The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program

David F. Gaona

"*Does the organization that regulates and polices virtually all serious intercollegiate athletic activity in the country operate in a way that does not offend our sense of fair play?*"[1] This question provides the focal point for this Note. The regulatory organization under scrutiny is the National Collegiate Athletic Association (NCAA), a "voluntary" association of over 800 four-year colleges and universities located across the nation.[2] One purpose of the NCAA is to supervise the conduct and standards of the athletic programs of member institutions.[3] The

1. *NCAA Enforcement Program: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2nd Sess. 1 (1978) (statement of Rep. John E. Moss, Chairman) [hereinafter NCAA HEARINGS]; *see* G. HANFORD, AN INQUIRY INTO THE NEED FOR AND FEASIBILITY OF A NATIONAL STUDY OF INTERCOLLEGIATE ATHLETICS (March, 1974) (printed in offset edition for the American Council on Education). Mr. Hanford conducted a pilot study of intercollegiate athletics to determine whether a full-scale investigation was needed. One conclusion Mr. Hanford reached was:

> [O]ne task of *any national study* effort should be to *assess the practices currently being followed in the policing of intercollegiate sports, particularly big-time ones*; to *speak to the adequacy or inadequacy* of the efforts of the NCAA, as well as of the other *national, regional, and conference agencies* involved; and to make such *recommendations for improvement* of the process as it may deem appropriate.

Id. at 91 (emphasis in original).

2. Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 355 (8th Cir.), *cert. denied*, 434 U.S. 978 (1977). As of 1977, the NCAA had approximately 830 members. *Id.* Half the members are public universities, the other half are private. *Id.*; Howard Univ. v. NCAA, 510 F.2d 213, 214 (D.C. Cir. 1975); California State Univ., Hayward v. NCAA, 47 Cal. App. 3d 533, 537, 121 Cal. Rptr. 85, 87 (1975). Membership in the NCAA is voluntary. *Id.*

3. NCAA CONST. art. 2, § 1, *printed in* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1981-82 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 7 (1981) [hereinafter NCAA MANUAL]. The NCAA Constitution sets forth the purposes of the organization as follows:

> Section 1. Purpose. The purposes of this Association are:
> (a) To initiate, stimulate and improve intercollegiate athletic programs for student-athletes and to promote and develop educational leadership, physical fitness, sports participation as a recreational pursuit and athletic excellence;
> (b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association;
> (c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;
> (d) To formulate, copyright and publish rules of play governing intercollegiate sports;
> (e) To preserve intercollegiate athletic records;

NCAA Enforcement Program is the means by which the NCAA achieves this purpose.[4]

In response to numerous allegations of improper practices in "big-time" athletic programs, the NCAA Enforcement Program has risen from a state of dormancy to a state of activism.[5] This activism has led to full-scale NCAA inquiries into athletic programs of member institutions. Many of these NCAA investigations have resulted in stringent penalties for the institutions involved.[6]

For instance, the football program at Arizona State University (ASU) was recently assessed a penalty of two years probation, including loss of the right to engage in postseason bowl games and loss of the right to make television appearances.[7] The harsh penalty stems from an NCAA investigation which found ASU's football program guilty of a number of violations. The violations that gave rise to the probationary sanction related to academic standards for athletes,[8] extra benefits and financial aid for athletes,[9] and improper recruiting inducements.[10]

Another example of the harsh penalties resulting from an NCAA investigation involved the Colorado Seminary (University of Denver) hockey program.[11] The violations found by the NCAA included the

---

(f) To supervise the conduct of, and to establish eligibility standards for, regional and national athletic events under the auspices of this Association;
(g) To cooperate with other amateur athletic organizations in promoting and conducting national and international athletic events;
(h) To legislate, through bylaws or by resolution of a Convention, upon any subject of general concern to the members in the administration of intercollegiate athletics; and
(i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletic activities on a high level.

Id.

4. *See* OFFICIAL PROCEDURE GOVERNING THE NCAA ENFORCEMENT PROGRAM, NCAA MANUAL, [hereinafter NCAA ENFORCEMENT PROGRAM], *supra* note 3, at 62-77.

5. *See* NCAA HEARINGS, *supra* note 1, at 68 (testimony of J. Brent Clark). Mr. Clark, a former enforcement representative of the NCAA, comments on the overwhelming number of alleged infractions that the NCAA routinely receives and processes. *Id. See also* note 6 *infra*.

6. In the period from 1970-1978, approximately 54 university athletic programs were assessed penalties of probation for various NCAA violations. NCAA HEARINGS, *supra* note 1, at 1512.

7. NCAA News Release (Dec. 31, 1980) (copy on file at the Arizona Law Review).

8. *Id.*; *see* NCAA CONST. art. 3, § 3, NCAA MANUAL, *supra* note 3, at 16-17.

9. NCAA News Release, *supra* note 7; *see* NCAA CONST. art. 3, §§ 1(g)(5), 4(a), NCAA MANUAL, *supra* note 3 at 13, 18.

10. NCAA News Release, *supra* note 7; NCAA BYLAW art. 1, § 1(b)(1), NCAA MANUAL, *supra* note 3, at 43.

11. Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), *aff'd per curiam*, 570 F.2d 320 (10th Cir. 1978). Athletes on the Colorado Seminary (University of Denver) hockey team were ineligible under an NCAA provision dealing with amateur status of foreign athletes. 417 F. Supp. at 889-90; *see* NCAA CONST. art. 3, § 1, NCAA MANUAL, *supra* note 3, at 9-15. The athletic department of the university interpreted the provision differently than did the NCAA. 417 F. Supp. at 891. Because of their interpretation, the university failed to declare the athletes ineligible. *Id.* After conducting a preliminary investigation, an "Official Inquiry" was authorized by the NCAA Committee on Infractions. *Id.* at 892; see text & notes 61-67 *infra*. The NCAA initially imposed indefinite probation on all athletic programs at the university, and prohibited

hockey team's use of several ineligible players and the university athletic program's general disregard for NCAA rules and policies.[12] The sanctions imposed by the NCAA included not only probation for the hockey program, but probation for all the university's athletic programs.[13]

Because violations of NCAA policy can lead to serious penalties and repercussions, the procedures employed in the NCAA Enforcement Program have come under fire.[14] Congress, evincing its concern with the power wielded by the NCAA Enforcement Program, undertook a massive investigation of the NCAA and the inherent unfairness its procedural protections afford member institutions.[15] The NCAA Enforcement Program has also attracted scrutiny from member institutions and the public at large.[16] Although the attack on the NCAA Enforcement Program has resulted in increased protection for the student-athlete,[17] the Enforcement Program still employs unfair procedures against member institutions.[18]

This Note will focus on the relationship between the NCAA and its member institutions. First, a historical overview of the NCAA and its Enforcement Program will be presented. The procedures afforded member institutions when they become targets of an NCAA investigation will be described. Then, the basis for judicial intervention of associational activity and authority supporting a member institution's right to sue the NCAA under 42 U.S.C. § 1983 will be presented. It will be argued that universities have a property interest in preserving their athletic programs that is entitled to protection under the due process

---

participation in postseason tournaments and television appearances controlled by the NCAA. 417 F. Supp. at 892. The university appealed, and the NCAA Council, the NCAA's appellate tribunal, reduced the penalty. *Id.* at 893. The hockey team was placed on two years probation, including exclusion from postseason tournament play and television appearances. *Id.* The remaining athletic programs at the university were placed on probation with similar prohibitions for one year. *Id.*

The university, joined by the ineligible athletes, brought an action against the NCAA under 42 U.S.C. § 1983 (Supp. 1974-80). 417 F. Supp. at 894 n.4. The university alleged a deprivation of a liberty interest, claiming they had been stigmatized. *Id.* at 896; see note 240 *infra*. The athletes also alleged a property interest in their scholarships and potential professional athletic careers. 417 F. Supp. at 895 n.5. Both arguments were rejected. *Id.* at 896; see text & notes 200-39 *infra*.

12. 417 F. Supp. at 892.

13. *Id.* at 892-93.

14. *See* NCAA HEARINGS, *supra* note 1, at 2.

15. *Id.* at 1. The investigation was prompted by Rep. James Santini of Nevada, with the support of 70 other Congressmen. *Id.* at 2.

16. *See* Colorado Seminary v. NCAA, 417 F. Supp. 885, 889 (D. Colo. 1976), *aff'd per curiam*, 570 F.2d 320 (10th Cir. 1978); Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 355 (8th Cir.), *cert. denied*, 434 U.S. 978 (1977); NCAA HEARINGS, *supra* note 1, at 1.

17. *See* NCAA ENFORCEMENT PROGRAM, § 12(c)(5), NCAA MANUAL, *supra* note 3, at 174. Section 12(c)(5) provides the student-athlete the opportunity to appear with legal counsel before the Committee on Infractions at the hearing granted member institutions under investigation. For further discussion, see text accompanying notes 69-70 *infra*.

18. See text & notes 242-76 *infra*.

clause. Finally, the procedures needed to afford member institutions due process when faced with harsh penalties for alleged athletic mismanagement will be described.

I. THE NCAA AND THE ENFORCEMENT PROGRAM: AN OVERVIEW

A. *The NCAA*

The NCAA is a voluntary, unincorporated association of public and private four-year institutions of higher education.[19] The NCAA functions as the primary regulatory body for intercollegiate athletics.[20] The basic policy of the NCAA is to maintain "[i]ntercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between collegiate athletics and professional sports."[21]

Membership by colleges and universities is voluntary.[22] A member institution not wishing to abide by NCAA guidelines may merely resign membership. Resigning membership, however, precludes the athletic program of that institution from participation in possible financial benefits associated with membership.[23] These benefits are best described by looking to the three primary activities the NCAA undertakes on behalf of affiliated colleges and universities.

First, as a regulatory body, the NCAA promulgates and enforces

19. Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 355 (8th Cir.), *cert. denied*, 434 U.S. 978 (1977); Trustees of States Colleges and Univ. v. NCAA, 82 Cal. App. 3d 461, 465, 147 Cal. Rptr. 187, 189 (1978); Comment, *A Student-Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions*, 10 CONN. L. REV. 318, 325 (1978). The NCAA is one of four national associations concerned with the regulation of intercollegiate athletics. The National Association of Intercollegiate Athletics (NAIA), the Association for Intercollegiate Athletics for Women (AIAW), and the National Junior College Athletic Association (NJCAA), constitute the remaining associations.

The NAIA is an association of colleges and universities of moderate size enrollment, whereas the NCAA consists of the larger colleges and universities. *See* C. HANFORD, *supra* note 1, at 85-86. The NAIA Handbook states that "[p]rior to the formation of the NAIA, opportunity for competition by colleges and universities of moderate enrollment and/or moderate athletic budgets was nonexistent at the national level." OFFICIAL HANDBOOK, NATIONAL ASSOCIATION OF INTERCOLLEGIATE ATHLETICS 3 (3d ed. 1969). The AIAW is the association providing services to women's athletics. G. HANFORD *supra* note 1, at 85. The AIAW's stated purpose is to foster programs of women's intercollegiate athletics. D. DEATHERAGE & C. REID, ADMINISTRATION OF WOMEN'S COMPETITIVE SPORTS 141 (1977). Finally, the NJCAA is the association promoting intercollegiate athletics at the junior college level. *See* G. HANFORD, *supra* note 1, at 84-85.

Because the NCAA is comprised of the major colleges and universities, in terms of both athletic and academic excellence, and because the NCAA's dominance of intercollegiate athletics has become a matter of widespread concern, this Note's discussion will focus on the NCAA only. *See* Note, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903, 904 nn.7, 8 (1972).

20. *See* Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 355 (8th Cir.), *cert. denied*, 434 U.S. 978 (1977); Comment, *supra* note 19, at 326-28; NCAA CONST. art. 2, § 2, NCAA MANUAL, *supra* note 3, at 7-8.

21. NCAA CONST. art. 2, § 2(a), NCAA MANUAL, *supra* note 3, at 7-8.

22. See text & note 2 *supra*.

23. Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 373 (8th Cir.) (Bright, J., concurring), *cert. denied*, 434 U.S. 978 (1977); see text & notes 27-28, 31 *infra*.

rules aimed at balancing the wealth of athletic talent among member institutions.[24] Strict recruiting rules dictate the permitted conduct for member institutions, and the enforcement program professedly insures compliance.[25] Thus, the member institution is assured of at least "facial" competitive equality with other members of the NCAA.[26] This competitive parity theoretically enables a greater number of member institutions to achieve athletic success and increased athletic revenues. Second, the NCAA acts as the exclusive bargaining agent for its members concerning commercial opportunity.[27] The NCAA, on behalf of its members, contracts with television networks for the right to televise collegiate athletic contests.[28] For the university with a "big-time" athletic program, television revenues can exceed one million dollars per year.[29] The power of the NCAA to bargain exclusively with television

24. *See generally* NCAA CONST. art. 2, § 2(a), NCAA MANUAL, *supra* note 3, at 7-8; NCAA BYLAWS arts. 1, 6, NCAA MANUAL, *supra* note 3, at 42-54, 89-94; Comment, *supra* note 19, at 326.

25. *See* NCAA BYLAWS art. 1, NCAA MANUAL, *supra* note 3, at 42-54; NCAA ENFORCEMENT PROGRAM § 1, NCAA MANUAL, *supra* note 3, at 162-63. Although each member institution is contractually bound to comply with the NCAA rules and regulations, Trustees of State Colleges v. NCAA, 82 Cal. App. 3d 461, 471, 147 Cal. Rptr. 187, 192 (1978), there has been recent concern regarding the NCAA Enforcement machinery and the possible discriminatory application of sanctions. *See* NCAA HEARINGS, *supra* note 1, at 1. J. Brent Clark, a former enforcement representative of the NCAA, testified before a house subcommittee about the "selective enforcement" policy utilized by the NCAA. *Id.* at 10-11. Clark testified that many times he was under instructions "[n]ot to pursue the individual since it would involve one of the NCAA's leading moneymakers, a major basketball power. In this instance politics and balance sheets seemed to dictate that the NCAA take no action." *Id.* at 11.

26. *See* NCAA HEARINGS, *supra* note 1, at 11. Selective enforcement of rules violations and a reluctance to investigate and punish institutions that maintain successful athletic programs merely because of the revenue they produce contravene NCAA policy. See text & note 3 *supra*. The competitiveness among institutions is severely hampered when the successful programs are not scrutinized by the NCAA. *See* NCAA HEARINGS, *supra* note 1, at 8-12. Furthermore, the success of these programs, to the extent attributed to policy violations, perpetuates the commitment of these violations. *See generally* NCAA HEARINGS, *supra* note 1.

27. *See* G. HANFORD, *supra* note 1, at 85. The NCAA represents its member institutions in bargaining for television contracts. In 1977, the NCAA announced the negotiation of a four-year, $104 million contract with the American Broadcasting Company (ABC) to televise intercollegiate football. Wallace, *More Money to the N.F.L., More of the N.F.L. on T.V.*, N.Y. TIMES, Oct. 30, 1977, § 5 at 3, col. 1. In 1981, the NCAA signed a four-year television football contract with ABC and CBS (Columbia Broadcasting System) for a record $263.5 million. ARIZONA REPUBLIC, Aug. 9, 1981, § E at 1, col. 1; *see* Howard Univ. v. NCAA, 510 F.2d 213, 220 (D.C. Cir. 1975); Board of Regents of Univ. of Okla. v. NCAA, 561 P.2d 499, 505 (Okla. 1977).

