinary sanctions adversely affecting a player's current or future eligibility to participate (usually with corresponding economic consequences) are mandatory subjects of collective bargaining in unionized professional sports. Thus, the players' union is empowered to protect the players' participation interests by negotiating the conduct subject to discipline, sanctions for violations, and grievance mechanisms. In most instances the union is able to limit the otherwise broad authority of a club or league commissioner to discipline players[173] through effective use of the

[170] 29 U.S.C. §§ 621-634 (2006).

[171] General Dynamics Land Systems, Inc. v Cline, 540 U.S. 581, 584 (2004). See also Detroit Police Officers Ass'n v. City of Detroit, 214 N.W.2d 803 (Mich. 1974).

[172] See supra notes 159, 160 and accompanying text.

[173] Absent limits imposed by the collective bargaining agreement, courts generally provide a professional sports league and its clubs with substantial discretion to impose player discipline and are very deferential to their decisions. See, e.g., Molinas v. Nat'l Basketball Ass'n, 190 F. Supp.

collective bargaining process. There generally is a collectively bargained range of disciplinary sanctions for on-field or off-field player misconduct that violates league or club rules promulgated to: maintain competitive balance (e.g., doping, corked bats); preserve the sport's integrity (e.g., gambling, doping); maintain the sport's public image (e.g., criminal conduct, domestic violence, doping); protect player health and safety (e.g., violence injuring opposing player, doping); and ensure team unity and appropriate decorum.

Currently, most disputes regarding player discipline imposed by the league or a member club are resolved by an impartial arbitrator mutually selected by the union and league representatives.[174] The union files a grievance on the player's behalf and represents him in the arbitration proceeding. It is not uncommon for an arbitrator to reduce the length of a player's disciplinary suspension for misconduct that initially was imposed by league or club officials.[175] Even if his disciplinary sanction is upheld by an arbitrator, a player has had a fair opportunity to be heard as well as the advantages of other procedural safeguards to protect his future opportunity to participate in the sport. The arbitrator's decision is final and binding, and it will be judicially invalidated only on very narrow grounds.[176]

241 (S.D.N.Y. 1961) (upholding indefinite suspension of player for admittedly gambling on his team's games in violation of his contract and league rules).

[174] A notable exception is the NFL Conduct Policy, which was established in April 2007, after input from NFL Players Association Executive Director Gene Upshaw and the NFL Player Advisory Council. The Policy gives NFL Commissioner Roger Goodell broad unilateral discretion to discipline NFL players for off-field violent and/or criminal conduct that is not subject to external review. Nat'l Football League Players Ass'n, Player Policies, Conduct Policy, http://www.nflplayers.com/user/template.aspx?fmid=181&1mid=336&pid=0&type=n (last visited Oct. 29, 2008).

[175] See, e.g., NBA Players Ass'n on Behalf of Player Latrell Sprewell and Warriors Basketball Club and NBA Arbitration Decision *in* Mitten et al., supra note 3, at 638. See also Major League Baseball Players Ass'n v. Comm'r (John Rocker), 638 PLI/PAT 765 (Feb. 2001) (Manfred, Arb.). But see Terrell Owens v. Philadelphia Eagles (Nov. 18, 2005) (Bloch, Arb.) available at http://sports.espn.go.com/espn/print?id=2234819&type=story (last visited Oct. 29, 2008) (finding club authority to suspend player without pay for conduct detrimental to team for maximum of four weeks under CBA, but that coach had discretion not to permit him to play or practice thereafter, because his misconduct posed a destructive and continuing threat to team).

[176] See, e.g., Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001); Sprewell v. Golden State Warriors, 266 F.3d 979, 986 (9th Cir. 2001).

B. Individual Performer Sports

1. Initial Eligibility Requirements

Those who participate in professional individual performer sports, such as golf, swimming, and track and field, generally are independent contractors who must satisfy a governing body's eligibility criteria and performance standards in order to participate in a competition. Because these athletes are not employees, there is no union to collectively bargain on their behalf.[177] In most instances the sport's governing authority or the event organizer unilaterally establishes the conditions of participation. To maximize an individual performer sport's commercial appeal to fans an spectators, an independent sports governing authority has a strong economic incentive to encourage and permit participation by the most highly skilled athletes without discriminating based on non-performance related factors.[178] Absent violation of an athlete's federal or state civil rights,[179] courts generally are reluctant to invalidate athlete eligibility rules established by an independent sports governing body or event organizer.[180]

[177] As a result, minimum age requirements are potentially subject to antitrust challenge. For example, the Ladies Professional Golf Association's requires players to be at least eighteen years old, but underage players may apply for a waiver. See also Joe Menzer, Feelings Mixed on Talk of Raising Age Requirement, NASCAR.com, Jan. 24, 2008, available at http://www.nascar.com/2008/news/headlines/cup/01/24/jgibbs.minimum.age/index.html (NASCAR is considering raising the minimum age requirement from eighteen to twenty-one for drivers in the Sprint Cup Series).

[178] Nevertheless, in some instances such discrimination has occurred. For example, the Professional Golfers Association formerly had a "whites only" provision, which prevented minorities from participating in its golf tournaments. Arthur Ashe, A Hard Road to Glory: A History of the African American Athlete 1919-1945 at 69 (Warner Books 1988) (commenting on informal PGA policy of excluding blacks from tour stops); Stanley Mosk, My Shot: The Tour's Fear of Carts is the Same Form of Bigotry That Caused the Caucasian-only Clause, SI.com, (June 5, 2001), available at http://sportsillustrated.cnn.com/golf/news/2001/06/05/my_shot/ (last visited Oct. 29, 2008) (commenting on the same).

[179] See, e.g., PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (holding that ADA requires PGA Tour to permit physically impaired professional golfer to use cart to enable him to compete in its tournaments); Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977) (issuing preliminary injunction to enable transsexual to qualify to participate in the United States Open Tennis Tournament based on plaintiff's likely success in proving that use of Barr body test as sole criterion of gender violates New York's Human Rights Law).

[180] See, e.g., Toscano v. PGA Tour, Inc., 201 F. Supp.2d 1106, 1113 (E.D. Cal. 2002) (rejecting antitrust challenge to Senior PGA Tour's per-event limit of seventy-eight golfers and its eligibility rules limiting the ability of new and non-exempt players to compete in its events because "[t]he Tour provides an entertainment product in which primarily well known and popular senior golfers may compete against one another").

For example, it is permissible to adopt non-discriminatory, unbiased eligibility rules or methods for evaluating an athlete's playing ability and skills.[181]

2. Disciplinary Sanctions Affecting Athlete Eligibility and Dispute Resolution Process

Because individual performer professional sports are not unionized, there is no collectively bargained disciplinary process and range of sanctions. Today, in most instances, player discipline for violations of the sport's rules, including suspension from competition, is imposed by an independent commissioner or governing authority. Under contract or private association law, courts will provide limited judicial review to ensure that an appropriate level of procedural process is provided, contract rights are respected, and decisions are not made in bad faith.[182]

C. Analysis and Conclusions

Unlike the Amateur Sports Act, which safeguards the opportunity of all U.S. athletes to qualify for and participate in the Olympic Games and other protected international sports competitions, there is no comparable federal law that directly regulates professional sports leagues and governing bodies and protects professional athletes. But professional athletes are covered by federal civil rights statutes, which prohibit discrimination based on "race, color, or national origin."[183] Federal labor law also provides the basis for collectively bargained contractual provisions (and eligibility dispute resolution procedures) that both define and protect unionized professional athletes' athletic participation opportunities.

Like Olympic athletes, professional athletes have no athletic participation "rights" absent those established by contract or applicable federal civil or human rights laws. Through the collective bargaining process, unionized professional athletes have the ability to negotiate initial eligibility requirements, limits on league and club disciplinary authority,

[181] Deesen v. Prof'l Golfers' Ass'n of America, 358 F.2d 165 (9th Cir. 1966).

[182] See, e.g., Crouch v. NASCAR, 845 F.2d 397 (2d Cir. 1988); Koszela v. NASCAR, 646 F.2d 749 (2d. Cir. 1981). But see Blalock v. Ladies Prof'l Golfers Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973) (finding that golfer's one-year suspension imposed with "completely unfettered, subjective discretion" by a group of her competitors violates the antitrust laws). In some situations (e.g., doping offenses), an individual sport athlete may have a contractual right to have an independent arbitrator review a decision by the sport's governing authority that adversely affects his eligibility to compete. See supra note 125 and accompanying text.

[183] 42 U.S.C. § 2000(d) et seq. (2006); 42 U.S.C. § 2000(e) et seq. (2006).

and a dispute resolution process that adequately protects their athletic participation interests. Except when collectively bargained initial eligibility rules temporarily preclude athletes such as Maurice Clarett from participating, professional team sport athletes have legal protections equivalent to, and in some instances, greater than those available to Olympic athletes.

By contrast, unlike unionized professional team sport athletes, individual performer sport athletes are unable to engage in arms-length negotiation of eligibility requirements. However, the sport's independent promoter or governing body has a strong profit motive to produce a commercially viable form of athletic competition attractive to fans, which provides an economic incentive not to unduly restrict athletic participation opportunities. Because of limited judicial precedent, it is unclear whether the federal antitrust laws adequately protect participation opportunities for individual performer sport athletes, although the threat of antitrust litigation by an excluded athlete creates a similar incentive. Courts appropriately recognize the legitimate regulatory and disciplinary authority of independent sport governing bodies and promoters, but they should ensure that athlete eligibility rules and their application in specific situations further legitimate objectives without unnecessarily excluding or limiting athletic participation opportunities.

III. INTERSCHOLASTIC AND INTERCOLLEGIATE ATHLETIC COMPETITION: JUDICIAL DEFERENCE TO THE "GOLDEN RULE"

A. Individual and Societal Benefits of Participation in High School and College Sports

Competing in athletics in interscholastic and intercollegiate athletics provides a unique educational experience with a significant potential to positively shape several aspects of a student-athlete's academic, personal, and professional life. Some of the most important traits and skills athletic competition develops are motivation, self-esteem, a strong work ethic, discipline, and the ability to work in a team environment, all of which are important factors in determining one's academic and career success. Former U.S. Supreme Court Justice Byron White, who played college football as a student at the University of Colorado and finished second in the 1937 Heisman Trophy voting, said that

> Sports and other forms of vigorous physical activity provide educational experience which cannot be duplicated in the classroom. They are an uncompromising laboratory in which we must think and act quickly and

> efficiently under pressure and then force us to meet our own inadequacies face-to-face and to do something about them, as nothing else does. . . . Sports resemble life in capsule form and the participant quickly learns that his performance depends upon the development of strength, stamina, self-discipline and a sure and steady judgment.[184]

Others have similar views. The Duke of Wellington claimed that "[t]he Battle of Waterloo was won on the playing fields of Eaton."[185] Sarah Palin, Alaska's first female governor and the 2008 Republican candidate for vice president, said, "Everything I need to know, I learned on the basketball court."[186]

In our increasingly technology-driven, isolated society,[187] participation in interscholastic athletics provides a means of establishing social networks with one's peers and developing a community-based identity with corresponding positive academic effects. Finding a link between high school students' sense of identity, patterns of extracurricular involvement, and indicators of successful and risky adolescent development, a 1999 study found that female and male students who participate in high school team sports through the twelfth grade have a school-based identity that correlates to positive academic performance (e.g., an increased twelfth-grade GPA and an increased probability of being enrolled in college full-time at age twenty-one)[188] This highly positive finding is consistent with prior research evidencing that sports participation, relative to participation in other extracurricular activities such as student government and academic clubs, is "linked to lower likelihood of school dropout and higher rates of college attendance."[189]

For many, participating in high school and college sports provides an otherwise unavailable opportunity during one's teenage and early adult

[184] John M. Barron et. al., The Effects of High School Athletic Participation on Education and Labor Market Outcomes, 82 Rev. Econ. & Stat. 409, 409 (Aug. 2000).

[185] Bartlett's Familiar Quotations 371 (Little Brown, 15th ed. 1980).

[186] Kathy Kiely, Alaska's New-Style Governor Already Shaking Things Up, USA TODAY, Jan. 4, 2007, at 6A.

