JUDICIAL REVIEW OF NCAA ELIGIBILITY DECISIONS:

EVALUATION OF THE RESTITUTION RULE AND A CALL FOR ARBITRATION

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INTRODUCTION

Imagine being a star athlete at a prominent Division I college or university. Now suppose that the National Collegiate Athletic Association ("NCAA") notified your college or university that you were being investigated for possible violations of their regulations, and shortly thereafter found a violation, declaring that you were ineligible to participate in intercollegiate athletics. With strong evidence of your innocence, suppose that you were to retain an attorney to take the matter to a court of equity, where your counsel met the high standards required and a sympathetic judge granted injunctive relief, allowing you to play just in time for the season opener. Thrilled with your victory, you would likely be shocked and heartbroken to learn that, in all likelihood, your institution would still not allow you to play. This is because, despite the judicial determination of your innocence, if your injunction is "voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified,"[1] the NCAA may impose severe financial penalties on member schools under Bylaw 19.7.[2] Known as the Restitution Rule, this Bylaw effectively prevents student-athletes from participating in intercollegiate athletics even though they have a court-ordered injunction that says otherwise.[3]

As the above hypothetical illustrates, the Restitution Rule serves to frustrate judicial relief granted to student-athletes, even if the athlete has conclusively demonstrated the likelihood of success on the merits, irreparable

1. NAT'L COLLEGIATE ATHLETIC ASS'N, 2012–2013 NCAA DIVISION I MANUAL, art. 19.7 (2012), *available at* http://www.ncaapublications.com/productdownloads/D113.pdf [hereinafter NCAA DIVISION I MANUAL].

2. *Id.*

3. *Id.*

harm, and that the balance of hardships favors immediate equitable relief. The rule places member schools in an impossible position. While a court order grants student-athletes the legal right to participate, the Restitution Rule prevents schools from allowing them to participate for fear of *potential* NCAA sanctions. The rule's clear effect is precisely the same as if the student-athlete had been required, as a condition of participation in NCAA athletics, to sign a waiver of recourse to judicial review of NCAA eligibility decisions. Courts in similar contexts have refused to enforce compulsory waivers of recourse as contrary to public policy, unless the parties' agreement contains an arm's length negotiated arbitration procedure for resolving their disputes.[4]

This article begins with a brief discussion of interim equitable relief and why it is a necessary remedy for eligibility decisions rendered under the NCAA's procedure for resolving eligibility disputes, as it currently exists.[5] Next, it examines the Restitution Rule, the interests it purports to protect, and its actual effects on student-athletes and member schools.[6] Judicial precedents have generally supported the principle of independent review of NCAA decisions regarding student-athlete eligibility, declining to apply the doctrine of non-interference decisions of private associations, which would otherwise operate to preclude independent judicial review.[7] Judicial treatment of the Restitution Rule, however, has not corresponded with these precedents.[8] This article will demonstrate how the Restitution Rule effectively operates as a waiver of recourse clause, and will demonstrate the courts' abhorrence of such clauses, generally, as well as in the sports league context.[9] This article will then discuss why the NCAA's legitimate concern regarding local court bias is insufficient to justify Bylaw 19.7, concluding that the courts should declare the Restitution Rule unenforceable as contrary to public policy.[10] Finally, we propose independent impartial arbitration as an alternative to court intervention.[11] This alternative would not only satisfy the NCAA's interest in maintaining fairness to competing institutions, which is the purported justification for the Restitution Rule, but would also provide quick, independent, and final resolution of NCAA eligibility disputes in compliance with the Federal Arbitration Act.[12] The NCAA should replace Bylaw 19.7 with a system of independent impartial arbitration, similar to the numerous arbitration systems adopt-

4. *See infra* Part IV.
5. *See infra* Part I.A–B.
6. *See infra* Part I.C.
7. *See infra* Part II.
8. *See infra* Part III.
9. *See infra* Part IV.
10. *See infra* Part V.
11. *See infra* Part VI.
12. *Id.*

ed by other leagues and associations throughout the sports industry.[13]

I. THE NECESSITY OF INJUNCTIVE RELIEF UNDER THE NCAA'S CURRENT SYSTEM OF RESOLVING ELIGIBILITY DISPUTES

A. The Purpose of Equitable Relief

The concept of equity, which was developed by the English common law and grew out of necessity to meet the needs of the time and of efficient judicial administration, was designed to prevent injustice that could occur if a plaintiff were only left to remedies at law.[14] Modern equity is designed to complement legal jurisdiction, allowing relief where courts of law are traditionally unable to act. As the Arkansas Supreme Court once explained, "A court of conscience must keep the granted relief abreast of the current forms of iniquity."[15] Thus, courts have developed injunctive relief as a way to ensure that equity is done. A federal court may issue injunctive relief under Rule 65 of the Federal Rules of Civil Procedure.[16] However, the rule itself "does not set forth a specific standard for the determination of a request for a preliminary injunction."[17] In place of a statutory standard, courts have generally relied on the traditional principles of equity when evaluating an application for a preliminary injunction.[18]

With equity as a guide, each federal circuit has developed its own test for determining whether interim judicial relief is appropriate.[19] Generally, federal courts balance the following factors: (1) the movant's likelihood of success on the merits; (2) the likelihood that the movant will suffer irreparable injury if the request for preliminary injunction were to be denied; (3) the hardships imposed on parties and non-parties by the issuance or non-issuance of preliminary relief; and (4) the effect of a grant or denial of preliminary injunctive relief on public policy.[20] State courts use a variety of methods in deciding whether to grant a temporary injunction.[21] Virtually

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13. *Id.*

14. *See* Quinn v. Phipps, 113 So. 419, 425–26 (Fla. 1927); Jones v. Newhall, 115 Mass. 244, 244 (1874). *See also* CHRISTOPHER GUSTAVUS TIEDEMAN, A TREATISE ON EQUITY JURISPRUDENCE 9–11 (F.H. Thomas Law Book Co. 1893).

15. Renn v. Renn, 179 S.W.2d 657, 661 (Ark. 1944).

16. FED. R. CIV. P. 65.

17. 13 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 65.22[1] (3d ed. 2013).

18. *Id.*; SEC v. Mono-Kearsarge Consol. Mining Co., 167 F. Supp. 248, 260 (D. Utah 1958).

19. *See* 13 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 65.22 (3d ed. 2013).

20. *Id.*

21. Some states, such as Minnesota, have created their own common law test, utilizing several factors:

> We evaluate the situation in light of five considerations which we consider

all jurisdictions provide for the granting of equitable relief in situations where irreparable harm is done to a party by the mere passage of time.[22]

B. The Appropriateness of Injunctive Relief for NCAA Eligibility Decisions

The underlying principles that led courts to develop interim equitable relief apply with particular force to review of NCAA eligibility decisions. In a number of cases, courts have developed a significant body of precedent that substantively constrains the unfettered ability of NCAA officials to exercise discretion in ruling student-athletes ineligible for intercollegiate competition. Federal and state laws impose substantive limitations on the NCAA's ability to implement and apply certain regulations. For example, a regulation might violate a student-athlete's constitutional rights if imposed by a state college or university,[23] or be constrained by non-discrimination

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relevant in deciding whether the determination made by the trial court should be sustained on appeal:

> (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
>
> (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
>
> (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.
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> (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.
>
> (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274–75 (Minn. 1965) (internal citations omitted).

Other states, such as Iowa and New York, frame the test within their state's code of civil procedure. *See* IOWA R. CIV. P. 1.1502; N.Y. C.P.L.R. 6301. Virginia adopted the test used by the Fourth Circuit Court of Appeals. *See* Danville Historic Neighborhood Ass'n v. City of Danville, 64 Va. Cir. 83 (Va. Cir. Ct. 2004) (citing Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353 (4th Cir. 1991)).

22. *See, e.g.*, Hall v. Univ. of Minn., 530 F. Supp. 104 (D. Minn. 1982) (holding that a university student and varsity basketball player, whose applications for admission into a degree program had been denied, and whose athletic eligibility had been lost as a result, was entitled to a preliminary injunction because otherwise his overall aspirations regarding a career in professional basketball would be substantially threatened, the harm to the student outweighed any harm that granting the injunction would inflict on other parties, and the student demonstrated a substantial probability of success on his due process claim).

23. Courts are divided as to whether athletic participation is a property right protected by the Due Process Clause. *See, e.g.*, Campanelli v. Bockrath, 100 F.3d 1476 (9th Cir. 1996) (state university athletic program subject to due process requirements of the Fourteenth Amendment); Colo. Seminary v. NCAA, 417 F. Supp. 885 (D. Colo.

provisions of federal civil rights and disability laws that apply to the vast majority of NCAA members that receive federal funding,[24] or a regulation or application of the regulation may be arbitrary and capricious.[25] Recent cases have established the principle that NCAA rules operate as a contract among member schools, with student-athletes as third-party beneficiaries, so that a challenge to an improper application of an NCAA rule or even a challenge to the rule itself is legally actionable.[26]

Despite these legal constraints on the NCAA's authority to rule a student-athlete ineligible, courts struggle to meaningfully protect a student-athlete's constitutional, statutory, or contractual rights in time-sensitive cases, where the ruling comes shortly before or during a season. Depending upon the particular facts and circumstances of the case, the time-sensitive nature of an athletic career and the potential adverse effect of ineligibility on a particular player and others (such as the college or university and fellow teammates) may demonstrate irreparable harm on the basis that money damages would be extremely difficult or impossible to ascertain.[27] For example, a federal district court judge analyzing this issue emphasized, with regard to a collegiate swimmer, the few years available and the significant proportion of a swimming career that could be lost while the case was being litigated.[28] The judge further noted that such harm could not easily

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1976), aff'd, 570 F.2d 320 (10th Cir. 1978); Hall v. Univ. of Minn., 530 F. Supp. 104 (D. Minn. 1982) (holding that athletic participation is a protected right); NCAA v. Yeo, 171 S.W.3d 863, 870 (Tex. 2005) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)) ("Yeo's claimed interest in future financial opportunities is too speculative for due process protection. There must be an actual legal entitlement.").