28. See note 27 *supra*. *But see* ARIZONA REPUBLIC, *supra* note 27, at col. 1. The article discusses the College Football Association (CFA). The CFA is comprised of 61 major colleges and universities that are also members of the NCAA. *Id.* In August, 1981, the CFA's executive director signed, subject to approval by the 61 CFA colleges, a tentative four-year, $180 million television contract with NBC (National Broadcasting System). *Id.* The contract, not negotiated by the NCAA on behalf of its members, is against NCAA rules and regulations, and thus could lead to the eventual expulsion of the CFA schools from the NCAA. *Id.*; *see* EXECUTIVE REGULATIONS, reg. 2, § 16, NCAA MANUAL, *supra* note 3, at 152-53; NCAA CONST. art. 4, § 16, NCAA MANUAL, *supra* note 3, at 29-30. The CFA television contract allows a CFA member to make seven television appearances every two years, whereas the NCAA allows only six. ARIZONA REPUBLIC, *supra* note 27, at col. 1. Furthermore, the CFA contract guarantees *each* member at least $1 million and two regional television appearances for the four-year period. *Id.* On the other hand, the NCAA does not guarantee that each of its members will appear on television. *Id.* The advantage of the CFA contract is increased revenue for each CFA member institution. *See id.*

29. Comment, *supra* note 19, at 326. The commentator provides an example of the revenue that a successful football team can earn. In the 1974-75 season, Pennsylvania State University's

interests, the medium that offers the greatest potential for exposure and substantial monetary gain, weighs heavily against resigning membership from the association.[30]

Third, because virtually all postseason play is sponsored and regulated by the NCAA, one must be a member to participate in the financial remuneration associated with postseason tournaments.[31] In sum, resignation from membership in the NCAA would subject the renegade institution to a substantial risk of economic harm.

B. *The Enforcement Program*

For over forty years, the NCAA had existed as an advisory association prior to its engaging in the business of regulation.[32] The presence of elements such as gambling, financial aid to student-athletes, and the development of air transportation made a rules enforcement mechanism necessary.[33] The "Sanity Code" (Code) thus was adopted in 1948 to alleviate the proliferation of exploitive practices in the recruitment of student-athletes.[34] To enforce the Sanity Code, a Constitutional Compliance Committee was created to interpret the Code and investigate alleged violations.[35] The committee and the Code were not successful, however, due to the limited penalty the Code provided for violations—absolute expulsion from the NCAA.[36]

---

football team earned over $1,150,000 through television and a post-season bowl game appearance. *Id. See also* note 28 *supra*.

30. *See* Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 373 (8th Cir.) (Bright, J., concurring), *cert. denied*, 434 U.S. 978 (1977). "The University of Minnesota, we assume, retains the prerogative of dropping its membership in the NCAA although such remedy may be impractical in this era of college athletic competition, which through exhibition on television under NCAA arrangements produces financial rewards and other benefits for the member colleges and universities." *Id. See also* Board of Regents of Univ. of Okla. v. NCAA, 561 P.2d 499, 505 (Okla. 1977).

31. *See* NCAA CONST. art. 3, § 7, NCAA MANUAL, *supra* note 3, at 22; NCAA BYLAWS art. 5, § 6, NCAA MANUAL, *supra* note 3, at 82-87; Comment, *supra* note 19, at 326; note 29 *supra*.

32. *See* NCAA HEARINGS, *supra* note 1, at 1082. Originally, the NCAA Bylaws provided that membership in the NCAA was not contingent upon adherence to NCAA eligibility rules. *Id.*

33. *Id.* Besides the increased evidence of gambling and the fixing of games, increased mobility probably contributed the most to changing the complexion of the NCAA. *Id.* The development of air transportation made it feasible for athletic programs to recruit nationally, while intersectional scheduling of athletic events provided needed exposure for programs seeking national prominence. *Id.* Finally, an increase in post-season football games strengthened the competitiveness among institutions vying for an invitation. *Id.*

34. *See id.* at 1083. The Sanity Code prohibited member institutions from inducing athletes to attend their respective institutions by offering lucrative scholarships. *Id.* To be eligible for financial assistance, the recipient had to show need or academic excellence, not only athletic ability. *See id.*

35. NCAA EXECUTIVE REGULATION art. 4, § 1, NCAA YEARBOOK (1948) at 222-23, *reprinted in* NCAA PROCEEDINGS 1946-1951 [hereinafter NCAA YEARBOOK 1948]. The Constitutional Compliance Committee consisted of three members, each serving a staggered term. The committee was authorized to interpret the NCAA Constitution and determine whether particular conduct was forbidden by or consistent with the Constitution. The committee's rulings were final, subject only to reversal by the "vote of the Association in convention assembled." *Id.* at 222.

36. *See id.* art. 4, § 2, *Administrative Procedure*, NCAA YEARBOOK 1948, *supra* note 35, at 223-24. At the 1951 NCAA convention, the Constitutional Compliance Committee reported that, because the memberships of six institutions were not terminated although found to be in violation

The code was ultimately repealed in 1951, and the NCAA immediately took steps to initiate new enforcement procedures.[37] A Committee on Infractions was created,[38] and a range of authorized penalties for rules violations was instituted.[39] The Committee on Infractions operated by directing the investigation of alleged wrongdoers, analyzing the information obtained, making findings of fact, and recommending penalties.[40] The committee granted a hearing to institutions under investigation, if requested, and the committee's findings were reported to the NCAA Council, where final resolution rested.[41]

In 1971, member institutions voiced concern regarding the unfairness of the procedures and tactics by which the Committee on Infractions operated.[42] The major complaint was that the committee's involvement in the entire investigative and adjudicatory process resulted in a fusion of the roles of prosecutor-investigator and judge.[43] A special NCAA committee therefore was formed to study the enforcement procedures[44] and, in 1973, amendments were adopted.[45] As a result, the Committee on Infractions presently acts solely as the tribunal and a special investigative staff handles all facets of investigation.[46]

---

of NCAA rules, the work of the Compliance Committee was strongly deterred in its disciplinary role. *Proceedings*, 1951 NCAA Convention, *reported in* NCAA HEARINGS, *supra* note 1, at 1111-12.

37. NCAA HEARINGS, *supra* note 1, at 1084. At the 1951 convention, the members repealed the Sanity Code and created a committee to develop and recommend proposals for new enforcement rules and procedures. *Id.*

38. *Id.* In the interim, prior to the creation of the Committee on Infractions in 1954, the Membership Committee conducted the NCAA enforcement machinery. *Id.* The Committee on Infractions was composed of 3 members whose function was to gather facts for the NCAA Council. NCAA YEARBOOK 1953-1954 at 367, *reprinted in* NCAA PROCEEDINGS 1952-1955, [hereinafter NCAA YEARBOOK 1953-1954].

39. NCAA CONST. art. 4, § 6 (1953-1954) at 342-43, NCAA YEARBOOK 1953-1954, *supra* note 38. Penalties assessed to violating members other than termination or suspension were subject to approval by a two-thirds vote of the NCAA Council. *Id.*

40. OFFICIAL PROCEDURE OF THE NCAA COMMITTEE ON INFRACTIONS, NCAA YEARBOOK 1953-1954, at 367-68, *supra* note 38.

41. *Id.* Because the committee's recommendations were only advisory in nature, the NCAA Council, the final judge, granted the institution a right to a hearing before them as well. *Id.*

42. NCAA HEARINGS, *supra* note 1, at 1086-87. An ad hoc committee was formed to study the enforcement program and report back to the NCAA Council. *Id.*

43. *Id.*; *see* Marshall v. Jericco, Inc., 446 U.S. 238, 242 (1980); note 268 *infra*. *See also* Carey v. Piphus, 435 U.S. 247, 259-62 (1978); *In re* Murchison, 349 U.S. 133, 136 (1955).

44. NCAA HEARINGS, *supra* note 1, at 1086-87.

45. *Id.* at 1087. In 1973, when amendments were adopted that changed the complexion of enforcement rules and procedures, the NCAA Council took notice of the changes and warned its members that the NCAA would assume an increased role in regulating intercollegiate athletics.

> With the planned increased emphasis on the enforcement program and the resultant penalties which obviously will result, the Association undoubtedly will be subject to increased pressures, including legal action or the threat thereof, from parties directly involved. The Council will remain steadfast in its position that such pressures, or the threat thereof, will not deter the NCAA from adopting and applying governing legislation which is educationally sound in its purpose and in the best interests of intercollegiate athletics.

NCAA Council Report to 1973 Convention, *reprinted in* NCAA HEARINGS, *supra* note 1, at 1161-62.

46. See text & notes 48-58 *infra*.

The NCAA Council currently functions as the NCAA's appellate tribunal.[47] Today the principle characters in an NCAA investigation of a member institution for alleged violations of NCAA regulations are: (1) the Committee on Infractions; (2) the NCAA Assistant Executive Director for Enforcement; (3) the Investigative staff; and (4) the member institution.

C. *NCAA Enforcement Procedures*

An institution may become the target of an NCAA investigation through either of two methods. The first and most likely method is through complaints received by the NCAA.[48] Alternatively, the investigative staff itself may initiate the inquiry.[49] In either case, both the Committee on Infractions and the investigative staff consider the merits of the allegations concerning athletic mismanagement and determine whether the charges are worth pursuing.[50] After an institution has been targeted for investigation, the investigative staff has the primary responsibility for conducting the inquiry.[51] The investigative staff is responsible for determining the mode of investigation[52] and informing the member of the preliminary investigation.[53]

---

47. NCAA ENFORCEMENT PROGRAM §§ 5, 6, NCAA MANUAL, *supra* note 3, at 165-66.

48. *Id.* § 2(a), NCAA MANUAL, *supra* note 3, at 163.

> All allegations and complaints relative to a member's failure to maintain the academic or athletic standards required for membership, the member's violation of the legislation or regulations of the Association or the member's failure otherwise to meet the conditions and obligations of membership shall be received by the committee or the Association's executive director and channeled to the NCAA investigative staff.

Id.

49. *Id.* § 2(c), NCAA MANUAL, *supra* note 3, at 163, which provides: "The investigative staff also may initiate an investigation on its own motion when it has reasonable cause to believe that a member is or has been in violation of its obligations as a member of the Association."

50. *Id.* §§ 1(a)(1), 2(a), NCAA MANUAL, *supra* note 3, at 162, 163. The fact that the Committee on Infractions is active in screening complaints contravenes the proposition that the committee is an unbiased tribunal. See text & notes 59, 268-72 *infra*.

51. *See* NCAA ENFORCEMENT PROGRAM §§ 2(a), 12(a)(1), NCAA MANUAL, *supra* note 3, at 163, 171. The investigative staff handles the investigation of suspect institutions and reports its findings to the Committee on Infractions. See text & note 60 *infra*.

52. NCAA ENFORCEMENT PROGRAM § 12(a)(1), NCAA MANUAL, *supra* note 3, at 171. The investigative staff is to act in accordance with established policy and procedure. *Id.* § 2(d), NCAA MANUAL, *supra* note 3, at 163. Within the established procedure, the staff may tailor the investigation to the method most consistent with obtaining the needed information. *See id.* §§ 2(d), 12, NCAA MANUAL, *supra* note 3, at 163, 171.

53. *Id.* §§ 2(b), 12(a)(2), NCAA MANUAL, *supra* note 3, at 163, 171. Section 12(a)(2) provides:

> The enforcement staff shall submit letters to notify member institutions of preliminary inquiries into their athletic policies and practices when information has been developed to indicate that violations of the Association's governing legislation may have occurred which will require further in-person investigation. Such a letter shall advise the institution that the preliminary inquiry will entail the use of a field investigator; further, the letter shall state that in the event the allegations appear to be of a substantial nature, the committee will submit an official inquiry to the institution in accordance with the provisions of Section 3 or, in the alternative, the institution will be notified that the matter has been closed.

Id. at 171. Although § 12(a)(2) provides that the institution shall be informed of preliminary

Throughout the inquiry, the investigative staff is required to develop any information which would either corroborate or refute the alleged violations.[54] To carry out this duty, field investigators are clothed with an "officialness" analogous to that of a police detective.[55] The investigator may interview any individual, including student-athletes,[56] but the interviewee must be allowed to consult legal counsel when the interview turns on self-incriminatory matter.[57] Deals involving immunity may be offered the student-athlete who cooperates by providing information.[58] If the investigative staff is faced with an unusual problem during the investigation, the Committee on Infractions is to be consulted.[59]

The information derived from the investigation is presented to the Committee on Infractions.[60] If the committee determines that the in-

---

inquiries, the timeliness of proper notice is left unclear. Section 12(a)(2) provides for letter notification when information has been developed that "will require further in-person investigation." This last phrase implies that inquiry, in the form of in-person investigation, has already occurred. Thus, the institution is not necessarily notified prior to any inquiry, and may not be notified at all if subsequent in-person investigation is not required.

Furthermore, the time a preliminary investigation can last is also unclear. Section 2(b) provides in part that "[d]uring the period of the preliminary inquiry, the investigative staff shall inform the involved institution of the general status of the inquiry not later than six months after the initial notice." *Id.* at 163. This provision empowers the NCAA to conduct endless preliminary inquiries, subject only to a single notification six months after initial notice.

54. *Id.* § 12(a)(10), NCAA MANUAL, *supra* note 3, at 159.

55. *See id.* §§ 12(a)(4)-(7), NCAA MANUAL, *supra* note 3, at 171-72. The field investigator is empowered to conduct interviews and develop evidence relating to alleged violations by the institution. *Id.* § 12(a)(4), NCAA MANUAL, *supra* note 3, at 171. The investigators, in conjunction with the Committee on Infractions, may also grant limited immunity to student-athletes who provide needed information. *Id.* § 12(a)(7), NCAA MANUAL, *supra* note 3, at 172; see note 58 *infra*.

56. NCAA ENFORCEMENT PROGRAM § 12(a)(4), NCAA MANUAL, *supra* note 3, at 171.

57. *Id.* § 12(a)(5), NCAA MANUAL, *supra* note 3, at 171. "When an NCAA enforcement staff member conducts an interview which may develop information detrimental to the interests of the individual being questioned, that individual may be represented by his personal legal counsel throughout the interview." *Id.* Informing the student-athlete of his right to have legal counsel present, however, appears to be an "after the fact" conclusion. For instance, an investigator may ask the student-athlete a question, and the answer may incriminate the athlete. Because the matter is *now* detrimental to the athlete, the investigator *must* only now inform him of his right to have counsel present. The appearance of counsel at this point, however, does little to mitigate the incriminatory matters revealed by the student-athlete. *See id.*

58. *Id.* § 12(a)(7), NCAA MANUAL, *supra* note 3, at 172.

> At the request of the enforcement staff, the committee may grant limited immunity to student-athletes providing information in infractions cases when such individuals otherwise might be declared ineligible for intercollegiate competition based on the information they report, it being understood that such immunity shall not apply to the student-athletes' involvement in violations of NCAA regulations. . .

Id. Although this provision purports to be an advantage given the student-athlete, it is not. Even if the student-athlete is given immunity and his eligibility is not harmed, the information he provides may lead to severe penalties imposed upon the institution. A penalty such as probation, ineligibility for post-season tournaments and championships, or loss of television privileges can have the same detrimental effect on the athlete as ineligibility would have. In either case, the athlete will lose the opportunity for television appearances and post-season tournament exposure which greatly enhance his chances in securing a professional contract. *See* Comment, *supra* note 19, at 323-24. *See generally* D. MEGGYSEY, OUT OF THEIR LEAGUE 38-40 (1970).