[187] See generally Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community (Simon & Schuster 2000); M. McPherson, L. Smith-Lovin, & M. Brashears, Social Isolation in America: Changes in Core Discussion Networks Over Two Decades, 71 Amer. Soc. Rev. 353 (June 2006).

[188] Jacquelynne S. Eccles & Bonnie L. Barber, Student Council, Volunteering, Basketball, or Marching Band: What Kind of Extracurricular Involvement Matters?,14 J. Adolescent Res. 10 (1999). On the other hand, participation in team sports also was linked to the risky behavior of drinking alcohol.

[189] Id. at 12.

years to learn positive values and to develop the skills necessary to pursue a better future and a successful life. For example, the determination and persistence developed through his participation in organized sports enabled Troy Smith to avoid the serious troubles encountered by his boyhood peers, earn a degree from Ohio State University, and win the 2006 Heisman Trophy.[190] Similarly, the opportunity to participate in high school football gave New Orleans students a sense of hope and a respite from the disruption of their lives and destruction of their homes caused by Hurricane Katrina.[191] A 2004 Women's Sports Foundation Report references several studies evidencing that girls' participation in high school sports results in better health and grades, greater commitment to academic endeavors, lower rates of absenteeism and dropout, fewer disciplinary problems, and an increased interest in attending college.[192]

Several recent empirical studies by economists demonstrate that both African-American and white males who participate in high school athletics generally earn more after graduation than those who do not participate.[193] In the aggregate, this research provides strong support that male participation in athletics generally reduces the likelihood of dropping out of high school, increases the likelihood of attaining a higher level of education, and provides an opportunity to acquire and develop skills valued by labor markets. One study concludes that "athletic participation contributes to productivity beyond that of other extracurricular activities; wages are higher by between [4.2 percent and 14.8 percent] if athletic participation in high school is chosen in place of other extracurricular activities."[194] Another

[190] Pat Forde, Smith, Mom to Share Heartwarming Moment of Triumph, ESPN.com, Dec. 7, 2006, available at http://sports.espn.go.com/espn/print?id=2689611&type=story (last visited Oct. 29, 2008).

[191] Neal Thompson, Hurricane Season, Sports Illus., July 23, 2007, at 59.

[192] Women's Sports Foundation, The Women's Sports Foundation Report: Her Life Depends On It: Sport, Physical Activity and the Health and Well-Being of American Girls, at 30-31 (2004), available at http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/990.pdf (last visited Oct. 29, 2008).

[193] Barron, supra note 184; Eric R. Eide & Nick Ronan, Is Participation in High School Athletics an Investment or a Consumption Good? Evidence from High School and Beyond, 20 Econ. Educ. Rev. 431 (2001); B. Ewing, High School Athletics and the Wages of Black Males, 24 Rev. Black Pol. Econ. 67 (Summer 1995); Andrew Postlewaite & Dan Silverman, Social Isolation and Inequality, 3 J. Econ. Inequality 243 (Oct. 2005).

[194] Barron, supra note 184, at 421. Postlewaite & Silverman found empirical evidence to support their thesis that participation in high school athletics "leads to the accumulation of skills valued in the labor market," resulting in an eighteen percent wage premium that "is largely not attributable to the crowding out of activities that have negative long-term effects on later

study concludes that male high school athletes "are significantly less likely to skip school, have unprotected sex, use marijuana or other drugs, be charged with a crime, watch television or smoke cigarettes."[195]

Participation in intercollegiate athletics provides student-athletes with the opportunity to experience similar academic and future career benefits. As articulated by Myles Brand, President of the National Collegiate Athletic Association ("NCAA"):

> Participation in athletics has educational developmental value. Student-athletes learn to strive for excellence, to work hard and to work in teams, to be resilient and to persist. A college education should do more than increase disciplinary learning through lectures and textbooks; it also should develop in students the values and character necessary for a successful life and for good citizenship. Participation in college athletics is one very good means to meet these developmental needs.[196]

Analysis of data from a 2007 National Collegiate Athletic Association study of 8,000 former student-athletes reveals that eighty-eight percent of student-athletes earn their baccalaureate degrees (compared to less than twenty-five percent of the American adult population); ninety-one percent of former Division 1 student-athletes are employed full-time (eleven percent more than the general population); and twenty-seven percent of former Division 1 student-athletes earn a postgraduate degree.[197] These findings are consistent with other empirical studies finding that former male student-athletes earn higher annual incomes on average than otherwise similar non-athletes.[198] As Peyton Manning, a current NFL quarterback and former University of Tennessee student-athlete, states, "The reality is that collegiate sports have a lot more to do with learning than they do with winning. As student-athletes, we learn more than most people . . . the blessings of . . . camaraderie and shared sacrifice, collective responsibility and commitment to excellence, and time management and life management."[199]

wages." Postlewaite & Silverman, supra note 193, at 250, 252.

[195] Postlewaite & Silverman, supra note 193, at 250.

[196] Myles Brand, Money Not Corruptive If Actions Uphold Collegiate Mission, The NCAA News, Apr. 25, 2005, at 4.

[197] Gary T. Brown, Research Validates Value and Values, of Athletics, The NCAA News, Feb. 12, 2007, at 1.

[198] Daniel J. Henderson, et.al., Do Former College Athletes Earn More at Work?, 41 J. Hum. Resources 558 (2006); James E. Long & Steven B. Caudill, The Impact of Participation in Intercollegiate Athletics on Income and Graduation, 73 Rev. Econ. & Stat. 525 (1991).

[199] Letter from Myles Brand, President, National Collegiate Athletic Association, to Honorable

B. The "Golden Rule" and the Limited Applicability and Effectiveness of Public Laws

At both the high school and college levels, athlete eligibility rules are adopted, interpreted, and enforced by a state governing body for interscholastic athletics or a national association for intercollegiate athletics (e.g., the NCAA), which is comprised of their respective member educational institutions. A state or national governing body often has monolithic power, and each high school and university also frequently has its own athlete eligibility rules and requirements. In contrast to athletes who participate in Olympic sports, high school and college athletes do not have direct representation on these governing bodies or a vote regarding athlete eligibility rules.[200] Unlike professional sport athletes, no union represents the interests of high school or college athletes[201] or collectively bargains for eligibility rules or an eligibility dispute resolution process (e.g., arbitration) on their behalf. Similar to the well-known "Golden Rule" in business and politics, high school and college sports governing bodies have the "gold," which provides broad and exclusive authority to adopt, interpret, and enforce athlete eligibility "rules" subject only to applicable legal constraints.

After exhausting all available internal avenues of relief,[202] a student-athlete's only option is to pursue litigation if he or she is dissatisfied with a rule or decision of a high school or college governing body (or educational

William Thomas, Chairman, House Committee on Ways and Means (Nov. 13, 2006). See also Gary Walters, Give Athletics Credit, Literally, The NCAA News, Aug. 13, 2007, at 4, 11 (Princeton University director of athletics argues that participation in intercollegiate athletics "contributes to the holistic education of the total person in the same manner as the arts" and that its academic legitimacy should be recognized rather than disregarded).

[200] As one court observed, "As a student, Carlberg has not voluntarily subjected himself to the rules of the [state high school athletic association]; he has no voice in its rules or leadership. We note as well the relatively short span of time a student spends in high school compared to the amount of time often required for institutional policies to change. These factors all point to the propriety of judicial scrutiny of [state high school athletic association] decisions with respect to student challenges." Indiana High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222, 230 (Ind. 1997). The same is essentially true for college athletes. Gulf S. Conference v. Boyd, 369 So.2d 553, 558 (Ala. 1979) ("The individual athlete has no voice or participation in the formulation or interpretation of these rules and regulations governing his scholarship, even though these materially control his conduct on and off the field. Thus in some circumstances the college athlete may be placed in an *unequal bargaining position.*") (emphasis added).

[201] Robert A. McCormick & Amy Christian McCormick, The Myth of the Student-Athlete: The College Athlete as Employee, 81 Wash. L. Rev. 71 (2006) (arguing that NCAA athletes are employees who should have right to unionize and collectively bargain).

[202] See, e.g., Florida High Sch. Athletic Ass'n v. Melbourne Cent. Catholic High Sch., 867 So.2d 1281, 1287 (Fla. Ct. App. 2004); Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004).

institution) that adversely affects his or her eligibility to participate in an interscholastic or intercollegiate sport. Unlike Olympic sports that are governed by the Stevens Act, no federal law provides a framework for directly regulating high school or college sports or establishes an independent governing body charged with a legal duty to protect student-athletes' sports participation opportunities. There is no federal (or state) constitutional law right to participate in either interscholastic or intercollegiate athletics,[203] and courts rarely find that athlete eligibility rules or their application in individual cases violate the U.S. Constitution or any state constitution.[204] Courts also have uniformly rejected antitrust challenges to NCAA student-athlete eligibility rules, thereby creating a body of federal antitrust law jurisprudence holding that these rules are essentially per se legal.[205]

Although high school and college sports are offered because of their inherent educational benefits to participants, U.S. courts almost uniformly refuse to recognize a legally protected interest in interscholastic or intercollegiate athletic participation (which is the means to the end of achieving these benefits) absent a valid contractual right to play a sport. Unless a governing body or educational institution violates federal or state civil rights laws by promulgating or applying eligibility rules that deny a high school or college student-athlete an opportunity to participate in sports based on race, color, national origin, gender, or learning or physical disability[206] courts refuse to apply de novo review or anything more than

[203] See, e.g., In re United States ex rel. Missouri High Sch. Ath. Ass'n, 682 F.2d 147 (8th Cir. 1982); Walsh v. Louisiana High Sch. Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980); Hysaw v. Washburn Univ., 690 F. Supp. 940 (D. Kan. 1987); Yeo v. NCAA, 171 S.W.3d 863 (Tex. 2005); Hart v. NCAA, 550 S.E.2d 79 (W. Va. 2001).

[204] See generally Scott C. Idleman, Religious Freedom and the Interscholastic Athlete, 12 Marq. Sports L. Rev. 295 (2001). Courts will intervene, however, to protect student-athletes' substantive rights premised on federal or state constitutional law and statutes. See, e.g., Pryor v. NCAA, 288 F.3d 548 (3rd Cir. 2002) (holding that student-athletes' complaint alleged intentional racial discrimination in violation of federal statutes); Hill v. NCAA, 865 P.2d 633 (Cal. 1994) (although ultimately rejecting student-athletes' claim against the NCAA, the court acknowledged the existence of a state constitutional right of privacy).

[205] See, e.g., Smith v. NCAA, 139 F.3d 180, 185-86 (3d. Cir. 1998) (finding NCAA eligibility rules are not related to the NCAA's commercial or business activities and therefore are not subject to Sherman Act scrutiny); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992) (NCAA student-athlete amateur eligibility rules have no anticompetitive effects); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (eligibility rules have predominately precompetitive effects and do not violate antitrust laws).

[206] See, e.g., Garvey v. Unified Sch. Dist. 262, 2005 WL 2548332 (D. Kan.) (Title VI provides college athletes with private cause of action for claims of intentional discrimination); Mercer v.

very limited rational basis review.[207]

C. Intercollegiate Sports Eligibility Disputes

The NCAA's student-athlete eligibility rules, which have national application and effect, are, inter alia, designed to maintain academic integrity, the "amateur" nature of intercollegiate athletics, and/or competitive balance among its member schools and participants. Most eligibility disputes arise when a prospective student-athlete fails to satisfy the NCAA's threshold academic or amateurism requirements, a current student-athlete violates one of these requirements, or either a prospective or current student-athlete is denied a requested waiver of a rule or restored eligibility that would enable him or her to participate in intercollegiate athletics.[208] Because it has no direct or express contractual relationship with student-athletes,[209] the NCAA has no authority to enforce directly its eligibility rules, interpretations, and decisions against them. The NCAA does, however, have the ability to do so indirectly—each of its member institutions has agreed to conduct its athletics program in full compliance with its rules and regulations.[210] The NCAA eligibility rules are incorporated by reference into its member institutions' respective contracts with each of their student-athletes.[211] Institutions must comply with and enforce the NCAA student-athlete eligibility rules and determinations.[212] An institution that permits a student-athlete to participate after the NCAA has declared

Duke Univ., 401 F.3d 199 (4th Cir. 2005) (finding the same under Title IX for gender discrimination); Cole v. NCAA, 120 F. Supp.2d 1060 (N.D. Ga. 2000) (finding the same with respect to discrimination based on a participant's disability).

