Roger Williams University Law Review

Volume 20
Issue 2 *Vol. 20: No. 2 (Spring 2015)*

Article 6

Spring 2015

The NCAA's Restitution Rule: Bulwark Against Cheating or Barrier to Appropriate Legal Remedies?

Brian L. Porto
Vermont Law School

The NCAA's Restitution Rule: Bulwark Against Cheating or Barrier to Appropriate Legal Remedies?

Brian L. Porto*

INTRODUCTION

The overarching question posed by this Symposium is whether courts or some other independent body should review the National Collegiate Athletic Association's ("NCAA" or the "Association") "enforcement actions," namely decisions that punish alleged rule violations by individuals and institutions. Typically, when journalists and scholars refer to NCAA enforcement they mean the process conducted by the Association's Committee on Infractions ("COI") and Infractions Appeals Committee ("IAC"), respectively, in which the accused parties are institutions and their employees.[1] This process, which can result in coaches and other institutional employees losing their jobs and college athletic programs incurring significant penalties, has long been the subject of criticism by journalists and academics for failing to treat accused parties fairly.[2]

But NCAA enforcement also encompasses decisions

* Professor, Vermont Law School. J.D., Indiana University (Bloomington), 1987; Ph.D. (Political Science), Miami University (Ohio), 1979; B.A., University of Rhode Island, 1974.

1. *See generally* Brian L. Porto, *New Rules for an Old Game: Recent Changes to the NCAA Enforcement Process and Some Suggestions for the Future*, 92 OR. L. REV. 1057 (2014).

2. *See, eg.*, *id.* I have been one of the critics of the NCAA's enforcement process, most extensively in BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA: THE CASE FOR LESS COMMERCIALISM AND MORE DUE PROCESS IN COLLEGE SPORTS (2012).

concerning the eligibility of individual athletes to compete, particularly decisions of the Committee on Student-Athlete Reinstatement ("Reinstatement Committee"), which hears appeals by institutions seeking the restoration of competitive eligibility for athletes previously declared ineligible.[3] The NCAA requires member institutions to certify the eligibility of their athletes[4] and to withhold from competition those athletes determined to be ineligible for academic, disciplinary, or other reasons consistent with the Association's bylaws.[5] If the athlete is to be reinstated, the institution, after having withheld him or her from competition, must conclude that "the circumstances warrant restoration of eligibility" and then appeal, on the athlete's behalf, to the Reinstatement Committee.[6]

Concerning individual eligibility decisions, NCAA Bylaw 19.13, the Restitution Rule, which is the subject of this Article, looms large for athletes and institutions alike. If the Reinstatement Committee denies the request to restore eligibility, the Restitution Rule will make the athlete think twice about seeking redress in court. The rule provides that if an athlete obtains an injunction from a trial court preventing the NCAA from keeping him or her off the field or court, but then an appellate court reverses the injunction, the NCAA may extend the period of ineligibility and punish the athlete's institution retroactively for letting the athlete compete while the injunction was in effect.[7] The best evidence of the Restitution Rule's power as a deterrent to college athletes seeking injunctions is that, although the rule has been in effect since 1975, the NCAA has only invoked it once.[8] Because of the Restitution Rule, trial courts have been reluctant to grant injunctions in eligibility disputes, and universities have told athletes they will not honor an injunction granted by a trial court for fear that its subsequent reversal on appeal would trigger severe penalties from the NCAA.[9]

3. *See* NCAA, 2014–15 NCAA DIVISION I MANUAL art. 12.12.1, at 85 (2014), *available at* http://www.ncaapublications.com/productdownloads/D115.pdf [hereinafter D-1 MANUAL].
4. *Id.* art. 12.10.1, at 84.
5. *Id.* art. 12.11.1, at 85.
6. *Id.* art. 12.12.1, at 85.
7. *Id.* art. 19.13, at 329–30.
8. *See* Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976).
9. *See infra* Part II.B, note 81.

Not surprisingly, in light of its power to blunt the effect of a court order, the Restitution Rule is controversial. It is criticized for interfering with judicial power by denying athletes access to the courts, or at least discouraging them from seeking judicial relief, and for spurring institutions to disregard injunctions favoring athletes for fear of being punished by the NCAA if the injunction is vacated on appeal.[10] On the other hand, some defend the rule because it discourages institutions from using ineligible players by ensuring that institutions are punished for doing so.[11] The clash of viewpoints raises the question whether the Restitution Rule is worth preserving to prevent institutions from seeking a competitive advantage by using ineligible players, or instead, is an impediment to fairness that should be eliminated. This Article argues that although the Restitution Rule serves legitimate goals, these goals can still be achieved with judicial authority remaining intact by submitting NCAA eligibility disputes to binding arbitration, thereby eliminating the need for the Restitution Rule.

Part I of this Article discusses the origins and principal features of the Restitution Rule. Part II explains how the rule operates in practice and the arguments both for and against it. Part III addresses the traditional reluctance of courts to intervene in the operations of private associations, which accounts for the continued viability of the rule. Part IV presents alternative proposals for supplanting the rule, although it emphasizes binding arbitration as the best means of doing so. Part V concludes that binding arbitration should be the exclusive method of resolving disputes between institutions and the NCAA regarding an athlete's eligibility for competition.

I. AN OVERVIEW OF THE RESTITUTION RULE

A. *Provisions and Consequences*

The Restitution Rule is codified in NCAA Bylaw 19.13.[12] It states as follows:

If a student-athlete who is ineligible under the terms of

10. *See infra* Part I.
11. *Id.*
12. D-1 MANUAL, *supra* note 3, art. 19.13, at 329–30.

> the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the Board of Directors may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions:
>
> > (a) Require that [the athlete's] individual records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;
> >
> > (b) Require that team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;
> >
> > (c) Require that team victories achieved during participation by such ineligible student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;
> >
> > (d) Require that individual awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
> >
> > (e) Require that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
> >
> > (f) Determine that the institution is ineligible for one or more NCAA championships in the sports and in the seasons in which such ineligible student-athlete participated;
> >
> > (g) Determine that the institution is ineligible for invitational and postseason meets and tournaments

> in the sports and in the seasons in which such ineligible student-athlete participated;
>
> (h) Require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Board of Directors concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program; and
>
> (i) Require that the institution that has been represented in an NCAA championship by such a student-athlete shall be assessed a financial penalty as determined by the Committee on Infractions.[13]

Thus, the Restitution Rule can have adverse consequences for individual athletes, teams, and institutions. Athletes can see their individual records erased, and teams can see their championship seasons eviscerated and their eligibility for future championships taken from them.[14] Most importantly, in the money-centered world of big-time college sports, institutions can be denied future financial rewards by being barred from upcoming championships and can be forced to pay financial penalties for the past participation of an ineligible player, even when a then-valid court order authorized that participation.[15]

B. *Defenders and Detractors*

Despite its potentially severe consequences for individuals and institutions, the Restitution Rule has been the subject of scant litigation and academic commentary.[16] Perhaps that is

13. *Id.*
14. *Id.* art. 19.13(a)–(c), at 330.
15. *Id.* art. 19.13(f)–(h), at 330.
16. The cases in which the NCAA's Restitution Rule has figured most prominently are *National Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77

because the NCAA has used the rule only once since its adoption in 1975.[17] In the spring of 1976, the Association invoked the rule against Oregon State University following a reversal by the United States Court of Appeals for the Ninth Circuit of a preliminary injunction issued previously by a federal district court.[18] The case involved Lonnie Shelton, a standout basketball player at Oregon State, who had forfeited his amateur status by signing a professional basketball contract in June 1975.[19] The University declared Shelton ineligible before the start of the 1975–76 college season, but he played anyway, thanks to the district court's order.[20] The NCAA appealed, and the Ninth Circuit reversed the district court.[21] Thereafter, the NCAA invoked the Restitution Rule and required Oregon State to vacate all of the individual records and performances Shelton achieved (and his team's record) during his ineligibility.[22]

According to one commentator, the use of the Restitution Rule just once in four decades is a testament to its effectiveness at "curtailing [NCAA] members' and college athletes' injunctive claims, and the success of those claims, against the NCAA."[23] The rule has achieved its drafters' aim—to stem the rising tide of lawsuits being filed against the NCAA in the 1970s, which had increased in number from two to twenty-five between 1971 and 1974.[24] The drafters were especially eager to deter athletes'

(Ky. 2001) and *Oliver v. National Collegiate Athletic Ass'n*, 920 N.E.2d 203 (Ohio C.P. 2009). In the latter, an Ohio trial court invalidated the Restitution Rule as violating the plaintiff's constitutional right of access to the courts, but a subsequent settlement by the parties negated that decision, thereby preserving the rule. *Oliver*, 920 N.E.2d 203, *vacated pursuant to settlement* (Sept. 30, 2009). For scholarly commentary on the rule, see Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Court . . . Until* Oliver v. NCAA, 11 FLA. COASTAL L. REV. 459 (2010) and Stephen F. Ross et al., *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J.C. & U.L. 79 (2014).