59. NCAA ENFORCEMENT PROGRAM § 12(a)(1), NCAA MANUAL, *supra* note 3, at 171.

60. *See id.* § 3(a), NCAA MANUAL, *supra* note 3, at 163.

formation reflects violations which are "not of a serious nature,"[61] the committee may privately reprimand or censure the institution without benefit of a hearing.[62] When a reprimand or censure is not issued, however, the information is then reviewed by the assistant executive director for enforcement, who is to determine whether the charges warrant "official inquiry" status.[63] The NCAA rules, however, do not set forth the elements that constitute the threshold for justifying an official inquiry.[64]

When an official inquiry is deemed warranted, the assistant executive director for enforcement sends a letter to the chief executive of the suspect institution.[65] This letter fully informs the member institution of the matters under investigation by setting forth the various alleged violations.[66] The letter also demands full and complete disclosure of all information relevant to the inquiry, asking the institution to respond to each allegation separately.[67]

After the member institution's response is received by the NCAA, the member is then given a hearing conducted by the Committee on Infractions.[68] At the hearing, the institution may be represented by institution officials, legal counsel, particular institutional staff members requested by the committee, and student-athletes whose interests may be adversely affected by the violations.[69] Those individuals personally requested to appear by the NCAA may appear with benefit of counsel.[70]

Protocol for the hearing is simple.[71] The investigative staff and the member institution each select a representative to present their respec-

---

61. *Id.* The words "not of a serious nature" are not defined by the NCAA.

62. *Id.*

63. *Id.* § 3(b), NCAA MANUAL, *supra* note 3, at 163-64. The factors that warrant "official inquiry" status are not defined; however, § 12(b) attempts to provide assistance.

> The assistant executive director for enforcement may file a letter of official inquiry with the involved institution when the assistant executive director determines that *adequate evidence of a violation(s) of NCAA legislation* has been collected to warrant consideration of the matter by the Committee on Infractions and the involved institution.

Id. § 12(b), NCAA MANUAL, *supra* note 3, at 173 (emphasis added).

64. See note 63 *supra*.

65. NCAA ENFORCEMENT PROGRAM § 3(b), NCAA MANUAL, *supra* note 3, at 163-64. Section 3(b) provides in part:

> [B]y this letter, the assistant executive director for enforcement shall call upon the chief executive officer of the member involved for the disclosure of all relevant information and may require the appearance of the chief executive or a designated representative before the committee at a time and place which are mutually convenient, if such appearance is deemed necessary.

Id.

66. *Id.*

67. *Id.* §§ 3(c), 12(b)(3), NCAA MANUAL, *supra* note 3, at 164, 173.

68. *Id.* § 4(a), NCAA MANUAL, *supra* note 3, at 164.

69. *Id.* § 12(c)(5), (6), NCAA MANUAL, *supra* note 3, at 174.

70. *Id.* § 12(c)(6), NCAA MANUAL, *supra* note 3, at 174.

71. *See id.* §§ 4(a), 12(c), NCAA MANUAL, *supra* note 3, at 164, 174-75; text & notes 72-79 *infra*.

tive statements.[72] The scope of the information to be presented is limited to matters within the general scope of the investigation.[73] The investigative staff presents their information first, followed by the statement of the institution.[74] Documentary information may also be received, subject to the discretion of the Committee on Infractions.[75] Witnesses, however, may not be introduced or examined at the hearing.[76] Further, although the hearing is tape recorded,[77] the institution under review cannot obtain a copy of the recording or a copy of the transcript.[78] Additional procedure is dictated by the committee as it deems appropriate.[79]

The committee then retires for deliberation, where findings are made[80] and penalties imposed.[81] The determination by the committee

---

72. NCAA ENFORCEMENT PROGRAM § 12(c)(8), NCAA MANUAL, *supra* note 3, at 175.

73. *Id.* § 4(a), NCAA MANUAL, *supra* note 3, at 164.

74. *Id.* §§ 4(a)(1), (2), NCAA MANUAL *supra* note 3, at 164.

75. *Id.* § 4(a)(3), NCAA MANUAL, *supra* note 3, at 164.

76. *See id.* §§ 4(a)(3), 12(c)(5), NCAA MANUAL, *supra* note 3, at 164, 174. Oral presentation by the university representative and documentary evidence may be received, although the rules do not mention the reception of witnesses at the hearing. In addition, limited questioning is allowed at the hearing.

> The committee, at the discretion of any of its members, shall question representatives of the member or the investigative staff, as well as any other persons appearing before it, in order to determine the facts of the case. Further, under the direction of the committee, questions and information may be exchanged between and among all parties participating in the hearing.

Id. § 4(a)(4), NCAA MANUAL, *supra* note 3, at 164.

77. *Id.* § 12(c)(10), NCAA MANUAL, *supra* note 3, at 175.

> The proceedings of institutional hearings shall be tape-recorded by the committee. No additional verbatim recording of these proceedings will be permitted by the committee. An institution shall not be provided the committee's recording or a copy of the transcript of the hearing. However, subject to approval of the committee, members of the investigative staff and authorized representatives of the institution may be permitted to review the tape recording, it being understood a verbatim transcript of the recording shall not be taken during such a review.

Id. This provision has been widely criticized, leading one critic to say:

> The hearing is taped for the ostensible purpose of providing a record of the proceedings. The taping apparatus is controlled by the staff, which manages not to include informal remarks which are nevertheless heard by the committee. But strangely, only one transcription is made, which is maintained by the NCAA staff primarily for its own use in preparing documents for later appeals. The institution involved is allowed only to listen to the one tape, at the NCAA headquarters, in the presence of NCAA staff. Verbatim notes are prohibited. *One has to wonder why.*

NCAA HEARINGS, *supra* note 1, at 7 (testimony of J. Brent Clark, former NCAA enforcement representative) (emphasis added).

78. NCAA ENFORCEMENT PROGRAM § 12(c)(10), NCAA MANUAL, *supra* note 3, at 175; see note 77 *supra*.

79. NCAA ENFORCEMENT PROGRAM § 4(a)(5), NCAA MANUAL, *supra* note 3, at 164.

80. *Id.* §§ 4(b), 12(c)(12), NCAA MANUAL, *supra* note 3, at 164, 175. Section 4(b)(2) provides that "[t]he committee shall base its findings on information presented to it which it determines to be credible, persuasive and of a kind on which *reasonably prudent persons rely in the conduct of serious affairs*." *Id.* at 175 (emphasis added). Arguably, § 4(b)(2) contravenes traditional notions of fairness, for the information presented the Committee on Infractions is hearsay evidence. In the conduct of serious affairs, it is reasonable to assume that "reasonably prudent persons" do not rely on hearsay evidence, when other evidence is reasonably available. See text & notes 263-67 *infra*.

81. Some of the various penalties that may be imposed against an institution are:

(1) Reprimand and censure;

is then reported to the institution, which has fifteen days to invoke an appeal to the NCAA Council.[82] If the institution does not appeal, an announcement of the committee's decision is released to the press.[83] The press release sets forth the violations found and the penalty imposed.[84] The institution is prohibited from commenting publicly on the investigative outcome before the NCAA issues the press release.[85]

The investigative and enforcement procedures purport to accord a threshold measure of due process to member institutions under inquiry. The balance of this Note will attempt to establish the additional protection and fairness needed to align NCAA procedures with due process requirements of fundamental fairness. Before discussing particular changes in NCAA procedures, however, a constitutional basis for imposing change will be established.

II. JUDICIAL SCRUTINY OF NCAA PROCEDURES

A. *Judicial Intervention of NCAA Action*

The courts have generally practiced a policy of judicial non-interference in disputes between the NCAA and member institutions.[86]

---

(2) Probation for one year;
(3) Probation for more than one year;
(4) Ineligibility for one or more NCAA championship events;
(5) Ineligibility for invitational and post-season meets and tournaments;
(6) Ineligibility for any television programs subject to the Association's control or administration;
(7) Ineligibility of the member to vote or its personnel to serve on committees of the Association or both;
(8) Prohibition against an intercollegiate sports team or teams participating against outside competition for a specified period;
(9) Prohibition against the recruitment of prospective student-athletes for a sport or sports for a specified period;
(10) A reduction in the number of either initial or total financial aid awards (as defined by O.I. 600) which may be awarded during a specified period; . . . .

NCAA ENFORCEMENT PROGRAM § 7(b), NCAA MANUAL, *supra* note 3, at 166-67.

82. *Id.* § 5(b), NCAA MANUAL, *supra* note 3, at 165.

83. *Id.* § 5(d), NCAA MANUAL, *supra* note 3, at 165; *see also id.* §§ 12(d), (f), NCAA MANUAL, *supra* note 3, at 175-77. Section 12(d) sets forth the NCAA confidentiality policy, and § 12(f) sets forth procedures involving press releases.

84. *Id.* § 12(f), NCAA MANUAL, *supra* note 3, at 176-77.

85. *Id.*

86. *See* Colorado Seminary v. NCAA, 417 F. Supp. 885, 889 (D. Colo. 1976), *aff'd per curiam*, 570 F.2d 320 (10th Cir. 1978); Trustees of State Colleges and Univ. v. NCAA, 82 Cal. App. 3d 461, 471, 147 Cal. Rptr. 187, 192 (1978); see text & notes 92-129 *infra*. Associations generally contend that membership is voluntary. Thus, absent allegations of fraud, mistake, bad faith, collusion, or misapplication of associational rules, the courts should not interfere in its internal affairs. *See generally* Blende v. Maricopa County Medical Soc'y, 96 Ariz. 240, 393 P.2d 926 (1964); Trustees of State Colleges and Univ. v. NCAA, 82 Cal. App. 3d 461, 147 Cal. Rptr. 187 (1978); Crandall v. North Dakota High Sch. Activities Ass'n, 261 N.W.2d 921 (N.D. 1978); Mozingo v. Oklahoma Secondary Sch. Activities, 575 P.2d 1379 (Okla. App. 1978).

In language still applicable today, a Texas court summed up the rationale behind the reluctance of courts to interfere with associational activity.

> To say the courts may exercise the power of interpretations and administration reserved to the governing bodies of such organizations would plainly subvert their contractual right to exercise such power of interpretation and administration. So long as governing

This judicial non-interference stems from the constitutional guarantee of freedom to associate[87] and the notion that privacy in group association is virtually indispensable to preservation of this guarantee.[88] In addition, courts are reluctant to interfere with the affairs of a voluntary association, viewing membership as a privilege rather than a right.[89] Although judicial non-interference has limited the scope of review by the courts, the doctrine has not limited the power of the courts to entertain NCAA disputes.[90] Further, courts have nonetheless been more willing to assess improprieties concerning the relationship between the NCAA and the student-athlete than the inequities concerning the relationship between the NCAA and the member institution.[91]

> bodies do not substitute legislation for interpretation, do not transgress the bounds of reason, common sense, fairness, do not contravene public policy, or the laws of the land in such interpretation and administration, the courts cannot interfere.

Brotherhood of R.R. Trainmen v. Price, 108 S.W.2d 239, 241 (Tex. Civ. App. 1937). Commentators have explained this policy of non-interference with various theories. Under the "group purpose" test, for example, an association's activities are justified only if deemed necessary in order to comply with the group's purpose. 76 HARV. L. REV. 983, 996-97, 1056-57 (1963).

87. NAACP v. Alabama, 357 U.S. 449, 460 (1958); see note 86 *supra*.

88. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 & n.42 (1977); Buckley v. Valeo, 424 U.S. 1, 64 (1976); NAACP v. Alabama, 357 U.S. 449, 462 (1958). In *NAACP v. Alabama*, the Court stated that " [i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment. . . ." *Id.* at 460. The *NAACP* Court further reasoned that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association. . . ." *Id.* at 462.

The importance that privacy plays in an association can be gleaned from the relationships among the members and the associational goals. For instance, in *NAACP v. Alabama*, the privacy of the association was threatened when the state ordered the NAACP to produce its membership rolls. *Id.* at 451. The NAACP is an association operating under the shared commitment principle. See text & notes 97-98 *infra*. The NAACP's purpose is to promote equality of rights and laws, and to advance the interests of colored citizens in all endeavors that may encounter. 357 U.S. at 451 n.1.

Conversely, the NCAA, if subjected to a due process challenge, would have to produce its policies and rules governing enforcement procedures. NCAA ENFORCEMENT PROGRAM, NCAA MANUAL, *supra* note 3, at 162-77. Because these rules are disclosed to the public, the NCAA's privacy cannot be said to be infringed. Furthermore, although the NCAA advances as its purpose the attainment of amateurism, this purpose has given way to a focus upon commercial opportunity. See text & notes 123-26 *infra*. Thus, although associational privacy was important in *NAACP v. Alabama*, its importance diminishes when viewed from the context of an NCAA dispute.

89. Marjorie Webster Jr. College v. Middle States Ass'n, 302 F. Supp. 459, 469 (D.D.C. 1969), *cert. denied*, 400 U.S. 965 (1970). This rationale, however, loses persuasiveness when the association assumes monopoly power in the particular area of concern. 302 F. Supp. at 469. When membership in an association becomes necessary to insure success, judicial intervention may become necessary as well. *Id.*; Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 591-92, 170 A.2d 791, 796-97 (1961); *see* Note, *supra* note 86, at 993-94.

90. *See generally* Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), *aff'd per curiam*, 570 F.2d 320 (10th Cir. 1978); Trustees of State Colleges and Univ. v. NCAA, 82 Cal. App. 3d 461, 147 Cal. Rptr. 187 (1978).

91. Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), *aff'd per curiam*, 570 F.2d 320 (10th Cir. 1978). The district court recognized a property interest students have in college athletics and their interest in future professional careers. *Id.* at 895 & n.5. Nevertheless, precedent precluded the court from holding that such an interest existed. *Id.* at 895-96. In the same opinion, the court summarily dismissed the university's claim of deprivation of liberty which was based upon the stigma resulting from the NCAA investigation and penalties. *Id.* at 896. The court termed the stigma "alleged government defamation," which did not violate any liberty or property right. *Id.*; *see* Paul v. Davis, 424 U.S. 693, 701 (1976).

Judicial interference in NCAA activities is warranted in light of this Note's examination of two principles. First, the member institution has the right to choose its own associates and to fashion its associational activities free of outside interference.[92] Second, the constitutional requirement of due process may serve to bar the association from proceeding against the member institution unfairly.[93] Courts generally justify a non-interference position, however, by claiming that the voluntary association confers upon the member the chance to join or leave the association at will.[94] Conceding this point, this Note will demonstrate that member institutions of the NCAA lack this decisionmaking power and, consequently, judicial interference is warranted.

A framework for understanding the lack of voluntary and association-like activity of the NCAA is suggested by Lon Fuller.[95] Fuller argues that associational activity is based on two models: (1) shared commitment, and (2) legal principle.[96] The shared commitment model focuses upon a traditional association held together by the dedication of its members to developing common interests and the rewards that flow from the common pursuit of those interests.[97] When an association operates under the shared commitment model, it is truly functioning as a voluntary association and interference by outside influence is not welcome.[98] The legal principle model, on the other hand, focuses

92. *See* NCAAP v. Alabama, 357 U.S. 449, 460 (1958); Shelton v. NCAA, 539 F.2d 1197, 1198 (9th Cir. 1976); Calabrese v. Policemen's Benevolent Ass'n, 157 N.J. Super. 139, 146-47, 384 A.2d 579, 583 (1978).