[207] Indiana High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222, at 230-31 (Ind. 1997).

[208] A student-athlete's eligibility to participate in intercollegiate sports also may be adversely affected by his or her non-compliance with athletic conference or university academic and conduct rules. Conard v. Univ. of Washington, 834 P.2d 17 (Wash. 1992) (refusing to renew student-athletes' football scholarships, with corresponding ineligibility to participate in sport, for engaging in multiple incidents of misconduct). See also Marsh v. Delaware State Univ., 2006 WL 141680 (D. Del, Jan. 19, 2006) (student-athlete expelled following arrest for possession of drug and weapons possession).

[209] Hart v. NCAA, 550 S.E.2d 79 (W. Va. 2001).

[210] Nat'l Collegiate Athletic Ass'n, 2006-07 NCAA Division I Manual, arts. 2.1.1, 6.01.1 (2006).

[211] The statement of financial aid between student-athletes and their institutions require athletes to conduct themselves in accordance with the rules and regulations of not only the institution, but also the NCAA and the athletic association of which the school is a member. See e.g., Wake Forest University, Wake Forest University Financial Aid Agreement (2007-08) (on file with the authors).

[212] See, e.g., Brennan v. Bd. of Trs., 691 So.2d 324 (La. App. 1997) (university suspends student-athlete from competition for one year for failing NCAA drug test).

him or her ineligible risks potentially severe sanctions.

1. Judicial Deference and Academic Abstention

The numerous judicial opinions that reject student-athletes' claims alleging the denial of an opportunity to participate in intercollegiate sports possess, with relatively few exceptions, the common theme of courts' general deference to NCAA and institutional decision-making. Indeed, these cases reflect a broader concept—the extraordinary freedom academic institutions have from any probing judicial scrutiny.[213] In reviewing decisions by universities into purely academic matters, historically courts have exercised restraint.[214] Academic abstention is commonly used to describe the reticence of courts to impose common law liability "where doing so would interfere with the college administration's good faith performance of its core functions."[215]

The reasons offered in support of academic abstention include the perception that institutions possess greater competence than courts to review academic decisions.[216] A related rationale is the questionable competency of the judiciary to review matters in the absence of authoritative standards available to courts to apply to particular facts.[217] Academic abstention is also derived from the belief that the academic setting differs from the rest of society and on practical considerations.[218] Finally, the doctrine rests on concern regarding the potential financial

[213] James Leonard, Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the American with Disabilities Act, 75 Neb. L. Rev. 27, 48 (1996); Regents v. Ewing, 474 U.S. 214, 225 (1985) (indicating that courts should act with great restraint in reviewing academic decisions).

[214] See Leonard, supra note 213, at 48.

[215] J. Peter Byrne, Academic Freedom: A "Special Concern for the First Amendment," 99 Yale L.J. 251, 323 (1989).

[216] Leonard, supra note 213, at 59, 90 (stating that "[j]udicial deference to academic decisions is a concession to the fact that courts are normally incapable of making meaningful assessments of academic decisions"). See *Ewing*, 474 U.S. at 226 (1985).

[217] Leonard, supra note 213, at 73 (The "very nature of academic standards makes them unsuitable for judicial review. These standards are often compromises that reflect the interaction of many constituencies within the university community. Sometimes these compromises are delicately balanced to accommodate competing institutional interests."). Id. at 74.

[218] Byrne, supra note 215, at 325. Academia is perceived as a world that emphasizes values that foster "collegial, pedagogical, or disciplinary models of personal relationships that eschew competition." Id. Whether or not this conceptualization of college comports with reality, it has profoundly impacted judges and academics such that judicial restraint in academic affairs is viewed as important to promoting the consensus-building image of academia. Id.

burden that might be imposed on schools forced to absorb litigation costs associated with athlete eligibility disputes.[219]

In affording the NCAA and its member institutions considerable deference in disputes with student-athletes, courts have readily endorsed the academic abstention rationale.[220] In addition to traditional justifications, such as the expertise of academic decision-makers to make judgments concerning academic policy, and the historical deference granted private associations,[221] a unique rationale has surfaced in the athletics arena. Courts defer to the NCAA and its member schools because of their presumed expertise in promulgating amateur athletics policy.[222] Consequently, when examining challenges to NCAA regulations, courts tend to accept the NCAA's characterization of its rules and regulations, as well as its enunciations of the underlying motivations for its regulations.[223] This is particularly true when the contested student-athlete eligibility rule relates to the NCAA's academic and/or amateurism principles. The judiciary also has exhibited a willingness to presume that the NCAA acts in accordance with "its own stated goals and mission."[224]

Courts generally recognize only narrow exceptions to the rule of non-interference into the affairs of private voluntary associations. Intervention is warranted when an association's actions infringe on a personal liberty or property right and are illegal or fraudulent.[225] Courts have recognized similar exceptions to the academic abstention doctrine. A court will "abstain

[219] Patrick R. Lineham, Dreams Protected: A New Approach to Policing Proprietary Schools Misrepresentations, 89 Geo. L.J. 753, 764-65 (2001).

[220] See, e.g., Ross v. Creighton, 957 F.2d 410 (7th Cir. 1992) (relying on academic abstention to justify rejection of an educational malpractice claim).

[221] W. Burlette Carter, Student-Athlete Welfare in a Restructured NCAA, 2 Va. J. Sports & L. 1, 69-70 (2000); Hispanic College Fund, Inc. v. NCAA, 826 N.E.2d 652 (Ind. Ct. App. 2005) ("Absent fraud, other illegality, or abuse of civil or property rights having their origin elsewhere, Indiana courts will not interfere with the internal affairs of voluntary membership associations."); Cole v. NCAA, 120 F.Supp.2d 1060, 1071-72 (N.D. Ga. 2000) (NCAA decisions regarding student-athletes are entitled to considerable judicial deference).

[222] Carter, supra note 221, at 70.

[223] Id.

[224] Id. This approach differs markedly from that taken in cases involving alleged antitrust violations. There, courts make an initial assessment of whether the challenged rule is motivated by academic or commercial consideration, and then exempt the former from close scrutiny. In cases not involving antitrust violations, courts refuse to make an initial determination of whether the exercise of discretion supports policies worthy of deference.

[225] *Hispanic College Fund, Inc.*, 826 N.E.2d at 655 (2005); NCAA v. Brinkworth, 680 So.2d 1081 (Fla. App. 1996). See also Indiana High Sch. Athletic Ass'n v. Reyes, 694 N.E.2d 249, 256 (Ind. 1997).

from interfering with decisions of school officials and school boards unless the decision represents an abuse of discretion, is irrational, or violates constitutional or statutory rights"[226] or is arbitrary.[227]

Although its source is not always clearly articulated,[228] the arbitrary and capricious exception theoretically limits the discretion exercised by the NCAA and colleges in terminating a student-athlete's eligibility. [229] Yet in only the most egregious cases will the arbitrary and capricious exception be used to overturn eligibility decisions adverse to student-athletes.[230] In fact, it is difficult to identify a reported decision in which, absent a violation of its own rules, a court has ruled that the NCAA's conduct was arbitrary or capricious.[231] This brings into doubt the value of the standard's effectiveness as an external means of accountability in which an ineligible student-athlete seeks an independent review of a governing association's denial of eligibility through its own unilaterally established internal procedures.

Two recent cases, *Bloom v. NCAA* and *NCAA* v. *Lasege*, illustrate that the arbitrary and capricious standard does not provide an effective measure of legal protection to student-athletes in eligibility disputes or appropriately limit the extreme deference courts afford the NCAA. Through its rulemaking and enforcement processes, the NCAA articulates values long considered fundamental to intercollegiate athletics. Despite widespread criticism,[232] the amateurism principle remains a value at the core of the NCAA's regulatory scheme and is an ingrained feature of its student-athlete eligibility rules. For example, the NCAA's amateurism rules prohibit student-athletes from

[226] David L. Dagley & Carole A. Veir, Subverting the Academic Abstention Doctrine in Teacher Evaluation: How School Reform Legislation Defeats Itself, 1 B.Y.U. Educ. & L.J. 123, 124 (2002).

[227] Leonard, supra note 213, at 58.

[228] See Bloom v. NCAA, 93 P.3d 621, 624 (Colo. App. 2004).

[229] See, e.g., NCAA v. Lasege, 53 S.W.3d 77 (Ky. 2001); *Hispanic College Fund, Inc.*, 826 N.E.2d at 655-56 (2005); See also *Reyes*, 694 N.E.2d at 256-57 (1997).

[230] In the constitutional sense only the most egregious conduct by a governmental official will be deemed arbitrary and capricious. Richard v. Perkins, 373 F. Supp. 2d 1211, 1220 (D. Kan. 2005).

[231] For example in California State Univ., Hayward v. NCAA, 121 Cal. Rptr. 85, 90-91 (Cal. App. 1975), the NCAA was enjoined for failing to adhere to its own constitution and bylaws in denying student-athletes the opportunity to participate in an NCAA championship competition. See also Gulf S. Conference v. Boyd, 369 So.2d 553 (Ala. 1979).

[232] See Walter Byers, Unsportsmanlike Conduct - Exploiting College Athletes, 374-84 (Univ. of Michigan Press 1995); Gary R. Roberts, The NCAA, Antitrust, and Consumer Welfare, 70 Tul. L. Rev. 2631 (1996); C. Peter Goplerud III, Pay for Play for College Athletes: Now, More Than Ever, 38 S. Tex. L. Rev. 1081 (1997); Matthew J. Mitten, University Price Competition for Elite Students and Athletes: Illusions and Realities, 36 S. Tex. L. Rev. 59, 77-78 (1995); Lee Goldman, Sports and Antitrust: Should College Students Be Paid to Play?, 65 Notre Dame L. Rev. 206, 207-08 (1990); James V. Koch, The Economic Realities of Amateur Sports Organization, 61 Ind. L.J. 9, 12 (1986).

accepting compensation for use of their athletic skills,[233] entering into contracts with agents,[234] signing contracts to play for professional teams, [235] and accepting compensation for endorsing commercial products or services.[236]

Bloom v. NCAA [237] arose out of the NCAA's decision to declare Jeremy Bloom, a gifted snow skier, ineligible to play football for the University of Colorado. He deferred his education and college football career for a year in order to compete in the 2002 Winter Olympics. NCAA rules permit an athlete to play and accept compensation as a professional in one sport (e.g., skiing), while retaining amateur eligibility to play another sport (e.g., football). As was customary for professional skiers, Bloom contracted to endorse commercial products to pay for his living expenses and Olympics training costs; in doing so, he violated NCAA amateurism rules prohibiting a student-athlete from accepting payment for product or service endorsements. After the NCAA denied the university's request on his behalf for a rule waiver, the trial court denied Bloom's request for a declaratory judgment based on his assertion that "his endorsement, modeling, and media activities were necessary to support his professional skiing career, something which the NCAA rules permitted."[238]

Noting that courts are reluctant to intervene in the affairs of a voluntary private association, the Colorado court of appeals initially held that Bloom had no legally protected civil or property right to participate in intercollegiate athletics.[239] Nevertheless, the court found that Bloom was a third party beneficiary of the membership contract governing the relationship between the NCAA and the University of Colorado.[240] Consequently, Bloom had standing to pursue his claim that the NCAA acted arbitrarily and capriciously in interpreting and applying its eligibility rules by breaching the duty of good faith and fair dealing implied into every contract.[241]

[233] 2006-07 NCAA Division I Manual, supra note 210, art. 12.1.2(a).

[234] Id. art. 12.1.2(g).

[235] Id. art. 12.1.2 (c).

[236] Id. art. 12.5.2.1(a) & (b).

[237] 93 P.3d 621 (Colo. App. 2004).

[238] Id. at 622.

[239] Id. at 624.