24. *See* 20 U.S.C. § 1681 (2012). *Cf.* Ganden v. NCAA, No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (reviewing NCAA eligibility rules for compliance with Americans with Disabilities Act).

25. *See* Bloom v. NCAA, 93 P.3d 621, 624 (Colo. Ct. App. 2004) (quoting NCAA v. Lasege, 53 S.W.3d 77, 83 (Ky. 2001) ("With respect to a claim of arbitrary and capricious action . . . 'relief from our judicial system should be available if voluntary athletic associations act arbitrarily and capriciously toward student-athletes.'").

26. *See, e.g.*, *Bloom*, 93 P.3d at 623–24 ("Here, the trial court found, and we agree, that the NCAA's constitution, bylaws, and regulations evidence a clear intent to benefit student-athletes. And because each student-athlete's eligibility to compete is determined by the NCAA, we conclude that [plaintiff] had standing in a preliminary injunction hearing to contest the meaning or applicability of NCAA eligibility restrictions."). See also Hall v. NCAA, 985 F. Supp. 782 (N.D. Ill. 1997); NCAA v. Brinkworth, 680 So. 2d 1081 (Fla. Dist. Ct. App. 1996).

27. *See, e.g.*, *Ganden*, 1996 WL 680000; *Hall*, 530 F. Supp. at 106 (noting that college basketball players' overall aspirations regarding a career in professional basketball would be substantially threatened and such harm outweighed any harm that granting the injunction would inflict on other parties). Although *Hall*'s analysis of the merits of the plaintiff's claim has been subsequently questioned, Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983), the trial court's analysis of the other factors relevant to equitable relief remain valid.

28. *See Ganden*, 1996 WL 680000.

be quantified in financial terms were the plaintiff ultimately to prevail.[29] Moreover, the court suggested that the balance of hardship tips so decidedly in favor of the athlete, minimizing any harm to the NCAA, that the athlete need only demonstrate a "modest probability of success on the merits."[30]

Public policy considerations often will support injunctive relief for student-athletes who can demonstrate that they have been wrongfully ruled ineligible by the NCAA. As discussed below,[31] courts have found a strong public interest in independent review for organizations whose rules must be followed by all those seeking to participate in their chosen endeavors. The NCAA dominates and is a monopolist in the field of elite collegiate athletics.[32] Thus, it is important that participant student-athletes have fair and impartial review of NCAA eligibility decisions. Due to the time-sensitive nature of NCAA eligibility decisions, student-athletes who can show a strong likelihood of success on the merits should be granted interim judicial relief in the form of a preliminary injunction.[33]

C. Impact of the Restitution Rule on Principles of Equitable Relief

The NCAA's Restitution Rule, Bylaw 19.7, provides:

> If a student-athlete who is ineligible under the terms of 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: *(Revised: 11/1/07 effective 8/1/08)* [List of nine categories of punishments is omitted].[34]

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29. *Id*.

30. *Id.* This conclusion likely understates the NCAA's legitimate concerns about the integrity of an athletic competition that includes a player who may well be ineligible and the need for prompt resolution of the dispute.

31. *See infra* Part II.B.

32. *See infra* Part V.

33. *See, e.g.*, Oliver v. NCAA, 920 N.E.2d 203, 206 (Ohio Ct. Com. Pl. 2009) (granting declaratory and permanent injunctive relief).

34. NCAA DIVISION I MANUAL, *supra* note 1 art. 19.7. For a complete history of the adoption, amendment, and modification of the Restitution Rule since 1975, 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 Courts . . . Until* Oliver

Despite the propriety of injunctive relief, the Restitution Rule distorts the underlying principles that led courts to develop interim equitable relief by making courts reluctant to issue these preliminary injunctions in the first place.[35] Although the NCAA's legitimate concerns that underlie the Restitution Rule are properly considered by the equity court in the discretionary balancing of interests inherent in equity cases, the Restitution Rule distorts the court's exercise of discretion by adding the concern for potentially harsh retributive sanctions that will be imposed on member schools.[36] Indeed, one trial judge expressly refused to grant an injunction for this precise reason:

> The harm to [Colorado University] 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 19.7], which would allow the NCAA to impose sanctions if an injunction was erroneously granted. These sanctions could include: forfeiture of all victories, of all titles, TV revenue, as well as others; forfeiture of games would irreparably harm all of the member[s] 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 sport[s] teams at CU. 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.[37]

The Restitution Rule is grounded on legitimate concerns for parity and

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v. NCAA, 11 FLA. COASTAL L. REV. 459, 482–520 (2010).

35. *See* Alain Lapter, Bloom v. NCAA*: A Procedural Due Process Analysis and the Need for Reform*, 12 SPORTS L. J. 255, 270 (2005).

36. Gordon E. Gouveic, *Sport: 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, 24 (2003).

37. Bloom v. NCAA, No. 02-CV-1249, slip op. at 8 (Colo. Dist. Ct. Aug. 15, 2002), *aff'd*, 93 P.3d 621 (Colo. Ct. App. 2004). *See also Due Process and the NCAA: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 18–19 (2004) [hereinafter *Due Process and the NCAA*] (statement by Jeremy Bloom, former student-athlete) ("In my experience, this [R]estitution [Rule] brought much concern to the 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.").

fairness to competing institutions.[38] If a member school allows a player to compete pursuant to a trial court order and a reviewing court concludes that the trial court was in error, the school has gained a competitive advantage by continuing to play an ineligible player.[39] Another argument put forth in favor of the Restitution Rule is that it is necessary to protect the NCAA's legitimate interest in preserving the integrity of its eligibility rules against injunctions by local courts, which are likely to be unduly favorable to local schools and athletes. Professor Gary Roberts testified before Congress that the rule is needed to protect against injunctions "from local judges who often act out of partisan or parochial interests."[40] According to Roberts, the fear is that, without the Restitution Rule, there will be nothing to prevent local courts from sanctioning blatant violations of eligibility rules:

> 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. . . allow[ing] the player to participate to the substantial competitive advantage of the team (and unfair disadvantage to its opponents), all without any fear of subsequent penalty [if] the appellate courts inevitably reverse the injunction.[41]

While the NCAA certainly has a legitimate interest in protecting the integrity of its rules, a review of reported cases where the NCAA rules have been enjoined, discussed in Part III below, shows that concerns about bias may be overstated.[42] In general, courts defer to the NCAA. Most importantly, as will be discussed in Part VI below, arbitration provides a better alternative for protecting these legitimate interests while allowing those subject to NCAA governance the critical opportunity for independent review.[43]

The Restitution Rule goes much further than simply precluding potentially biased judicial review of its eligibility decisions; rather, it oftentimes prevents any judicial review at all.[44] Freeing a dominant standard-setting organization from any judicial review regarding eligibility decisions is neither a legitimate interest worthy of protection nor sound public policy.[45]

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38. NCAA DIVISION I MANUAL, *supra* note 1.

39. *See* W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 82–83 (2000) (noting that the Restitution Rule "is not driven by academic or amateurism concerns" but rather "[i]t is driven by concerns over parity . . . and possibly concerns over litigation costs").

40. *See Due Process and the NCAA*, *supra* note 37, at 15 (statement of Gary Roberts, then-Professor of Sports Law, Tulane Univ.).

41. *Id.*

42. *See infra* Part III.

43. *See infra* Part VI.

44. *See infra* Part II.

45. *See infra* Part V.A.

As the remainder of this article shows, the law properly imposes substantive limits on the discretion of NCAA officials to apply their bylaws in whatever manner they see fit.[46] Effective independent review is essential to enforce these limits, but Bylaw 19.7 frustrates this process.[47] In other contexts, courts disfavor contractual agreements that have the same effect as Bylaw 19.7 (so-called "waiver of recourse clauses").[48] This article demonstrates that mandatory arbitration addresses the legitimate concerns about parity and biased local judicial review, while permitting independent enforcement of legal constraints on the exercise of unfettered discretion by colleges and universities and NCAA officials.[49]

II. EXCEPTIONS TO THE GENERAL RULE OF DEFERENCE TO PRIVATE ASSOCIATIONS

A. The General Rule of Deference

Generally, courts will refuse to "intervene in questions involving the enforcement of bylaws and matters of discipline in voluntary associations."[50] This reluctance is based on several complementary concerns about active judicial review: (1) individuals should have the freedom to choose their associations and their rules; (2) judicial review of private associations would impinge on the right to freedom of association; and (3) rules and regulations of private associations are often unclear and are better evaluated by the association rather than by the courts.[51]

Having regard for these concerns, however, courts have created numerous exceptions to the broad principle of non-interference. As one annotation observed, "[u]nless the property or pecuniary rights of members are involved, the decisions of the tribunals of an association with respect to its internal affairs will, in the absence of mistake, fraud, illegality, collusion, or arbitrariness, be accepted by the courts as conclusive."[52] More broadly, another noted, "courts will exercise power to interfere in the internal affairs of an association where law and justice so require."[53]

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46. *See infra* Part II–VI.
47. *See infra* Part IV.
48. *Id.*
49. *See infra* Part VI.
50. Am. Fed'n of Technical Eng'rs v. La Jeunesse, 347 N.E.2d 712, 715 (Ill. 1976).
51. *See* Gulf S. Conf. v. Boyd, 369 So. 2d 553, 556–57 (Ala. 1979) (internal citations omitted); Zechariah Chaffee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1022 (1930).
52. 6 AM. JUR. 2d *Associations and Clubs* § 27 (2013).
53. 7 C.J.S. *Associations* § 83 (2007).