93. *See* Pavey v. University of Alaska, 490 F. Supp. 1011, 1014 (D. Alaska, 1980); Blende v. Maricopa County Medical Soc'y, 96 Ariz. 240, 245, 393 P.2d 926, 930 (1964); Quimby v. School Dist. No. 21, 10 Ariz. App. 69, 72, 455 P.2d 1019, 1022 (1969). In *Quimby*, the Arizona Supreme Court recognized that the fourteenth amendment applies to non-governmental agencies such as the Arizona Interscholastic Association (AIA). In *Pavey*, the district court conferred upon university students the "right to engage in intercollegiate athletics." 490 F. Supp. at 1014. *See generally* McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008, 1010 (S.D. Ill.), *aff'd*, 506 F.2d 1404 (7th Cir. 1974); Marjorie Webster Jr. College v. Middle States Ass'n, 302 F. Supp. 459, 469-70 (D.D.C. 1969); Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 596-97, 170 A.2d 791, 799 (1961).

94. *But see* Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 373 (8th Cir.) (Bright, J., concurring), *cert. denied*, 434 U.S. 978 (1977); see note 30, *supra*.

95. Fuller, *Two Principles of Human Behavior*, in VOLUNTARY ASSOCIATIONS 3 (1969); see text & notes 96-104 *infra*.

96. Fuller, *supra* note 95, at 6. Fuller warns that he is speaking of principles of association and not the different forms of associations. *Id.* In the interest of clarity, however, the word "model" will be substituted for the word "principle" as used by Fuller.

97. *Id.* at 7. The shared commitment model is similar to the group purpose notion espoused by courts and commentators. See 76 HARV. L. REV. 983, 996-97, 1056-57 (1963). Fuller, however, differentiates shared commitment from group purpose on the grounds that a commitment does not imply a desired end. Fuller, *supra* note 95, at 6. Shared commitment is not an ends-oriented concept; rather, the important element is the member's commitment to the association's continued existence. *Id.* at 7.

98. *See id.* at 6-7. Non-interference by outside influence is perhaps most warranted by the shared commitment model, since members of the association are interested only in the commitment and rules to govern activity along the way are unimportant and peripheral. *See id.* at 7. Interference, judicial or otherwise, could only be warranted when the rights of non-members are or may be jeopardized. *Id.* at 7, 12.

upon a regimented association held together by formal rules and procedures.[99] The legal principle model reflects the formality that serves to govern associational relationships.[100]

Fuller does not suggest that these two models operate to the exclusion of one another; to the contrary, the models interact and reinforce each other.[101] When trouble erupts within the association, the tension between the two models surfaces and a new balance is struck.[102] Fuller suggests that the legal principle model will eventually predominate, given the sociological impediments an association faces.[103] As the traditional "shared commitment" association develops toward the legal principle model, due process concerns take effect, and the courts become more willing to expand jurisdiction to review the internal affairs of the association.[104]

The seminal case of *Falcone v. Middlesex County Medical Society*[105] illustrates the breakdown of the shared commitment model in a professional association. In *Falcone*, the propriety of terminating a doctor's membership in a medical association was at issue.[106] Dr. Fal-

99. *Id.* at 6. When formalized rules and procedures governing the relationship between a member and the association become integral to the association, the association begins moving further away from their shared commitment. *Id.* at 12-14. Associations with a well defined internal structure fall within the legal principle model. *Id.* at 9.

100. *Id.* at 8.

101. *Id.* at 8-9. Fuller suggests that a balance between the two models is not damaging, and that all associations will operate under both models. *Id.* at 12. Fuller posits eight laws that govern the interrelations between the two models and delineates their effect on the association. *Id.* at 12-14. The first four laws deal with shared commitment and its tendency to dominate an association in its formation. *Id.* at 12. The domination will exist despite the formality the internal structure imposes. *Id.* During the period that the shared commitment principle is pervasive, the association will be hostile to all other influence, among them, internal splinter groups dominated by the same model. *Id.* Fuller cities as an example the Vatican, and the various Catholic orders comprising it. *Id.*

Laws five and six deal with the situations encountered when the association begins to be dominated by the legal principle model. *Id.* at 13. In this situation, substantive commitments and formalized rules begin to overshadow the members' dedication toward common interests. *Id.* During this period, the legal principle so dominates that the principle of shared commitment is insignificant. *Id.* A crisis may serve to restore the commitment to its original place in the association, but the restoration is only temporary; after the crisis passes, the legal principle re-emerges. *Id.*

Finally, laws seven and eight suggest that once the legal principle dominates, other factors serve to perpetuate its domination. *Id.* at 13-14. Modern society contributes the other factors by which the laws governing the association become barely distinguishable from the laws of the state. *Id.* at 14-19. Many times associations develop laws and procedures similar to those of the state to insure non-interference by the courts. *See id.* at 20-21.

102. *Id.* at 11.

103. *Id.* at 13-14; see note 101 *supra* (discussion of laws seven and eight in Fuller's analysis).

104. *Fuller*, *supra* note 95, at 14. Where the legal principle has so over-dominated, Fuller characterizes the associational atmosphere as frigid. *Id.* at 15-21. The association no longer cares what a member thinks or believes. *Id.* Instead, the members' actions become important, and the notion that "one must act in accordance with association rules, at all costs" prevails. *Id.* at 21. Recognizing that this is the state of most associations today, Fuller, in his eighth law, calls upon the courts to grant review of associational activity to protect the individual members from the autonomous association they have created. *Id.* at 20-21.

105. 34 N.J. 582, 170 A.2d 791 (1961).

106. *Id.* at 588, 170 A.2d at 793-94.

cone, an associate member of the medical association, was declined active member status by virtue of the association's use of unwritten requirements in considering his membership application.[107] After exhausting his administrative remedies,[108] Dr. Falcone sought a judicial order compelling the association to admit him as a member.[109] A New Jersey trial court issued the requested relief, and the New Jersey Supreme Court affirmed.[110]

Among the policy reasons articulated by the *Falcone* court to justify judicial non-interference in associational activity,[111] the nature of the relationship among association members weighed heavily.[112] The *Falcone* court recognized that, in general, the intimacy of the relationship among all members of the modern medical association in issue was gone.[113] There also were no individual intimate relationships among members in the defendant association.[114] Further, the goal of the defendant association had disappeared and a monopolistic objective had surfaced.[115] The *Falcone* court therefore felt obliged, given the changing character of associations, to scrutinize the defendant association's activity.[116]

The NCAA, upon formation in 1906, could have been described correctly as an association based upon the shared commitment model. The NCAA originally was committed to enhancing the competitive atmosphere of collegiate sports.[117] Although few procedural guidelines were present, the association members were successful in meeting their

107. *Id.* at 586, 170 A.2d at 793-94. Although Dr. Falcone was an associate member of the medical society, the bylaws of the society provided that a doctor could not serve as an associate for more than two years. *Id.* at 586, 170 A.2d at 793. Dr. Falcone, holding an M.D. degree, was educated at a College of Osteopathy and studied seven months at an approved medical college. Id. at 584-85, 170 A.2d at 793. Evidence produced at trial established that the medical society applied an unwritten membership requirement of four years study at an A.M.A. (American Medical Association) sanctioned school. *Id.* at 586, 170 A.2d at 794. This unwritten requirement precluded Dr. Falcone's membership, though his application met all the written criteria provided in the association's bylaws. *Id.*

108. *Id.* at 588, 170 A.2d at 795.

109. Id.

110. *Id.* at 589, 598, 170 A.2d at 795, 800.

111. *Id.* at 596-97, 170 A.2d at 799. The court reasoned that hesitation to review was justified because associations were generally religious or social in nature, involving intimate relationships between members. *Id.* In determining whether judicial review was proper, the *Falcone* court looked to the defendant medical association's monopolistic power over the use of hospital facilities and to public policy. *Id.*

112. *Id.*

113. *Id.* at 596, 170 A.2d at 799. When courts deal with associational activity today, the associations are usually trade and professional groups which wield monopolistic control over their members. *Id.* Hence, review of associational disputes is justified. *Id.*; *see* Fuller, *supra* note 95, at 20-21. *See also* Note, *supra* note 19, at 909-11.

114. 34 N.J. at 596, 170 A.2d at 799.

115. *Id.* at 597, 170 A.2d at 799.

116. *Id.*

117. *See* NCAA HEARINGS, *supra* note 1, at 1. The NCAA was formed under the support and guidance of President Theodore Roosevelt. *Id.* The initial aim of the Association was to reduce the number of injuries that resulted from college football. *Id.*

goals. The shared commitment ideal of competitive collegiate sports, however, began to give way to the legal principle model upon the adoption of the Sanity Code.[118]

Since 1950, the NCAA has moved increasingly toward legal principle dominance, and can correctly be termed a working example of this model today.[119] The association is governed by complex rules and procedures, with enforcement and interpretation of the rules left to the internal machinery of the association.[120] As with the professional association in *Falcone*, no intimate relationships among members exist and the association has finally lost touch with its articulated commitment.[121] Rather than promoting the amateur ideal in collegiate athletics,[122] the NCAA's ideal is now directed toward obtaining a greater share of the entertainment dollar.[123]

Moreover, the NCAA's power over its members is monopolistic

---

118. *See* NCAA CONST. art. 3, § 5, NCAA YEARBOOK 1948, at 213, *supra* note 35. The Sanity Code of 1948 adopted measures governing financial aid and athletic recruiting. *Id.* These measures were compulsory for all members and non-compliance resulted in expulsion. See text & note 36 *supra*.

119. The NCAA Manual governs all areas of intercollegiate athletic activity. NCAA MANUAL, *supra* note 3. Interpersonal relationships among the members or between members and the NCAA staff are virtually nonexistent. The NCAA is much like a large corporation, where shareholder contact only occurs at the annual meeting. *See also* W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 166-68 (5th ed. 1980).

120. *See* NCAA CONST. art. 6, § 2, NCAA MANUAL, *supra* note 3, at 38; NCAA ENFORCEMENT PROGRAM, § 1, NCAA MANUAL, *supra* note 3, at 162-63.

121. See text & note 122 *infra*.

122. *See* text accompanying note 21 *supra*; NCAA CONST. art. 2, § 26, NCAA MANUAL, *supra* note 3, at 7-8. The express policy of the NCAA is the maintenance of amateurism. *Id.* An example of the NCAA's going beyond this policy is Bylaw art. 7, § 1, which limits the number of coaches that a member institution can employ in intercollegiate sports programs. NCAA BYLAWS art 7, § 1, NCAA MANUAL, *supra* note 3, at 95-97. The NCAA's concern with limiting coaching positions evidences a shift in ideals from amateurism to commercialism. *See* Comment, *Judicial Review of the NCAA's Bylaw 12-1*, 29 ALA. L. REV. 547, 561-62 (1978). Further evidence of the NCAA's loss of its original objectives is the commercialism of intercollegiate athletics. The NCAA is actively involved in securing television rights and in marketing a variety of commercial products such as athletic shoes, t-shirts, golf shoes and caps, windbreakers, and bathing suits. NCAA HEARINGS, *supra* note 1, at 540 (testimony of Lana Tyree, attorney).

But see C. KENNEDY, COLLEGE ATHLETICS (1925). Kennedy offers two factors that evidence the noncommercial nature of college athletics, in particular, football. *Id.* at 41. The first factor is, in what manner is the money taken in? *Id.* Kennedy claims that gate receipts are ancillary to the "thrilling interest" that football games hold for the spectator. *Id.* The second factor is the "graduate's spirit of interest in, and loyalty to, the institution at which his undergraduate years were spent." *Id.* at 42. Kennedy, believing in the value of college sports, justifies large expenditures on football by finding that football alone "finances our whole modern system of intercollegiate sport." *Id.* at 47.

123. *See* NCAA HEARINGS, *supra* note 1, at 540-41. The NCAA's commercialism is ironic in that the NCAA has a free hand to promote and advertise products, while student-athletes are prohibited from this "exploitation." *See* EXECUTIVE REGULATIONS, reg. 2, § 17, NCAA MANUAL, *supra* note 3, at 153. Indeed, one witness, testifying before the house subcommittee, stated that the NCAA

> has actively and aggressively exploited collegiate football and thrust itself full speed into the commercial marketplace. The NCAA is a massive, commercial, tax-exempt empire which does not radically distinguish itself from professional athletics, . . . By controlling and monopolizing collegiate competition, the NCAA only assures that the association and its institutions reap the financial benefit.

NCAA HEARINGS, *supra* note 1, at 541 (testimony of Lana Tyree).

and its actions are no longer distinguishable from those of big business.[124] Like the professional association in *Falcone*, which possessed a virtual monopoly over hospital care facilities,[125] the NCAA possesses a virtual monopoly over football television programming and postseason tournament play.[126] The *Falcone* court found that public policy dictated that a medical association not have unbridled power when that association possesses monopolistic power over its members.[127] Unlike *Falcone*, however, the NCAA's power remains unbridled, although the traditional voluntary nature of the NCAA has changed to that of monopolistic and economic control.

Thus, because of the NCAA's changed emphasis and the association's firm entrenchment into what Lon Fuller characterizes as the legal principle model, the NCAA must no longer be viewed as a voluntary association.[128] Consequently, the activities of the NCAA should not be foreclosed from judicial scrutiny.[129] Once subject to judicial scrutiny, due process concerns may protect the member institution from being treated unfairly.[130] Merely because the courts are willing to review associational activity, however, does not confer upon them the power to do so.[131] If a member institution wishes to assert a constitutional claim against the NCAA in state or federal court, state action must first be found to be present.[132]

---

124. Board of Regents of Univ. of Okla. v. NCAA, 561 P.2d 499, 505 (Okla. 1977). The court said that the "NCAA is a virtual monopoly engaged in interstate commerce. . . . The NCAA sanctions all bowl games and NCAA members may not participate in a bowl unless it has NCAA sanction. It is an economic necessity that member schools belong to the NCAA regardless of the fact that it is a voluntary organization. . . ." *Id.* (footnote omitted).

125. 34 N.J. 582, 597, 170 A.2d 791, 799 (1961).

126. See text & notes 27-28 *supra*; Board of Regents of Univ. of Okla. v. NCAA, 561 P.2d 499, 505 (Okla. 1977); NCAA BYLAWS art. 4, § 6, NCAA MANUAL, *supra* note 3, at 80-84; EXECUTIVE REGULATIONS, reg. 2, § 16, NCAA MANUAL, *supra* note 3, at 152-53.

127. 34 N.J. 582, 596-97, 17 A.2d 791, 799 (1961).

128. See text & notes 99-100 *supra*. Cases upholding judicial intervention into private associations when matters of economic and public interests are at issue include Van Daele v. Vinci, 51 Ill. 2d 389, 394, 282 N.E.2d 728, 731, *cert. denied sub nom.* Certified Grocers of Ill., Inc. v. Sparkle Food Center, Inc., 409 U.S. 107 (1972); Grempler v. Multiple Listing Bureau, 258 Md. 419, 426-27, 266 A.2d 1, 5 (1970); *see* Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Ass'n, 344 F.2d 860, 863-64 (9th Cir. 1965); Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 597, 170 A.2d 791, 799 (1961).

129. See authorities cited in note 128 *supra*.

130. See text & note 93 *supra*.

131. Because most lawsuits challenging NCAA actions are constitutional in nature, the courts must find state action before subjecting NCAA actions to constitutional scrutiny. *See* Civil Rights Cases, 109 U.S. 3, 13 (1883); Howard Univ. v. NCAA, 510 F.2d 213, 217 (D.C. Cir. 1975); Buckton v. NCAA, 366 F. Supp. 1152, 1156 (D. Mass. 1973).

132. *See* Howard Univ. v. NCAA, 510 F.2d 213, 217 (D.C. Cir. 1975); Parish v. NCAA, 506 F.2d 1028, 1031-33 (5th Cir. 1975); Associated Students, Inc. of Cal. State Univ. (Sacramento) v. NCAA, 493 F.2d 1251, 1254-55 (9th Cir. 1974). *See generally* Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492, 494-95 (1st Cir. 1977).