[240] The court found that the "NCAA's constitution, bylaws, and regulations evidence a clear intent to benefit student-athletes." Id. at 623-24. Consequently, Bloom had standing to contest the NCAA's application of one of its rules against him.

[241] Id. It is unclear whether the duty of good faith provides an independent basis for an increased level of judicial scrutiny and enhanced protection of athletes' participation opportunity. What is

Regarding the merits of Bloom's claim, the appellate court ruled that the NCAA's application of its endorsement and media rules to Bloom was rationally related to a legitimate purpose—maintaining a line of demarcation between college and professional sports.[242] The court characterized the NCAA as having a special role as the guardian of amateurism in intercollegiate athletics and accepted, without question, the NCAA's interpretation of this principle and its underlying policies.[243] Citing with approval other cases in which courts refused to substitute their judgment for that of the NCAA, the court concluded that the NCAA's application of its bylaws was not "manifestly arbitrary, unreasonable, or unfair."[244]

The *Bloom* court deferred to the NCAA's broad interpretation of the subject amateurism rules, its interpretation of the amateurism principle, and the results of its internal appeals process. Despite finding that he had standing to assert his claims, the court held that Bloom possessed no legally protected interest in participating in intercollegiate athletics, and it judicially validated an eligibility rule without any consideration of whether its exclusionary effect on this otherwise eligible student-athlete was no broader than necessary to protect the NCAA's legitimate interests. The court also refused to characterize the NCAA's duty of good faith and fair dealing as requiring anything more than very minimal rational basis review, despite the fact it was reviewing take-it-or-leave it eligibility rules unilaterally imposed on student-athletes by a monolithic sports governing body.

In *NCAA v. Lasege*,[245] a student-athlete from Nigeria was declared ineligible by the University of Louisville after he entered into a professional basketball contract with a Russian team,[246] signed a representation contract

clear, however, it that the duty of good faith may supply, as it did in *Bloom*, the basis for overcoming the standing limitation. As noted by the court in *Bloom*, courts are required to, but do not always clearly identify the justification which allows them to substantively evaluate an arbitrary and capricious claim. Id. at 624.

[242] Id. at 626-27. The court also rejected Bloom's claims that the NCAA acted arbitrarily in allowing colleges to endorse athletic equipment but not student-athletes. "[T]his application of the bylaw has a rational basis in economic necessity: financial benefits inure not to any single student-athlete but to member schools and thus to all student-athletes, including those who participate in programs that generate no revenue." Id. at 627.

[243] Id. at 626 (citing NCAA v. Bd. of Regents, 468 U.S. 85, 101 (1984)).

[244] Id. at 628.

[245] 53 S.W.3d 77, 82 (Ky. 2001).

[246] 2006-07 NCAA Division I Manual, supra note 210, art. 12.2.5 (providing that a student-athlete who enters into a contract to play professional sports loses his or her intercollegiate eligibility in that sport).

with a sports agent,[247] and received financial benefits stemming from his status as a student-athlete.[248] The university requested that the NCAA reinstate Lasege's intercollegiate eligibility based on his ignorance of the NCAA regulations he had violated. The NCAA's Student-Athlete Reinstatement Committee declined because it found that his conduct evidenced a "clear intent to professionalize."[249]

The trial court ordered the NCAA to restore Lasege's intercollegiate eligibility. It concluded that a clear weight of evidence suggested Lasege violated NCAA amateurism rules not in an effort to become a professional athlete but only to obtain a visa which would allow him to become a student-athlete in the United States.[250] On appeal, the Kentucky Supreme Court adopted the general principle that courts should avoid interference in the affairs of voluntary associations.[251] Like *Bloom*, it recognized that judicial intervention is warranted only when a "voluntary association acts arbitrarily and capriciously toward student-athletes."[252] The court found that the NCAA's refusal to restore Lasege's eligibility did not violate this standard. Deferring to the NCAA, the court determined that its eligibility determination was entitled to a presumption of correctness particularly because Lasege admitted the violations.[253]

2. Deprivation of Eligibility to Participate in Intercollegiate Athletics Does Not Require Due Process of Law

Because the NCAA is a private association,[254] student-athletes rendered ineligible to participate in intercollegiate athletics can assert federal denial of due process claims against only public colleges and universities, which

[247] A student-athlete who signs a contract to be represented by a sports agent will lose his or her intercollegiate eligibility. Id. at art. 12.3.1.

[248] A student-athlete who uses his athletic skill to receive compensation in a sport loses his intercollegiate eligibility in that sport. Id. at art. 12.1.2(a).

[249] *Lasege*, 53 S.W.3d at 81 (2001).

[250] Id. at 82.

[251] Id. at 83.

[252] Id. at 83. According to the court, a ruling is arbitrary and capricious only "where it is 'clearly erroneous,' and by 'clearly erroneous' we mean 'unsupported by substantial evidence.'" Id. at 85 (citing Thurman v. Meridian Mutual Ins. Co., 345 S.W.2d 635, 639 (Ky. 1961)).

[253] Id. at 85. In comparison to Gulf S. Conference v. Boyd, 369 So.2d 553, 557-58 (Ala. 1979), in which a student-athlete successfully challenged his denial of eligibility because a college athletics conference had misinterpreted its own rules, Bloom and Lasege involved student-athlete substantive challenges to the legality of properly applied NCAA rules.

[254] NCAA v. Tarkanian, 488 U.S. 179, 195-96 (1988).

are "state actors" subject to the constraints of the federal constitution.[255] The Due Process Clause protects only property and liberty interests.[256] A property interest arises when a plaintiff can establish a "legitimate claim of entitlement" to the benefit that he or she seeks to protect; "a person must clearly have more than an abstract need or desire for it."[257] A liberty interest extends beyond imprisonment to include "a person's good name, reputation, honor, or integrity."[258] According to the Supreme Court, property interests "are 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits."[259]

Courts generally refuse to recognize a constitutionally protected property interest in intercollegiate athletic competition and reject arguments that such participation is necessary to develop the skills necessary for a future professional sports career.[260] Although many college athletes aspire to a professional career, few achieve their dreams and such aspirations are considered speculative and not subject to constitutional protection.[261] Courts do recognize a student-athlete's property interest in the economic value of his or her athletic scholarship, which constitutes a one-year contract with his or her university.[262] However, an athletic scholarship itself does not create a constitutionally protected property right to participate in intercollegiate sports.[263]

[255] Id. at 192.

[256] Board of Regents v. Roth, 408 U.S. 564, 577 (1972)

[257] Id. at 578.

[258] Goss v. Lopez, 419 U.S. 565, 574 (1975) (citing Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

[259] Id. at 572-73 (citing Board of Regents v. Roth, 408 U. S. 564 (1972)). Once a property or liberty interest is established, a state actor cannot deprive a person of their interest without due process which requires the opportunity for a hearing. The nature of the hearing requires, at a minimum, an impartial decision maker, notice, and the opportunity to be heard. Diane Heckman, Fourteenth Amendment Procedural Due Process Governing Interscholastic Athletics, 5 Va. Sports & Ent. L.J. 1, 19 (2005).

[260] See Hall v. NCAA, 985 F. Supp. 782 (N.D. Ill. 1997); Lesser v. Neosho County Cmty. Coll., 741 F. Supp. 854 (D. Kan. 1990); Spath v. NCAA, 728 F.2d 25 (1st Cir. 1984); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345 (9th Cir. 1981); Marcum v. Dahl, 658 F.2d 731 (10th Cir. 1981).

[261] Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), aff'd 570 F.2d 320 (10th Cir. 1978).

[262] Conard v. Univ. of Washington, 834 P.2d 17, 22-23 (Wash. 1992).

[263] Hysaw v. Washburn Univ., 690 F. Supp. 940 (D. Kan. 1987). If an institution has fulfilled its obligation during the one-year contract term by allowing a student-athlete's access to scholarship funds, courts conclude that a he or she has not been deprived of a property interest. Jackson v. Drake Univ., 778 F. Supp. 1490, 1493 (S.D. Iowa 1991). Moreover, courts have refused

NCAA v. Yeo[264] represents the prevailing judicial approach that rejects student-athlete due process challenges to NCAA eligibility rules or adverse interpretations of such rules.[265] After transferring from the University of California at Berkeley ("Cal-Berkeley") to the University of Texas-Austin ("UT") before the 2000-01 academic year, Joscelin Yeo attempted to satisfy an NCAA transfer rule that required a one-year period of ineligibility by not participating in intercollegiate swimming during the fall 2000 or spring 2001 semesters at UT.[266] She did not enroll in classes during the fall 2000 semester in order to participate in the Olympics (as permitted by NCAA rules), but she was enrolled as a student during the spring 2001 semester.[267] During the fall 2001 semester she competed in four swimming events based on UT's erroneous advice that NCAA rules allowed her to do so.[268] After complaints from Cal-Berkeley (which initially refused to waive the transfer rule), UT admitted its error and disqualified Yeo from participating in

to imply into the student-athlete/university contract terms that would create an entitlement to athletic participation that extend beyond contract's one-year term. See, e.g., Gonyo v. Drake Univ., 837 F. Supp. 989, 994 (S.D. Iowa 1993); (not reaching the above conclusion because the school continued the scholarships) Lesser v. Neosho County Cmty Coll., 741 F.Supp. 854, 861-62 (D. Kan. 1990); *Conard*, 834 P.2d at 22-23. But see Richard v. Perkins, 373 F.Supp.2d 1211, 1219 (D. Kan 2005) (holding that although there is no property interest in athletic participation, a university cannot act arbitrarily and capriciously and escape judicial scrutiny). According to one commentator, advocates "argue that what is bargained for between the student-athlete and the institution is not merely the express provisions of the scholarship agreement, but instead a much broader package of benefits." John P. Sahl, College Athletes and Due Process Protection: What's Left After *National Collegiate Athletic Association v. Tarkanian*?, 21 Ariz. St. L.J. 621, 657 (1989). See also Brian L. Porto, Note, Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility, 62 Ind. L.J. 1151 (1987). In rejecting such arguments, courts reason in part that to imply terms into the agreement would lead to improper judicial intrusion into academic affairs. See Ross v. Creighton Univ., 957 F.2d 410, 416-17 (7th Cir. 1992).

[264] 171 S.W.3d 863 (Tex. 2005).

[265] See Peter C. Carstensen & Paul Olszowka, Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation, 1995 Wis. L. Rev. 545, 565 (discussing the unwillingness of courts to entertain student-athlete due process claims); Katherine Elizabeth Maskevich, Comment, Getting Due Process into the Game: A Look at the NCAA's Failure to Provide Member Institutions with Due Process and the Effect on Student-Athletes, 15 Seton Hall J. Sports & Ent. L. 299, 318 (2005).

[266] Under NCAA rules, a student-athlete who transfers from one four-year institution to another typically cannot compete in intercollegiate competition for his or her new school for one full year unless the college from which he or she transfers waives this restriction. *Yeo*, 171 S.W.3d at 866 (2005). 2006-07 NCAA Division I Manual, supra note 210, art. 14.5.5.1.

[267] *Yeo*, 171 S.W.3d at 866 (2005).

[268] Id.

additional swimming competitions during the fall 2001 semester and part of the spring 2002 semester, including the NCAA women's swimming championship, to fulfill the one-year transfer restriction.

Seeking to participate in the NCAA championship, Yeo alleged that UT denied her procedural due process under the Texas Constitution and requested a court order enjoining UT from disqualifying her.[269] Acknowledging precedent that students do not possess protectable property interests in extracurricular activities,[270] Yeo argued that her pre-existing reputation as a world-class athlete in her home country and her potential earning potential represented an interest that was *separate and apart from her intercollegiate swimming career.*"[271] Rejecting Yeo's argument, the Texas Supreme Court held that a mere good reputation does not give rise to due process protection and that Yeo's future athletic potential was too speculative to be protected.[272] In characterizing Yeo's future athletic potential as speculative, the Texas Supreme Court, like previous courts, held that a student-athlete's participation in college sports does not constitute a property interest for constitutional purposes.[273]

Yeo is another example of the prevailing trend of judicial deference to intercollegiate sports governing bodies and educational institutions and corresponding abstention regarding athletic eligibility disputes. *Yeo* strongly suggests that participation in intercollegiate athletics is not sufficiently important to warrant judicial scrutiny or intervention, even when a student-athlete has reasonably relied and acted on advice that adversely affects her athletic eligibility and economic interests.[274] *Yeo* also reflects the judiciary's perceived lack of competence to resolve the merits of disputes arising in an academic setting,[275] which is based on the

[269] Id.