B. The Exceptions

Disputes in social, political, or religious associations can be quite bitter, and their resolution can be of the utmost importance to the antagonistic parties. But courts have distinguished between these disputes, which must be resolved in accordance with internal rules and procedures, and other situations where the concerns underlying the principles of non-interference are absent or less severe. Thus, courts have found that judicial intervention into the rules of private associations is warranted in a variety of instances, including in the context of sports leagues. In *Board of Regents of the University of Oklahoma v. NCAA*,[54] the Oklahoma Supreme Court addressed the general rule and cited exceptions:

> It is asserted by the NCAA that judicial scrutiny of the bylaw is inappropriate. Courts are normally reluctant to interfere with the internal affairs of voluntary membership associations, however, in particular situations, where the considerations of policy and justice are sufficiently compelling judicial scrutiny and relief are available. In dealing with an organization in which membership is an economic necessity, the courts must be particularly alert to the need for protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity to earn a livelihood while not impairing the proper standards and objectives of the organization. *The necessity of court action is apparent where the position of a voluntary association is so dominant in its field that membership in a practical sense is not voluntary but economically necessary.* It was proper for the trial court to examine the validity of the bylaw.[55]

The NCAA is a private association appropriately subject to the exception applicable when an organization is so dominant that conformance to its rules is not really voluntary; any student-athlete wishing to participate in elite collegiate athletic competition must attend an NCAA member school that is bound by the association's rules.[56] Under this exception, the Supreme Court of Alabama made clear that, because student-athletes lack bargaining power, and because the "freedom of association" principle that supports the general rule of deference is lacking with student-athletes, courts may intervene in disputes between college and university athletes and the Association:

> [T]he general non-interference doctrine concerning voluntary associations does not apply to cases involving disputes between college athletes themselves and college athletic associations.

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54. 561 P.2d 499 (Okla. 1977).
55. *Id.* at 504 (emphasis added) (internal citations omitted).
56. *Id*.

> There is a cogent reason for this position. 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 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. Thus he may be deprived of the property right eligibility to participate in intercollegiate athletics.[57]

A second exception to the general non-interference doctrine arises where the private association's laws are themselves illegal, or where they are incompatible with one another.[58] This exception applies "where the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the charter or bylaws of the association."[59] Under this exception, the courts may strike down a private association's rule if it violates the law or if it is not consistent with the association's other laws.[60]

A third exception arises when a private association "has failed to follow the basic rudiments of due process."[61] Additionally, "courts have demonstrated more of a willingness to intervene in the internal matters of private associations when they conclude that there are inadequate procedural safeguards to protect members' rights."[62]

A fourth exception to the general rule arises when the rules of private associations violate public policy. As noted by one commentator, "[a]nother factor that courts have often considered in determining the degree of scruti-

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57. Gulf S. Conf v. Boyd., 369 So. 2d 553, 557. *See also* Johnson, *supra* note 34, at 595 (italics in original) ("[T]he courts have shown deference to unincorporated associations when there is a dispute between *its* members and *the* associations, because the members' real remedy is to quit the clubs they do not like, subject to certain legal exceptions. Here, a college athlete is not a member of the NCAA, and there is no case where an unincorporated entity should be afforded deference in regards to actions taken against a nonmember third-party.").

58. *See* Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 544 (7th Cir. 1978).

59. *Id*. (citing Allen v. Chicago Undertakers' Ass'n, 137 Ill. App. 61 (Ill. App. Ct. 1907), *aff'd*, 83 N.E. 952 (Ill. 1908); Ryan v. Cudahy, 41 N.E. 760 (Ill. 1895)).

60. Cal. State Hayward v. NCAA, 121 Cal. Rptr. 85, 89 (Cal. Ct. App. 1975) (citing Smith v. Kern Cnty. Med. Ass'n, 120 P.2d 874 (Cal. 1942)) ("In any proper case involving the expulsion of a member from a voluntary unincorporated association, the . . . courts may . . . determine whether the association has acted . . . in accordance with its laws and the law of the land.").

61. *Finley*, 569 F.2d at 544. *See also* Lindemann v. Am. Horse Shows Ass'n, 624 N.Y.S.2d 723, 734 (N.Y. Sup. Ct. 1994) (holding that athletes' suspensions were "arbitrary and capricious and imposed without a meaningful hearing and in the absence of substantial evidence").

62. Crouch v. NASCAR, 845 F.2d 397, 401 (2d Cir. 1988).

ny they will apply is the extent to which action by the association conflicts with public policy."[63] In *Gulf South Conference v. Boyd*, the court noted that judicial review is appropriate "when the actions of an association are the result of fraud, lack of jurisdiction, collusion, arbitrariness, or are in violation of or contravene any principle of public policy."[64] Under a public policy analysis, courts may evaluate the actions of private associations in a variety of contexts, such as where the action violates the association's own rules or there is evidence of fraud or bad faith.[65] Thus, public policy analysis allows the courts to scrutinize the rules and actions of voluntary private associations when there is evidence of fraud, bad faith, malicious intent, collusion, or arbitrariness, and in instances when the association is not following its own rules or is directly violating them.

In addition to the express exceptions listed above, courts are more willing to intervene in the affairs of private associations when membership in an association is an economic necessity or the plaintiff's career or livelihood is involved.[66] For example, the Oklahoma Supreme Court in *Board of Regents* noted that courts must be particularly careful to protect the interests of individuals when membership in an association is an economic necessity or impacts their ability to earn a livelihood.[67] Also, in *Pinkser v. Pacific Coast Society of Orthodontists*,[68] a member was excluded from a professional orthodontist association that offered professional advantages but was not required for professional practice, and the California Supreme Court held that the plaintiff had a right to judicial review in order to determine whether he was reasonably excluded.[69] Finally, in *Bixby v. Pierno*,[70] the California Supreme Court made it clear that exclusions from professional associations must be based on substantial evidence that the excluded individual was not qualified for admission.[71] Although these cases are not directly on point because student-athletes are not members of the NCAA, one commentator suggests that "[i]f an athlete can show that action by the NCAA is likely to have a detrimental effect on his future professional ca-

63. Kenneth J. Philpot & John R. Mackall, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903, 914 (1971).

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

65. Philpot & Mackall, *supra* note 63, at 911 ("Courts have not hesitated to intervene in the internal affairs of private associations where the action by the association constitutes a clear violation of its rules or where it evidences malicious intent, such as fraud or bad faith.").

66. *Id.* at 912.

67. *See* Bd. of Regents of the Univ. of Okla. v. NCAA, 561 P.2d 499, 504 (Okla. 1977).

68. 460 P.2d 495 (Cal. 1969).

69. *Id.* at 498.

70. 481 P.2d 242 (Cal. 1971).

71. *Id.* at 257.

reer, a court might rely on these cases and subject the NCAA's actions to a higher standard of review . . . ."[72]

C. Application of the Exceptions to the Restitution Rule

The noted exceptions to the principle of non-interference demonstrate that there are many judicially—and legislatively—created limits on the unfettered discretion of private associations to enforce their internal rules. All of them suggest that NCAA eligibility determinations should likewise be subject to judicial review. A student-athlete excluded from participation in an NCAA-sanctioned sporting competition is not like someone kicked out of the local Moose Lodge, both in terms of the impact on a potential professional career, as well as the absence of an alternative association such as the local Elks Lodge. As with non-sports-related precedent, when the NCAA rules a student-athlete ineligible, the determination is sometimes challenged on the grounds that the decision is contrary to existing NCAA rules, in violation of external constitutional or statutory limits, or because the decision-making process deprived the affected athlete of due process. NCAA eligibility decisions are also attacked on grounds of arbitrariness, collusion, or inconsistency with public policy.

Application of precedent regarding other dominant, standard-setting associations suggests that NCAA eligibility decisions should also be given close judicial scrutiny. However, the Restitution Rule's effect is to preclude such review. In essence, the Restitution Rule attempts to act as an exception to the exceptions. This inherent conflict further demonstrates the need for the Restitution Rule to be evaluated by the courts.