B. *The NCAA and State Action*

A threshold question in constitutional scrutiny of an activity is the degree of the state involvement in the activity being constitutionally challenged.[133] In determining whether a sufficient nexus exists between the state and the challenged activity, two theories are commonly posited to justify the presence of state action.

The first theory is one of entanglement. Generally, a private activity will be treated as state action when it is subject to a substantial degree of state control.[134] Thus, if all member institutions of the NCAA were state universities and colleges, the NCAA's actions would surely be said to constitute state action.[135] State universities, however, constitute only one half of the membership of the NCAA.[136] These state-supported institutions, however, play a substantial role in the association and provide most of the working capital.[137] Although the Supreme Court has yet to address the degree to which public interests must outweigh private interests before an association's activities constitute state action,[138] the Court has commented on factors evidencing state action.[139] The Court has recognized that conduct which was

133. *See* United States v. Guest, 383 U.S. 745, 755-56 (1966).

> [T]he involvement of the State need [not] be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the state was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.

Id. See also Peterson v. City of Greenville, 373 U.S. 244, 247-48 (1963); Shelly v. Kraemer, 334 U.S. 1, 13-15 (1948); Note, *supra* note 19, at 916.

134. *See, e.g.*, Evans v. Newton, 382 U.S. 296, 299 (1966); Pennsylvania v. Board of Trustees of City Trusts, 353 U.S. 230, 231 (1957); Williams v. Howard Johnson's Restaurant, 268 F.2d 845, 847 (4th Cir. 1959). In *Pennsylvania v. Board of Trustees* (Girard College Case), a city board acted as trustee in administering trust funds of a will. 353 U.S. at 231. As trustee, the board acted in what would ordinarily be a private capacity. The Court found state action, however, because the board was a state agency. *Id.* Status as a state agency pervaded other roles the board assumed. *See id.*

135. *See* Howard Univ. v. NCAA, 510 F.2d 213, 217, 220 (D.C. Cir. 1975). "If the NCAA was composed of solely public institutions, clearly state action would be present. In contrast, if the NCAA had no public members, its actions would be private for constitutional purposes." *Id.* at 220.

136. See note 2 *supra*. The unique question involved in assessing whether NCAA action constitutes state action centers around the composition of the association. Private institutions as well as public institutions make up the NCAA. Howard Univ. v. NCAA, 510 F.2d 213, 214 (D.C. Cir. 1975). Clearly, the public state-supported institutions are invested with state interests. *Id.* at 220; Note, *supra* note 19, at 918. The question could then become one of whether, if private institutions provide 51% of the membership and public institutions only 49%, the activity of the NCAA can therefore be held to constitute state action. *See* Howard Univ. v. NCAA, 510 F.2d at 220; Parish v. NCAA, 361 F. Supp. 1214, 1219 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975) ("Although the college involved here is private, this is of no assistance to defendant because of the large number of public colleges and universities which are members").

137. Howard Univ. v. NCAA, 510 F.2d 213, 219 (D.C. Cir. 1975).

138. See note 136 *supra*.

139. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-55 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-24 (1961). In *Jackson*, Metropolitan Edison Co., a privately owned corporation, was alleged to have engaged in state action. 419 U.S. at 347-48. The Metropolitan utility company was, in many business aspects, subject to extensive state regulation. *Id.* at 350. The pervasive state regulation of a business, however, does not necessarily convert private

"[f]ormally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[140]

Indeed, private colleges and universities have been recognized as maintaining a close relationship with the state. First, the state retains a traditional interest in education, public or private.[141] In addition, participation in intercollegiate athletics is an integral part of the overall academic process.[142] Second, private schools, although not per se state supported, receive state subsidies in the form of financial support.[143] Third and perhaps most compelling is the fact that private schools award degrees to graduating students.[144] The authority to grant degrees emanates from the state, and not the university.[145] The combination of all of these factors creates a "substantial and pervasive" entanglement between the state and the NCAA, supporting the invocation of a fourteenth amendment challenge when the NCAA has acted against a member institution, whether that member is private or

---

action to state action for purposes of the fourteenth amendment. *Id.* The *Jackson* Court concluded that "the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351; *see* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972). Two important factors in *Jackson* were: (1) Whether the exercise of power by the entity was a power delegated by the state which is traditionally associated with sovereignty; and (2) whether there was a symbiotic relationship between the state and the private entity. 419 U.S. at 353, 357.

The symbiotic relationship referred to in *Jackson* was evident in Burton v. Wilmington Parking Auth., 365 U.S. 715, 724-25 (1961). In *Burton*, an equal protection violation was alleged against a local coffee shop. *Id.* at 716. The coffee shop was located within an automobile parking building, lessor of which was a state agency. *Id.* The Court, finding state action present, found a symbiotic relationship between the lessor (state agency) and lessee (coffee shop) and thus allowed the constitutional challenge to continue. *See id.* at 724-26. The Court, finding it impossible to fashion and apply a precise maxim, stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722.

140. Evans v. Newton, 382 U.S. 296, 299 (1966); *accord*, Gilmore v. City of Montgomery, 417 U.S. 556, 565 (1974); Fortin v. Darlington Little League, Inc., 514 F.2d 344, 347 (1975).

141. Parish v. NCAA, 506 F.2d 1028, 1032 (5th Cir. 1975); Buckton v. NCAA, 366 F. Supp. 1152, 1156-57 (D. Mass. 1973). Institutions of higher education are usually supported in some way by the state. *Id.* The state has a strong interest in providing quality higher educational instruction after it has expended the money to provide primary and high school instruction. *See* Parish v. NCAA, 361 F. Supp. 1214, 1219 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975). Furthermore, intercollegiate athletics provide entertainment to state citizens. C. KENNEDY, *supra* note 122, at 42. Finally the public policy of the state arguably supports this activity as providing a patriotic and supportive base for the state. *See id.* at 48.

142. *See* Parish v. NCAA, 506 F.2d 1028, 1032 (5th Cir. 1975); Kelley v. Board of Educ., 293 F. Supp. 485, 493 (M.D. Tenn. 1968); Dumez v. Louisiana High Sch. Athletic Ass'n, 334 So. 2d 494, 501 (La. App. 1976). The *Dumez* court considered extra-curricular athletics an integral part of the academic process, despite the existence of a voluntary supervisory organization. *Id.*

143. Note, *supra* note 19, at 919 & n.117.

144. Note, *Private Government On the Campus-Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1384 (1963).

145. *Id.* The commentator notes that in the majority of states, the power to confer degrees is vested with the state. *Id.* at 1384 n.119. Private schools are often confirmed by name in state constitutions as having the power to confer degrees. *Id.* at 1384. Also, for purposes of licensing with state or civil service agencies, states recognize degrees conferred by private universities in considering the applicant's qualifications. *Id.* at 1384 n.118.

public.[146]

The second state action theory is that of public function. Essentially, when a private entity has assumed performance of a traditional state function, that entity has stepped into the state's shoes and their activities are termed "state action."[147] By regulating intercollegiate athletics, the NCAA has undertaken a "traditional state function."[148] The state has traditionally administered education, and athletics constitutes a portion of the educational process.[149] Furthermore, the NCAA was originally established under the guise of government.[150] The government had an interest in instituting guidelines to protect student-athletes.[151] The NCAA, by regulating intercollegiate athletics, ostensibly strives to protect the student-athlete, and in this manner administers the state function of preserving and protecting the health, morals, and safety of its citizenry.[152]

The NCAA's conduct in regulating educational activities in private and state institutions has thus become "so impregnated with governmental character" as to be properly termed "state action."[153] In

146. Howard Univ. v. NCAA, 510 F.2d 213, 220 (5th Cir. 1975); Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 858-59 (E.D. La. 1962), *vacated and approved on appeal of new decree*, 306 F.2d 489 (5th Cir. 1962). In *Guillory*, Tulane University argued that it was exempt from the equal protection clause by virtue of its private nature. 203 F. Supp. at 858. Judge J. Skelly Wright dismissed this argument:

> At the outset, one may question whether any school or college can ever be so "private" as to escape the reach of the Fourteenth Amendment. In a country dedicated to the creed that education is the only "sure foundation ** of freedom," "without which no republic can maintain itself in Strength" institutions of learning are not things of purely private concern. . . . No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by public or private institution.

Id. at 858-59 (citations omitted).

147. *See, e.g.*, Food Employees v. Logan Valley Plaza, 391 U.S. 308, 325 (1968); Marsh v. Alabama, 326 U.S. 501, 506 (1946); Note, *supra* note 19, at 919.

148. Parish v. NCAA, 506 F.2d 1028, 1032-33 (5th Cir. 1975); *see* Evans v. Newton, 382 U.S. 296, 299 (1966); Howard Univ. v. NCAA, 510 F.2d 213, 218 n.6 (D.C. Cir. 1975); Buckton v. NCAA, 366 F. Supp. 1152, 1156 (D. Mass. 1973). In *Evans*, the Court concluded that "[w]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." 382 U.S. at 299. The Court further stated that this test is merely a generalization, requiring one to look to all the factors and circumstances to apply the test. *Id.* In *Evans*, the mere substitution of trustees for municipal control did not serve to transfer a park from the "public to the private sector." *Id.* at 301. The *Parish* court, after seemingly applying the *Evans* rationale, stated that "[t]he NCAA by taking upon itself the role of coordinator and overseer of college athletics—in the interest both of the individual student and of the institution he attends—is performing a traditional governmental function." 506 F.2d at 1032-33, *citing* Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 347 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946).

149. See note 142 *supra*; NCAA v. Califano, 622 F.2d 1382, 1389 (10th Cir. 1980); 45 C.F.R. § 86.31 (1980). In *NCAA v. Califano*, the court equated "education program" with "intercollegiate sports program." 622 F.2d at 1389.

150. See note 117 *supra*.

151. *Id.*

152. *See* Parish v. NCAA, 506 F.2d 1028, 1032-33 (5th Cir. 1975). *See also* Western Turf Assoc. v. Greenberg, 204 U.S. 359, 363 (1907); Ambrosini v. United States, 187 U.S. 1, 7 (1902).

153. *See* Evans v. Newton, 382 U.S. 296, 299 (1966). In suits between the NCAA and member institutions, when the facts are sifted and weighed, the court should find state action. The public

fact, in those cases that have challenged NCAA action, the finding of state action has been consistently upheld.[154] Further, because the actions of the NCAA are tantamount to state action,[155] the NCAA acts "under color of state law" and is therefore a proper defendant in an action under 42 U.S.C. § 1983.[156] Despite this fact, however, the question remains whether colleges and universities are the proper parties to bring an action under § 1983 seeking redress for penalties imposed by the NCAA.

C. *The Public University as a Proper Party Plaintiff Under § 1983*

To be a proper party plaintiff in a § 1983 action, one must be "any citizen of the United States or other person within the jurisdiction

---

institutions which are members of the NCAA are state funded, and the private institutions which are members of the NCAA also receive state and federal economic assistance. *See* Buckton v. NCAA, 366 F. Supp. 1152, 1157 (D. Mass. 1973). State assistance is important in injecting state action into otherwise private action. *See* Cooper v. Aaron, 358 U.S. 1, 19 (1958); Buckton v. NCAA, 366 F. Supp. at 1156-57. Thus, when the NCAA deals with any member institution, whether public or private, their actions become "[s]o entwined with governmental policies . . . as to become subject to the constitutional limitations placed upon state action." *See* Evans v. Newton, 382 U.S. at 299.

154. *See* Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 364-65 (8th Cir.), *cert. denied*, 434 U.S. 978 (1977); Rivas Tenorio v. Liga Atletic Interuniversitaria, 554 F.2d 492, 495 (1st Cir. 1977); Parish v. NCAA, 506 F.2d 1028, 1031-33 (5th Cir. 1975); Associated Students, Inc. of Cal. State Univ. (Sacramento) v. NCAA, 493 F.2d 1251, 1254-55 (9th Cir. 1974). *But see* McDonald v. NCAA, 370 F. Supp. 625, 629-32 (C.D. Calif. 1974). The *McDonald* court reasoned that NCAA actions are not the "functional" or "sovereign equivalent" of acts of a sovereign. *See id.* at 631. The court further reasoned that the NCAA cannot act without the concurrence of its members, while a state or sovereign equivalent needs no such acquiescence. *Id.* at 632. Thus, the court concluded that NCAA action does not constitute state action. *Id.* The reasoning posited and the conclusion reached in *McDonald* have not been adopted by any other court. *See* Parish v. NCAA, 506 F.2d 1028, 1031-32 (5th Cir. 1975). In fact, in Associated Students, Inc. of Cal. St. Univ. (Sacramento) v. NCAA, 493 F.2d 1251 (9th Cir. 1974), the Ninth Circuit's finding of state action on the part of the NCAA can be said to implicitly overrule *McDonald*. *Id.* at 1254-55; Parish v. NCAA, 506 F.2d at 1032 n.9.

155. See text & notes 133-54 *supra*; *see* United States v. Price, 383 U.S. 787, 794 n.7 (1966); Howard Univ. v. NCAA, 510 F.2d 213, 217 n.4 (D.C. Cir. 1975). These cases indicate that the terms "state action" and "under color of state law" are interchangeable. Parish v. NCAA, 506 F.2d 1028, 1031 n.6 (5th Cir. 1975). *But see* Lavoie v. Bigwood, 457 F.2d 7, 15 (1st Cir. 1972).

156. 42 U.S.C. § 1983 (Supp. 1974-80) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Id. A § 1983 action is an attractive remedy to the aggrieved university. Should a constitutional deprivation be found under § 1983, the NCAA would have to amend its enforcement procedures to conform to proper standards. Also, § 1983 provides the aggrieved university with a tort remedy. Thus, a university may be able to recover a monetary judgment for damages resulting from the improper enforcement procedures. Hostrop v. Board of Jr. College Dist. No. 515, 523 F.2d 569, 579 (7th Cir. 1975) (after termination, president of junior college entitled to damages for denial of procedural due process), *cert. denied*, 425 U.S. 963 (1976); Burt v. Board of Trustees of Edgefield County Sch. Dist., 521 F.2d 1201, 1207 (4th Cir. 1975) (Winters, J., concurring and dissenting) (In a per curiam opinion, the court adopted a damage measure entitling the plaintiff to recover losses sustained for breach of contract for wrongful termination without due process); *see* Carey v. Piphus, 435 U.S. 247, 266 (1978) (in the absence of actual damages, plaintiff may recover nominal damages in § 1983 action).

thereof" who has been deprived of a federally secured right.[157] A public university, represented by a corporate body of regents, has not yet been squarely defined as a "person" protected by § 1983.[158] The question was addressed but not decided in *Regents of University of Minnesota v. NCAA*.[159] At the time of the *Regents* decision, *Monroe v. Pape*[160] mandated the exclusion of municipalities as "persons . . . liable" in § 1983 actions.[161] The *Regents* court recognized merit in the argument that the word "person" was intended to have the same meaning throughout § 1983.[162] The *Regents* court, relying on *Monroe*, therefore suggested that a political subdivision of the state, including a university, would not be a "person" (plaintiff or defendant) under § 1983.[163]

Though the *Regents* court was probably correct in suggesting the logic of the above outcome under then existing law, that portion of the *Monroe* rationale relied upon has since been overruled.[164] The Supreme Court, in *Monell v. Department of Social Services*,[165] held that municipalities, as political subdivisions of the state, are among the "persons" that can be sued under § 1983.[166] Thus, the argument suggested in *Regents* to preclude political subdivisions from bringing suit under § 1983 no longer exists. Instead, the same *Regents* logic would equate universities *with* municipalities in order to hold them as persons for § 1983 purposes. Therefore, in light of *Monell*, the Eighth Circuit would probably consider the corporate regents, acting on behalf of the university, a proper party plaintiff under § 1983.[167]

---

157. 42 U.S.C. § 1983 (Supp. 1974-80); see note 156 *supra*.