[270] Id. at 868.

[271] Id. at 869. The court of appeals found these facts warranted its finding that Yeo possessed a liberty interest in her reputation (which entitled her to due process protection), and distinguished her case from others where courts had refused to recognize a liberty or property interest. NCAA v. Yeo, 114 S.W.3d 584, 598 (Tex. App. 2003).

[272] *Yeo*, 171 S.W.3d at 870 (2005).

[273] See e.g., Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), aff'd 570 F.2d 320 (10th Cir. 1978).

[274] See Alfred D. Mathewson, Intercollegiate Athletics and the Assignment of Legal Rights, 35 St. Louis U. L.J. 39, 47-48 (tracing the history of judicial marginalization of sports-related matters).

[275] The court noted, "We have twice reminded the lower courts that 'judicial intervention in [student athletic disputes] often does more harm than good." *Yeo*, 171 S.W.3d at 870 (2005). See generally Carstensen & Olszowka, supra note 265, at 565-66 (commenting that courts find that student-athletes do not possess a property interest in intercollegiate athletics not only on the

presumption that the NCAA and its member institutions are in the best position to resolve athletic eligibility disputes and should be allowed to do so with only minimal judicial scrutiny.[276] Although not expressly addressed in *Yeo*, practical considerations also prompt judicial reluctance to grant student-athletes a property or liberty interest in intercollegiate athletic participation. Preeminent among them is concern that recognition of such an interest will impose an undue burden on the judicial process given the substantial number of claims student-athletes might potentially assert.[277]

3. Analysis and Conclusions

The significant degree of deference exercised by courts when confronted with intercollegiate student-athlete eligibility disputes is derived from the convergence of the academic abstention doctrine, the law of private associations, an unwillingness to "constitutionalize" these issues, and pragmatic considerations. Deference premised on the law of private associations is particularly troublesome. As noted above, the deference granted by courts in the athletics context is derived, in part, from the law of private associations.[278]

In the context of an athletic eligibility dispute, a blind adherence to private association law seems unwarranted when a non-association member such as a student-athlete challenges an adverse eligibility decision rendered by a monolithic sports governing body. Not only are student-athletes not members of athletic associations or governing bodies, but they do not possess the ability or opportunity to ever become members.[279] Therefore, there is no direct contractual relationship that provides student-athletes with a voice and a vote concerning the governing body's eligibility rules, which is the underlying basis for judicial deference in other contexts.[280] The application of deference premised on private association

basis of constitutional doctrine but also due to concerns related to their competency in deciding matters in an academic setting and practical considerations).

[276] See Carstensen & Olszowka, supra note 265 at 565.

[277] Id. at 562.

[278] The well-established rule is that, except in limited circumstances, courts will not interfere in the internal affairs of private associations. See e.g., Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, 518 S.E.2d 28, 30 (N.C. App. 1999); Levant v. Whitley, 755 A.2d 1036, 1043 (D.C. App. 2000).

[279] Gulf S. Conference v. Boyd, 369 So.2d 553, 558 (Ala. 1979) (observing that most rules and regulations "are promulgated by athletic associations whose membership is composed of the individual colleges [and that the] individual athlete has no voice or participation in the formulation or interpretation of these rules and regulations").

[280] Ermert v. Hartford Ins. Co., 559 So.2d 467, 473 (La. 1990) (noting that private associations

law is also questionable given the substantial interests at stake in athletic eligibility disputes.[281] As a result of such extreme deference, courts do not recognize a legally protected interest in the opportunity to participate in intercollegiate athletics and generally refrain from considering the merits of athletic eligibility disputes. The underlying reasons for refusing to do so appear to be concern about substituting their judgment for that of the NCAA and institutions of higher education as well as considerations of judicial economy.

Yeo, Bloom, and *Lasege,* all of which involve athletic eligibility rules unrelated to academic requirements for student-athletes, illustrate that the seemingly automatic application of judicial deference is unjustified.[282] The legitimate concerns that are captured in the academic abstention doctrine are absent when non-academic eligibility matters are at issue. As demonstrated by these cases, the extent to which NCAA and institutional athletic eligibility determinations may adversely impact student-athletes' overall educational experiences as well as their present and future economic interests suggests that courts should not always blindly defer to the NCAA. Rather, more probing judicial scrutiny may be appropriate in some cases.[283] This is particularly true because, notwithstanding NCAA Student-Athlete Advisory Committees,[284] student-athletes' interests are not directly represented in the process for promulgating, interpreting, or enforcing NCAA eligibility rules. Moreover, some commentators have

are the product of a contract).

[281] John C. Weistart & Cym H. Lowell, The Law of Sports 42-43 (1979) (questioning the application of private association law in the athletic context since athletes are not athletic members of athletics associations and due to the substantial interests of athletes at stake in eligibility cases). See Note, Sherman Act Invalidation of the NCAA Amateurism Rules, 105 Harv. L. Rev. 1299, 1318 n.35 (1992) (arguing the rule of non-interference is unwarranted where litigants, such as athletes, are not members of the association); *Gulf S. Conf.*, 369 So.2d 553 at 557 (Ala. 1979) (refusing to apply non-interference doctrine in dispute between athlete and athletic associations).

[282] Gordon E. Gouveia, Making a Mountain Out of a Mogul, *Jeremy Bloom v. NCAA* and Unjustified Denial of Compensation Under NCAA Amateurism Rules, 6 Vand. J. Ent. L. & Prac. 22, 26 (2003) (arguing deference in matters and disputes where athletes challenged NCAA amateurism regulations is unjustified).

[283] See supra notes 233-36 and accompanying text.

[284] At its 1989 convention, the NCAA created an association-wide Student Athlete Advisory Committee (SAAC). Each NCAA division has a SAAC comprised of student athletes from NCAA member institutions. The SAAC's role is "to provide insight on the student-athlete experience and offer input regarding the rules, regulations and policies affecting student-athletes' lives" on NCAA member institution campuses. NCAA Student Athlete Advisory Committee 2-3 (Sept. 2004).

suggested that no effective internal mechanism currently exists within the NCAA's governance structure to fully protect student-athletes' interests.[285]

The existing legal framework provides very limited protection to student-athletes in athletic eligibility disputes and contrasts sharply with the corresponding legal regimes governing eligibility disputes involving Olympic and professional athletes. Student-athletes lack the necessary leverage and direct representation to have an effective voice in athletic eligibility rulemaking and NCAA regulation. In contrast, major league professional team sport athletes exercise substantial bargaining power through their respective unions.[286] Olympic athletes also have direct representatives with a voice and voting power on governing bodies that promulgate athlete eligibility rules for particular sports.[287]

In the case of intercollegiate athletics, the arbitrary and capricious standard, as applied by the *Bloom* and *Lasege* courts, reflects judicial reluctance to micromanage the manner in which private associations or educational institutions apply their policies.[288] The end result is that courts defer to the decisions of the NCAA and institutions with regard to matters that are not necessarily related to maintaining higher education's academic freedom and integrity. By exercising such extreme deference, courts decline to carefully scrutinize and balance appropriately the conflicting interests of the NCAA, its member institutions, and student-athletes that frequently arise in eligibility disputes.

By comparison, when resolving eligibility disputes involving Olympic athletes, the Court of Arbitration for Sport conducts a de novo hearing and appears to better protect an athlete's opportunity to participate in sports without always providing extreme deference to international sports governing bodies.[289] These realities suggest that courts should not apply rigid deferential scrutiny to all student-athlete eligibility disputes. As

[285] See W. Burlette Carter, Responding to the Perversion of In Loco Parentis: Using a Non-Profit Organization to Support Student-Athletes, 35 Ind. L. Rev. 851 (2002) (arguing an independent means of protecting the interests of student-athletes may be warranted given that "institutional interests are powerfully represented, but there is currently minimal representation of student-athlete interests"); Carstensen & Olszowka, supra note 265, at 546-47. For example, NCAA member institutions can attempt to change legislation on which an adverse eligibility decision was based or they can leave the association. These options are unavailable to student-athletes, who are precluded from membership in the NCAA and lack an effective mechanism for changing NCAA rules and regulations from within the organization. See Mathewson, supra note 274, at 50.

[286] See supra notes 147-48 and accompanying text.

[287] See supra note 200 and accompanying text.

[288] See Marsh v. Del. State Univ., No. Civ.A. 05-00087JJF, 2006 WL 141680, at *5 (D. Del. 2006).

[289] See supra notes 43-47 and accompanying text.

discussed more fully infra,[290] a heightened standard of judicial review is appropriate in at least some cases.

D. Interscholastic Sports Eligibility Disputes

Similar to the prevailing judicial approach for intercollegiate sports, courts have granted substantial deference to sports governing bodies and educational institutions when considering student-athletes' challenges to rules and regulations precluding or limiting their participation in interscholastic (high school) sports. These rules and regulations are promulgated at the statewide level by state interscholastic athletic associations and at the local level by individual schools and school districts. State athletic associations, which typically are composed of public and private member high schools, promulgate and enforce student-athlete eligibility rules to achieve legitimate objectives of broad concern to their members such as academic integrity, competitive balance, and health and safety. Unlike with college sports, direct recruiting of students by member high schools for athletics-related reasons is prohibited. As a means of achieving this objective, transfer rules often restrict the eligibility of student-athletes to participate immediately in interscholastic athletics after transferring from one school to another or from one school district to another.[291] Eligibility rules created and enforced at local levels by individual schools or school districts often address more discrete matters, such as those conditioning a student-athlete's eligibility to participate in sports on complying with conduct[292] or grooming standards.[293]

Student-athletes who have received adverse eligibility determinations after exhausting internal administrative mechanisms[294] have sought relief from courts in cases involving rules relating to their inability to participate in both a school and a non-school or club sport,[295] as well as ineligibility to participate because of their status as a home-schooled child,[296] misconduct,[297] transfer from one school to another,[298] exceeding maximum

[290] See infra notes 354-62 and accompanying text.

[291] Mitten, et al., supra note 3, at 21.

[292] Brands v. Sheldon Cmty. Sch., 671 F.Supp. 627 (N.D. Iowa 1987).

[293] See, e.g., Davenport v. Randolph County Bd. of Educ., 730 F.2d 1395 (11th Cir. 1984).

[294] Student-athletes must exhaust administrative remedies before turning to courts for recourse. See, e.g., Fla. High Sch. Athletic Ass'n v. Melbourne Cent. Catholic High Sch., 867 So.2d 1281, 1286-87 (Fla. Ct. App. 2004).

[295] See infra notes 335-37 and accompanying text.

[296] See infra notes 325-34 and accompanying text.

[297] See infra notes 305-06, 312-15 and accompanying text.

[298] See, e.g., Ryan v. Cal. Interscholastic Fed'n, San Diego Section, 114 Cal. Rptr. 2d 798, 805 (Cal.

age limitations,[299] and failing to meet minimum academic requirements (e.g., no-pass, no play rules).[300] These cases raise important questions regarding the nature and scope of a student-athlete's legal interest in interscholastic sports participation as well as the exclusionary effects of eligibility rules and their application to deny athletic participation opportunities in specific situations.

1. No Constitutional Property or Liberty Interest in Interscholastic Athletic Eligibility

As is true at the intercollegiate level, even if the requisite state action necessary to trigger federal constitutional protection exists,[301] the prevailing view is that participation in interscholastic athletics is not a federally protected property right or liberty interest.[302] However, the Supreme Court has recognized that high school students have a legally protected interest in "attending and participating in extracurricular activities," such as school-sponsored athletic events, "as part of a complete educational experience."[303] Nevertheless, absent violation of some other independent constitutional right, a high school athletic association or school rule or decision rendering a student-athlete ineligible to participate in interscholastic sports does not violate the Constitution.[304]

Brands v. Sheldon Community School,[305] which upholds a public high

App. 4th 2001) (articulating majority rule that there is no property interest in interscholastic athletics in case involving student-athlete challenging a transfer rule); accord Ind. High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222, 242 (Ind. 1997) (reaching the same result).