III. JUDICIAL TREATMENT OF THE RESTITUTION RULE

Despite its review-precluding effect, courts have traditionally treated the Restitution Rule very favorably. Time and again, the Restitution Rule has been upheld by courts citing theories of deference to private associations and the freedom of contract. In *Lasege v. NCAA*,[73] the Kentucky Supreme Court stressed that "[i]n general, the members of such [voluntary athletic] associations should be allowed to 'paddle their own canoe' without unwarranted interference from the courts."[74] The court further explained that the NCAA is a voluntary athletic association and that member schools agree to abide by its rules and regulations.[75] Moreover, the court favorably cited *Indiana High School Athletic Ass'n v. Reyes*,[76] a decision in which the In-

72. Philpot & Mackall, *supra* note 63, at 913.
73. 53 S.W.3d 77 (Ky. 2001).
74. *Id.* at 83.
75. *Id.* at 87.
76. 694 N.E.2d 249 (Ind. 1997).

diana Supreme Court upheld the Restitution Rule in the high school sports context stating:

> Member schools voluntarily contract to abide by the rules of the organization in exchange for membership in the association. One of those rules is the Restitution Rule. Undeniably, the Restitution Rule imposes hardship on a school that, in compliance with an order of a court which is later vacated, fields an ineligible player. On the other hand, use of an ineligible player imposes a hardship on other teams that must compete against the teams fielding ineligible players. While schools will contend that it is unfair when they have to forfeit victories earned with an ineligible player on the field because they complied with a court order, competing schools will reply that it is unfair when they have to compete against a team with an ineligible student athlete because a local trial judge prohibited the school or the IHSAA from following the eligibility rules. The Restitution Rule represents the agreement of IHSAA members on how to balance those two competing interests. The Restitution Rule may not be the best method to deal with such situations. However, it is the method which the member schools have adopted. And in any event, its enforcement by the IHSAA does not impinge upon the judiciary's function.[77]

Reyes drew an explicit distinction between challenges to the Restitution Rule by an association member and challenges to an association decision by a student-athlete:

> Unlike most [association] cases, here we are not faced with a student athlete's challenge to an [association] decision. Rather, it is [the high school] that challenges the Restitution Rule. Although we hold in *Carlberg* that we will continue to review for arbitrariness and capriciousness [association] decisions affecting students, we see little justification for it when it comes to the [association's] member schools. As to its member schools, the [association] is a voluntary membership association. Judicial review of its decisions with respect to those schools should be limited to those circumstances under which courts review the decisions of voluntary membership associations—fraud, other illegality, or abuse of civil or property rights having their origin elsewhere.[78]

In a companion case decided on the same day as *Reyes*, the Indiana Supreme Court upheld the Restitution Rule against a student-athlete's chal-

77. *Id.* at 257–58.
78. *Id*. at 257.

lenge that the rule was arbitrary and capricious.[79] The court found that the Indiana High School Athletic Association had an interest in restitution and fairness to schools that would be forced to compete against ineligible students.[80]

Likewise, the Michigan Supreme Court reached a similar decision in upholding their state high school athletic association's version of the Restitution Rule:

> [The restitution rule] is 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. We find relevant to our decision the fact that [the restitution rule] 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. We also find relevant the fact that the member schools of the MHSAA have voluntarily agreed to submit to the MHSAA's regulations, including [the restitution rule], as a condition of their membership. Furthermore, compliance with MHSAA rules on the part of student athletes is an appropriate and justifiable condition of the privilege of participating in interscholastic athletics under the auspices of the MHSAA.[81]

The foregoing decisions reflect a view that the courts "are a very poor place in which to conduct interscholastic athletic events . . . ."[82] In *Lasege*, the court denied that the Restitution Rule "thwarts the judicial power," arguing that "the authority of the courts is . . . in no way compromised" because Bylaw 19.8 only allows for "post-hoc equalization when a trial court's erroneously granted temporary injunction upsets competitive balance."[83] Thus, for the most part courts have refused to invalidate the Restitution Rule.

It is difficult to reconcile these cases upholding the Restitution Rule with the line of cases that impose substantive limits on private associations and

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79. Ind. High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222, 235 (Ind. 1997).

80. *Id.*

81. Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass'n, 467 N.W.2d 21, 23–24 (Mich. 1991). The Michigan court mentioned in a footnote that while the validity of the NCAA Restitution Rule was not directly at issue in *Wiley v. NCAA*, 612 F.2d 473 (10th Cir. 1979), the court "appears to assume [its] validity." *Cardinal*, 467 N.W.2d at 24 n.3.

82. Ky. High Sch. Athletic Ass'n v. Hopkins Cnty. Bd. of Educ., 552 S.W.2d 685, 690 (Ky. Ct. App. 1977), *overruled* by NCAA v. Lasege, 53 S.W.3d 77, 89 (Ky. 2001).

83. Lasege v. NCAA, 53 S.W.3d 77, 88 (Ky. 2001).

exceptions to the general rule of noninterference.[84] The same concerns that led other courts to refuse to defer to decisions by private associations,[85] including dominant professional associations and dominant sports competition organizers,[86] ought to be raised by the courts with regard to the Restitution Rule. Indeed, the court in *Reyes* acknowledged that "[t]he Restitution Rule may not be the best method to deal with such situations."[87] Although courts generally do not get involved in the decisions of athletic associations, the exceptions to the general rule of judicial non-interference in private associations' procedures[88] could be applied to allow the court to step in and strike down the Restitution Rule. This was the basis of a widely publicized 2009 Ohio state court decision, *Oliver v. NCAA*:

> Student-athletes must have their opportunity to access the court system without fear of punitive actions against themselves or the institutions and teams of which they belong. The old adage, that you can put lipstick on a pig, but it is still a pig, is quite relevant here. The defendant may title 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.
>
> Bylaw 19.7 takes the rule of law as governed by the courts of this nation and gives it to an unincorporated business association. The bylaw is overreaching. For example, if a court grants a restraining order that permits a student-athlete the right to play, the institution will find itself in a real dilemma. Does the institution allow the student-athlete to play as directed by the court's ruling and, in so doing, face great harm should the decision be reversed on appeal? Alternatively, does the institution, in fear of Bylaw 19.7, decide that it is safer to disregard the court order and not allow the student-athlete to play, thereby finding itself in contempt of court? Such a bylaw is governed by no fixed standard except that which is self-serving for the defendant. To that extent, it is arbitrary and indeed a violation of the covenant of good faith and fair dealing implicit in its contract with the plaintiff, as the third-party beneficiary.[89]

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84. *See supra* Part II.

85. *See supra* Part II.B–C.

86. *Id.*

87. Ind. High Sch. Athletic Ass'n v. Reyes, 694 N.E.2d 249, 258 (Ind. 1997).

88. *See supra* Part II.B.

89. 920 N.E.2d 203, 216 (Ohio Ct. Com. Pl. 2009). Oliver and the NCAA reached a settlement whereby Oliver was paid $750,000 and the trial court's order was vacated. *See* Katie Thomas, *N.C.A.A. to Pay Former Oklahoma State Pitcher $750,000*, N.Y. TIMES, Oct. 8, 2009, at B12.

IV. THE RESTITUTION RULE AS A WAIVER OF RECOURSE

The Restitution Rule constitutes, in effect, a waiver of recourse clause.[90] Although the Restitution Rule does not preclude access to the courts on its face, it effectively stops member institutions from honoring and enforcing valid court orders and injunctions. As a practical matter, by inhibiting the issuance and enforcement of preliminary injunctions, the rule effectively removes a judge's ability to independently review eligibility decisions. As a result, preliminary injunctions are rendered useless to student-athletes when NCAA member institutions refuse to comply with them out of fear that they will receive future penalties by the NCAA. This leaves ineligible student-athletes without adequate access to meaningful judicial review. As former student-athlete Jeremy Bloom testified before Congress, "[i]t has proven to be virtually impossible for a student athlete to get relief or due process within the courts . . . as a result of the NCAA's restitution by-law."[91]

The favorable judicial treatment of the Restitution Rule contrasts sharply with judicial treatment of express clauses with the same practical effect—an explicit agreement among private parties to waive recourse to the courts and thereby effectively preclude any independent dispute resolution mechanism. In general, such contractual provisions have been held to violate public policy.[92] Moreover, federal legislation, supported by broadly interpreted Supreme Court precedent, has drawn a critical distinction between an agreement that renders decisions of private associations final, and one that, while still insulating decisions from judicial review, provides for impartial review through a mutually agreed upon form of private arbitration. Historically, courts viewed agreements to arbitrate as equivalent to waivers of recourse, and often refused to enforce them.[93] The Federal Arbitration

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90. For purposes of the discussion contained in this Section, it is not our position that student-athletes, by signing the Letter of Intent or grant-in-aid with a college or university, have expressly or implicitly consented or agreed to the NCAA's Restitution Rule.

91. *Due Process and the NCAA*, *supra* note 37, at 21 (prepared statement by Jeremy Bloom, former student-athlete).

92. Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 233 (2008).

93. As an arbitration scholar observed:

> [W]hen . . . [courts] are asked to . . . compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.

THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 49 (3d ed. 2003) (citing Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1320–21 (C.C.D. Mass. 1845)).