17. *See* Johnson, *supra* note 16, at 504.
18. Shelton v. NCAA, 539 F.2d 1197, 1199 (9th Cir. 1976).
19. *Id.* at 1198; *see also* Johnson, *supra* note 16, at 504.
20. *See* Johnson, *supra* note 16, at 504–05.
21. *Shelton*, 539 F.2d at 1199.
22. *Johnson*, *supra* note 16, at 505.
23. *Id.* at 520.
24. *See id.* at 474.

requests for injunctive relief, namely temporary restraining orders and preliminary injunctions.[25] They have succeeded in spectacular fashion.

Still, the Restitution Rule is limited in its reach. It applies only to eligibility disputes involving individual athletes, not to NCAA enforcement proceedings against institutions or athletic department employees.[26] And it is connected to a larger enterprise: the work of the Reinstatement Committee, which is in charge of reinstating eligible athletes previously declared ineligible for having violated Association rules.[27] Under NCAA bylaws, an ineligible athlete may seek restoration of eligibility, provided the athlete's institution is willing to appeal to the Reinstatement Committee on his or her behalf.[28] Frequently, time is of the essence regarding these types of requests because the athlete is seeking to have eligibility restored for a fast-approaching game, meet, or tournament.[29]

The Reinstatement Committee delegates to the NCAA's reinstatement staff the initial authority to process requests for restoration of eligibility—subject to guidelines established by the committee—and with a provision for the committee to hear appeals from the staff's decision.[30] Neither the staff nor the committee conducts an investigation or engages in independent fact-finding; rather, each body evaluates the athlete's responsibility for the rule violation based on information the institution provides and, in turn, decides whether the athlete's eligibility may be restored and, if so, how restoration should occur.[31] An athlete would be most likely to seek a temporary restraining order or a preliminary injunction permitting a return

25. *See id.* at 477.

26. *See* D-1 MANUAL, *supra* note 3, art. 19.13, 329–30. Indeed, the Restitution Rule is contained in just one article, 19.13, within the larger entity, Bylaw 19, which encompasses the NCAA's entire enforcement program.

27. *See* Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 261 (2010).

28. D-1 MANUAL, *supra* note 3, art. 12.12.1, at 85; *see also id.* art. 12.11.1, at 85.

29. PORTO, *supra* note 2, at 286.

30. *Id.* at 285.

31. *Id.* at 286.

to competition immediately after an unfavorable decision by the Reinstatement Committee. If the trial court granted injunctive relief, the NCAA would presumably appeal, thereby enabling invocation of the Restitution Rule if the appellate court were to overturn the injunction.[32]

Despite its capacity to blunt the impact of a court order and its potentially harsh consequences for individuals and institutions, the Restitution Rule has its defenders. For example, in 2004, then-Tulane University law professor Gary Roberts testified about the rule to a Congressional subcommittee investigating the NCAA's enforcement process.[33] He stated as follows:

> If an institution were not subject to penalties in such a situation, coaches could recruit a number of ineligible players, seek short-term injunctions just before important contests from local judges who often act out of partisan or parochial interests, and then allow players to participate to the substantial competitive advantage of the team (and unfair disadvantage to its opponents), all without any fear of subsequent penalty when the appellate courts inevitably reverse the injunction.[34]

But, the rule's critics are equally outspoken. For example, the Ohio trial court in *Oliver v. NCAA*, which struck down the rule before the parties' settlement negated its decision, stated that "[t]he [NCAA] may title [then] Bylaw 19.7 'Restitution,' but it is still punitive in its achievement, and it fosters a direct attack on the constitutional right of access to courts."[35] Later in its opinion, the Ohio court commented on the difficult choice the rule forced on institutions between honoring a court order, thereby facing NCAA penalties, or disregarding a court order to avoid such penalties.[36] The court wrote:

> Such a bylaw is governed by no fixed standard except that which is self-serving for the [NCAA]. To that extent,

32. *See* D-1 MANUAL, *supra* note 3, art. 19.13, at 229–30.

33. *See Due Process and the NCAA: Hearing before the Subcomm. on the Constitution of the Comm. on the Judiciary*, *House of Representatives*, 108th Cong. 15 (2004) (statement of Gary Roberts, Deputy Dean & Dir. of Sports Law, Tulane Law School).

34. *Id.*

35. 920 N.E.2d 203, 216 (Ohio C.P. 2009).

36. *Id.*

> it is arbitrary and indeed a violation of the covenant of good faith and fair dealing implicit in its contract with the plaintiff [athlete], as the third-party beneficiary [of the contract between the NCAA and the athlete's institution].[37]

Despite the clarity of the conflicting viewpoints expressed above, the best way to assess the merits and demerits of the Restitution Rule is to observe it in operation in the few cases in which it has played a role. That is the focus of Part II, which follows.

II. THE RESTITUTION RULE IN COURT

A. NCAA v. Lasege

The Restitution Rule figured prominently in *National Collegiate Athletic Ass'n v. Lasege*.[38] In that case, the Reinstatement Committee upheld a finding by the reinstatement staff that a Nigerian citizen had violated NCAA rules by playing professional basketball in Russia before enrolling at the University of Louisville.[39] Both NCAA entities concluded that the athlete's violation of Association bylaws against professionalism, by accepting cash and other benefits in exchange for his basketball services, reflected a clear intent to become a professional, thereby rendering him ineligible for intercollegiate competition.[40]

Mr. Lasege sought injunctive relief in a Kentucky trial court, which agreed with him that any violations of NCAA rules he committed occurred only to obtain a visa that would enable him to become a student in the United States, not a professional athlete in Russia.[41] The trial court also invalidated the Restitution Rule, reasoning that it prevents parties from availing themselves of appropriate legal protections.[42] The court's injunction enabled Lasege to play for Louisville during the 2000–01 college basketball season.[43]

37. *Id.*
38. 53 S.W.3d 77 (Ky. 2001).
39. *Id.* at 80–81.
40. *Id.*
41. *Id.* at 81–82.
42. *Id.* at 82.
43. *Id.*

The Kentucky Court of Appeals upheld the injunction,[44] but the Kentucky Supreme Court later vacated the injunction in its entirety, including the portion that prohibited the NCAA from invoking the Restitution Rule.[45] Regarding the rule, the Kentucky Supreme Court observed:

> Perhaps the trial court believed that NCAA Bylaw 19.8 [which housed the rule in 2001] would deter aggrieved student-athletes from seeking judicial redress because of fears that their efforts would only hurt their teams in the long run. Perhaps the trial court believed that the bylaw created a disincentive for NCAA member institutions to allow players whose eligibility has not yet been finally adjudicated to play in games or other athletic events.[46]

Noting the existence of comparable rules in high school sports, the Court continued:

> NCAA Bylaw 19.8, like the Restitution Rules enforced by many state high school athletic associations, 'does not purport to authorize interference with any court order during the time it remains in effect, but only authorizes restitutive penalties when a temporary restraining order is ultimately dissolved and the challenged eligibility rule remains undisturbed in force.'[47]

Accordingly, the Kentucky Supreme Court concluded that the Restitution Rule does not compromise judicial authority, but instead, "merely allows for post-hoc equalization when a trial court's erroneously granted temporary injunction upsets competitive balance."[48]

B. Bloom v. NCAA

1. The Litigation

The Restitution Rule was not as prominent in the outcome of *Bloom v. NCAA* as it was in *Lasege*, but in Plaintiff Jeremy

44. *Id.*
45. *Id.* at 89.
46. *Id.* at 88.
47. *Id.* (quoting Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass'n, 467 N.W.2d 21, 22 (1991)).
48. *Id.*

Bloom's mind, it was the 800-pound gorilla in the trial judge's chambers that silently directed the judge to deny Bloom's request for injunctive relief.[49] In 2002, Jeremy Bloom faced a delicious dilemma. Before enrolling that year at the University of Colorado, Bloom had competed in Olympic and World Cup skiing events and had become the World Cup Champion in freestyle moguls.[50] During the 2002 Olympics, he appeared on MTV and was offered various paid entertainment opportunities; he also agreed to endorse certain ski equipment and model Tommy Hilfiger clothing.[51]

Bloom's dilemma derived from his athletic versatility; besides being a world-class ski racer, he was a talented football player.[52] Bloom had relinquished his endorsement and media opportunities in order to be eligible for collegiate football because NCAA rules prohibited athletes from accepting endorsement income, even when that income came from a sport other than the one the athlete played in college.[53] Acting on Bloom's behalf, the University of Colorado first requested waivers of NCAA rules restricting endorsements and media activities by athletes and later sought a favorable interpretation of the rule on media activities, but the NCAA denied these requests.[54] Accordingly, Bloom ceased his endorsement, modeling, and media activities to play football during the 2002 and 2003 seasons.[55] In 2004, though, with the next Olympics approaching in two years, he

49. Bloom v. NCAA, 93 P.3d 621, 622 (Colo. App. 2004).

50. *Bloom*, 93 P.3d at 622. Freestyle, moguls skiing combines the bumpy terrain of moguls competition with the jumps, flips, and twists of freestyle events. *See Mogul skiing*, WIKIPEDIA, http://en.wikipedia.org/wiki/Mogul_skiing (last visited Feb. 9, 2015).