[299] See, e.g., Baisden v. W. Va. Secondary Schs. Activities Comm'n, 568 S.E.2d 32 (W. Va. 2002); Tiffany v. Ariz. Interscholastic Ass'n, Inc., 726 P.2d 231 (Ariz. Ct. App. 1986).

[300] See, e.g, Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556, 560, 561 (Tex. 1985) (finding, where students required to maintain a "70" average in all classes to be eligible to participate in interscholastic activities ,that participation in interscholastic sports is neither a fundamental right for equal protection purposes nor a property or liberty interest for due process purposes).

[301] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

[302] See, e.g., A.C. v. Bd. of Educ., No. 05-4092, 2005 WL 3560658 (C.D. Ill. 2005) (adopting the majority rule that student-athletes possess no protectable property interest in interscholastic athletics and citing to cases that have similarly held); Brown v. Oklahoma Secondary Sch. Activities Ass'n, 125 P.3d 1219, 1227 (Okla. 2005) (rejecting plaintiff's assertion he possessed a right to participate in interscholastic athletics); *Ryan*, 114 Cal. Rptr. 2d 798, 805 (Cal. App. 4th 2001) (articulating majority rule denying property interest in interscholastic athletics).

[303] Santa Fe Indep. School District v. Doe, 530 U.S. 290, 311 (2000).

[304] Walsh v. Louisiana High Sch. Athletic Ass'n, 616 F.2d 152, 159-60 (5th Cir. 1980) (holding a "student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement").

[305] 671 F.Supp. 627 (N.D. Iowa 1987). See also *Ryan*, 114 Cal. Rptr. 2d at 805 (2001) (finding no

school's disciplinary action rendering a student-athlete ineligible for interscholastic athletic competition for violating its good conduct rules,[306] illustrates the majority view. In *Brands*, a student-athlete was declared ineligible to participate on his high school's interscholastic wrestling team because he and three other male students engaged in multiple acts of sexual intercourse with a sixteen-year-old female student. School officials suspended the athlete and declared him ineligible, in part, because his conduct was "detrimental to the best interests" of the school district.[307] The suspension prevented the plaintiff from defending his state wrestling championship.

In attempting to set aside his suspension, the plaintiff argued, *inter alia*, that he had been deprived of substantive and procedural due process rights.[308] The court framed the procedural due process issue as "whether the plaintiff has a *legitimate* claim that he is *entitled* to participate and not a 'mere expectation' that he will be permitted to do so."[309] Noting that most courts hold that student-athletes have a mere expectancy rather than a property interest, the *Brands* court found that the speculative nature of whether a student-athlete might obtain a college scholarship based on how he performed in the state wrestling championship justified its refusal to recognize the existence of a property interest in athletic participation.[310] If a property interest existed, according to the court, it would have been created

property interest in interscholastic sports and identifying the holding as consistent with "the holding of virtually every court that has addressed the issue").

[306] "'Good conduct rules' refer to school rules that attempt to govern out-of-school conduct, as well as in-school conduct by students engaged in extracurricular activities." Larry D. Bartlett, The Courts' View of Good Conduct Rules for High School Student Athletes, 82 Ed. L. Rep. 1087, 1088 (1993). Good conduct rules are directed at prohibiting behaviours, including consuming alcohol. See, e.g., Smith v. Chippewa Falls Area Unified Sch. Dist., 302 F.Supp.2d 953, 955-56 (student-athlete's ineligibility based on high school athletic code precluding consumption of alcohol). The rules are also directed at prohibiting the use of illegal drugs and tobacco. See Dominic J. v. Wyoming Valley W. High Sch., 362 F.Supp.2d 560, 563 (M.D. Pa. 2005). Finally, they are directed at requiring students to abide by community standards of decency as a condition to participation in extracurricular activities including sports. See Palmer v. Merluzzi, 868 F.2d 90, 94 (3rd Cir. 1989) (participation in extracurricular activities hinged on a student demonstrating "good citizenship and responsibility").

[307] Brands v. Sheldon Cmty. Sch., 671 F.Supp. 627, 629 (N.D. Iowa 1987).

[308] Id. at 630.

[309] Id. at 630-31.

[310] Id. at 631. See *Ryan*, 114 Cal. Rptr. 2d at 811 (2001) (stating that "[t]he acquisition of a scholarship is purely speculative, contingent upon far more than simply maintaining playing privileges," and adding that a scholarship is contingent on many factors including the student's performance athletically and academically).

by the high school's policies and administrative rules. Because his sanction was in accordance with the school's administrative rules and policies, the student-athlete had no legitimate basis for successfully asserting that he was deprived of a property interest.[311]

Recent decisions have followed the approach adopted in *Brands.* In *Taylor v. Enumclaw School District No. 216,*[312] a case of first impression, the Washington Court of Appeals held that participation in interscholastic sports does not give rise to a protected property or liberty interest. A football player suspended from athletic participation for consuming alcohol argued that his Fourteenth Amendment due process rights were violated because he was denied the ability "to confront his accuser, examine and cross-examine witnesses, and review the evidence against him in the disciplinary hearing."[313] He emphasized the importance of participating in interscholastic athletics, which he claimed would enable him to attend college on a football scholarship.[314] He also asserted that recognition of a property interest in athletic participation was justified because athletics are an integral part of the high school educational process, which gave rise to a reasonable expectation that he would not be arbitrarily and capriciously denied the right to participate. Although the court acknowledged the importance of sports participation to his overall education, it refused to hold that each individual component of the educational process constituted a separate property right.[315]

Only a few courts have held that student-athletes have a constitutionally

[311] Id. at 631. The court found that assuming a property interest existed, plaintiff should nevertheless be denied relief since he received all the process due to him. This result will typically follow due to the minimal level of due process required. In *Goss v. Lopez,* the Court stated that where a property interests exists, students who are suspended for misconduct for ten or fewer days are entitled only to "rudimentary" procedures consisting of "an informal give-and-take between student and disciplinarian." See *Smith,* 302 F.Supp.2d at 957-58 (holding school administrators' conduct in suspending student-athlete comported with procedural due process even though student had no such right since athletic participation does not give rise to a protected property interest).

[312] 133 P.3d 492 (Wash. Ct. App. 2006).

[313] Id. at 495.

[314] Id.

[315] Id. at 496-97. The court stated that "[a]lthough participation in extracurricular activities, including sports, clearly supplements and enriches a student's educational experience . . . participation in interscholastic sports is a privilege, not a protected property or liberty interest arising under Washington law." Id. at 497. See *Ryan,* 114 Cal. Rptr. 2d at 810 (indicating that "[p]articipation in interscholastic athletics, standing alone is but one stick in the bundle of the educational process and does not rise to the level of a separate property or liberty interest....").

protected property interest in high school sports participation. Their underlying rationale is that sports participation is integral to students' high school education, to a future college athletics scholarship, or to a lucrative professional sports career.[316] *Boyd v. Board of Directors of McGehee School District*[317] held that a student-athlete's continued participation in interscholastic athletics was sufficiently important to both his future educational and economic development that it is a constitutionally protected property interest.[318] However, the extent to which *Boyd* departs from the majority view is somewhat uncertain, because the plaintiff's underlying claim raised issues of racial discrimination, implicating another independent federal constitutional right.

Similarly, in *Duffey v. New Hampshire Interscholastic Athletic Association, Inc.*,[319] the New Hampshire Supreme Court relied on state education regulations as the independent source of a student's property right to participate in interscholastic athletics. The regulations stated that activities, "including athletics, should be considered a part of the curriculum," and that "state athletic programs [are] an integral part of the entire school program."[320] The court also noted the "common sense recognition" of the educational and economic benefits that may accrue from

[316] Most courts have rejected the argument that a future college athletics scholarship creates a protected property right. As a California court observed: "The acquisition of a scholarship is purely speculative, contingent upon far more than simply maintaining playing privileges. For example, a scholarship is contingent upon not only the availability of the scholarship, but also the student's excelling during season, meeting certain academic and entrance exam requirements, overcoming any inference from a disciplinary record, remaining healthy, and overcoming like competitors for the same finite scholarships that are distributed by coaches in their unbridled discretion." Id. at 811. The presumed speculative nature of a student-athlete acquiring a scholarship appears to serve as a surrogate for judicial concern that participation in sports is not important enough to clog the judicial system with cases regarding interscholastic athletic eligibility. McFarlin v. Newport Special Sch. Dist., 784 F. Supp. 589, 593 (E.D. Ark. 1992) ("[S]hould this court 'create' the property interest that plaintiffs request, it could only result in a deluge of litigation over not only athletic participation, but also participation in activities that others may hold dear as some do sports, such as band, theatre, or choir."). Given that approximately seven million student-athletes engaged in interscholastic sports, the refusal to recognize a property interest in athletic participation may represent pragmatic considerations related to judicial economy. The fear is that the judiciary would be overwhelmed by establishing rights that would encourage litigation.

[317] 612 F.Supp. 86 (E.D. Ark. 1985).

[318] Id. at 93 (relying on testimony that plaintiff's "participation in high school sports is vital and indispensable to a college scholarship and, in essence, a college education").

[319] 446 A.2d 462 (N.H. 1982).

[320] Id. at 467.

high school athletic participation.[321] Notwithstanding *Boyd* and *Duffey*, the vast majority of courts hold that there is no a property right or liberty interest in high school sports participation.[322] The majority view constitutes a judicial consensus that, absent infringement of constitutional rights independent of a high school student's status as an athlete, his or her eligibility to participate is not subject to protection under the Constitution.

2. Judicial Deference and Academic Abstention

Reflecting the perceived lack of importance that athletic participation plays in the educational process, courts afford interscholastic athletic associations and schools considerable deference regarding their internal resolution of athletic participation disputes.[323] Even when student-athletes assert that infringement of independent and traditionally recognized federal constitutional rights by public high schools or state high school governing bodies deemed to be state actors adversely affects their athletic participation interests, generally only rational basis review is applied absent discrimination or exclusion based on race, color, national origin, or gender.[324]

A rational basis test has been applied where students are denied any opportunity to participate in a school's interscholastic athletics program. For example, courts uniformly have upheld rules prohibiting otherwise eligible home-schooled students from participating in interscholastic sports.[325] Although they elect to opt out of formalized high school education

[321] Id.

[322] Farver v. Board. of Educ. of Carroll County, 40 F.Supp.2d 323, 324 (D. Md. 1999) ("Even recognizing that these days colleges are farm teams for the pros, and high schools are farm teams for colleges, and that, for champion athletes, certainly there could be economic consequences, the right to participate in extracurricular activities, as distinguished from the right to attend school, is not considered a protected interest under the Fourteenth Amendment.").

[323] In re Univ. Interscholastic League, 20 S.W.3d 690, 692 (Tex. 2000) (holding that there is no fundamental right to participate in extracurricular activities and reasoning that judicial intervention into the matters of educational institutions do more harm than good).

[324] Hadley v. Rush Henrietta Central School District, No. 05-CV-6331T, 2007 WL 1231753 (W.D. N.Y. Apr. 25, 2007); Garvey v. Unified Sch. Dist. 262, 2005 WL 2548332 (D. Kan.).

[325] A comprehensive discussion of the merits of allowing home-schooled children to participate in interscholastic athletic competition is beyond the scope of this paper. Differing views on the subject may be found in Batista & Hatfield, infra note 326. See also Darryl C. Wilson, Home Field Advantage: The Negative Impact of Allowing Home-Schoolers to Participate in Mainstream Sports, 3 Va. J. Sports & L. 1 (2001); Kathryn Gardner & Allison J. McFarland, Legal Precedents and Strategies Shaping Home Schooled Students' Participation in Public School Sports, 11 J. Legal Aspects Sport 25 (2001).

systems, many parents desire that their children receive the educational and other benefits of participating in interscholastic sports offered by local public schools.[326]

Jones v. West Virginia State Board of Education[327] illustrates the prevailing judicial response to litigation by home-schooled children seeking to play interscholastic sports. The West Virginia Secondary School Activities Commission ("WVSSAC") denied a home-schooled child's request that he be permitted to join a public middle school's wrestling team. The boy's parents alleged that their son's exclusion from athletic participation violated his equal protection rights as a home-schooled child.