Act ("FAA")[94] modified that doctrine. Without affecting state court decisions holding that waivers to recourse were contrary to public policy, the FAA "validates arbitration agreements as contracts" and finds that an agreement to have a dispute resolved by arbitration, rather than judicial determination, is not against public policy.[95] The United States Supreme Court has interpreted the FAA as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[96]

The close relationship between independent arbitration and the enforceability of a waiver of recourse clause is illustrated, in the context of sports leagues, by *Charles O. Finley & Co. v. Kuhn,*[97] where a team owner sought judicial review of a controversial adverse decision by the Commissioner of Baseball.[98] The league constitution and bylaws provided that "[t]he Major Leagues and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed in their favor."[99] In upholding the clause, the Seventh Circuit viewed the waiver of recourse provision together with the mandatory arbitration clause in the Major League Agreement: "Considering the waiver of recourse clause in its function of requiring arbitration by the Commissioner, its validity cannot be seriously questioned."[100] The court of appeals also noted that, under the FAA, federal courts have upheld arbitration clauses in private agreements to waive judicial review of an arbitrator's decision.[101] The court of appeals emphasized that the arbitration provision was not the only saving grace for the waiver of the recourse clause: "Even if the waiver of recourse clause is divorced from its setting in the charter of a private, voluntary association and even if its relationship with the arbitration clause in the agreement is ig-

94. 9 U.S.C. § 2 (2000).

95. *See* Carbonneau, *supra* note 92, at 247.

96. Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). Indeed, in the context of collective bargaining agreements between unions and employers, the Court has declared that arbitration is to be presumed as the means of dispute resolution absent clear evidence of the parties' intent to the contrary. *See* United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960). *See also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001).

97. 569 F.2d 527 (7th Cir. 1978).

98. *Id.*

99. *Id.* at 533 n.14 (quoting Major League Agreement, Art. VII, Sec. 2).

100. *Id.* at 543.

101. *Id*. (citing Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Rossi v. TWA, 507 F.2d 404 (9th Cir. 1974), *aff'g* 350 F. Supp. 1263 (C.D. Cal. 1972); Euzzino v. London & Edinburgh Ins. Co., 228 F. Supp. 431 (N.D. Ill. 1964)).

nored, we think that it is valid *under the circumstances here involved*."[102] What makes *Finley* pertinent to the Restitution Rule is what the court of appeals explained in a footnote: "Waiver of recourse clauses rarely appear in the absence of an association charter or an agreement to arbitrate. Indeed, the waiver of recourse clause presented here must be viewed in light of the totality of circumstances presented, *wherein private contractual recourse remedies are provided*."[103]

The totality of the circumstances test includes careful consideration of whether the waiver of the recourse clause, with or without an arbitration clause, is the product of negotiation. "[U]nder circumstances where the waiver of rights is not voluntary, knowing or intelligent, or was not freely negotiated by parties occupying equal bargaining positions," the court will find that it is invalid as against public policy.[104] Thus, in *Finley*, the waiver of recourse clause was upheld because the owners bargained for and agreed to include the clause in the Major League Agreement. Owners, after all, were agreeing to submit disputes to determination by a single individual whom they had the power to hire and terminate. This is, of course, in marked contrast to granting unreviewable discretion to the individual members of the NCAA reinstatement committee empowered by the NCAA to render eligibility decisions without any input into their selection by, or accountability to, the student-athletes whose fates are in their hands. The Seventh Circuit clarified in *Finley* that even though the waiver of recourse clause was upheld in this instance, it does not "foreclose[] access to the courts under all circumstances."[105] Thus, *Finley* stands for the proposition that, despite a waiver of recourse provision, judicial review still exists under the recognized exceptions to the general rule of non-interference with private associations or where the requirements of the FAA[106] are not followed.[107]

The Seventh Circuit's qualified acceptance of the owners' waiver of recourse clause in *Finley* is remarkable in light of the traditional judicial deference to the broad powers given to the Commissioner to act in the best interests of baseball.[108] In dismissing the lawsuit, the court of appeals concluded that Commissioner Kuhn's broad authority included the power to veto three extraordinary player transfers for cash, particularly in the

102. *Id.* (emphasis added).
103. *Id.* at 544 n.61 (emphasis added).
104. *Id.* at 543–44.
105. *Id.* at 544.
106. *See* 9 U.S.C. § 2 (2000).
107. *Finley*, 569 F.2d at 527.
108. *See, e.g.*, Milwaukee Am. Ass'n v. Landis, 49 F.2d 298, 299 (N.D. Ill. 1931) (looking for "clear intent upon the part of the parties to endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias").

unique circumstances of the radical changes occurring within baseball's labor market.[109] The court of appeals made it clear that if they had found that Kuhn's decision was arbitrary or exceeded his authority, they would have acted notwithstanding the waiver of recourse clause.[110]

This reasoning is also illustrated in *Atlanta National League Baseball Club, Inc. v. Kuhn*,[111] another challenge to a ruling by the Commissioner of Baseball.[112] In *Atlanta National*, the district court modified the Commissioner's challenged disciplinary action, despite the waiver of recourse provision. The district court noted that, "[w]hen faced with the same waiver provision in *Finley & Co. v. Kuhn*, the court rejected the Commissioner's argument that the waiver of recourse to the courts deprived the court of subject-matter jurisdiction."[113] The *Atlanta National* court explained that "[t]he extent of defendant Kuhn's contractual power is a question for the court. Indeed, whether the Commissioner's decision in issue here is the type of decision to which the parties agreed they would be bound is itself at issue. Accordingly, jurisdiction is not lacking."[114] Thus, the district court stated that while the waiver provision illustrates the broad powers given to the Commissioner, it "operates to make the *Finley* court, and this court, hesitant, but not powerless, to upset the exercise by the Commissioner of such discretion."[115] Ultimately, the district court determined that one of the Commissioner's sanctions imposed on the plaintiff went beyond the powers authorized by the Major League Agreement.[116] The *Finley* and *Atlanta National* cases show that the waiver of recourse provision does not act as a complete bar to judicial action.[117]

Applying these principles to Bylaw 19.7, it is apparent that courts should not uphold the NCAA's rule that effectively precludes any independent review of internal decisions regarding eligibility. Unlike the waiver of recourse provision in the Major League Agreement, the Restitution Rule is not the product of arm's length negotiation—let alone *any* negotiation—between student-athletes and the NCAA. Unlike a prospective owner, who has alternative options for investment (or even consumers subject to adhesion provisions of consumer contracts), the NCAA dominates the field of college athletics. In essence, the Restitution Rule constitutes an agreement among the NCAA and its members to subject student-athletes to an internal process of resolving eligibility disputes—the NCAA's reinstatement pro-

109. *Finley*, 569 F.2d at 539.
110. *Id.* at 539 n.44.
111. 432 F. Supp. 1213 (N.D. Ga. 1977) [hereinafter *Atlanta National*].
112. *Id.* at 1218, 1220.
113. *Id.* at 1218 (citations omitted).
114. *Id.* (quoting Finley & Co. v. Kuhn, No. 76C-2358 (N.D. Ill. Sept. 7, 1976)).
115. *Id.*
116. *Id.* at 1226.
117. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 543 (7th Cir. 1978).

cess. To deprive student-athletes of a meaningful opportunity for judicial review, the agreement must, as a matter of law, comply with the provisions of the FAA. In other words, if the Restitution Rule operates to deprive student-athletes of a fundamentally fair process of resolving eligibility disputes, then the Restitution Rule is not consistent with the FAA and the reinstatement process used for resolving disputes must be reviewed to determine if it affords student-athletes a process of independent impartial review.[118] Part V addresses these issues.

V. REVIEWING THE RESTITUTION RULE AND THE REINSTATEMENT PROCESS UNDER THE FEDERAL ARBITRATION ACT

A. Basic Principles Regarding Agreements Unenforceable on Public Policy Grounds

Generally, parties are able to contract as they see fit. However, contracts imposing obligations that violate public policy will not be enforced. In these instances, the Restatement (Second) of Contracts states that "a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise or other term on grounds of public policy."[119] The Restatement defines when a contract term is unenforceable under public policy analysis:

> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
>
> (2) In weighing the interest in the enforcement of a term, account is taken of
>
> > (a) the parties' justified expectations,
> >
> > (b) any forfeiture that would result if enforcement were denied, and
> >
> > (c) any special public interest in the enforcement of the particular term.
>
> (3) In weighing a public policy against enforcement of a term, account is taken of
>
> > (a) the strength of that policy as manifested by legislation or judicial decisions,

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118. *See* Graham v. Scissor-Tail, Inc., 623 P.2d 165, 176 (Cal. 1981) ("[I]f a party resisting arbitration can show that the rules under which arbitration is to proceed will operate to deprive him of what we in other contexts have termed the common law right of fair procedure, the agreement to arbitrate should not be enforced.").

119. RESTATEMENT (SECOND) OF CONTRACTS 8 Intro. Note (1981).

> (b) the likelihood that a refusal to enforce the term will further that policy,
>
> (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
>
> (d) the directness of the connection between that misconduct and the term.[120]

There is no general definition of public policy.[121] Instead, the drafters of the Restatement have attempted to "establish general, though highly variable, principles to give guidance to courts in particular cases."[122] One court's approach states that a "contract is against public policy if it is injurious to interests of the public, or contravenes some established interest of society or some public statute, or is against good morals, or tends to interfere with the public welfare."[123]

The principle of public policy has been used to review agreements in the context of private associations. "Courts have more readily restricted the actions of private associations when these actions conflict with [public] policy."[124] When dealing with expulsion from a private association, courts have been even more willing to intervene.[125] Although student-athletes are not members of the NCAA, the association's determinations regarding their ineligibility to compete are akin to an expulsion from membership. "Generally, courts will provide relief from an expulsion from membership in a private association on substantive grounds . . . if the association's rules or its actions with respect to an individual member 'conflict with public policy.'"[126] This is especially true in instances where the association is in monopolistic control of an area affecting an individual's economic livelihood.[127] Many examples of courts overturning an expulsion from a private association on the grounds of public policy exist.[128] In *Finley*, the court upheld the waiver of recourse provision only after deciding that it did not violate public policy.[129] The court in *Gulf South* also evaluated the agree-

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120. *Id*. § 178.