51. *Bloom*, 93 P.3d at 622.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* Bloom's exploits on the football field showed why the University of Colorado had sought a waiver of NCAA rules that would have allowed him to play football while earning endorsement income. *See* Gordon Gouveia, *Making a Mountain Out of a Mogul:* Jeremy Bloom v. NCAA *and Unjustified Denial of Compensation Under NCAA Amateurism Rules*, 6 VAND. J. ENT. L. & PRAC. 22, 22 (2005). For example, as a freshman, he made an immediate impact on the Buffaloes' gridiron fortunes with a 94-yard pass reception—the longest in school history—and an 80-yard punt return for a touchdown. *See id.* The punt return occurred against Oklahoma in the 2002 Big-12 championship game. *See id.*

resumed those activities in order to pay the expenses associated with his ski training.[56] In an effort to remain eligible for football while engaged in commercial activities, he sought declaratory and injunctive relief against the NCAA in the Colorado courts.[57]

Specifically, Bloom sought to enjoin the NCAA from punishing him for participating in those activities because: (1) he had pursued them before enrolling in college, and (2) they were entirely unrelated to his football prowess.[58] The trial court denied his request, reasoning that although he was a third-party beneficiary of the NCAA's contractual relationship with the University of Colorado (hence he had standing to challenge NCAA rules), his claims did not warrant a preliminary injunction under Colorado law.[59] Such was the case because he satisfied only three parts of Colorado's six-part test for preliminary injunctions; he could show: (1) a danger of real, immediate, and irreparable injury that may be prevented by injunctive relief; (2) the lack of a plain, speedy, and adequate remedy at law; and (3) the likelihood that an injunction would preserve the status quo pending a trial on the merits.[60] But he could not show that: (4) he had a reasonable probability of success on the merits; (5) granting him an injunction would serve the public interest; and (6) the balance of equities favored granting the injunction.[61]

Bloom appealed, and the Colorado Court of Appeals affirmed after reviewing his claims for breach of contract and arbitrary and

56. *Bloom,* 93 P.3d at 622.
57. *Id.*
58. *Id.*
59. *Id.* at 623. The third-party beneficiary rule drops contract law's traditional privity requirement by permitting one who is not a party to a contract to enforce its terms nonetheless. *See* Joel Eckert, Note, *Student-Athlete Contract Rights in the Aftermath of* Bloom v. NCAA, 59 VAND. L. REV. 905, 928 (2006) (citing RICHARD A. LORD, 13 WILLISTON ON CONTRACTS § 37:1 (Jack K. Levin ed., 4th ed. 2000); RESTATEMENT (SECOND) OF CONTRACTS §§ 304, 310 (1981)). Third parties can thus enforce a contract to the same extent as a traditional party in privity if they are intended beneficiaries because the promisor has a duty to any intended beneficiaries to perform the promise. *See id.* In most cases, the third-party beneficiary's claim will be against the promisor. *See id*. Still, the promisee can be liable to the third-party beneficiary if the promisee is responsible for the breach, either jointly or individually. *See id.*
60. *Bloom*, 93 P.3d at 623.
61. *Id.*

capricious action by the NCAA.[62] Like the trial court, the appellate court agreed that Bloom was a third-party beneficiary of the NCAA's contractual relationship with the University of Colorado, and therefore, he had standing to challenge the Association's bylaws.[63] Key to Bloom's case was his reasoning that NCAA Bylaw 12.1.2 permitted a college student to be a professional in one sport, yet an amateur in his or her college sport.[64] In Bloom's view, because a professional athlete is simply one who "gets paid" for playing a sport, the NCAA should permit him to play college football while earning whatever income is "customary" in his sport, namely endorsement income.[65]

The appellate court disagreed, observing that, although NCAA rules permitted one to play a college sport as an amateur while earning a salary from playing professionally in another sport, no NCAA bylaw identified a right to receive "customary income" for playing a sport.[66] On the contrary, the court noted, NCAA Bylaw 12.5.2.1 specifically prohibited college athletes from receiving money for advertisements and endorsements.[67]

> In the court's view, these bylaws taken together, show a clear . . . intent to prohibit student-athletes from engaging in endorsements . . . without regard to: (1) when the opportunity for such activities originated; (2) whether the opportunity arose or exists for reasons unrelated to participation in an amateur sport; and (3) whether

62. *Id.* at 622, 623.

63. *Id.* at 623–24.

64. The current version of this rule is Bylaw 15.3.1.4, which states, "[a] professional athlete in one sport may represent a member institution in a different sport and may receive institutional financial assistance in the second sport." D-1 MANUAL, *supra* note 3, art. 15.3.1.4, at 195.

65. *Bloom*, 93 P.3d at 625.

66. *Id.*

67. *Id.* This bylaw is still in effect under the same number. It states:

> After becoming a student-athlete, an individual shall not be eligible for participation in Intercollegiate athletics if the individual:
>
> (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or
>
> (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

D-1 MANUAL, *supra* note 3, art. 12.5.2.1, at 71.

> income derived from the opportunity is customary for any particular professional sport.[68]

Therefore, although college athletes have the right to be professional athletes in other sports, "they do not have the right to simultaneously engage in endorsement or paid media activity and maintain their eligibility to participate in amateur competition."[69] The court added that despite the disparate impact of Bylaws 12.1.2 and 12.5.2.1 on, say, minor league baseball players, who earned salaries, and skiers, who earned only endorsement income, it could not ignore the clear language of those bylaws "simply because they may disproportionately affect those who participate in individual professional sports."[70]

Moreover, the court noted that the bylaws' prohibition on income from endorsements and media activities was rationally related to the NCAA's stated purpose of maintaining a "clear line of demarcation" between college and professional sports.[71] According to the court, permitting Mr. Bloom to endorse products and be paid for doing so could "open the door" to the commercial exploitation of athletes in other sports.[72] Furthermore, permitting him to be paid for entertainment activities, such as hosting a television show, would make it difficult "to determine which of Bloom's requested activities were, in fact, unrelated to his athletic ability,"[73] which NCAA rules prohibited him from using to obtain commercial opportunities.[74]

---

68. *Bloom*, 93 P.3d at 626.
69. *Id.*
70. *Id.*
71. *Id.* (quoting NCAA, 2013–14 NCAA DIVISION I MANUAL art. 12.01.2, at 59 (2013)).
72. *Id.* at 627.
73. *Id.*
74. Under current Bylaw 12.5.1.3, a college athlete may continue modeling and other promotional activities unrelated to athletics begun before entering college if, among other criteria, "[t]he [athlete] became involved in such activities for reasons independent of athletics ability; . . . [and t]he [athlete] does not endorse the commercial product" involved. D-1 MANUAL, *supra* note 3, art. 12.5.1.3(b),(d), at 69. The *Bloom* court's concern in this regard was that, although Mr. Bloom's pre-college commercial ventures may have resulted only from his skiing prowess, any such activities in which he might engage during college could derive as much from his status as a college football player as from his skiing fame. *Bloom*, 93 P.3d at 627. In that case, it would be difficult to determine whether or not he was in violation of NCAA rules.

Finally, the court pointed out that Bloom had failed to show any arbitrariness or inconsistency in the way the NCAA applied its rules in his case or any unfair treatment in its denial of his request for a waiver of those rules.[75] Thus, the court agreed with the trial court's reasoning that he had not demonstrated a reasonable probability of success on the merits and affirmed the denial of his request for an injunction.[76] Because it affirmed the trial court's decision, the appellate court did not need to address the validity of the Restitution Rule.[77]

2. *The Aftermath: Bloom's Congressional Testimony*

Jeremy Bloom certainly addressed the Restitution Rule in subsequent testimony before a congressional subcommittee. In September 2004, Bloom told the subcommittee:

> In my experience, this restitution bylaw brought much concern to the [trial] judge who heard my case as well as spurred university officials to notify me that, even if I were granted injunctive relief by the court, that the university would not take the risk of allowing me to play for fear of possible sanctions.[78]

To make his point, Bloom quoted the portion of the trial judge's opinion that sought to determine whether granting the injunction would serve the public interest.[79] Toward that end, the judge weighed the relative harms to Mr. Bloom and the University of Colorado that would result from a decision granting the injunction.[80] The trial judge wrote:

> The harm to CU . . . would be that an injunction mandating that they declare Mr. Bloom eligible and allow him to compete on the football team would risk the imposition of sanctions pursuant to bylaw 19.8, which would allow the NCAA to impose sanctions if an injunction was erroneously granted. These sanctions

75. *Bloom*, 93 P.3d at 628.
76. *Id.*
77. *Id.*
78. *Due Process and the NCAA Hearing*, *supra* note 33, at 19 (statement of Jeremy Bloom).
79. *Id.* at 22.
80. *Id.*