The West Virginia Supreme Court ruled that participation in interscholastic extracurricular activities, including sports, is not a constitutionally protected right, much less a fundamental right justifying heightened scrutiny.[328] Deferring to the state athletic association's judgment, the court applied the rational basis test.[329] It found that promoting academics over athletics and protecting the economic interests of the county school systems justified categorically excluding home-schooled children from athletic participation.[330] With respect to the

[326] See Paul J. Batista & Lance C. Hatfield, Learn at Home, Play at School, 15 J. Legal Aspects Sport 213, 216 (2005).

[327] 622 S.E.2d 289 (W. Va. 2005). Approximately 1.9 million students are currently home-schooled in the United States. Andrew Lawrence, Out At Home?, Sports Illus., Oct. 30, 2006, at 40.

[328] Id. at 295-96. In Pelletier v. Maine Principals' Assoc., 261 F.Supp.2d 10, at 13, the court rejected claims asserted by parents of home-schooled students, denying the right to participate in interscholastic athletics at a private school and concluding that there is no fundamental right to athletic participation. Accord Bradstreet v. Sobel, 630 N.Y.S.2d 486, 487 (1995) (home-schooled student failed to establish a property interest in interscholastic athletic participation).

[329] Id. at 306. Other courts have adopted a rational basis standard of review. See Angstadt v. Midd-West School District, 377 F.3d 338 (3rd Cir. 2004); Pelelitier v. Maine Principals' Assoc., 261 F.Supp.2d 10 (D. Maine, 2003). In Kaptein v. Conrad School Dist., 931 P.2d 1311 (Mont. 1997), the Montana Supreme Court applied a middle-tier standard of review, indicating that "a student's right to participate in extracurricular activities, although not a fundamental right, is 'clearly subject to constitutional protection.'" Id. at 1316. Application of this standard nevertheless resulted in a ruling in favor of the defendant, because the school district's interest in restricting participation to enrolled students outweighed the private-school student's interest in participating in extracurricular activities. Id. at 1317. But see Davis v. Massachusetts Interscholastic Athletic Ass'n, No. 94-2887, 3 Mass. L. Rep. 375 Mass Super. Ct. Jan. 18, 1995) (holding that playing sports does not invoke a fundamental right, and that a student-athlete is not a member of a suspect class, but granting injunctive relief because the distinction between home-schooled and non-home-schooled children was not rationally related to a legitimate state purpose).

[330] Jones v. West Virginia State Board of Education, 622 S.E.2d at 296 (W. Va. 2005). See also Bradstreet v. Sobol, 630 N.Y.S.2d 486, 487 (N.Y. Sup. Ct. 1995) (regulations bore rational

academic rationale, the court deferred to the judgment of school officials who expressed concerns regarding the potential negative impact on maintaining the academic integrity of its interscholastic programs caused by the differences in curriculum, grading standards, and methods between home-schooled and publicly educated children.[331]

Further, in *Reid v. Kenowa Hills Public Schools*,[332] the court also rejected a challenge by a home-schooled student to a Michigan High School Athletic Association rule that only students enrolled in school for at least twenty hours can participate in extra-curricular sports. Although it agreed with the parents that the pertinent Michigan statute granted parents the right to direct the education of their children and required public schools to assist them, the court held that the statute did not entitle home-schooled students to participate in interscholastic athletics (which it deemed to be a privilege, not a constitutional right). Applying the rational basis test, the court distinguished between academic instruction and participation in interscholastic sports. It concluded that only the former was required by the state's educational law.[333]

Courts have adopted a similar approach in uniformly rejecting legal challenges to "outside competition" rules, which generally prohibit student-athletes from participating on a non-school or club team as a condition of participating in the same sport on a high school team during the same season or academic year.[334] In *Letendre v. Missouri State High School Activities Association*,[335] the court upheld the Missouri State High School Activities Association's ("MSHSAA") outside competition rule and ruled that it did not violate student-athletes' equal protection rights. Finding no violation of any fundamental constitutional right and no creation of a suspect classification, the court applied rational basis review. It concluded that the outside competition rule is rationally related to the MSHSAA's

relationship to stated purposes of "promoting loyalty and school spirit . . . securing role models for other students . . . [and] maintaining academic standards for participation in interschool sports activities").

331 The same result was reached in Angstadt v. Midd-West Sch. District, 377 F.3d 338 (3rd Cir. 2004).

332 680 N.W.2d 62 (Mich. App. 2004).

333 Id. at 67-68. See also Jones v. Cal. Interscholastic Fed'n, 197 Cal.App.3d 751, 757 (1988) (applying a rational basis standard since participation in interscholastic sports does not involve a fundamental right). Accord Swanson v. Guthrie Indep. Sch. Dist. No. 1-1, 135 F.3d 694, 698 (10th Cir. 1998).

334 See, e.g., Burrows v. Ohio High Sch. Athletic Ass'n, 891 F.2d 122 (6th Cir. 1989); Zuments v. Colo. High Sch. Activities Ass'n, 737 P.2d 1113, 1116 (Colo. App. 1987).

335 86 S.W.3d 63 (Mo. Ct. App. 2002).

legitimate objectives, including preventing conflicts between sports and academics, discouraging an overemphasis on sports by students, avoiding conflicts in coaching philosophy and scheduling, and promoting competitive equity.[336]

In addition to rational basis review, courts implicitly rely on the academic abstention doctrine to provide only limited judicial scrutiny of the merits of student-athlete eligibility disputes pursuant to the law of private associations.[337] In *Indiana High School Athletic Association v. Carlberg*,[338] the Indiana Supreme Court held that the Indiana High School Athletic Association ("IHSAA") was "analogous to a government agency with respect to challenges to its rules and enforcement actions brought by students." Although the court recognized that the students were not represented in the association's leadership, did not voluntarily subject themselves to the association's athletic eligibility rules, and had no voice in the making of those rules, it refused to provide de novo review in disputes challenging the validity or application of the rules.

The court held that deferential "arbitrary and capricious" review, the standard generally applied in reviewing administrative agency action, is appropriate. According to the court, this "is a narrow standard of review and the reviewing court may not substitute its judgment for the judgment of the IHSAA."[339] The rule or decision will be found to be arbitrary and capricious

[336] Id. at 68. The court's conclusion is troublesome given the obvious self-interest of a high school sports governing body in maintaining exclusive regulatory authority over high school student-athletes, including their participation in athletic participation sponsored by other organizations. The Stevens Act recognizes, as a matter of policy, the impropriety of doing so. See 36 U.S.C. § 220526(a).

The court also rejected Letendre's first amendment claim, finding plaintiff failed to bring her claim within the parameters of the circumstances under which a cognizable freedom of association claim will be recognized—cases involving intimate human relationships, as well as those involving activities expressly protected under the First Amendment, such as the freedom of speech or the right to assembly. Id. at 69. Accord, *Burrows*, 891 F..2d 122 (1989); Zuments v. Colo. High Sch. Activities Ass'n, 737 P.2d 1113, 1116 (Colo. App. 1987); E. N.Y. Youth Soccer Ass'n v. N.Y. State Pubic High Sch. Athletic Ass'n, 488 N.Y.S2d 293, 294-95 (N.Y. App. Div. 1986) (holding that "[t]he instant rule does not interfere with parental privacy rights. The choice of whether to participate in school or nonschool teams remains with the parents and their children.").

[337] Brown v. Oklahoma Secondary Sch. Activities Ass'n, 125 P.3d 1219, 1226 (Okla. 2005) ("All that is required of the Association is that its rules be reasonable, lawful, in keeping with public policy, and interpreted fairly and reasonable and enforced uniformly and not arbitrarily."); IHSAA v. Carlberg, 694 N.E.2d 222, 230 (Ind. 1997).

[338] 694 N.E.2d 222, 228(Ind. 1997).

[339] Id. at 233.

"only where it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion."[340]

In upholding the IHSAA's application of its transfer rule to a student who transferred schools for non-athletic reasons without a change of permanent residence by his parents, the court rendered the student ineligible to participate in varsity interscholastic athletics for 365 days after enrollment. The court concluded that the IHSAA's decision was not arbitrary and capricious, although it was "undisputed that his transfer was neither primarily for athletic reasons nor as a result of undue influence" by his new high school.[341] Even though it recognized the importance of sports participation, the court found that it failed to rise to the level of a deeply rooted historical and traditional fundamental right or liberty that is subject to constitutional protection.[342]

3. Analysis and Conclusions

Courts sometimes fail to recognize the important—perhaps unique—educational benefits derived from interscholastic athletics, which generally have many positive effects on a student's future personal life and career. The prevailing judicial approach, which is to accord substantial deference to state high school athletic associations and educational institutions regardless of the adverse effects on students who are deemed ineligible, reflects the judiciary's strong desire to avoid micromanaging the high school educational process.[343] Thus, many courts justify their refusal to closely scrutinize the merits of interscholastic athletic participation disputes by claiming judges are "ill-equipped to make fundamental, legislative, and administrative policy decisions which are involved in the everyday administration of a public school."[344]

[340] Id.

[341] Id. at 232.

[342] Id. at 242.

[343] Wooten v. Pleasant Hope R-VI Sch. Dist., 139 F.Supp.2d 835, 842-43 (W.D. Mo. 2000); Jones v. Cal. Interscholastic Fed'n, 197 Cal.App.3d 751, 757 (1988) (indicating that "schools themselves are far the better agencies to devise rules and restrictions governing extracurricular activities. Judicial intervention into school policy should always be reduced to a minimum").

[344] Stewart v. Bibb County Bd. of Educ., 2006 WL 449197 at *2. Referring to a request by an athlete that the court ensure that he be afforded meaningful participation on a high school basketball and track teams, one court responded, "Accommodation of that request would take this judge off the federal bench and place him on the team's bench next to the coach. Is the athlete getting enough playing time? Is the athlete playing the right position? The possibilities are endless." McFarlin v. Newport Special

In the context of interscholastic sports, parents have attempted to overcome the strong judicial reluctance to intervene in athletic participation disputes by asserting a right to control the education of their minor children. But even courts recognizing this right hold that it does not encompass parental control over the separate components of their children's education such as participation in interscholastic athletics.[345] This is substantially similar to the prevailing judicial approach for resolving eligibility disputes involving college student-athletes and reflects an outgrowth of the academic abstention doctrine, pursuant to which courts defer to the presumed expertise of education officials.

On the one hand, state high school athletic associations and school officials should be afforded substantial latitude to establish and enforce academic eligibility requirements that must be satisfied to participate in interscholastic sports. There is even less of a concern with a student-athlete's temporary loss of eligibility for engaging in misconduct that violates a disciplinary code if clear notice of the required standards of conduct and decorum is provided. Although participation in interscholastic athletics is not a constitutionally protected right, courts appropriately recognize at least a limited *de jure* legal interest by requiring appropriate notice and a fair opportunity to be heard before a student is declared ineligible to participate in sports as a sanction for misconduct.[346]

On the other hand, denying home-schooled children an opportunity to participate in interscholastic sports arguably deprives them of the full benefits of a well-rounded education. Such exclusion potentially has a more significant adverse impact than "outside competition" rules because alternative local athletic participation opportunities such as club sports may not be available to home-schooled children. Moreover, excluding all home-schooled students from any participation in interscholastic sports seems inappropriate in comparison with the temporary loss of a student's opportunity to participate in interscholastic sports for academic or misconduct reasons.

When applying the rational basis or arbitrary and capricious standards—which both provide only a minimum level of cursory judicial review—courts rarely render decisions that enable students to participate in interscholastic athletics.[347] In one of the rare cases applying rational basis

School Dist., 784 F.Supp. 589, 593 (E.D. Ark. 1992).

[345] See, e.g., *E. N.Y. Youth Soccer Ass'n*, 488 N.Y.S.2d 293 at 295.

[346] See supra note 311 and accompanying text.