121. *Id.*

122. SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 12.1 (4th ed. 1993).

123. Canal Ins. Co. v. Ashmore, 126 F.3d 1083, 1087 (8th Cir. 1997).

124. Philpot & Mackall, *supra* note 63, at 914.

125. *See* Higgins v. Am. Soc'y of Clinical Pathologists, 238 A.2d 665 (N.J. 1968).

126. Cipriani Builders, Inc. v. Madden, 912 A.2d 152, 159 (N.J. Super. Ct. App. Div. 2006) (quoting Higgins v. Am. Soc. of Clinical Pathologists, 238 A.2d 665, 671 (N.J. 1968)).

127. *Id.*

128. *See* Brounstein v. Am. Cat Fanciers Ass'n, 839 F. Supp. 1100 (D.N.J. 1993); Zelenka v. Benevolent and Protective Order of Elks of U.S., 324 A.2d 35 (N.J. Super. Ct. App. Div. 1974); Loigman v. Trombadore, 550 A.2d 154 (N.J. Super. Ct. App. Div. 1988).

129. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 543–44 (7th Cir. 1978).

ment under public policy concluding that judicial review is appropriate when "the actions of an association . . . are in violation of or contravene any principle of public policy."[130]

Federal law overlays these common law principles when it comes to agreements between the parties to substitute arbitration for judicial resolution of their dispute. Section 2 of the FAA states that arbitration provisions will be valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[131] This has been interpreted as precluding state laws that specifically limit arbitration contracts, but allows a court to invalidate even an arbitration clause included in a contract if the provision is unconscionable or violates public policy according to general contract law principles.[132] As such, the Restitution Rule and the NCAA's reinstatement process, like any private arbitration agreement, may be invalidated under the FAA on grounds of unconscionability or they are deemed to be against public policy.[133]

Under public policy principles, courts can invalidate arbitration provisions that take away the possibility of impartial review. In *Hooters of America, Inc. v. Phillips*,[134] the Fourth Circuit invalidated an employer's arbitration scheme providing that the employer's pre-approved arbitrators would be selected to hear any employment-related dispute:

> The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators

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

131. 9 U.S.C. § 2 (2000).

132. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

133. *See* Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler, 825 So. 2d 779, 782 (Ala. 2002) ("[A]s a general rule, applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate an arbitration agreement without contravening § 2 of the Federal Arbitration Act."); Lewis v. Prudential-Bache Sec., Inc., 225 Cal. Rptr. 69, 73 (Cal. Ct. App. 1986) ("Under the Federal Arbitration Act, an arbitration clause can be revoked on any legal or equitable ground that allows revocation of contracts, including unconscionability.").

134. 173 F.3d 933 (4th Cir. 1999).

> who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision maker would be a surprising result.[135]

Numerous state courts have also struck down clauses whereby one of the parties selects the arbitrator(s), as inherently inequitable, unconscionable, and lacking fundamental fairness.[136] Additionally, in *Finley*, the court noted that although an arbitration clause was a valid waiver of recourse, access to the courts was not foreclosed in all circumstances.[137] Thus, even the existence of an agreement to arbitrate or waive access to the courts does not preclude a court from deciding that public policy justifies judicial modification or alteration of the agreement.

B. The NCAA's Concern about Local Bias is Insufficient to Justify the Restitution Rule

One of the NCAA's strongest arguments for the Restitution Rule is that it has a legitimate interest in protecting its rules against injunctions by local

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135. *Id.* at 938–39 (internal citations omitted). *See also* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 208 (D. Mass. 1998) ("[F]ederal law and arbitral norms and practices have evolved standards of impartiality that require arbitrators to be independent of the parties before them. . . . In addition, both parties to a dispute must have an equal right to control the appointment of the arbitral panel, and neither side should play a disproportionate role in the decision-making.").

136. *See, e.g.*, *Butler*, 825 So. 2d at 784 (noting that its research "ha[d] not disclosed a single case upholding a provision in an arbitration agreement in which appointment of the arbitrator is within the exclusive control of one of the parties"); Bd. of Educ. of Berkeley v. W. Harley Miller, Inc., 236 S.E.2d 439, 443 (W. Va. 1977) ("[T]his Court would not countenance an arbitration provision by which the parties agree that all disputes will be arbitrated by a panel chosen exclusively by one of the parties. . . . Such a contract provision is inherently inequitable and unconscionable because in a way it nullifies all the other provisions of the contract."); Ditto v. RE/MAX Preferred Props., Inc., 861 P.2d 1000, 1004 (Okla. Civ. App. 1993) ("[S]uch an arbitration clause as would exclude one of the parties from any voice in the selection of arbitrators cannot be enforced. Such a clause conflicts with our fundamental notions of fairness, and tends to defeat arbitration's ostensible goals of expeditious and equitable dispute resolution.").

137. *See* Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 544 (7th Cir. 1978). *See, e.g.*, State ex. rel. Hewitt v. Kerr, No. ED 100479, 2013 WL 5725992 (Mo. Ct. App. Oct. 22, 2013) (arbitration provision in employment agreement between NFL team and equipment manager was unconscionable and unenforceable, and, thus, trial court was required to appoint arbitrator, where it entrusted the arbitration proceedings to the Commissioner of the NFL, his decision was final, binding, conclusive, and unappealable, arbitrator was the Commissioner's designee, Commissioner owed his position to the teams comprising the NFL, and process of receiving, reviewing, and signing the contract, which was presented to employee on a take-it or leave-it basis with the admonition that acceptance of the contract was a condition of continued employment, lasted less than one minute).

courts likely to be unduly favorable to local athletes.[138] However, this concern is greatly overstated. Not only does the argument presume that local judges are biased, but the NCAA's doomsday predictions of biased local courts enjoining justified sanctions have failed to materialize.[139] To the contrary, with a few exceptions,[140] the courts have generally been unwilling to enjoin NCAA rules and decisions concerning student-athlete eligibility. The Tenth Circuit stated that, "unless clearly defined constitutional principles are at issue, the suits of student-athletes displeased with high school athletic association or NCAA rules do not present substantial federal questions."[141] Following the general unwillingness to enjoin NCAA rules and decisions concerning eligibility, most courts have refused to enjoin the Restitution Rule.[142]

More significantly, the Restitution Rule is not necessary to address the NCAA's concern about court bias towards local athletes and colleges and universities. Even if overstated, the NCAA does maintain a legitimate interest in protecting the integrity of its rules and ensuring fairness to competing institutions. However, instead of developing a set of procedures that ensure NCAA rules are properly followed by creating a mechanism of independent outside review, the NCAA has chosen to effectively preclude any independent review. Under this analysis, it appears that the Restitution Rule actually works against the NCAA's *legitimate interests*. In order to ensure that the integrity of NCAA rules are upheld and to ensure that competing institutions are not unfairly penalized by incorrect eligibility decisions, there needs to be a procedure through which eligibility decisions can be independently and efficiently reviewed, so that all bias can be removed from the process. The *Reyes* court itself recognized that the "Restitution Rule may not be the best method to deal with such situations."[143] For the reasons discussed in the next subpart, the NCAA's current student-athlete reinstatement process does not provide for independent, impartial review of eligibility decisions. In our view, a system of independent arbitration can ensure that the integrity of NCAA rules is protected.

C. The Student-Athlete Reinstatement Process

In order to achieve the legitimate goal of organizing a distinctive, intercollegiate sporting competition among student-athletes that is distinct from professional sports,[144] the NCAA has an obvious and legitimate interest in

138. *See* Johnson, *supra* note 34, at 558–59.
139. *See id.* at 559–60.
140. *See supra* Part II.B.
141. Wiley v. NCAA, 612 F.2d 473, 477 (10th Cir. 1979).
142. *See supra* Part II.
143. Ind. High Sch. Athletics Ass'n v. Reyes, 694 N.E.2d 249, 258 (Ind. 1997).
144. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984)

ensuring that participation in its competitions is limited to those student-athletes who meet otherwise lawful eligibility requirements contained in the association's bylaws. The bylaws expressly provide that it is the obligation of the member institutions to certify the eligibility of their student-athletes[145] and to immediately withhold a student-athlete from competition if the institution determines that the student-athlete "is ineligible under the [NCAA's] constitution, bylaws, or other regulations."[146] Because sanctions for playing an ineligible player are so significant, Bylaw 19.7 has the clear effect of requiring an institution to make such a finding if there is any serious doubt about the player's eligibility.[147] After the institution makes such a determination, if the institution "concludes that the circumstances warrant restoration,"[148] it may then appeal to the Committee on Student-Athlete Reinstatement (hereafter referred to as the "Reinstatement Committee") for restoration of the student-athlete's eligibility.[149] The Reinstatement Committee can then restore the eligibility of a student-athlete *only if*, after reviewing the eligibility dispute, it decides that the "circumstances clearly warrant restoration."[150] Further, the NCAA bylaws provide that "the eligibility of a student-athlete involved in a major violation shall not be restored other than through an exception authorized by the [Reinstatement Committee] in a unique case on the basis of specifically stated reasons."[151] Pursuant to NCAA bylaws, the determination of the Reinstatement Committee "shall be final, binding and conclusive and shall not be subject to further review by any other authority."[152]

For all the reasons noted in Part II, under the common law of private associations, courts can find that the exclusion of a student-athlete from intercollegiate competition is an exception to the general rule of deference,[153] and, as outlined in Part IV, to the extent that a student-athlete's agreement to follow all NCAA rules could be construed as acceptance of a waiver of

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("NCAA seeks to market a particular brand of football—college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball.")