> could include: forfeiture of all victories, of all titles, TV revenue, as well as others; forfeiture of games would irreparably harm all of the members of the CU football team who would see their hard earned victories after great personal sacrifice nullified; the loss of revenues would harm all student athletes at CU who would find their various programs less economically viable; imposition of NCAA sanctions would harm CU's reputation; and sanctions would reduce the competitiveness of various sports teams at CU.[81]

After weighing the stakes for Bloom and the University, respectively, the trial judge added, "I find that the harm to CU and the NCAA is more far reaching, especially because it could harm other student athletes, than the harm to Mr. Bloom. Therefore, the public interest would not be served by an injunction."[82]

Thus, although the Restitution Rule did not play a key role in the appellate court's decision in *Bloom v. NCAA*, its likely consequences for the University of Colorado if an injunction had issued in Bloom's favor nonetheless influenced the trial judge's decision to deny Bloom's request for an injunction. The appellate court relied on the reasonableness of the NCAA's prohibition on endorsements by athletes to resolve the case; nevertheless, its decision affirmed the denial of an injunction request that, if granted, could have unleashed the NCAA's notion of "restitution" on the University of Colorado.[83]

C. Oliver v. NCAA

More recently, in *Oliver v. NCAA*, briefly addressed above, the Restitution Rule was front-and-center in an Ohio trial court's decision to grant the college-athlete plaintiff's request to enjoin the NCAA from keeping him off the baseball diamond.[84] In May 2008, the NCAA suspended Oklahoma State University pitcher Andy Oliver indefinitely for violating Bylaw 12.3.1, the "no-agent" rule, by: "(1) allowing his previous attorneys to contact the

81. *Id.*
82. *Id.*
83. Bloom v. NCAA, 93 P.3d 621, 627 (Colo. App. 2004).
84. 920 N.E.2d 203 (Ohio C.P. 2009).

Minnesota Twins by telephone and (2) by allowing [one of those attorneys] to be present in [Oliver's Ohio] home" when a Twins representative offered Oliver a contract.[85] Oliver sued in Ohio, and the trial court issued a temporary restraining order reinstating him, after which Oklahoma State asked the NCAA to reinstate him.[86] Instead of reinstating him, however, the NCAA suspended Oliver for one year and reduced his collegiate eligibility by a year.[87]

On the merits of the case, the trial court attacked both the No-Agent Rule, which Oliver had allegedly violated, and the Restitution Rule, which would affect both Oliver and Oklahoma State if he obtained an injunction that was later overturned on appeal. Regarding Oliver's claim against the No-Agent Rule, the court first observed that Oliver, like Jeremy Bloom, was a third-party beneficiary of his University's contractual relationship with the NCAA, which entitled him to assert "a violation of the duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members."[88] Therefore, the court continued, the NCAA "was required to deal honestly and reasonably with [Oliver] as a third-party beneficiary of its contractual relationship."[89] Yet the No-Agent Rule, which permits an athlete to hire a lawyer as an advisor, but prohibits the lawyer from contacting a professional team on the athlete's behalf and from being present when a contract is offered, failed to satisfy those requirements.[90] In the court's view, the rule "is unreliable (capricious) and illogical (arbitrary) and indeed stifles what attorneys are trained and retained to do."[91]

The court reached a similar conclusion about the Restitution Rule, observing that it not only "fosters a direct attack on the constitutional right of access to courts," but is also "arbitrary and indeed a violation of the covenant of good faith and fair dealing implicit in [the NCAA's] contract with [Oliver], as the third-party

85. *Id.* at 207.
86. *Id.*
87. *Id.* Later, the Association lessened the penalty to "70 percent of the original suspension and no loss of eligibility." *Id.*
88. *Id.* at 212.
89. *Id.*
90. *Id.* at 213–14; D-1 MANUAL, *supra* note 3, art. 12.3.2.1, at 66.
91. *Oliver*, 920 N.E.2d at 214.

beneficiary" of the NCAA's contractual relationship with Oklahoma State.[92] It forces an institution to either permit an athlete to compete in accordance with a court order and face penalties if the order is reversed on appeal, or to prohibit the athlete from competing, thereby defying a court order and risking a contempt-of-court citation.[93]

Thus, the Ohio trial court invalidated both the No-Agent Rule and the Restitution Rule and granted Oliver a declaratory judgment and a permanent injunction preventing the NCAA from declaring him ineligible to compete.[94] The NCAA commenced an appeal, but before the appeal could be heard, the parties reached a settlement whereby the NCAA paid Oliver $750,000 to end the litigation, therefore leaving both the No-Agent Rule and the Restitution Rule intact.[95] In *Oliver*, then, as in *Bloom*, the appellate court never addressed the legitimacy of the Restitution Rule directly, leaving that issue for another case and another day.

D. *The High School Cases*

Because so few cases have considered the NCAA's Restitution Rule directly, it is instructive to examine those cases that have addressed analogous rules established by state high school athletic associations. Indeed, because the high school cases have addressed restitution directly, they present the arguments for and against "restitution" more clearly and completely than do the college cases. Accordingly, the high school cases merit review and analysis.

1. The Cardinal Mooney *Case*

At issue in *Cardinal Mooney High School v. Michigan High School Athletic Ass'n* was the validity of Michigan's Regulation V, Section 3D ("Rule 3D"), a restitution rule similar to the NCAA's.[96] Under this rule, if a high school athlete obtained an injunction that was vacated, stayed, or reversed on appeal, the Michigan High School Athletic Association ("MHSAA") could take one or

92. *Id.* at 216.
93. *Id.*
94. *Id.* at 206, 218–19.
95. *See* Brandon D. Morgan, Oliver v. NCAA*: NCAA's No Agent Rule Called Out, but Remains Safe*, 17 SPORTS L. J. 303, 314 (2010).
96. 467 N.W.2d 21, 22 (Mich. 1991).

more of the following actions against the athlete's school:

> (1)—Require that individual or team records and performances achieved during the ineligible athlete's participation be vacated or stricken.
>
> (2)—Require that team victories be forfeited to opponent.
>
> (3)—Require that team or individual awards earned by such ineligible student be returned to the association.[97]

The case arose when the MHSAA declared John McClellan, a senior basketball player at Cardinal Mooney, ineligible for the 1987–88 season because his nineteenth birthday had occurred before September 1, 1987.[98] McClellan challenged the declaration of ineligibility in a Michigan trial court and obtained two temporary restraining orders, but he ultimately lost the case when the trial court determined that the age-eligibility rule applied to him.[99] Still, the trial court prohibited the MHSAA from penalizing McClellan or his school retroactively because he had participated, as a second-string player, in a few games while the temporary restraining orders were in effect.[100] The Michigan Court of Appeals affirmed, reasoning that Rule 3D was "arbitrary, unreasonable and unlawful," and assessed $1,500 in damages against both the MHSAA and its counsel for filing a "vexatious" appeal.[101]

The MHSAA appealed to the Michigan Supreme Court, which first reversed the damage award, observing that because of the absence of case law on athletic restitution rules, the matter was sufficiently unsettled that a reasonable lawyer could challenge the trial court's ruling in good faith.[102] Indeed, the Court explained, the MHSAA was entitled to continue challenging the damage award in hopes that "this Court would eventually grant leave to appeal, as we have now done."[103]

The Michigan Supreme Court also reversed on the merits,

97. *Id.* at 22–23 (internal quotation marks omitted).
98. *Id.* at 23.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 23–24.
103. *Id.* at 24.

finding Rule 3D "to be a valid restitutive provision."[104] In the Court's view, the rule was "reasonably designed to rectify the competitive inequities that would inevitably occur if schools were permitted without penalty to field ineligible athletes under the protection of a temporary restraining order, pending the outcome of an ultimately unsuccessful legal challenge to one or more eligibility rules."[105] Furthermore, the opinion noted, the rule did not interfere with a court order while it was in effect, and the member schools in the state association had agreed to abide by it as a condition of their membership.[106] Thus, according to the Michigan Supreme Court, Rule 3D was "a valid regulation which neither infringe[d] the authority of the courts nor improperly restrict[ed] access to the judicial system."[107] The court therefore reversed the trial court and vacated the injunction against enforcement of Rule 3D.[108]

2. The Reyes *Case*

A restitution rule was also at the forefront of the Indiana Supreme Court's decision in *Indiana High School Athletic Ass'n v. Reyes*.[109] In *Reyes*, a high school senior who sought to play baseball during the 1994–95 academic year was declared ineligible under Indiana's rule restricting high school athletes to eight semesters of competition.[110] Reyes was set to exceed the eight-semester limit because he had first enrolled in the ninth grade in the fall of 1990 and had repeated that grade in 1991–92 at a high school in Puerto Rico.[111] After exhausting his administrative options within the state athletic association, he sought injunctive relief.[112] An Indiana trial court issued a temporary restraining order preventing the association from enforcing the eight-semester rule against him.[113] The trial court subsequently issued a permanent injunction against the state athletic association and

104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 25.
108. *Id.*
109. 694 N.E.2d 249 (Ind. 1997).
110. *Id.* at 252.
111. *Id.*
112. *Id.* at 253.
113. *Id.*

prohibited it from penalizing Reyes's high school for honoring the injunction.[114]