[347] Our research found only a few cases that did so. See, e.g., Zuehlsdorf v. Simi Valley Unified

review decided in favor of a student-athlete, *Ruiz v. Massachusetts Interscholastic Athletic Ass'n*,[348] the court held that a state governing body should have granted a student a waiver from its transfer rules, thereby enabling him to participate in basketball at his new high school. It found that the student's exclusion from athletics did not further the transfer rule's objective of preventing recruiting or "forum shopping" for athletics reasons because he transferred from a private to a public school solely for financial reasons. The court emphasized the importance of athletics to the educational mission of public high schools, observing that the state legislature "expresses as public policy the view that athletics constitute an integral component of public education and should be considered a fundamental ingredient of the educational experience."[349] However, most courts still fail to legally recognize this important interest and generally uphold the rules and decisions of state governing bodies and high schools (which generally have monolithic state or local control of interscholastic athletics) that render students ineligible to compete in high school sports.

Sch. Dist., 55 Cal. Rptr. 3d 467, 471 (Cal. App. 2007) (holding that local athletics conference's exclusion of student who transferred schools from interscholastic sports, "based on their own rule whose terms they could not define, was 'illogical and capricious'"); Bagan v. N.J. Interscholastic Athletic Ass'n, No. BER-C-109-05 2005, WL 1861944 (N.J. Sup. Ch. 2005) (holding that student was eligible to play football at his new school based on finding that his transfer was not primarily for athletic reasons); Boyle v. Pa. Interscholastic Athletic Ass'n, Inc., 676 A.2d 695 (Pa.Cmwlth. Ct. 1996), appeal denied, 686 A.2d 1313 (Pa. 1996) (finding that application of state high school athletic association's bylaws, which rendered transferring student ineligible to participate in basketball, was inconsistent with their avowed purpose and arbitrary and capricious).

[348] Ruiz v. Mass. Interscholastic Athletic Ass'n, No. CV0068, 2000 WL 1273381 (Mass. Super. Feb. 7, 2000) (unreported decision).

[349] Id. at *3. This minority view was also asserted by the dissenting judge in Jones v. West Virginia State Board of Education:

> [I]nterscholastic sports "constitute an extension of a good educational program. [T]he students who engage in such activities "tend to have higher grade-point averages, better attendance records, lower dropout rates and fewer discipline problems than students generally" . . . [t]hey are "inherently educational" in that they "provide valuable lessons for practical situations - teamwork, sportsmanship, winning and losing, and hard work." The participants "learn self-discipline, build self-confidence and develop skills to hand competitive situations,' all of which contributes to the development of "responsible adults and good citizens." "Participation in high school activities is often a predictor of later success—in college, a career and becoming a contributing member of society."

622 S.E.2d 289, 304 (adopting the view of the circuit court judge who quoted from the National Federation of State High Schools Association's document entitled "The Case for High School Activities").

CONCLUSION AND A PROPOSAL TO PROTECT ADEQUATELY INTERCOLLEGIATE AND INTERSCHOLASTIC ATHLETIC PARTICIPATION OPPORTUNITIES

The important individual and social benefits of athletic participation at the high school and college levels justify legal recognition and more significant protection of a student-athlete's opportunity to participate in sports competition offered by public or private educational institutions.[350] It is ironic that participation in intercollegiate and interscholastic sports is a sufficiently important interest for purposes of applying federal anti-discrimination laws such as Title IX,[351] invalidating an exculpatory waiver of negligence claims as condition of participating in high school sports,[352] and rejecting a public university's claimed sovereign immunity from tort liability for injury to college athletes,[353] but it is insufficient otherwise. Although we agree that participation in high school or college sports should not be characterized as a "property right" or a "liberty interest" (much less a "fundamental right") under the Constitution, the opportunity to do so currently lacks adequate statutory or common law protection. Legislative recognition and protection of this opportunity (e.g., giving home-schooled students a conditional right to participate in sports) would be preferred, but we recognize the traditional reluctance of Congress or state legislatures to enact sport-specific legislation that benefits student-athletes.

We acknowledge that it is neither feasible nor appropriate for student-athletes to participate in the making, interpretation, and application of eligibility rules for sports competitions offered as part of high school or college education. Further, it is important that appropriate deference be given to educational institutions and athletic governing bodies to avoid judicial micro-management of, and intrusion into, athlete eligibility disputes. Although arbitration is an efficient process that works well for resolving athletic eligibility disputes for the few thousand U.S. professional and Olympic sport athletes, it probably is not a feasible alternative for resolving eligibility disputes affecting the nation's more than seven million high school athletes or four hundred thousand NCAA student-athletes. Moreover, given the current deferential scope of judicial review, the NCAA,

[350] We do not assert that elimination of athletic participation opportunities due to budget constraints or to comply with Title IX is illegal conduct that violates student-athletes' legally protected rights. However, our strong preference would be to create, rather than eliminate or reduce, sports participation opportunities for all student-athletes.

[351] See, e.g., Pederson v. Louisiana State Univ., 213 F.3d 858 (5th Cir. 2000).

[352] Wagenblast v. Odessa Sch. Dist., 758 P.2d 968 (Wash. 1988).

[353] Avila v. Citrus Cmty. Coll. Dist., 131 P.3d 383 (Cal. 2006).

state high school governing bodies, and educational institutions have little incentive to agree to submit athlete eligibility disputes to final and binding arbitration. In addition, arbitration may not lead to the development of a body of uniform precedent that provides clear legal guidance to university and high school athletics governing bodies and administrators. Other potential drawbacks to the development of an effective arbitration system may be a scarcity of arbitrators who possess the requisite sports law expertise to adjudicate college and high school sports athletic eligibility disputes as well as an arbitrator's more limited scope of authority to fashion effective relief vis-à-vis a federal or state judge.

To ensure that student-athletes are not denied the educational benefits of athletic participation without adequate justification, courts should apply a higher level of judicial scrutiny than the traditional common law rational basis or arbitrary and capricious standards. We do not advocate de novo or strict judicial review, but the significant educational and potential economic benefits of athletic participation (e.g., a scholarship or professional sports career) warrant more than courts merely asking the very deferential and frequently outcome determinative question of whether an eligibility rule or its application is rational or arbitrary and capricious. We propose a uniform level of judicial scrutiny that allows a student-athlete to prove, by clear and convincing evidence, that his or her exclusion from athletic participation does not substantially further an important and legitimate interest of an interscholastic or intercollegiate sports governing body or educational institution.[354]

This standard would better balance the parties' respective interests in an athletic eligibility dispute, but it poses the risk of unwarranted judicial micro-management of high school and college athletics and potentially more

[354] In effect, we are advocating that athletic eligibility rules be judicially evaluated in light of their teleological or purposive nature. See Jonathan Yovel, Legal Formalism, Institutional Norms, and the Morality of Basketball, 8 Va. Sports & Entertainment L.J. 33, 43 (2009) (summarizing and advocating "purposive interpretation" of sports governing body rules that affect player eligibility to participate).

Regarding student-athlete eligibility disputes with the NCAA, it is important to ensure national uniformity and consistency as well as to avoid a potential Dormant Commerce Clause violation if multiple, differing state law standards are applied. Therefore, if the Indiana Supreme Court or legislature adopts our proposed heightened legal standard, we suggest that the NCAA (which is based in Indianapolis), its member institutions, and student-athletes contract to have Indiana state law govern the resolution of eligibility disputes. Establishing a uniform national substantive law for resolving intercollegiate athletic eligibility disputes would be consistent with the CAS objective of establishing a worldwide, uniform *lex sportiva* for Olympic and international sports. See supra note 39 and accompanying text.

litigation. On the other hand, because a student-athlete has a significant burden of persuasion to satisfy, an adverse eligibility determination will be judicially vacated in relatively few cases. This standard, however, may provide a means of legal redress that enables athletic participation in the following examples of cases that we believe were inappropriately decided against student-athletes: categorical exclusion of home-schooled students from athletic participation opportunities[355] (although conditioning participation on appropriate academic requirements and the payment of reasonable user fees seems appropriate); ineligibility due to a mistake by an educational institution causing a student-athlete's failure to comply with non-academic requirements;[356] ineligibility to participate in varsity interscholastic athletics for 365 days despite uncontradicted evidence that school transfer occurred only for academic, not athletics-related, reasons;[357] NCAA refusal to grant a waiver of its post-graduate eligibility rule to a student-athlete who graduated in two and a half years and was unable to pursue a graduate degree in a chosen field at her undergraduate institution;[358] and a university's refusal to reinstate a student-athlete's eligibility after he was removed from team in alleged retaliation for successfully appealing a coach's recommendation that his scholarship not be

[355] See supra notes 328, 333 and accompanying text.

[356] See, e.g., Yeo v. NCAA, 171 S.W.3d 863 (Tex. 2005); Hendricks v. Clemson Univ., 578 S.E.2d 711(S.C. 2003); Perry v. Ohio High Sch. Athletic Ass'n, No. 05-cv-937, 2006 WL 2927260 (S.D. Ohio 2006). See also Rick Reilly, The Punishment Is the Crime, Sports Illus., Nov. 26, 2007 at 88 (explaining that Washington Interscholastic Athletic Association required high school football team to forfeit games and not participate in state playoffs because school officials failed to ensure that one player's physical fitness exam was updated within the required time).

[357] As Judge Dickson observed in his dissent in IHSAA v. Carlberg:

> The IHSAA's action against Jason is blatantly contrary to the expressed purpose of the IHSAA Transfer Rule. The IHSAA rules provide that, "Standards governing residence and transfer are a necessary prerequisite to participation in interschool activities because: . . . (5) *they keep the focus of students* and educators *on the fact that they attend school to receive an education first* and participate in athletics second." Record at 170 (citing I.H.S.A.A. Rule 19(c)(5)) (emphasis added). The trial court found that the Carlbergs have always put Jason's education first and the IHSAA officials "indicated they had no reason to believe Jason Carlberg's transfer was athletically motivated." Record at 11. Thus, the arbitrariness of the IHSAA's application of its rule becomes apparent in the present case: A rule purporting to limit athletically-motivated transfers and promote education as the primary value of school in fact punishes a student whom the IHSAA found did *not* transfer for an athletic reason and where the uncontradicted evidence points only to academic reasons for the transfer. Common sense instructs that application of the Transfer Rule to limit Jason's opportunities for participation would be blatantly arbitrary and capricious. The trial court was correct in making such a finding."

IHSAA v. Carlberg, 694 N.E.2d 222, 245 (Ind. 1997) (Dickson, J., concurring and dissenting).

[358] Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998).

renewed.[359] Under this new heightened legal standard, the NCAA would have a higher burden to justify, for example, its "advertisement and endorsement,"[360] as well as its "no draft" and "no agent" rules,[361] although these "amateurism" rules ultimately may be upheld under more exacting judicial scrutiny. At a minimum, a greater scope of legal protection of student-athletes' athletic participation opportunities would provide a legal incentive for interscholastic and intercollegiate sports governing bodies and educational institutions to apply eligibility rules more liberally and to refrain from restricting athletic participation opportunities unless necessary to further legitimate objectives.[362]

[359] Richard v. Perkins, 373 F. Supp.2d 1211 (D. Kan. 2005).

[360] See supra note 238 and accompanying text.

[361] See Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992).

[362] We also advocate that courts scrutinize and perhaps invalidate on public policy grounds rules of restitution promulgated by the NCAA and state athletic associations. A rule of restitution permits athletic associations to impose particular types of penalties (e.g., forfeiture of games and vacatur of individual and team records and performances) if an institution is deemed to have violated an association's rules prohibiting ineligible student-athletes from engaging in interscholastic or intercollegiate athletic competition. See NCAA v. Lasege, 53 S.W.3d 77, 87 (Ky. 2001) (describing and upholding the NCAA's rule of restitution); 2006-07 NCAA Division I Manual, supra note 210, art. 19.7 (describing penalties that may be imposed pursuant to NCAA's rule of restitution). The actual or threatened application of rules of restitution provides a strong disincentive for schools to allow student-athletes to participate in athletic competition even when athletes have prevailed in litigation against a sports governing body at the trial court level. Schools fear that an appellate court's reversal of a lower court ruling in favor of a student-athlete will lead to application of a rule of restitution, which creates a strong disincentive to allow him or her to participate in athletic competition until the litigation is finally resolved.