



## Comparing NCAA and Olympic Athlete Eligibility Dispute Resolution Systems in Light of Procedural Fairness and Substantive Justice

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### ABSTRACT

The traditional adjudicative model for resolving disputes involves public judicial systems (i.e., courts) established and administered by the government. But disputes also are resolved by alternative dispute resolution (ADR) systems outside the traditional model that are established and administered by private parties. The National Collegiate Athletic Association (NCAA), International Olympic Committee (IOC), and United States

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Olympic Committee (USOC) use differing ADR systems to resolve intercollegiate and Olympic athletic eligibility disputes that are afforded very deferential review by courts with the merits of their respective determinations almost always judicially upheld and enforced. Olympic sports athlete eligibility disputes are resolved at the international level by the Court of Arbitration for Sport (CAS), an external system of arbitration that has been called the gold standard for resolving athlete disputes. The NCAA uses a system of internal committees comprised of faculty and institutional and conference staff to resolve intercollegiate athlete eligibility disputes, which is the subject of perpetual criticism and has led to calls for reform measures mirroring CAS's external arbitral process. In this Article we describe the NCAA's internal systems for resolving athlete eligibility disputes, which often are misunderstood by commentators without due consideration of the need for its ADR processes to be tailored to effectively, efficiently, and fairly resolve disputes in light of the NCAA's particular demographics and needs. We also describe the CAS arbitral system as well as the corresponding American Arbitration Association (AAA) system used to resolve domestic Olympic athlete eligibility disputes in the U.S. and the requisite procedural fairness and substantive justice both systems provide to athletes, which justify judicial recognition and enforcement of their arbitration awards. Considering the salient differences between the ADR processes for resolving Olympic and intercollegiate sports athlete eligibility disputes, we explain why the NCAA's ADR processes provide a commensurate level of procedural fairness and substantive justice to athletes that responds to the demographics and requisites of its approximately 460,000 student-athletes, its eligibility requirements, and the thousands of annual competitions that it administers. Finally, we offer suggestions to improve the NCAA's processes for resolving athlete eligibility disputes without jeopardizing its needed autonomy or ability to govern its affairs in an efficient and effective manner.

## I. INTRODUCTION

For more than 100 years the National Collegiate Athletic Association<sup>1</sup> (“NCAA”) and the International Olympic Committee<sup>2</sup> (“IOC”) in combination with the United States Olympic Committee<sup>3</sup> (“USOC”), which all

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<sup>1</sup> The NCAA was founded in 1906 in response to the deaths of 18 college football players and serious injuries to another 150 or so. President Theodore Roosevelt urged administrators from Princeton, Yale, and Harvard to reform the game to prevent deaths and serious injuries from occurring, threatening to propose federal legislation to outlaw football if they did not do so. See WALTER BYERS, *UNSPORTSMANLIKE CONDUCT* 38–40 (U. Mich. Press, 1995). The NCAA has three divisions. See 2014–15 NCAA Division I, II, III Manuals, available at <http://www.ncaapublications.com/>. Overriding NCAA foundational principles, including the amateurism principle, apply similarly to all three NCAA divisions, as do the enforcement/infractions and student-athlete reinstatement processes. NCAA BYLAW Chapter 19; Student-Athlete Reinstatement Frequently Asked Questions at 2, <http://www.ncaa.org/compliance/reinstatement/student-athlete-reinstatement-frequently-asked-questions>. Division I, and more specifically its football bowl subdivision, is what commentators, media, and the public typically mean when they discuss the NCAA. For these reasons, all citations to NCAA bylaws and constitutional provisions are to the 2014–15 NCAA Division I Manual available at <http://aspsa.dasa.ncsu.edu/sites/aspsa.dasa.ncsu.edu/files/images/2014-15%20NCAA%20Division%20I%20Manual.pdf>. Similarly, all textual references are to Division I legislative processes, boards, councils, cabinets, and committees.