158. Private universities, constituting one-half of the NCAA membership, see note 2 *supra*, are already conferred the status of a protected "person" for § 1983 purposes. *See* Howard Univ. v. NCAA, 510 F.2d 213, 220 (D.C. Cir. 1975). Because private universities are separate corporate bodies, they are entitled to due process protections and are persons under § 1983. *See* note 166 *infra*. A public university has yet to be characterized as a person entitled to redress under § 1983; therefore, the possibility exists that they will be denied such status. If this were to be the case, however, inequities would result. The private university could be compensated under § 1983 and restored to its position prior to the NCAA action. On the other hand, the public university would be precluded from recovering. Only the public university would therefore remain vulnerable to injury at the hands of the NCAA.

159. 560 F.2d 352 (8th Cir. 1977).

160. 365 U.S. 167 (1961).

161. *Id.* at 187-92. The Court held that a municipality, as a political subdivision of the state, was not a "person . . . liable" within the meaning of § 1983. *Id.*

162. 560 F.2d at 362-63, *citing* Akron Bd. of Educ. v. State Bd. of Educ., 490 F.2d 1285, 1291-92 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974).

163. 560 F.2d at 363; *see* Monroe v. Pape, 365 U.S. 167, 191-92 (1961).

164. Monell v. Department of Social Serv., 436 U.S. 658, 690 (1978).

165. 436 U.S. 658 (1973).

166. *Id.* at 690. Corporations are "persons" entitled to the fourteenth amendment rights of equal protection and due process. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Pennsylvania Bank & Trust Co. v. Hanisek, 426 F. Supp. 410, 413 (W.D. Pa. 1977). Thus, political subdivisions, as corporations, must be recognized as having the right to redress, as well as the privilege of being sued, under § 1983. *See* Township of River Vale v. Town of Orangetown, 403 F.2d 684, 686 (2nd Cir. 1968).

167. See text & notes 159-63 *supra*. The *Regents* court portrayed the University of Minnesota,

Whether a university is a proper party plaintiff, however, will differ from state to state.[168] The court faced with such a problem must determine whether the university or the Board of Regents that acts on its behalf is a political subdivision similar to a county or municipal corporation,[169] or whether the university is an arm of the state not subject to liability or redress under § 1983.[170] Factors that have aided courts in determining whether an entity is a political subdivision rather than an arm of the state are the following: (1) whether the entity is a corporate body with the power to sue and be sued;[171] (2) whether the entity is liable for judgments against it;[172] (3) whether the entity is empowered to hold, sell, or otherwise deal in property;[173] (4) whether the board of directors is elected by state voters;[174] (5) whether the entity is empowered to issue bonds and generate revenue;[175] and (6) whether the power of the entity is open-ended, and not solely defined and limited by statute.[176] An affirmative finding for each factor will enhance the entity's chance of being deemed a political subdivision and not a state agency.[177]

The number of factors that will apply to a particular public university will differ from state to state.[178] A court thus must ultimately

---

a public university, as a political subdivision of the state. 560 F.2d at 362; see text & notes 168-80 *infra*.

168. *See* Bailey v. Ohio State Univ., 487 F. Supp. 601, 604 (S.D. Ohio 1980); Soni v. Board of Trustees of Univ. of Tenn., 513 F.2d 347, 352 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976).

169. Monell v. Department of Social Serv., 436 U.S. 658, 690 (1978); see note 166 *supra*.

170. *See* Bailey v. Ohio State Univ., 487 F. Supp. 601, 604 (S.D. Ohio 1980). The court in *Bailey* held that Ohio State, a public university, was not a political subdivision of the state; instead, Ohio State was a state agency. *Id.* at 606. This determination had to be made for eleventh amendment purposes. *Id.* The eleventh amendment bars suit against an unconsenting state in federal court by state citizens as well as citizens of another state. Edelman v. Jordan, 415 U.S. 651, 663 (1974). Because the university was found to be a state agency, the eleventh amendment immunized it from suit. Bailey v. Ohio State Univ., 487 F. Supp. at 604-05.

Whether the state is a named party to the suit does not determine the applicability of the eleventh amendment bar. Edelman v. Jordan, 415 U.S. at 663. The test to determine whether the suit is barred because it is an action against the state was articulated in Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). In *Ford Motor Co.*, the Supreme Court stated that "[w]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 464. As suggested by this Note, member universities should seek relief against the NCAA through a § 1983 action. Although the NCAA acts "under color of state law" for § 1983 purposes, the eleventh amendment does not immunize the NCAA from suit. The recovery of any monetary relief will not be drawn from state funds; rather, recovery will be drawn from the association's funds. Thus, it is the NCAA, and not the state, who is the real party in interest. *See id.*

171. Moor v. County of Alameda, 411 U.S. 693, 719 (1973).

172. *Id.*; Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 402 (1979).

173. Moor v. County of Alameda, 411 U.S. 693, 719 (1973).

174. Bailey v. Ohio State Univ., 487 F. Supp. 601, 604 (S.D. Ohio, 1980); *see* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979).

175. Bailey v. Ohio State Univ., 487 F. Supp. 601, 604-05 (S.D. Ohio, 1980).

176. *Id.* at 604.

177. *See* cases cited at notes 171-76 *supra*.

178. See text & note 168 *supra*.

decide how many factors must be present before the university is considered a political subdivision.[179] Applying the factors to the Arizona Board of Regents, for example, it becomes apparent that the board is a political subdivision and entitled to redress under § 1983.[180] First, the board is a corporate body.[181] As a corporate body, the board has perpetual succession,[182] may sue and be sued,[183] and may contract and be contracted with.[184] Second, the Board of Regents, and not the state of Arizona, is liable for the board's obligations.[185] Third, the board is authorized to purchase, sell, or hold real and personal property.[186] Fourth, the board is empowered to issue and secure bonds on behalf of each university within the state.[187] Fifth, the power of the board extends beyond that delegated by statute, for the board may use that power needed in effectuating its purpose.[188] Finally, however, the entire board is appointed by the governor.[189] Thus, the Board of Regents, the representative of the public universities in Arizona, meets five of the six factors that serve to characterize the board as a political sudivision rather than as an arm of the state. Even though the governor appoints all eight members of the board,[190] meeting five of six factors would probably be enough to properly define the board as a political subdivision. The board would thus be regarded as a "person" subject to redress under § 1983.

Even in cases where the university is not a political subdivision of the state, however, suit under § 1983 may still be maintained. A plaintiff may have standing to sue to prevent the violation of the rights of a

179. *See* cases cited notes 171-76 *supra*. Although the factors delineated by these courts provide useful analysis, the weight assigned to each factor conforms to no set standard.

180. *But see* Roe v. Arizona Bd. of Regents, 23 Ariz. App. 477, 481, 534 P.2d 285, 289 (1975), *vacated on other grounds*, 113 Ariz. 178, 549 P.2d 150 (1976). In *Roe*, the Arizona Court of Appeals characterized the Board of Regents as a state agency and thus not a person within the meaning of § 1983. 23 Ariz. App. at 481, 534 P.2d at 289. However, the court of appeals implied that the individual members of the Boards of Regents could be sued under § 1983. *Id.* Prior to *Roe*, the Arizona Supreme Court decided New Times, Inc. v. Arizona Bd. of Regents, 110 Ariz. 367, 519 P.2d 169 (1974). Relief for one cause of action against the Board of Regents was sought under § 1983. *Id.* at 374, 519 P.2d at 176. In *New Times*, the Arizona Supreme Court stated that they would "not preclude the state courts from granting a full measure of relief from wrongs inflicted by state agencies. . . . *Id.* Thus, the Arizona Supreme Court has defined the Board of Regents as a state agency as well as designating the board a person subject to suit under § 1983. *Id.* Extending the rationale of the Eighth Circuit in Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir.), *cert. denied*, 434 U.S. 978 (1977), Arizona, by characterizing the Board of Regents as persons subject to suit under § 1983 might also characterize the board as a person entitled to redress under § 1983. *See* text & notes 159-63 *supra*.

181. ARIZ. REV. STAT. ANN. § 15-724(A) (1975).

182. *Id.*

183. *Id.* § 15-724(B)(3).

184. *Id.* § 15-724(B)(2).

185. *Id.* § 15-782.10.

186. *Id.* § 15-724(B)(4).

187. *Id.* § 15-773.

188. Arizona Bd. of Regents v. Harper, 108 Ariz. 223, 225, 495 P.2d 453, 455 (1972).

189. ARIZ. REV. STAT. ANN. § 15-721(A) (1975).

190. *Id.*

class of persons if a sufficiently close relationship exists between the plaintiff and the injured class.[191] For instance, the university can allege that it is suing on behalf of all its students and athletes. Thus, the collective rights of the students becomes the thing protected, and students are persons under § 1983.[192] Though the general rule is that constitutional rights are individual,[193] the university is in a position to argue that it has a sufficient identity of interest with its students to justify standing to sue on their behalf.[194] Therefore, the public university may be termed a proper party plaintiff in a § 1983 action when alleging injury and deprivation on behalf of its students and student-athletes due to the imposition of penalties by the NCAA.[195]

---

191. NAACP v. Alabama, 357 U.S. 449, 458-59 (1958). The NAACP resisted disclosure of its membership lists. *Id.* at 451. The Supreme Court stated that an entity may have standing to assert constitutional rights on behalf of its members if "its nexus with them is sufficient to permit that it act as their representative before this Court." *Id.* at 458-59.

192. Akron Bd. of Educ. v. State Bd. of Educ., 490 F.2d 1285, 1289 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974). The *Akron Bd. of Educ.* court found it proper for the local board to bring a § 1983 action on behalf of its students and the taxpayers within the community. 490 F.2d at 1289-90. The court fully realized that the students whose rights would be affected would be proper plaintiffs in a § 1983 action, but this fact did not justify denying standing to the Board. *Id.* "[I]f jurisdiction is refused in a precedent-setting case because the potential litigants, alert to the possible constitutional abuse, are denied standing, quite a bit of the unconstitutional camel may be in the tent before the tent's less alert occupants are awakened." *Id.* at 1290; *see* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Pennsylvania v. Porter, 49 U.S.L.W. 2954 (3rd Cir. 1981); Brewer v. Hoxie Sch. Dist. No. 46, 238 F.2d 91, 104 (8th Cir. 1956). In *Pierce*, the Supreme Court recognized the right of the school to protect the constitutional rights of it's pupils. 268 U.S. at 535. See text & note 194 *infra*.

193. See Pennsylvania v. Porter, 49 U.S.L.W. 2954 (3rd Cir. 1981).

194. *See* Brewer v. Hoxie Sch. Dist. No. 46, 238 F.2d 91, 104 (8th Cir. 1956). Referring to the general rule that constitutional rights are personal, the *Brewer* court said the rule "is only a rule of practice, . . . which will not be followed where the identity of interest between the party asserting the right and the party in whose favor the right directly exists is sufficiently close." *Id.*

195. *See* Pennsylvania v. Porter, 49 U.S.L.W. 2594 (3rd Cir. 1981). *Porter* addressed the question whether the state could sue under § 1983 in a representative capacity by invoking the parens patriae doctrine. *Id.* Although the Third Circuit precluded suit in this instance, the court described two situations in which a state, acting in a representative capacity, could sue under § 1983. Suit may be brought by the state under § 1983 to protect either (1) the state's "propietary interests," or (2) the state's quasi-sovereign interests, such as the health, comfort, and welfare of its citizens. *Id.*

It appears that if a state, or agency thereof, sues the NCAA under § 1983, both of the above-mentioned situations are present. First, if the university were put on probation, the loss of television and postseason tournament revenues would surely affect the state's proprietary interests. *See* text & notes 207-09 *infra*. Loss of television revenue alone may require the university to pursue other revenue-generating activity. *See* text & notes 207-10 *infra*. Hence, the state's proprietary interests are severely affected. Second, the health and welfare of state citizens is greatly affected. Probation and the subsequent loss of revenues affects many citizens. The student/citizen may be required to forego intramural activities and/or experience an increase in student activity fees. *See* text & notes 210-11 *infra*. The athlete/citizen misses the national television exposure. Finally, the fan/citizen suffers from the decline in the quality of the entertainment provided. *See* text & note 209 *infra*. Therefore, the university, even if defined as a state agency, may still be able to sue under § 1983 in a parens patriae role.

But see City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir. 1980). The Ninth Circuit held that "[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment." *Id.* at 233, *quoting* City of New York v. Richardson, 473 F.2d 923, 929 (2nd Cir.), *cert. denied*, 412 U.S. 950 (1973). The rationale for this general rule is that creatures of a state should not question acts of their creator. Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933). By challenging the NCAA, however, the

This Note has outlined to this point (1) the enforcement procedures that a university is subjected to when under NCAA investigation;[196] (2) the reasons why the NCAA should no longer be able to hide behind the judicial non-interference doctrine;[197] and (3) the reasons why the NCAA's actions are open to constitutional scrutiny,[198] including the university's standing to sue the NCAA.[199] The last section of this Note identifies the university's property interest in athletic revenue and delineates the process a university is entitled to when denial of that interest is threatened.

III. THE RIGHT TO INCREASED FAIRNESS

A. *The NCAA and Due Process*

In any constitutional procedural due process case, the nature of the interests at stake must be scrutinized before determining what procedures due process requires.[200] Traditionally, the United States Supreme Court has required a deprivation of either a liberty or property interest to justify due process protection under the fourteenth amendment.[201] The very real financial impact on universities who have been dealt harsh penalties by the NCAA should merit the recognition of a property interest entitled to protection under the due process clause.

Big-time, successful athletic programs usually depend upon a popular, winning football program to supply needed revenue.[202] Football in such programs becomes a big business, and after gate receipts, television proceeds, and proceeds from postseason play, the football program very often produces a profit for the athletic program as a whole.[203] These profits are then used to finance the other intercollegiate and intramural programs at the university.[204] Thus, the revenue-producing

---

university as a political subdivision is not challenging the acts of its creator, the state. Rather, the university is challenging an independent body—the NCAA. *See* text & note 2 *supra*.

196. See text & notes 48-85 *supra*.

197. See text & notes 86-129 *supra*.

198. See text & notes 133-54 *supra*.

199. See text & notes 157-95 *supra*.

200. Goss v. Lopez, 419 U.S. 565, 575-76 (1975); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1973).

201. The fourteenth amendment provides in part:

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

U.S. CONST. amend. XIV, § 1; *see* Board of Curators v. Horowitz, 435 U.S. 78, 82 (1978); Paul v. Davis, 424 U.S. 693, 710-11 (1976); Goss v. Lopez, 419 U.S. 565, 572 (1975).

202. *See* G. HANFORD, *supra* note 1, at 102-03.

203. *Id.*

204. *Id.* at 24.

football program may be essential to the continued existence of other intercollegiate activities.