145. NCAA DIVISION I MANUAL, *supra* note 1 art. 14.10.1.

146. *Id.* art. 14.11.1 ("If a student-athlete is ineligible under the provisions of the constitution, bylaws or other regulations of the Association, the institution shall be obligated to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition.").

147. *Id.*

148. *Id.*

149. *Id*. *See also id.* art. 14.12.1.

150. *Id.* art. 14.12.3.

151. *Id*.

152. *Id.* art. 21.7.7.3.3.1.

153. *See supra* Part II.

recourse, the clause would be found to be contrary to public policy.[154] Furthermore, the NCAA cannot persuasively claim that its rules constitute an agreement to have any dispute resolved by the Reinstatement Committee as an arbitrator under the FAA. The appeals process used for resolving eligibility disputes does not comport with the FAA's requirement of independent impartial review. First, the student-athlete is not afforded a right of appeal;[155] the member institution has the right to appeal, but only if *it* concludes that the circumstances warrant a restoration of eligibility.[156] Second, the standard of review applied by the Reinstatement Committee—when the circumstances *clearly warrant restoration*—is akin to a "clearly erroneous" standard, which is not only a highly unusual standard for a reviewing panel charged with analyzing facts, but it is nearly impossible for a student-athlete to overcome because it requires the committee to defer to the member institution's determination of ineligibility and to make a determination that the school's findings of fact and eligibility determination was clearly in error.[157] Lastly, all five members of the Reinstatement Committee serve a three-year term and are selected by the NCAA; the student-athlete has no ability to appoint or remove any member.[158] A selection process in which one party appoints the arbitrators, that party being the NCAA, raises concerns over institutional bias—the "tendency for arbitration outcomes to favor one class of participants over another."[159] Thus, on its face, the process lacks independence and impartiality because it requires: (1) the college or university to determine that a student-athlete is ineligible under NCAA rules, but then to appeal its own determination when it believes the student-athlete should not be ineligible; and (2) a reviewing committee made up of members selected by the NCAA to be convinced that a member institution's original determination of ineligibility was clearly wrong.[160]

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154. *See supra* Part IV.

155. NCAA DIVISION I MANUAL, *supra* note 1 art. 21.7.7.3.3.1.

156. *Id.* art. 14.12.3.

157. *See* Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infraction Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 286 (2010) ("[T]he Reinstatement Committee and staff neither conduct investigations nor engage in independent fact finding. Instead, they assess a student-athlete's responsibility based on information that his institution provides and then decide whether—and, if so, how—he may be reinstated to eligibility.").

158. NCAA DIVISION I MANUAL, *supra* note 1 art. 21.7.7.3.

159. Roger J. Perlstadt, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. CHI. L. REV. 1983, 1986 (2002).

160. Recognizing that the Reinstatement Process lacks independence and impartiality, at the time of publication of this Article a proposed bill, titled the "National Collegiate Athletics Accountability Act," is pending in the House of Representatives. This bill, which was introduced on August 1, 2013, would amend Section 487(a) of the Higher Education Act of 1965 to provide that an institution is prohibited from member-

The case of *Paxton v. University of Kentucky*[161] highlights the need for, as well as the Restitution Rule's practical effect of denying student-athletes access to, independent, impartial review.[162] James Paxton was selected in the 2009 Major League Baseball June draft in the summer following his junior year at Kentucky, but he decided not to sign a professional contract and returned to Kentucky for his senior year.[163] When Paxton returned to school that fall, the NCAA personnel informed Kentucky that they wanted to interview him based solely upon a journalist's blog post, which suggested that Paxton's lawyer may have had communications with the MLB club that drafted him.[164] NCAA Bylaw 12.3.2.1 prohibits a student-athlete from having a lawyer engage in *any* communications with professional club personnel, including for the purpose of negotiating a professional contract.[165] Paxton refused to participate in the interview with the NCAA, and Kentucky's athletic department informed Paxton that it was withholding him from competition on the basis that his failure to participate in an NCAA interview constituted a violation of the "Unethical Conduct" rule (Bylaw 10.1) and could result in sanctions from the NCAA.[166]

Apparently, Kentucky did not believe there was sufficient evidence of a violation of Bylaw 12.3.2.1 because it did not withhold Paxton from competition on that basis. Rather, Kentucky asserted that Paxton was obligated to submit to an NCAA interview on the basis that there were "unresolved eligibility questions."[167] Thus, not only did the Restitution Rule give Kentucky every incentive to withhold Paxton from competition before the university even made a determination that he violated Bylaw 12.3.2.1, but it clearly influenced the judge's decision as lawyers for Kentucky told the judge in Lexington that the entire baseball program and university would be at risk if he granted an injunction directing Kentucky to allow Paxton to

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ship in a nonprofit athletic association unless the association, prior to enforcing any remedy for an alleged infraction or violation of the association's rules, affords the student-athlete, 1) the opportunity for a formal administrative hearing, 2) the right to an appeal, and 3) any other due process procedure the Secretary of Education determines to be necessary. *See* National Collegiate Athletics Accountability Act, H.R. 2903, 113 Cong. (2013). The amendment would also stay the association's enforcement until all appeals have been exhausted or the deadline to appeal has passed. *Id.*

161. No. 09-CI-6404 (Ky. Cir. Ct., Jan. 15, 2010).

162. *Id.*

163. *Id.*

164. *Id.* Whether this particular bylaw is reasonably tailored to protecting the NCAA's interest in preserving amateurism and maintaining a clear demarcation between college and professional sports has been questioned by at least one state court. *See* Oliver v. NCAA, 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009).

165. NCAA DIVISION I MANUAL, *supra* note 1 art. 12.3.2.1.

166. Paxton v. Univ. of Ky., No. 09-CI-6404 (Ky. Cir. Ct. Jan. 15, 2010).

167. *See* Defendant's Response to Plaintiff's Motion for a Temporary Injunction at 7, Paxton v. Univ. of Ky., No. 09-CI-6404 (Ky. Cir. Ct. Jan. 15, 2010).

compete.[168] Thus, while the Restitution Rule's stated purpose is to act as a shield against injunctions by local courts likely to be unduly favorable to local athletes, in this case, the Restitution Rule was being used as a sword by Kentucky in its own hometown court likely to be biased in the university's favor. Indeed, the Restitution Rule should not have been of any concern to the judge in this particular case because Paxton was not seeking a court order mandating that he be allowed to compete (as suggested by University of Kentucky) but rather that Kentucky make a determination, as the member institution is obligated to do under NCAA bylaws, on whether he violated Bylaw 12.3.2.1 or any other amateurism rule, which Kentucky apparently was not willing to do based solely upon a blog post.[169] Nevertheless, the judge denied Paxton's motion for temporary injunction,[170] and Paxton left the University without any official determination of his status.[171]

VI. INDEPENDENT IMPARTIAL ARBITRATION IS AN EFFECTIVE ALTERNATIVE TO THE RESTITUTION RULE AND REINSTATEMENT PROCESS

A. Arbitration Produces Quick and Final Resolution of Eligibility Disputes

In cases where timely final decisions are necessary, parties benefit from having an arbitration procedure in place to resolve the dispute. Instead of bouncing around the courts, disputes go directly through a pre-agreed upon system of binding arbitration, which produces a quick and final result. NCAA eligibility disputes and decisions are similar to time-sensitive eligi-

168. *See id.* In its Response to Plaintiff's Motion for a Temporary Injunction, the University proclaimed that, "If the Court enters an injunction directing UK to have plaintiff participate in intercollegiate contests when there are unresolved eligibility questions, the Court puts the other student-athletes on the baseball team, the baseball team, and the University at risk." *Id*.

169. Indeed, before any member institution could even *possibly* be sanctioned under the Restitution Rule, there is a chain of events that must take place and in the following order (and the first step did not even occur in the *Paxton* case): First, a student-athlete must be declared ineligible by a member institution and not be reinstated by the NCAA. Second, a court must enter an order or an injunction requiring the institution to disregard the ineligibility determination. Third, the institution must then allow the student-athlete to compete. Fourth, the court's original order must be subsequently reversed on appeal. Fifth, the NCAA must then make a determination to impose sanctions on the institution under Bylaw 19.7 for allowing the student-athlete to compete. NCAA DIVISION I MANUAL, *supra* note 1 art. 19.7 (2012).

170. *Paxton*, No. 09-CI-6404.