A panel of the Indiana Court of Appeals reversed, and upheld both the eight-semester eligibility rule and the state athletic association's restitution rule.[115] But in a prior decision, *Indiana High School Athletic Ass'n v. Avant*, a different court of appeals panel had invalidated Indiana's restitution rule,[116] so the affected high school in *Reyes* asked the Indiana Supreme Court to resolve the apparent conflict between the two court of appeals decisions and to adopt the position taken by the panel in *Avant*.[117]

Under Indiana's restitution rule, which is also similar to the NCAA's, the state athletic association could impose one or more of the following sanctions on a school and an athlete if the original injunction was stayed or reversed:

> (1) require [that] individual or team records and performances achieved during participation by such ineligible student be vacated or stricken;
>
> (2) require [that] team victories be forfeited to opponents;
>
> (3) require [that] team or individual awards earned be returned to the state association; and/or
>
> (4) if the school has received or would receive any funds from an Association tournament series in which the ineligible individual has participated, require the school forfeit its share of net receipts from such competition, and if said receipts have not been [distributed], authorize the withholding of such [receipts] by the Association.[118]

In its analysis, the Indiana Supreme Court acknowledged the high school's argument that the restitution rule showed "disrespect" for the judiciary by encouraging school administrators to defy court orders.[119] But the court rejected that argument, stating:

114. *Id.*
115. *Id.*
116. 650 N.E.2d 1164, 1171 (Ind. Ct. App. 1995).
117. *Reyes*, 694 N.E.2d at 253.
118. *Id.* at 254, n.3.
119. *Id.* at 257.

> If a school wants to enjoy the benefits of membership in the IHSAA, the school agrees to be subject to rule that permits the IHSAA to require the school to forfeit victories, trophies, titles and earnings if a trial court improperly grants an injunction or restraining order prohibiting enforcement of IHSAA eligibility rules. Such an agreement shows no disrespect to the institution of the judiciary.[120]

The court then analogized the operation of Indiana's restitution rule to the purchase of professional liability insurance by doctors and lawyers to protect themselves from the potentially adverse consequences of lawsuits and to the signing by couples of prenuptial agreements specifying what will occur if a court finds the agreement unenforceable.[121] In light of the similarity between Indiana's restitution rule and malpractice insurance or prenuptial agreements, the court reasoned that the former showed no disrespect to courts.[122] Rather, the rule was an acceptable means by which the members of the state athletic association chose to balance one team's interest in complying with a court order and another team's interest in not having to compete against an opponent using an ineligible player because a local trial court prohibited a high school association from enforcing its eligibility rules.[123] Thus, the Indiana Supreme Court affirmed the decision of the Court of Appeals in *Reyes* and overturned *Avant* to the extent that decision had invalidated the state athletic association's restitution rule.[124]

3. The Carlberg *Case*

On the same day that the Indiana Supreme Court issued its decision in *Reyes*, it also issued a decision in the companion case, *Indiana High School Athletic Ass'n v. Carlberg*.[125] In *Carlberg*, a trial court ordered the same state athletic association to permit a transfer student to participate on the swim team of the transferee high school and enjoined the enforcement of a restitution rule

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 258.
124. *Id.*
125. 694 N.E.2d 222 (Ind. 1997).

against the athlete or his school.[126] The state athletic association appealed, and the Indiana Court of Appeals affirmed.[127] It reasoned that the association's transfer rule, which prohibited *varsity* (but not junior varsity or freshman) participation by a transfer student for one year post-transfer unless a parental change of address accompanied the transfer, violated the Equal Protection Clause of the United States Constitution.[128]

The state athletic association appealed to the Indiana Supreme Court, which reversed, upholding the transfer rule because it was rationally related to the goal of preventing "school jumping" for athletic purposes.[129] The majority noted that a rational basis test applies to an equal protection challenge to state action when, as in this case, no constitutional right is at stake and no suspect classification has been created.[130] Regarding the trial court's order prohibiting enforcement of Indiana's restitution rule, the *Carlberg* majority cited and adopted the reasoning used by the Michigan Supreme Court in the *Cardinal Mooney* case discussed earlier.[131] According to the *Carlberg* majority, the rule was reasonably designed to rectify competitive inequities that would result if schools could field teams with ineligible athletes, subject to a favorable court order, pending the outcome of an ultimately unsuccessful legal challenge to an eligibility rule.[132]

For present purposes, though, the importance of *Carlberg* lies in the dissent penned by Justice Brent Dickson, specifically that portion concerning Indiana's restitution rule. In Justice Dickson's view, although the rule might well protect the interests of athletes who competed against a team with an ineligible player, "it wholly fails to protect the interests of an equally innocent set of actors: those teammates with whom the student participated and the schools they represented."[133] He added that when, as in this case, a trial court issues an order enjoining a state athletic association from prohibiting an athlete's participation, "neither the ineligible

126. *Id.* at 227.
127. *Id.*
128. *Id.*
129. *Id.* at 236 (internal quotation marks omitted).
130. *Id.*
131. *Id.* (citing Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass'n., 467 N.W.2d 21, 24 (Mich. 1991)).
132. *Id.*
133. *Id.* at 245 (Dickson, J., concurring and dissenting).

player's teammates nor his school are free to ignore [the] court order."[134] Therefore, Justice Dickson concluded, to punish that player's teammates and school "is manifestly arbitrary and capricious."[135] Moreover, to do so in an individual sport, like swimming, is nonsensical because the ineligible athlete's times or scores can be easily deducted from team totals to determine whether the team would have qualified for the honors it earned even without the ineligible player's contribution.[136]

E. *The Limits of Restitution*

The above review of litigation concerning the NCAA's Restitution Rule and its analogs in the high school context reveals that, although arguments can be made in support of this type of rule, its inequities are sufficiently severe to warrant a search for alternatives. After all, to achieve its aim of preventing institutions from using ineligible players, the NCAA's Restitution Rule: (1) discourages athletes from pursuing legal remedies, (2) punishes institutions that honor court-ordered injunctions, thereby encouraging them to flout such injunctions, and (3) penalizes the innocent teammates of the litigant whose institution honors an injunction.[137]

But any effort to identify and adopt an alternative to the Restitution Rule must take into account American courts' historic deference to the right of private associations to manage their affairs as they see fit. That deference is the subject of Part III, which follows.

134. *Id.*
135. *Id.*
136. *Id.* at 245–46.
137. Furthermore, a recent academic commentary characterizes the Restitution Rule as a "waiver of recourse" clause that "does not preclude access to the courts on its face, [but] effectively stops member institutions from honoring and enforcing valid court orders and injunctions." *See* Ross et al., *supra* note 16, at 96. Such clauses in contracts have generally been held to violate public policy; hence, they rarely exist absent an agreement to arbitrate. *See id.* at 97-98 (citing Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 544 n.61 (7th Cir. 1978)).

III. JUDICIAL DEFERENCE TO PRIVATE ASSOCIATIONS

A. *Deference and Restitution*

The NCAA, like other private associations, enjoys considerable deference from courts when enforcing its rules and regulations. Several cases illustrate this judicial deference at work. In *NCAA v. Brinkworth*, a Florida appellate court reversed a trial court order temporarily enjoining the NCAA from enforcing its decision declaring Brinkworth ineligible to play football for the University of Miami ("Miami") during the 1996 season.[138] Brinkworth had enrolled at Miami in 1991; so in the NCAA's eyes, he had exhausted his collegiate eligibility (four years of competition within a five-year period) at the end of the 1995 season.[139] Still, he sought to play in 1996 because he had been injured in the first game of 1995 and was forced to sit out the rest of that season.[140]

In rejecting Brinkworth's claim for a waiver of the five-year rule, the appellate court observed that "a court *may* intervene in the internal affairs of a private association *only* in *exceptional* circumstances."[141] Those circumstances occur when: (1) the association's action adversely affects substantial property, contract, or other economic rights, and the association's own procedures were inadequate or unfair, or (2) the association acted maliciously or in bad faith.[142] In this case, the appellate court concluded that it was not required to decide whether the NCAA's decision had adversely affected Brinkworth's economic rights because Brinkworth had failed to show that those procedures were inadequate or unfair.[143] He had sought a waiver of the five-year eligibility rule; Miami had submitted the waiver request on his

138. 680 So. 2d 1081, 1082 (Fla. Dist. Ct. App. 1996).

139. *Id.* at 1082. *See* D-1 MANUAL, *supra* note 3, art. 12.8.1, at 75 ("A student-athlete shall complete his or her seasons of participation within five calendar years from the beginning of the semester or quarter in which the student-athlete first registered for a minimum full-time program of studies in a collegiate institution . . .").

140. *Brinkworth*, 680 So. 2d at 1082.

141. *Id.* at 1084 (emphasis added).

142. *Id.* (quoting Rewolinski v. Fisher, 444 So. 2d 54, 58 (Fla. Dist. Ct. App. 1984)) (internal quotation marks omitted).