When the NCAA imposes harsh penalties upon this type of football program, the ramifications are severe.[205] The stigma produced by probation[206] can result in loss of respect for the university and thereby reduce gate receipts and university contributions.[207] Ineligibility for television broadcasts and postseason play can mean the loss of millions of dollars to the university.[208] Damage to the national reputation of the university can adversely affect the recruitment of blue chip athletes to the university, which may affect the success of the program for years.[209]

The loss of football revenue has the potential of harming not only the athletic program and the other intercollegiate sports offered, but the university student as well.[210] Intramural sports are played and enjoyed by all types of students, and loss of football revenue can endanger the funding of intramural programs.[211] A property interest in athletic reve-

205. Although the scope of this Note is not limited to "big-time" university athletic programs, it is the "big-time" program that will be more seriously affected by harsh NCAA penalties. *See* Daly, *'80s Herald New Age for ASU Athletics: Less Money for All*, THE ARIZONA REPUBLIC, Aug. 16, 1981, § E at 1, col. 1. The author discusses the athletic program at Arizona State University and the budget cuts faced by all ASU intercollegiate sports programs. *Id.* The budget cuts are directly attributable to penalties assessed the ASU football program by the NCAA prohibiting the football team from appearing on television and in bowl games. *Id.* The loss of revenue from these two activities mandates across the board budget cuts for all other intercollegiate sports programs. *Id.*; *see* NCAA v. Califano, 622 F.2d 1382, 1388 (10th Cir. 1980).

206. *See* note 240 *infra*. Probation denotes that the athletic department of a member institution has adopted a "winning-at-all-costs" attitude, where the athlete is always the loser. *See* NCAA HEARINGS, *supra* note 1, at 4 (testimony of J. Brent Clark). The university is then accused of exploiting young, impressionable athletes, which potentially lessens the community support of intercollegiate athletics. *See* G. HANFORD, *supra* note 1, at 104. Loss of respect for the university athletic department translates into dollars and cents, *i.e.*, loss of gate receipts. *Id.* Hanford's study indicates that two-thirds of the income necessary to support a football program at a major university comes in the form of gate receipts. *Id.*

207. G. HANFORD, *supra* note 1, at 104. John Schwada, former president of Arizona State University, commenting on the publicity and notoriety resulting from the NCAA investigation at Arizona State, stated that "[t]hese have affected and will continue to affect the program's ability to recruit and to attract fans and support, and so will adversely affect the income upon which not only the football program depends but all other intercollegiate programs as well." Letter from John Schwada to William B. Hunt, NCAA Assistant Executive Director, and Charles Alan Wright, Chairman NCAA Infractions Committee (Nov. 14, 1980) (on file at the Arizona Law Review).

208. Note, *supra* note 19, at 326. In 1974-75, the Pennsylvania State University football program received over $1,150,000 for television and postseason play. *Id.* Taking inflation into account, it is conceivable that a big-time football program like Penn State's, can now earn over $2,000,000 per year as a result of television and postseason play. In the 1980 football season, Arizona State University realized almost $500,000 in television revenue. THE ARIZONA DAILY WILDCAT, Feb. 5, 1981, at 6, col. 2. In the 1981 football season, while ASU is on probation, no revenue from television or postseason games will be forthcoming. *Id.*

209. *See* NCAA HEARINGS, *supra* note 1, at 4 (testimony of J. Brent Clark). The witness suggests that recruiting is "all but destroyed" when a member is put on probation. *Id.*

210. If football, the revenue producing program in an athletic department, operates at a deficit rather than a profit, the money usually going to intramurals from the former profits will be lost. The ordinary student-participant in intramurals will be harmed. *See* G. HANFORD, *supra* note 1, at 24.

211. Loss of gate receipt revenue affects the money available to other programs at the university, such as intramurals. *Id.*

nue can thus be established by resort to two theories: (1) that the university is entitled to the enjoyment of athletic revenue and in fact relies upon it;[212] or (2) that the NCAA and member institutions have a contractual relationship and benefits arising from the contract cannot be denied without due process.[213]

The Supreme Court has fashioned a definition of the entitlement/property interest needed to invoke constitutional due process scrutiny. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[214] The university, subject to a loss of athletic revenue and other interests due to NCAA penalty, must therefore be shown to have a legitimate claim of entitlement to such revenues and interests to establish a constitutionally protected property interest.[215]

Reliance upon receipt of welfare benefits,[216] unemployment compensation,[217] tax exemptions,[218] tenured teacher positions,[219] and educational assistance benefits[220] have all been held to be property interests. To constitute a property interest in terms of a due process analysis, however, the interest must have some basis beyond the recipient's mere expectations.[221] Constitutionally protected interests are "[c]reated and their dimensions are defined by existing rules or under-

212. *See generally* Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Goldberg v. Kelly, 397 U.S. 254, 262 & n.8 (1970); Pence v. Kleppe, 529 F.2d 135, 141 (9th Cir. 1976); Note, *Statutory Entitlement and the Concept of Property*, 86 YALE L.J. 695, 696 (1977).

213. *See generally* Thorpe v. Housing Auth., 393 U.S. 268, 278-79 & n.31 (1969); Lynch v. United States, 292 U.S. 571, 579 (1934); Housing Auth. v. United States Housing Auth., 468 F.2d 1, 10 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

214. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *see* Mathews v. Eldridge, 424 U.S. 319, 330-32 (1976); Perry v. Sinderman, 408 U.S. 593, 601 (1972); Pendleton v. Rumsfeld, 628 F.2d 102, 106 (D.C. Cir. 1980).

215. *See* text & notes 232-35 *infra*. When denial of a benefit effectively forecloses one's freedom to partake in other opportunities, either a property or liberty interest exists. *See* Board of Regents v. Roth, 408 U.S. 564, 575 (1972). The NCAA, by withholding all television and postseason tournament privileges as sanctions, creates an absolute bar to these opportunities. The university has no alternative tournament it can play in, nor can the university bargain with another national television network to televise its events. NCAA ENFORCEMENT PROGRAM § 7(c), NCAA MANUAL, *supra* note 3, at 168. *But see* note 32 *supra*.

216. *See* Goldberg v. Kelly, 397 U.S. 254, 265 (1970).

217. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

218. *See* Speiser v. Randall, 357 U.S. 513, 518-19 (1958).

219. *See* Board of Regents v. Roth, 408 U.S. 564, 578 (1972). In *Roth*, the Court addressed whether an untenured teacher had a property interest in his job. *Id.* at 576-78. The Court left it clear, however, that a tenured teacher had a legitimate claim of entitlement in his job. *See id.* at 578.

220. Devine v. Cleland, 616 F.2d 1080, 1086 (9th Cir. 1980).

221. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Brede v. Director for Dep't of Health, 616 F.2d 407, 410 (9th Cir. 1980); Sherrill v. Knight, 569 F.2d 124, 131 n.22 (D.C. Cir. 1977).

standings that stem from an independent source such as state law."[222]

In the employment dismissal setting, a legitimate claim of entitlement has been based upon the parameters of the employment relationship as defined by formal rules or mutual understanding.[223] Thus, when the rule or understanding is that dismissal may be at will, neither the employer nor the employee has a property interest in continued employment.[224] This type of situation exemplifies a unilateral expectation of a property interest in the asserted employment.[225] On the other hand, when the rule or understanding is that dismissal may only be for cause, continued employment is a property interest protected by due process.[226] In this situation, the expectation of continued employment is not unilateral; rather, the expectation is mutual.[227]

With respect to the relationship between the NCAA and member institutions, an understanding exists that penalties may be imposed only for cause.[228] "Cause" is defined by the NCAA Manual.[229] In this manner, the expectation of continued athletic revenue is mutual, not unilateral.[230] The NCAA-member institution relationship closely parallels the continued employment relationship, where a property interest is present and protected by due process.[231]

Further support for athletic revenue constituting a property right conferred by entitlement is created by the NCAA Manual. Property rights have been found where a statutory entitlement creates a right to

222. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980), *quoting* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

223. *See* Johnson v. United States, 628 F.2d 187, 194 (D.C. Cir. 1980); Webster v. Redmond, 599 F.2d 793, 801 n.13 (7th Cir. 1979), *cert. denied*, 444 U.S. 1039 (1980); Sherrill v. Knight, 569 F.2d 124, 131 n.22 (D.C. Cir. 1977); Note, *supra* note 212, at 699-700.

224. Board of Regents v. Roth, 408 U.S. 564, 578 (1972); Van Leeuwen v. United States Postal Serv., 628 F.2d 1093, 1097 (8th Cir. 1980). *See also* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160-61 (1980).

225. *See* Board of Regents v. Roth, 408 U.S. 564, 578 (1972). Furthermore, because the employment contract was not to be automatically renewed, the interest in renewal was merely abstract. *Id.*

226. Perry v. Sinderman, 408 U.S. 593, 601-02 (1972); Johnson v. United States, 628 F.2d 187, 194 (D.C. Cir. 1980). *See also* Bishop v. Wood, 426 U.S. 341, 344-45 (1976); Arnett v. Kennedy, 416 U.S. 134, 164-67 (1974) (Powell, J., concurring in part).

227. See text & note 223 *supra*.

228. NCAA CONST. art. 1, § 2(b), NCAA MANUAL, *supra* note 3, at 8. Art. 1, § 2(b) provides the following:

> Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; member institutions shall be obligated to apply and enforce this legislation and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation.

Id. See also NCAA CONST. art. 3, § 2, NCAA MANUAL, *supra* note 3, at 16.

229. *See* note 228 *supra*.

230. *See* text & notes 223-27 *supra*.

231. *Id.* The due process clause governs the deprivation of any property right, whether the origin of the right is in the public or private sector. *See, e.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (bank account); Fuentes v. Shevin, 407 U.S. 67 (1972) (household furnishings); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (wages).

a governmental benefit.[232] Provisions in the NCAA Manual entitling members to benefits such as television programming and postseason tournament play[233] are analogous to entitlements created by statute. Like statutes, the regulations found in the NCAA Manual create the prerequisites for enjoying benefits and, as a corollary, necessarily create the instances by which the benefits may be denied.[234] Thus, the NCAA Manual can be said to confer upon a member institution an entitlement to revenues generated through NCAA regulated activities.[235]

The second theory from which a property interest can be established is a contracts theory. Valid contracts are property, and rights arising from the contract are constitutionally protected.[236] The relationship between the NCAA and member institutions has been recognized as contractual.[237] The terms of this contract are contained in the NCAA Manual.[238] Therefore, when the NCAA institutes an investigation of a member, the NCAA is effectively accusing the member of breaching the contract.[239] Because the rights created by the contract are constitutionally protected, the NCAA cannot deny a member its contractual rights and benefits without due process.

Once the university has a property interest in athletic revenue,[240] any proceeding depriving the university of these revenues must adhere to constitutional due process requirements.[241] The final question thus

---

232. *See* cases cited in notes 217-21 *supra*.

233. EXECUTIVE REGULATIONS, reg. 2, § 16, NCAA MANUAL, *supra* note 3, at 152-53; NCAA BYLAWS art. 4, § 6, NCAA MANUAL, *supra* note 3, at 80-84.

234. *See* note 228 *supra*.

235. One commentator has proposed the following definition with respect to property rights conferred by statutory entitlement: "[a] statute will create an entitlement to a governmental benefit either if the statute sets out conditions under which the benefit *must* be granted or if the statute sets out the *only* conditions under which the benefit may be denied." Note, *supra* note 212, at 696; *see* text & notes 232-34 *supra*.

236. Lynch v. United States, 292 U.S. 571, 579 (1934). "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States." *Id.*; *see* cases cited at note 213 *supra*; Note, *supra* note 86, at 1001-02.

237. Trustees of State Colleges and Univ. v. NCAA, 82 Cal. App. 3d 461, 471, 147 Cal. Rptr. 187, 192 (1978).

238. *Id.*

239. *See id.*

240. Deprivation of a liberty interest might also be established when the university is sanctioned. The Supreme Court, in discussing the infringement of liberty interests, has intimated that employment dismissal, coupled with publication of the reasons for dismissal, will amount to a stigma infringing upon a liberty interest. *See* Bishop v. Wood, 426 U.S. 341, 348 (1976). Recently, ASU was assessed sanctions of probation, ineligibility for television broadcasts, and ineligibility for participation in championship events and postseason tournaments. See text & notes 7-10 *supra*. After the penalties were assessed, NCAA investigative findings were allowed to be published. Cox Arizona Publications, Inc. v. Arizona State Univ., No. C-423427 (Ariz., Dec. 1, 1980). Because publication was made, it seems that the test of *Bishop v. Wood* has been satisfied, and the university has suffered a liberty infringement. *See* 426 U.S. at 348.

241. Once a liberty or property interest is found, due process applies and the question becomes "what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

becomes whether current NCAA provisions are fundamentally unfair to member institutions.

B. *Suggested Increased Procedural Safeguards*

The notion of due process is elusive, with boundaries definable only by the particular factual situation.[242] Because due process is such a relative term, procedures traditionally associated with judicial process are not warranted in all factual contexts.[243] The NCAA, however, should employ fairer and more reliable procedures in investigating its members. It is not suggested that full trials be afforded institutions under investigation.[244] Rather, procedures should be adopted that will insure fairness to the accused university and lead to a more reliable determination of the issues in light of the binding determinations made by the NCAA and the rights affected by those determinations.[245]

The type of procedures that will be considered fair depends on

---

242. Hannah v. Larche, 363 U.S. 420, 442 (1960). In Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), Justice Frankfurter stated in a concurring opinion:

> Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

Id. at 163.

243. *See* Mathews v. Eldridge, 424 U.S. 319 (1976). When the Court was faced with the deprivation of a property interest in Social Security disability payments, it identified three factors that aid in identifying the specific dictates of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The need for enhanced procedural protection is demonstrated by applying this test to the termination of economic revenue (the property interest) when a university is sanctioned by the NCAA. First, the interests to be affected go beyond one individual, for loss of athletic revenue may impair numerous students' participation in intramural activities. *See* text & note 204 *supra*. Second, because the affected interests are substantial, the risk of erroneous deprivation is enhanced, especially when the evidence relied upon is hearsay. See text & notes 263-67 *infra*. Finally, the NCAA's interest, that of retaining the ideal of amateurism, will not be affected by according enhanced procedural protection. The NCAA enforcement structure, already replete with rules and provisions, would not be burdened by allowing the confrontation and examination of witnesses. See text & notes 48-85 *supra*; 263-67 *infra*.

244. At a minimum, due process requires a right to notice and fair hearing when the deprivation of an important interest is at stake. *See, e.g.*, Slochower v. Board of Educ., 350 U.S. 551, 554-55 (1956); Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950). In addition, due process may require (1) an opportunity to confront and examine witnesses; (2) the right to be represented by counsel; (3) a decision based on the evidence adduced at the hearing; and (4) an impartial tribunal. Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970).

245. *See* State Board of Educ. v. NCAA, 273 So. 2d 912, 917 (La. App. 1973) (Frugé, J., dissenting). "If the rules of the NCAA are to provide an opportunity for the member to appear and defend itself, implicitly therein, the member school must be given a *reasonable opportunity* to defend itself. *Id.* (emphasis in original).

factors such as the size of the association,[246] the nature of the issues involved in the dispute,[247] and the extent of the harm a member may incur.[248] For example, strict procedural requirements appear unwarranted given a small association that adheres to the shared commitment principle.[249] Rigid procedural requirements would add little to the accurate ascertainment of facts because the nature of the personal relationships would adequately determine the credibility issue.[250] Conversely, resort to rigid procedural requirements is more appropriate in matters involving historical facts concerning fiscal rather than fraternal issues.[251] Similarly, when the potential harm to be incurred is economic, the need for strict procedure is increased.[252]

The NCAA, as previously mentioned, has blossomed in terms of membership.[253] This expansion has resulted in a more formal and impersonal organization.[254] This growth has also led to greater diversification of associational activity, which in turn has necessitated greater regulatory measures.[255] Further, the size of the NCAA has led the association to act as the exclusive bargaining agent of its members, regulating who can be televised and who cannot.[256] Commercialization of the athletic product has given the NCAA monopolistic control of the marketplace, which is especially visible in the marketing of televised NCAA events.[257] The vast membership of the NCAA and the control it has assumed thus warrant the invocation of strict procedural requirements.