171. *See* B. W. Jones, *Paxton leaves UK baseball team*, KENTUCKYKERNEL (Feb. 27, 2010), *available at* http://kykernel.com/2010/02/27/paxton-leaves-uk-baseball-team/. He is currently pitching in the Seattle Mariners' farm system. *See James Paxton*, MILB.COM, http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p_pbp&pid=572020 (last visited Oct. 21, 2013).

bility decisions of governing bodies involving Olympic athletes, which are subject to quick and impartial arbitration.[172] The NCAA and its members would benefit from a system of binding arbitration; arbitration is superior to judicial review in providing finality, certainty, and accuracy of results. Moreover, college athletes' careers are limited in duration, and wins on appeal that occur years after a dispute arises provide no real relief for student-athletes who have long since graduated. Thus, it is important to have arbitration procedures in place, so that athletes can get independent, impartial review of NCAA eligibility decisions in a timely manner. "[G]iven the unique circumstances of the fast-paced world of sports competition [binding arbitration] may offer the most viable option to quickly settle disputes."[173]

The Olympic Games use arbitration to resolve eligibility disputes in a timely and fair manner. The International Olympic Committee ("IOC"), which controls the Olympic Games, entrusts national Olympic committees with the determination of which athletes are eligible to compete; in the United States, this national committee is the United States Olympic Committee ("USOC").[174] The IOC created the Court of Arbitration for Sport ("CAS"),[175] which has evolved into the world leader in sports arbitration.[176] International governing federations recognize the CAS as the exclusive and binding dispute resolution mechanism for all cases and controversies involving athletes.[177] The CAS provides fast and final review of eligibility decisions, disciplinary actions for misconduct, contested drug test results, and challenges to technical decisions made by competition officials.[178] Final decisions of the sports federations on such matters are appealable to the CAS, and cases must be decided within four months from the filing of an appeal.[179] As one commentator notes, the CAS "provides a forum for the world's athletes and sports federations to resolve their disputes through a single, independent and accomplished sports adjudication body that is capable of consistently applying the rules of different sports organizations . . . ."[180]

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172. MATTHEW MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 320 (2d ed. 2009).

173. Melissa R. Bitting, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Securtiy"?*, 25 FLA. ST. U. L. REV. 655, 678 (1998).

174. *See* PAUL C. WEILER ET AL., SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS 1051 (4th ed. 2010).

175. *See* Eric T. Gilson, *Exploring the Court of Arbitration for Sport*, 98 LAW LIBR. J. 503 (2006).

176. *See id.* at 503.

177. *See* WEILER, *supra* note 174, at 1071.

178. *See* MITTEN, *supra* note 172, at 320.

179. *Id*.

180. Richard H. McLaren, *The Court of Arbitration for Sport: An Independent*

The USOC grants the national governing body ("NGB") for each sport the exclusive authority to resolve athlete eligibility issues, and if an athlete claims that the NGB denied her the opportunity to participate in competition, the USOC constitution provides that the USOC must promptly investigate the complaint and take appropriate steps to settle the controversy.[181] The Ted Stevens Olympic and Amateur Sports Act[182] ("Stevens Act") provides that the USOC "shall establish and maintain provisions in its constitution and bylaws for the swift and equitable resolution of disputes involving any of its members and relating to the opportunity of an amateur athlete . . . to participate in [competition]."[183] First passed in 1978 and extensively amended in 1998, the Stevens Act gives athletes a statutory right to submit the eligibility dispute to the American Arbitration Association, which provides for independent, impartial review and a final and binding decision.[184] Arbitration awards can be judicially confirmed and enforced by the athlete under the provisions of the FAA.[185]

The statute also explicitly prevents an athlete from being able to seek injunctive relief against the USOC regarding his or her eligibility within twenty-one days before the Olympic Games, the Paralympic Games, or the Pan-American Games, if the USOC certifies to the court that its constitution and bylaws cannot provide for the resolution of the dispute prior to the beginning of such games.[186] As one court noted, the twenty-one day rule "is designed to prevent a court from usurping the USOC's powers when time is too short for its own dispute-resolution machinery to do its work."[187] It also reinforces the notion that the USOC should be able to have the final say, free of court interference, on eligibility questions that might arise so close before a covered competition.[188] However, the Stevens Act also requires the USOC to hire an ombudsman, at no cost to the athletes, who provides athletes and their attorneys with independent advice and guidance concerning eligibility disputes and their rights under the Stevens Act.[189] The ombudsman's job also includes providing mediation in disputes over whether an athlete is eligible to compete in a covered compe-

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Arena for the World's Sports Disputes, 35 VAL. U. L. REV. 379, 381 (2001).

181. *See* MITTEN, *supra* note 172, at 293 (citing United States Olympic Committee Constitution art. IX, § 2).

182. 36 U.S.C. § 220501–512 (2006).

183. § 220509(a).

184. § 220529(a).

185. MITTEN, *supra* note 172, at 304.

186. § 220509(a).

187. Lindland v. U.S. Wrestling Ass'n, 227 F.3d 1000, 1007 (7th Cir. 2000).

188. S. REP. NO. 105–325, at 7 (1998).

189. § 220509 (b)(1).

tition and reporting to the Athletes' Advisory Council on a regular basis.[190]

B. Other Benefits of Arbitration in Resolving NCAA Eligibility Disputes

In addition to providing quick and final, independent review, arbitration promotes review by experts in the often-arcane field of collegiate sports law, as well as increased privacy, flexibility, and cost-effectiveness.

First, because the NCAA and its member schools would set up the arbitrator selection procedures, they could ensure that an expert arbitrator or panel of arbitrators is selected to hear eligibility disputes. In many cases involving private associations, non-expert judges are unqualified to make informed decisions. As Professor Chaffee observed, the "[r]esult has often been that the judicial review . . . is really an appeal from a learned body to an unlearned body."[191] Thus, the NCAA and its member schools could ensure an accurate decision by implementing a process that appoints a neutral, expert arbitrator who brings experience to the process and gains experience for future cases.

A second benefit that arbitration offers is privacy. Many eligibility decisions concern sensitive issues about the academic or personal life of young men and women. Sensitive information can have effects that go beyond determining NCAA eligibility, such as affecting athletes' future professional careers or negatively impacting their personal reputations. By implementing a confidential arbitration procedure, potentially embarrassing information can be kept private.

A third benefit of arbitration is its flexibility. The desire to accurately determine whether a student's eligibility has been wrongly denied need not be restricted by formal rules of evidence. Additionally, the time-sensitive nature of eligibility decisions suggests that a more flexible period of discovery is appropriate. Due to the unique circumstances presented by NCAA eligibility decisions, arbitration provides the degree of flexibility required to ensure that accurate decisions are made in a timely manner.

A fourth benefit of arbitration is that it allows final decisions to be made in a cost-effective manner. The costs associated with appealing an eligibility decision are potentially prohibitive for many student-athletes. Arbitration, through its speed, flexibility, and pre-arranged structure, greatly reduces the costs that student-athletes will face in appealing a denial of eligibility.

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190. § 220509 (b)(1)(c).
191. Chaffee, *supra* note 51, at 1024.

C. Implementing a Process that would Ensure Independent, Impartial Review and Resolution of NCAA Eligibility Disputes

There are many possible ways to formulate an arbitration process that ensures independent, impartial review and resolution of eligibility disputes. We propose that the NCAA and its member schools amend the NCAA Bylaws by replacing and substituting the athlete reinstatement process with an arbitration process that expressly adopts the American Arbitration Association's ("AAA") Commercial Arbitration Rules and Mediation Procedures.[192] This would ensure the selection of an arbitrator who is both an expert and impartial, pursuant to the Commercial Arbitration Rules and Mediation Procedures' strike and rank R-11 (Appointment from National Roster) method, described as follows:

> This method begins with the parties providing the case manager with the qualifications they are seeking in an arbitrator. For example, they might desire commercial litigators with experience in accounting disputes, or CPAs that handle business valuations. The case manager then develops a list that meets the parties' expectations. If the parties cannot agree, they must choose who they want to eliminate, and rank those remaining in order of preference. The AAA then tallies the results and appoints the arbitrator ranked highest by the parties. If the parties do not return the lists, the AAA will deem all arbitrators to be acceptable and invite an arbitrator from that list to serve. The parties may also request that the AAA administratively appoint the arbitrator.[193]

This method ensures that the NCAA, the member institution, and the student-athlete are given the chance to have meaningful input in the selection of an expert and impartial arbitrator, thereby eliminating the inherently inequitable, unconscionable, and fundamentally unfair process that currently exists under the NCAA reinstatement process whereby one of the parties (the NCAA) selects the arbitrator(s).[194]

CONCLUSION

Eligibility disputes involving student-athletes are time-sensitive, which makes injunctive relief appropriate. However, because of the Restitution Rule, this equitable remedy is effectively frustrated. While courts generally do not interfere in the rules and decisions of private associations, judicial

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192. COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (American Arbitration Association ed., 2013), *available at* http://www.adr.org/commerical.

193. Elizabeth Shampnoi, *The Arbitrator Selection Process and New Ethical Standards*, THE CPA JOURNAL ONLINE (Dec. 2005), *available at* http://www.nysscpa.org/cpajournal/2005/1205/essentials/p60.htm.

194. *See supra* Part V.C.

review is warranted by well-established exceptions. Because the Restitution Rule effectively serves as a waiver of recourse provision, the courts should refuse to enforce it as a matter of public policy. Indeed, if the NCAA's reinstatement process is replaced by a system of arbitration that would ensure timely, independent, impartial, and final review of NCAA eligibility disputes, the immensely controversial Restitution Rule would be no longer necessary to protect the NCAA's legitimate interest in preserving the integrity of its eligibility rules against injunctions by local courts.