143. *Id.* at 1082.

behalf to the NCAA's eligibility staff, which had denied it.[144] Thereafter, he appealed to the Eligibility Committee, which affirmed the denial.[145] The court acknowledged that Brinkworth challenged the Committee's reliance on its 1991 waiver rule, which was in effect when he enrolled in college, instead of its 1994 waiver rule, but concluded that the responsibility for interpreting NCAA rules rests with the NCAA itself, not with the judiciary.[146] "As the procedures were adequate and fair," the court wrote, "there was no basis on which to intervene in the internal affairs of the NCAA."[147]

Similarly, in *Hispanic College Fund, Inc. v. National Collegiate Athletic Ass'n*, the court upheld an NCAA decision denying the Hispanic College Fund's ("HCF") request for a waiver allowing it to sponsor a college football game that would be exempt from the Association's rule limiting member institutions to playing twelve games per season.[148] The appellate court affirmed the trial court's ruling that it could not interfere with the NCAA's decision "[a]bsent fraud, other illegality, or abuse of civil or property rights having their origin elsewhere."[149] "The HCF voluntarily subjected itself to the NCAA's decision making process," the court continued, "and does not allege the NCAA's actions were fraudulent, otherwise illegal, or that they abused civil or property rights having their origin elsewhere."[150] Therefore, the court declined "HCF's invitation to interfere in the NCAA's internal affairs" and upheld an Association rule establishing which organizations could sponsor early-season games that were exempt from the cap on the number of football games a member institution could play per season.[151]

In *NCAA v. Lasege*, alluded to earlier, in which the trial court had granted a Nigerian basketball player an injunction permitting him to compete for the University of Louisville, the Kentucky

144. *Id.*
145. *Id.*
146. *Id.* at 1084 (citing *Rewolinski*, 444 So. 2d at 58).
147. *Id.*
148. 826 N.E.2d 652, 654 (Ind. Ct. App. 2005). *See* D-1 MANUAL, *supra* note 3, art. 17.9.5.1, at 253.
149. *Brinkworth*, 680 So. 2d at 655 (citing Ind. High Sch. Athletic Ass'n v. Reyes, 694 N.E.2d 249, 256 (Ind. 1997)).
150. *Id.* at 658.
151. *Id.*

Supreme Court granted the NCAA interlocutory relief from the injunction.[152] The justices reasoned that the trial court had "wrongfully substituted its judgment for that of the NCAA after it analyzed the evidence and reached a different conclusion as to Lasege's intent to professionalize"—by previously accepting various benefits in return for playing basketball in Russia.[153] They added that the NCAA's decision denying eligibility was not "arbitrary and capricious," as the trial court had ruled, because that decision "ha[d] strong evidentiary support—Lasege unquestionably signed contracts to play professional basketball and unquestionably accepted benefits."[154]

Finally, in *McAdoo v. University of North Carolina*, the court rejected football player Michael McAdoo's challenge to a November 2010 decision by the NCAA's Reinstatement Committee, which declared him permanently ineligible for collegiate competition for committing academic fraud and receiving extra benefits after he received impermissible assistance from a former tutor on multiple assignments over the course of several academic terms.[155]

In that case, a North Carolina appellate court noted, "[i]t is well established that courts will not interfere with the internal affairs of voluntary associations."[156] Accordingly, when a plaintiff challenges a private association's decision, a court will dismiss the case as non-justiciable unless the plaintiff alleges facts showing that: (1) the decision violated due process, or (2) the association engaged in arbitrary behavior, fraud, or collusion.[157] The court then determined that McAdoo lacked standing because the injury he allegedly suffered with respect to his professional football prospects was speculative.[158] More precisely, it was unclear that his loss of college eligibility for academic reasons had caused him

152. 53 S.W.3d 77, 80, 84 (Ky. 2001).
153. *Id.* at 81, 85.
154. *Id.* at 85.
155. 736 S.E.2d 811, 814, 819 (N.C. Ct. App. 2013).
156. *Id.* at 825 (alteration in original) (quoting Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc., 518 S.E.2d 28, 30 (N.C. Ct. App. 1999) (citing 6 AM. JUR. 2D *Association and Clubs* § 37 (1963)) (internal quotation marks omitted).
157. *Id* (quoting Topp v. Big Rock Found., Inc., 726 S.E.2d 884, 889 (N.C. Ct. App. 2012)). This set of factors is known as the *Topp* test. *Id.*
158. *Id.* at 823.

to not be selected in the National Football League draft, thereby forcing him to sign a free-agent contract for a lesser amount than he would have received if drafted.[159] Moreover, because he had signed a contract with the Baltimore Ravens, his claim seeking reinstatement of collegiate eligibility had become moot.[160] The appellate court, therefore, affirmed the trial court's order dismissing the case.[161]

B. *Deference Denied*

Nevertheless, judicial deference to private associations in general and the NCAA in particular is not an impregnable fortress; indeed, courts have breached its defenses in several cases involving collegiate sports. For example, in *Gulf South Conference v. Boyd*, the Alabama Supreme Court affirmed a trial court order declaring Boyd eligible to play football because his athletic conference had violated its own rules in declaring him ineligible.[162] Boyd had played football on scholarship as a freshman at Livingston University.[163] Declining an offer of renewal for his sophomore year, he transferred to a junior college instead, where he later graduated but did not play football.[164] When he tried to enroll for his junior year and play football at Troy State University, which, like Livingston, belonged to the Gulf South Conference, the conference office declared him ineligible.[165]

In affirming the trial court, the Alabama Supreme Court stated boldly:

> We hold that the general non-interference doctrine concerning voluntary associations does not apply to cases involving disputes between college athletes themselves and college athletic associations. . . . In such cases the athlete himself is not even a member of the athletic association; therefore, the basic "freedom of association" principle behind the non-interference rule is not present. The athlete himself has no voice or bargaining power

159. *Id.*
160. *Id.*
161. *Id.* at 826.
162. 369 So. 2d 553, 554 (Ala. 1979).
163. *Id.* at 555.
164. *Id.*
165. *Id.*

> concerning the rules and regulations adopted by the athletic associations because he is not a member, yet he stands to be substantially affected, and even damaged, by an association ruling declaring him to be ineligible to participate in intercollegiate athletics.[166]

Having freed itself from the traditional deference to private associations, the court proceeded to examine the rule under which the conference had declared Boyd ineligible and concluded that the conference had violated its own rule.[167] The rule provided that if a member school declined to renew an athlete's scholarship or offered a renewal, but the athlete declined, the athlete was permitted to accept an offer from another conference member.[168] Moreover, a separate conference rule granted eligibility to an athlete who declined a scholarship at one member school, did not compete for two years, and then accepted a scholarship offer from another member school.[169] Because Boyd qualified under both rules, the Alabama Supreme Court held that the conference had violated its own rules in declaring him ineligible.[170]

The court in *California State University, Hayward v. National Collegiate Athletic Ass'n* did not find a blanket exception to the traditional rule of judicial deference in all cases featuring athletes and college athletic associations.[171] Still, the *Hayward* court echoed the *Boyd* court in holding that courts should intervene in the affairs of a private association when the latter violates its own rules.[172] The *Hayward* case concerned the NCAA's former "1.6 rule," which barred from athletic competition any freshman whose institution could not predict, based on the athlete's high school grade-point average and standardized test (SAT or ACT) score, that he or she would earn at least a 1.6 grade-point average.[173] The period of ineligibility would end when the athlete earned at least a 2.0 grade-point average for ten hours of college credit.[174]

166. *Id.* at 557.
167. *Id.*
168. *Id.* at 557–58.
169. *Id.* at 558.
170. *Id.*
171. 47 Cal. App. 3d 533, 539 (Cal. Ct. App. 1975).
172. *Id.* at 543; *see also Boyd*, 369 So. 2d at 557.
173. *Hayward*, 47 Cal. App. 3d at 538.
174. *Id.*

Two such athletes, a runner and a baseball player, were ineligible for competition at California State University-Hayward ("CSUH") as first-semester freshmen (in the fall of 1969 and 1970, respectively), but the University permitted them to compete in the spring semester after they each earned at least a 2.0 average during the fall term.[175] CSUH interpreted the 1.6 rule to apply to postseason competition only, thereby permitting a freshman "sub-predictor" to compete during the regular season so long as he or she was not allowed to compete in postseason events.[176] The Far West Conference, to which CSUH belonged, also interpreted the rule that way, relying on a 1969 letter from the NCAA to the commissioner of the conference.[177] Consequently, CSUH was unaware that its runner and baseball player had eligibility problems until the NCAA published a memo in November 1972 stating that "sub-predictors" were ineligible for both regular-season and postseason competition.[178]

When the NCAA directed CSUH to declare the two athletes ineligible, CSUH chose not to do so.[179] Instead, CSUH appealed on their behalf to the NCAA, which retaliated against the University for defying it and taking up the athletes' cause by declaring all CSUH athletes ineligible for postseason competition indefinitely.[180] CSUH obtained a preliminary injunction barring the NCAA from enforcing its blanket declaration of postseason ineligibility.[181] On appeal by the NCAA, a California appellate court affirmed, reasoning that CSUH was entitled to a preliminary injunction so that the parties could litigate the question whether the NCAA's decision violated its own constitution and bylaws.[182] The appellate court observed that courts will intervene in the internal affairs of a private association when the association's action is either contrary to its rules or not authorized by its bylaws.[183]

175. *Id.* at 539.
176. *See* Trs. of Cal. State Univs. & Colls. v. NCAA, 82 Cal. App. 3d 461, 467 (Cal. Ct. App. 1978).
177. *Id.*
178. *Id.* at 469.
179. *Hayward*, 47 Cal. App. 3d at 539.
180. *Id.* at 537.
181. *Id.*
182. *Id.* at 540.
183. *Id*. at 539.