The nature of the issues to be resolved and the possible harm to be

246. *See* California State Univ. Hayward v. NCAA, 47 Cal. App. 3d 533, 537, 121 Cal. Rptr. 85, 87 (1975). The *Hayward* court stated that the NCAA "[i]s the largest voluntary association of intercollegiate athletics in the country." *Id. See generally* Note, *supra* note 86, at 1029.

247. *See* Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 366 (8th Cir.), *cert. denied*, 434 U.S 978 (1977). Issues such as the property and liberty interests of student-athletes are involved when the NCAA penalizes a member. *Id. See generally* Note, *supra* note 86, at 1029.

248. *See* Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 373 (Bright, J., concurring) (8th Cir.), *cert. denied*, 434 U.S. 978 (1977). Substantial financial rewards may be withheld by NCAA penalty because the member may be unable to participate in television broadcasts or postseason tournaments. *Id.*; text & note 34, 120-23 *supra*. *See generally* Note, *supra* note 86, at 1029.

249. *See* Note, *supra* note 86, at 1029-30.

250. *Id.* at 1030.

251. *Id.*

252. *Id.* at 1032-33.

253. *See* note 246 *supra*.

254. The mass of information contained in the NCAA Manual demonstrates the role of formality in the NCAA. *See* NCAA MANUAL, *supra* note 3; Howard Univ. v. NCAA, 510 F.2d 213, 214 (D.C. cir. 1975); text & notes 124-27 *supra*.

255. *See* NCAA ENFORCEMENT PROGRAM, NCAA MANUAL, *supra* note 3, at 162-67. Diversification of activity is shown in the many television broadcasts of NCAA intercollegiate events. The importance of television revenue is reflected by the fact that one of the penalties the NCAA may assess is ineligibility for NCAA sponsored television broadcasts. *Id.* § 7(b)(6), NCAA MANUAL, *supra* note 3, at 167.

256. EXECUTIVE REGULATIONS reg. 2, § 16, NCAA MANUAL, *supra* note 3, at 152.

257. *Id.* reg. 2, §§ 14, 16, NCAA MANUAL, *supra* note 3, at 151-52. *See* text & notes 123-26 *supra*.

incurred by member institutions under NCAA investigation also warrant strict procedural requirements. The issues dealt with by an NCAA investigation center around retaining the "[c]lear line of demarcation between college athletics and professional sports."[258] Recruiting practices and athletic eligibility remains the primary concerns in every investigation. Fiscal concerns, however, are obviously implicated, for any sanction imposed by the NCAA will be felt in the pocketbook of the university.[259] Thus, issues involving university athletic revenues and the eligibility of both athletes and institutions call for strict procedural requirements.

Hearings afforded member institutions by the NCAA can be likened to the administrative hearings required by federal and state statutes.[260] While these statutes provide for hearings before governmental agencies,[261] they do not require full-scale trials. The administrative hearing does provide the participant with the right to call its own witnesses and the right of cross-examination,[262] unlike the hearings afforded universities by the NCAA. Decisions made by the NCAA Committee on Infractions, however, are potentially harmful enough to call for complete development of factual matters.[263] Universities are

258. NCAA CONST. art. 2, § 2(a), NCAA MANUAL, *supra* note 3, at 7-8.

259. *See* text & notes 29, 208 *supra*.

260. *See* 5 U.S.C. § 556 (1977). *See generally* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

261. 5 U.S.C. §§ 553(c), 554, 556, 557 (1977).

262. *See id.* § 556(d). Furthermore, many times the party has other avenues of relief available after the administrative determination. *Id.* § 702. Such alternative avenues of recourse are not available to an NCAA member institution. Although a member may appeal the penalty imposed by the Committee on Infractions to the NCAA Council, NCAA ENFORCEMENT PROGRAM § 5(b), NCAA MANUAL, *supra* note 3, at 165, the NCAA Council has yet to overturn in full a penalty imposed by the Committee on Infractions. NCAA HEARINGS, *supra* note 1, at 1069 (testimony of Arthur Reynolds).

In Multiple Listing Serv. v. Century 21, 390 So. 2d 982 (Miss. 1980), the right of associations to enforce disciplinary sanctions for failure to follow associational rules was addressed. There, the association was termed "private," and accorded its members the right to confront and cross-examine witnesses in disciplinary proceedings. *Id.* at 984. Despite these protections, the Mississippi Supreme Court found the associational standards constitutionally infirm. *Id.* at 985-86. The court held that if fines were to be imposed as penalties, then a schedule of maximum fines must be stated in the bylaws. *Id.* at 986. Addressing judicial review of associational proceedings, the court stated that

> [t]he authorities are in general agreement that judicial review of disciplinary proceedings of a voluntary association should be limited to determining only whether the member disciplined received procedural due process as required by the Fourteenth Amendment to the United States Constitution, and whether the association has conducted its inquiry in accordance with its own rules of procedure.

Id. at 983.

263. *See* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1076 (1969). Professor Wright, a member of the Committee on Infractions of the NCAA, identifies four fundamental safeguards required in proceedings leading to serious penalties. *Id.* at 1071. The subject must be advised of the charge, must be informed of the evidence against him, must be accorded an opportunity to be heard, and must not be punished unless the evidence against him is substantial. *Id.* at 1071-72. Furthermore, Professor Wright claims that the right to confrontation and cross-examination of witnesses is required when "enlightened action" is involved. *Id.* Enlightened action occurs when credibility is in issue, and the tribunal must choose to believe the accused or

therefore entitled to more than potentially unreliable, untrustworthy, or insincere evidence when accused of NCAA violations which could subject them to potential sanctions causing loss of revenue-producing activities.[264] Because complete factual development is instrumental to a fair hearing, insurance against inadequate factual development goes to the heart of fair procedure.[265] Indeed, the right to confront one's accusers has traditionally been viewed as constituting the threshold of fair play.[266]

Consequently, hearings before the NCAA should provide for confrontation and cross-examination of witnesses. Reliance on hearsay evidence in a matter of such magnitude is not consistent with the precepts of fairness under which the Committee on Infractions purports to operate.[267] The right to confront and cross-examine witnesses, however, would do a member institution very little good if probation or other harsh penalties would nevertheless result because the tribunal had decided the question of guilt beforehand. All the fairness in the world would be wasted if the tribunal were biased.[268] This may, however, be

---

the accuser. *Id.* In an NCAA investigation and subsequent hearing, the member has been accused of wrongdoing, and the determination of wrongdoing hinges on the "credibility" of hearsay evidence. Surely, the hearing given the member under investigation is worthy of Professor Wright's "enlightened action" status, thus making confrontation and cross-examination of witnesses a requirement.

264. *See* NCAA v. Califano, 622 F.2d 1382, 1389-90 (10th Cir. 1980). The court identified the substantial interest member institutions have in their intercollegiate sports program. "The members of the NCAA own established education businesses; they have made substantial investments in facilities for sports and have operated sports programs as they wished, all under protection of state law." *Id.*

265. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Goss v. Lopez, 419 U.S. 565, 574 (1975); Lightfoot v. Board of Trustees, 457 F. Supp. 135, 140 (D. Md. 1978). *See also* State Board of Educ. v. NCAA, 273 So. 2d 912, 920 (La. App. 1973) (Frugé, J., dissenting). Judge Frugé, recognizing that the hearing afforded the member institution under scrutiny is to assess guilt and determine the severity of the penalty, concludes that the member should be entitled to, at a minimum, "a reasonable opportunity to introduce mitigating evidence." *Id.*

266. *See* Richardson v. Perales, 402 U.S. 389, 412-14 (1971) (Douglas, J., dissenting); Consolidated Edison v. NLRB, 305 U.S. 197, 230 (1938); 5 WIGMORE § 1367 (Chadbourn rev'd ed. 1974). "The problem of the law is to give advantage to neither, but to let trial by ordeal of cross-examination distill the truth." Richardson v. Perales, 402 U.S. at 414 (Douglas, J., dissenting).

267. *See* NCAA HEARINGS, *supra* note 1, at 1300 (testimony of Charles Alan Wright, Chairman, Committee on Infractions). Professor Wright, describing NCAA procedures, testified that "though always subject to change and improvement, [it] is a fair procedure, one that provides every protection the Constitution requires and more, and one that is well adapted to reaching a fair and reliable determination of the facts." *Id. But see* Richardson v. Perales, 402 U.S. 389, 411 (1971) (Douglas, J., dissenting). "But this hearsay evidence cannot by itself be the basis for an adverse ruling." *Id.* The NCAA procedures, institutional in nature, should not be based upon hearsay for a reliable determination of truth. NCAA HEARINGS, *supra* note 1, at 6; *see* Wright, *supra* note 263, at 1060.

268. *See* Marshall v. Jerrico, 446 U.S. 238, 242 (1980). In *Marshall*, the Court stated:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. . . . The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.

the case with NCAA disciplinary hearings.

The Committee on Infractions presides over the hearings provided institutions under inquiry.[269] The Committee on Infractions is also available throughout the course of investigation to answer or aid the investigative staff in problems they may encounter.[270] Further, the committee reviews findings of the investigation, helping to determine whether an official inquiry is justified.[271] The Committee on Infractions thus becomes the factfinder, the judge, and the jury. The involvement by the committee throughout the course of the entire investigation has led some to question whether the hearing is merely to aid the committee in assessing penalties for which guilt has already been established.[272] If this is the case, any hearing serves no useful function, for the conclusions have been reached and appearance by the institution can do more harm than good.[273]

The fact that no institution which has been the subject of an investigation has avoided NCAA sanctions[274] supports the view that guilt had been established prior to the hearing. Although many institutions have the severity of their penalty reduced upon appeal to the NCAA

Id. (footnotes omitted). *See also* Carey v. Piphus, 435 U.S. 247, 259-62, 266-67 (1978); Mathews v. Eldridge, 424 U.S. 319, 344 (1976); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring); 5 U.S.C. § 554(d)(2) (1977).

269. NCAA ENFORCEMENT PROGRAM § I, NCAA MANUAL, *supra* note 3, at 162.

270. *Id.* § 12(a)(1), NCAA MANUAL, *supra* note 1, at 171; see text & note 63 *supra*.

271. NCAA ENFORCEMENT PROGRAM § 3(b), NCAA MANUAL, supra note 1, at 163-64. The investigation is a two-tiered process. *See* text & notes 63-67 *supra*.

272. *See* NCAA HEARINGS, *supra* note 1, at 702 (testimony of Charles M. Neinas, Commissioner of the Big Eight Conference). Mr. Neinas, in his testimony, stated:

> The impression of the close relationships between the committee on infractions and the enforcement staff frequently leads the accused institution to conclude that the hearing procedure may be less than fair, although such conclusion may be based more on appearance than fact.
>
> I would suggest that there be a separate administrative staff appointed to assist the committee on infractions with its clerical and administrative duties. As a result, the accused institution would not find the enforcement staff serving in a dual capacity of prosecutor as well as assisting those who are to judge the case.

Id. See also McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008, 1010-11 (S.D. Fla.), *aff'd*, 506 F.2d 1404 (1974). "Those who conduct the hearings and make the decisions must be unbiased and maintain open minds until they have heard the whole story in open hearings with the challenged member. . . ." 379 F. Supp. at 1011.

273. If guilt has been determined prior to the hearing, a member's statement seeking to exonerate itself may add to the penalty. Saying one is innocent, when guilt is a forgone conclusion, serves to intensify the guilt.

274. *See* NCAA HEARINGS, *supra* note 1, at 875. *But see id.* at 1063 (testimony of Arthur Reynolds, former Chairman, Committee on Infractions). Dean Reynolds testified to the following:

> From October 1952 to September 1978 there have been 1,016 formally open infraction cases. In 450 cases, almost half of the cases formally instituted, no disciplinary action was taken. Of the remaining 566 cases in which the committee on infractions or council ultimately imposed a penalty against a member institution, only 213, less than one-fourth of all cases, involved public penalties.

Id. Dean Reynolds, however, failed to define a "formally open infractions case," and whether the institution was informed of the investigation.

Council,[275] this procedure provides little relief if the institution is not also given the chance to fully exonerate itself at the original hearing. In sum, when an investigation is undertaken by the NCAA, the institution under inquiry does not enjoy procedures consistent with ideals of fair play. Many arguments have posed the necessity for variable standards in applying the due process notion of fair play.[276] Fair play, however, supports the application of various additional procedural safeguards once member institutions become targeted by the NCAA.[277]

Conclusion

The NCAA enforcement procedures violate the constitutional requirement of procedural due process by failing to provide for confrontation and cross-examination of witnesses before an impartial tribunal. The universities subject to NCAA scrutiny can allege a due process violation on the basis of a property interest, and judicial relief can be sought under § 1983.

Despite the judicial avenue open to universities to challenge the unconstitutional procedures of the NCAA, it is hoped that the NCAA conducts its own "house-cleaning." If not, forced changes by the courts or by the government may be forthcoming. The investigation undertaken by the House Subcommittee on Oversight and Investigations evinces the concern of Congress. The increase in the number of lawsuits challenging NCAA action evinces concern by member institutions.

This Note has criticized NCAA procedure from the standpoint of the member institution. Many student-athletes have challenged the NCAA, but the member institutions should challenge the unfair proce-

275. *Id.* at 1069.

276. *See* 76 HARV. L. REV. 983, 1020-34 (1963). The student commentator discusses the merits of judicial intervention and the procedural rights associations grant to their members. *Id.* at 1020. Judicial deference to associational autonomy, and the notion that associations are better equipped to ascertain the parameters of needed procedures, are arguments commonly posited to justify the lack of procedural safeguards associations afford their members. *See id.* The change in emphasis that contemporary associations have experienced, and the importance that economics has played, warrants increased procedural protections against denial of membership. See text & notes 86-129 *supra*.

277. *See* Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 368 (8th Cir.), *cert. denied*, 434 U.S. 978 (1977); Shelton v. NCAA, 539 F.2d 1197, 1198 (9th Cir. 1976); NCAA v. Gillard, 352 So. 2d 1072, 1083 (Miss. 1977). Of final mention is the process by which change of procedures can occur. Theoretically, member institutions may institute change by submitting proposed amendments to the NCAA Council. NCAA CONST. art. 7, § 1, NCAA MANUAL, *supra* note 3, at 40. When a member wishes to submit an amendment, the proposed amendment must be sponsored by a total of six members. *Id.* art. 7, § 1(c), NCAA MANUAL, *supra* note 3, at 40. Although sponsorship by six members may seem trivial, when members fear changing the status quo because of possible jeopardy to their own athletic programs, the six sponsor requirement may be insurmountable. *See* NCAA HEARINGS, *supra* note 1, at 2; Note, *supra* note 19, at 908. Hence, because the NCAA Council is empowered to adopt and sponsor their own amendments, *see* NCAA CONST. art. 7, § 1, NCAA MANUAL, *supra* note 3, at 40, change should emanate from the council rather than from members.

dures applied to NCAA members. The member institution has the most to lose from imposition of NCAA sanctions, for the institution is the representative of many interests—athletic, educational, and public. All of these interests are affected by NCAA sanctions.

The cumulative and multiplying effect of the harm resulting from NCAA sanctions demonstrates the need for seeking the truth before penalties are assessed. Traditional procedures, including the confrontation and cross-examination of witnesses, together with impartial and unbiased decisionmakers, would help insure that the truth has been discovered and that the decisionmaking is informed.