Later, after a trial on the merits, the trial court issued a permanent injunction in favor of CSUH, from which the NCAA appealed.[184] The appellate court affirmed.[185] Like CSUH, the appellate court interpreted the 1.6 rule to apply only to the eligibility of institutions for postseason competition, not to that of individual athletes for regular-season competition.[186] The appellate court construed the pertinent bylaw's reference to ineligibility for participation "in an NCAA-sponsored event" to mean a postseason championship event, not a regular-season contest.[187] Thus, the appellate court concluded, the runner and the baseball player had been eligible to compete for CSUH under NCAA standards beginning in the spring semester of each one's freshman year in college, and CSUH did not violate an NCAA rule in permitting them to do so.[188] The permanent injunction would stand because the NCAA had misread and misapplied its own rule.[189]

C. *Lessons for the Future*

The import of the above cases for anyone contemplating a challenge to the NCAA's Restitution Rule is that, unless the plaintiff can show that the Association's action was illegal, contrary to its own rules, or adverse to substantial economic rights, courts will defer to its right to regulate its members' athletic programs. Nevertheless, commentators have advocated several methods of defanging the Restitution Rule, each of which Part IV will identify before concluding that binding arbitration is the best means to that end.

IV. ARBITRATION INSTEAD OF RESTITUTION

A. *A Menu of Alternatives*

The Restitution Rule's harsh penalties and its tendency to discourage athletes from seeking and institutions from honoring

184. Trs. of Cal. State Univs. & Colls. v. NCAA, 82 Cal. App. 3d 461, 465 (Cal. Ct. App. 1978).
185. *Id.* at 476.
186. *Id.* at 474–75.
187. *Id.* at 474.
188. *Id.* at 475.
189. *Id.* at 475–76.

injunctions have spawned several suggestions for replacing it or, at least, blunting its impact. Most of those suggestions would require courts to change the standards by which they judge disputes between the NCAA and college athletes.

One suggestion is that in such cases, courts should abandon their traditional deference to the rights of private associations to govern themselves because that rationale fails when applied to college athletes, who are not members of the NCAA.[190] This reasoning echoes that of the Alabama Supreme Court in the *Boyd* case, in which the court held:

> [T]he general non-interference doctrine concerning voluntary associations does not apply to cases involving disputes between college athletes themselves and college athletic associations . . . [because] the athlete himself is not even a member of the athletic association [a conference in this instance] . . . [and] has no voice or bargaining power concerning [its] rules and regulations.[191]

Like the *Boyd* opinion, commentary advocating the end of judicial deference to the NCAA argues that the associational-autonomy rationale for such deference "is a red herring in the context of the NCAA and student-athletes, as the rule of deference applies to members, which the student-athletes are not."[192]

This suggestion, if adopted, would leave the Restitution Rule in place, but could reduce the likelihood of appellate court reversals of injunctions favoring athletes, thereby limiting the NCAA's opportunities to invoke the rule. Without the deference rationale, appellate courts would presumably be more likely to affirm injunctions favoring athletes, thereby preventing the NCAA from employing the Restitution Rule.

An alternative suggestion would eliminate the Restitution Rule on the ground that it "[r]enders the court system meaningless," replacing it with heavy penalties (e.g., fines, scholarship reductions, bans on postseason competition,

190. *See* T. Matthew Lockhart, Oliver v. NCAA*: Throwing a Contractual Curveball at the NCAA's 'Veil of Amateurism*,*'* 35 U. DAYTON L. REV. 175, 187 (2010).

191. Gulf S. Conference v. Boyd, 369 So. 2d 553, 557 (Ala. 1979).

192. Lockhart, *supra* note 190, at 187.

suspensions of coaches, etc.) for institutions that use ineligible players repeatedly.[193] Still another suggestion is for courts "to punish the NCAA until it directs members to follow the court's order."[194] According to this view, "[t]he NCAA could easily adopt a simple rule that all members are required to follow valid court orders issued against the NCAA."[195]

Each of these suggestions is problematic. Presumably, courts will not uniformly abandon their traditional deference to the NCAA in its relations with college athletes anytime soon. Even if some courts were to do so, others would not, leaving injunctions more vulnerable to reversal and athletes more vulnerable to imposition of the Restitution Rule in some jurisdictions than in others. And even absent judicial deference to the NCAA, an appellate court could still reverse an injunction in a particular case, thereby triggering imposition of the Restitution Rule. Eliminating the Restitution Rule and substituting major penalties for repeat institutional offenders is flawed too. By the time the penalties are imposed, the ineligible athlete may well have graduated or exhausted eligibility, and the perhaps complicit coach may have moved on as well, leaving innocent successors to bear the burdens of the penalties. Finally, the NCAA, which has not needed to invoke the Restitution Rule since 1976, is unlikely to mothball its nuclear weapon by ordering its members to honor court orders adverse to the Association.

B. *The Best Choice: Binding Arbitration*

Fortunately, a better substitute exists for the Restitution Rule, one that will be less punitive to athletes and institutions while serving the NCAA's legitimate goal of discouraging its members from using ineligible athletes in competition. The proper substitute for the Restitution Rule is binding arbitration conducted by professional arbitrators independent of the NCAA, in the manner of professional sports leagues and the United States Olympic Committee ("USOC").[196]

Binding arbitration has several advantages over the NCAA's

193. Morgan, *supra* note 95, at 313.
194. Johnson, *supra* note 16, at 507.
195. *Id.*
196. *See* Ross et al., *supra* note 16, at 82.

current reinstatement procedure, potentially followed by a claim for injunctive relief. First, arbitrators, unlike members of the Reinstatement Committee, would be independent of the NCAA. Members of the Reinstatement Committee owe their positions to the NCAA, and athletes cannot participate in the appointment or the removal of members, who serve three-year terms.[197] In contrast, under an arbitration scheme, the athlete and the NCAA, as the parties, could consult with a case manager employed by the American Arbitration Association ("AAA") to identify the qualities they desired in an arbitrator.[198] The case manager would use the information provided by the parties to compile a list of candidates, from which the parties could either agree on a person or rank the candidates to whom they did not object and then let the case manager select the highest ranked candidate.[199]

Second, binding arbitration produces a result more quickly than litigation can, which is why it is available with respect to the time-sensitive eligibility and selection decisions that sports governing bodies must make regarding Olympic athletes.[200] In the collegiate context, as in the Olympic setting, time is often of the essence concerning eligibility determinations; hence arbitration would be preferable to litigation in collegiate sports too.[201] In Olympic sports, the Ted Stevens Amateur Sports Act,[202] enacted in 1978 and significantly amended in 1998, gives athletes a statutory right to submit eligibility disputes to the AAA, which results in independent, impartial review and a final decision that is binding on the parties.[203]

197. *See id.* at 107 (citing NCAA, 2012–13 NCAA DIVISION I MANUAL art. 21.7.7.3, at 364 (2012)).
198. *See id.* at 113.
199. *See id.*
200. *See id.* at 109.
201. *See id.*
202. 36 U.S.C. §§ 220501–220529 (2012).
203. *See id.* § 220529; Ross et al., *supra* note 16, at 111. Independent of the Amateur Sports Act, since 1996, the International Olympic Committee has required athletes wishing to compete in the Olympics to sign a waiver form agreeing to bring all disputes before the Court of Arbitration for Sport ("CAS") and forego lawsuits. *See* Jason Gubi, Note, *The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns,* 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 997, 998 (2008). The form states: "The decisions of CAS shall be final, non-appealable and enforceable. I shall not institute any claim, arbitration or litigation, or seek any other form of relief in any other court or tribunal." Melissa R.

USOC Bylaw 9.7 also guarantees athletes whose claims against sports governing bodies are not resolved to the athletes' satisfaction access to binding arbitration.[204] Another USOC bylaw, 9.9, provides for expedited arbitration; when a competition is fast approaching and a decision can not be reached in time under the customary procedure, expedited arbitration produces a decision within forty-eight hours of the claim having been filed.[205] In such expedited reviews, the arbitrators are authorized to hear and decide the claims under such procedures as are necessary but still fair to the parties.[206] Indeed, the main difference between the binding arbitration provisions in the USOC bylaws and those in the Amateur Sports Act is that the former apply to all disputes brought by claimants, whereas the latter apply only to disputes arising within twenty-one days of the start of an international competition.[207]

Third, arbitration is generally less expensive, more private, and more likely than litigation to feature a decision maker with deep knowledge of the particular issues in question.[208] In the latter connection, all of the arbitrators employed by the Court of Arbitration for Sport ("CAS"), which considers eligibility disputes concerning the Olympics, the Paralympics, and the Pan American Games, are not only trained lawyers, but also persons with deep

Bitting, Comment, *Mandatory Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for 'Job Security'?*, 25 FLA. ST. U. L. REV. 655, 663 (1998) (internal quotation marks omitted).

204. U.S. OLYMPIC COMMITTEE, BYLAWS OF THE UNITED STATES OLYMPIC COMMITTEE § 9.7, at 40 (2014), *available at* http://www.teamusa.org/Footer/Legal/Governance-Documents.

205. *Id.* § 9.9, at 40.

206. *See id.*

207. *Compare* 36 U.S.C. § 220509(a) ("In any lawsuit relating to the resolution of a dispute involving the opportunity of an amateur athlete to participate in the Olympic Games, the Paralympic Games, or the Pan-American Games, a court shall not grant injunctive relief against the corporation within 21 days before the beginning of such games if the corporation, after consultation with the chair of the Athlete's Advisory Council, has provided a sworn statement in writing executed by an officer of the corporation to such court that its constitution and bylaws cannot provide for the resolution of such dispute prior to the beginning of such games."), *with* U.S. OLYMPIC COMM. BYLAWS § 9.7, at 40. *See also* Bitting, *supra* note 203, at 663 (quoting Stephen A. Kaufman, Note, *Issues in International Sports Arbitration,* 13 B.U. INT'L L. J. 527, 532 (1995)); Gubi, *supra* note 203, at 1022.

208. *See* Ross et al., *supra* note 16, at 112.

experience in sports.[209]

Finally and most importantly, if binding arbitration were to replace the NCAA's current reinstatement process, athletes would not seek injunctions to restore their eligibility because the arbitrator's decision would be final. Therefore, the Restitution Rule would no longer be necessary to protect the Association's legitimate interest in discouraging its members from using ineligible athletes.[210] At the same time, athletes challenging an NCAA declaration of ineligibility would know that the arbitrators in their respective cases were entirely independent of the NCAA.

C. *Arbitration in Action*

Ideally, the NCAA would amend its bylaws to replace its current athlete reinstatement process with an arbitration mechanism.[211] If the NCAA resists this change, Congress ought to require it, perhaps as a condition precedent to conferring on the Association a limited antitrust exemption.[212] The exemption would empower the NCAA to rein in the commercial excess of major college sports without risking lawsuits from member institutions or media outlets.[213]

209. *See* Bitting, *supra* note 203, at 673.

210. *See* Ross et al., *supra* note 16, at 113.

211. *See id.* at 112.

212. In recent years, several commentators have suggested that Congress confer a limited antitrust exemption on the NCAA in exchange for requiring the Association to enact reforms that would strengthen the link between athletics and higher education. *See generally* PORTO, *supra* note 2 (discussing the impact of two cases, *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) and *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988), on the NCAA and collegiate sports and proposing that congressional action be taken in order to ensure the fairness and educational soundness of the administration of college sports).

213. *See generally* Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 ORE. L. REV. 837, 857 (2014) (arguing that, as opposed to other alternatives, reform of commercialized collegiate athletics should focus on "creat[ing] programs designed to ensure that student-athletes participating in big-time sports receive the fullest opportunity to gain the benefits a college education can offer," and the best way to accomplish this is through an external regulatory commission); C. Thomas McMillen, *Could the Government End the Mess in College Sports*?, CHRON. OF HIGHER EDUC. (August 15, 2014), http://chronicle.com/article/Could-the-Government-End-the/148407/ (arguing that a congressional

Regardless of how arbitration is applied to NCAA eligibility disputes, the NCAA can use the arbitration provided for in the Amateur Sports Act as a model.[214] The Act authorizes arbitration for athletes, coaches, trainers, managers, and officials[215] whose complaints against national sport governing bodies the USOC has decided in favor of the governing bodies.[216] The NCAA could restrict arbitration to athletes whose institutions have declared them ineligible for competition. The Act specifies that a party seeking arbitration must submit its request within thirty days of the USOC's decision.[217] No such timetable presently exists for colleges and universities to seek reinstatement of athletes, but under an arbitration model, the NCAA could establish a period of time after the declaration of ineligibility for submitting an arbitration request.[218] Under the Amateur Sports Act, when the AAA receives a demand for arbitration, the pertinent regional office notifies the complainant, the sports governing body involved, and the USOC.[219] Similarly, a college athlete contesting an eligibility decision could file a request for arbitration with the AAA, which would then be required to notify the athlete, the institution, and the NCAA that it had received the filing.

The Amateur Sports Act provides for three arbitrators per hearing, unless the parties agree to fewer,[220] to be held at a site the AAA selects, unless the parties agree to a different site.[221] These provisions would work well in the college sports context too because they insure that the majority view of a panel prevails,

grant of an antitrust exemption to the NCAA would allow the Association to rein in rampant spending and commercialism in college athletics in favor of restoring academic integrity).

214. *See* 36 U.S.C. § 220529(a) (2012).

215. *Id.* § 220505(c)(5).

216. *Id.* § 220529(a).

217. *Id.* § 220529(b)(1).

218. *See* D-1 MANUAL, *supra* note 3, art. 12.12.2, at 85–86 ("Any appeal to restore a student athlete's eligibility shall be submitted in the name of the institution by the president or chancellor (or an individual designated by the president or chancellor), faculty athletics representative, senior woman administrator or athletics director."); *see supra* text accompanying note 29 (explaining why the absence of a timetable for eligibility disputes is inconvenient in the context of college athletics).

219. 36 U.S.C. § 220529(a).

220. *Id.* § 220529(b)(2)(a).

221. *Id.* § 220529(b)(2)(B).

rather than one person's view, and that neither party enjoys a "home court advantage." The Act also opens hearings to the public.[222] This requirement could be problematic in the collegiate context, where the athletes are often still in their teens; sensitive personal information can be involved, and public interest can be intense.[223] Accordingly, an arbitration hearing for a college athlete should be closed to the public if the athlete so requests. The Act provides that each party may have counsel present at the hearing, which should apply in collegiate arbitration hearings too.[224]

The Amateur Sports Act further provides that the arbitrators may settle the dispute before making a final award, so long as the parties agree and the settlement is consistent with the USOC's constitution and bylaws.[225] This provision may seem unnecessary in the collegiate context, where one party seeks an immediate return to eligibility and the other favors continued ineligibility. But in cases featuring a significant violation of NCAA rules, with mitigating circumstances, both the athlete and the NCAA might agree to a reduced period of ineligibility. Therefore, a settlement option should exist in collegiate arbitration, just as it does in Olympic arbitration.

Under the Amateur Sports Act, the arbitrators' final decision is binding on the parties, provided that decision is consistent with the constitution and bylaws of the USOC.[226] At any time before a final decision is made, the hearing may be reopened, either by the arbitrators, on their own motion, or on the motion of a party.[227] If a party's motion prompts the reopening, and if that reopening would result in the arbitrators' decision being delayed beyond the deadline agreed to at the start of the proceedings, all parties to the decision must agree to reopen the hearing.[228] Comparable provisions would be advisable in the collegiate context, especially one that renders the arbitrators' decision binding so long as it does

222. *Id.* § 220529(b)(2)(C).
223. *See* Ross et al., *supra* note 16, at 112 (addressing the personal nature of issues often involved in eligibility disputes and the impact of such issues on lives of young athletes).
224. 36 U.S.C § 220529(b)(4).
225. *Id.* § 220529(c).
226. *Id.* § 220529(d).
227. *Id.* § 220529(e)(1).
228. *Id.* § 220529(e)(2).

not violate the constitution and bylaws of the NCAA or is not void as against public policy, such as by violating federal law. Those two provisos would be the only permissible bases for challenging the arbitrators' decision in court.

V. CONCLUSION

The NCAA's Bylaw 19.13, the Restitution Rule, is a punitive relic of a paternalistic past in college sports, and it should give way to binding arbitration, either at the NCAA's own initiative or at Congress's insistence. By subjecting individuals and institutions to retroactive punishment when an athlete's successful claim for an injunction is reversed on appeal, the Restitution Rule discourages athletes from pursuing legal relief and institutions from honoring court-ordered injunctions. It also potentially subjects an institution that honors an injunction, along with the plaintiff athlete's innocent teammates, to severe and wholly undeserved retribution.

Several alternatives to the Restitution Rule exist, the best of which is binding arbitration of athletic eligibility disputes using the model provided by Olympic arbitration. Binding arbitration is the best substitute because it would remove the prospect of retroactive penalties by virtually eliminating the need for injunctive relief in eligibility cases, while also protecting the NCAA's legitimate interest in barring ineligible athletes from competition. Only by replacing the Restitution Rule with binding arbitration can the NCAA punish the guilty, while protecting the innocent, and respecting the American legal system.