<sup>2</sup> In 1894, thirteen nations, including the United States, met during the Congress of Paris to create the IOC and the modern Olympic Games, which were reestablished by Pierre de Coubertin of France. See generally MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & N. JEREMY DURU, *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 258 (3d ed. 2013). The IOC is “an international non-governmental not-for-profit organization” domiciled in Lausanne, Switzerland. International Olympic Committee, Olympic Charter, Rule 15. It is the “supreme authority” within the Olympic movement. Olympic Charter, Rule 1. The Olympic Movement includes “organisations, athletes and other persons who agree to be guided by the Olympic Charter.” *Id.*

<sup>3</sup> The USOC is a federally chartered corporation authorized by Congress “to exercise exclusive jurisdiction . . . over all matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games.” 36 U.S.C.A. §§ 220502, 220503(3) (A). The Supreme Court held that the USOC is a private entity, not a state actor. See *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 547 (1987). Similarly, the Supreme Court held that the NCAA is not a state actor. See *NCAA v. Tarkanian*, 488 U.S. 179, 201 (1988). See generally Josephine R. Potuto, *NCAA as State Actor Controversy: Much Ado About Nothing*, 23 MARQ. SPORTS L. REV. 1, 3–8 (2012).

are private associations, respectively have regulated “amateur”<sup>4</sup> athletic competition within the United States and internationally. The NCAA exercises plenary governing authority over intercollegiate athletic competition in the United States,<sup>5</sup> while the IOC exercises plenary governing authority over Olympic sports competition worldwide and the USOC does so nationally.<sup>6</sup> These governing bodies adopt and enforce their respective rules defining and regulating the eligibility of Olympic sport and NCAA athletes to compete, including anti-doping rules designed to safeguard the health and

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<sup>4</sup> The USOC currently defines an “amateur athlete” as “any athlete who meets the eligibility standards established by the [NGB] or Paralympic Sports Organization for the sport in which the athlete competes.” BYLAWS OF THE UNITED STATES OLYMPIC COMMITTEE, Section 1.3(c) (effective March 8, 2013). The IOC permits each International Federation (the world governing body for each Olympic sport) to establish its athlete eligibility requirements, Olympic Charter, Rule 40, and virtually all of them permit professional athletes to participate in the Olympic Games and other international competitions. For a detailed discussion of the history of the IOC’s “amateurism” rules and the professionalization of Olympic sports since the 1970’s, *see generally* JAMES A.R. NAFZIGER, INTERNATIONAL SPORTS LAW 132–46 (2d ed. 2004). The NCAA defines college athletics as “an avocation” in which student-athletes are “protected from exploitation by professional and commercial enterprises” and are “primarily motivated by education and the by the physical, mental and social benefits to be derived.” NCAA CONST.ART. 2.9. *See* NCAA BY-LAW art. 12. In its narrowest sense, amateurism in collegiate sports means that athletes who are, or have been, paid to play are ineligible to compete in varsity collegiate athletic competition. More broadly, amateurism in collegiate sports means that student-athletes professionalize themselves if they capitalize financially on their athletic skill or reputation. NCAA BYLAW 12.5.2. *See generally*, Josephine R. Potuto, William H. Lyons & Kevin N. Rask, *What’s in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 ORE. L. REV. 879, 889–92 (2014) (hereinafter Collegiate Model). The NCAA concept of amateurism, as well as its implementation, is subject to increasing challenge in the courts. *See, e.g., NCAA v. Collegiate Licensing Co., Elec. Arts, Inc.*, Fulton City, Georgia, Civil Action No. 2013CV238557 (Nov. 1, 2013); Order Granting in Part and Denying in Part Motion for Class Certification at 2, *In re NCAA Student–Athlete Name & Likeness Licensing Litig.*, No. C 09-1967CW (N.D.Cal, 2013).

<sup>5</sup> There are other national associations that administer collegiate competition, but they operate on a much smaller scale. *See infra* note 45 and accompanying text.

<sup>6</sup> USOC authority is pursuant to its recognition by the IOC as the National Olympic Committee (NOC) for the United States. *See DeFrantz v. USOC*, 492 F. Supp. 1181, 1188 (D.D.C. 1980) (ruling that the Amateur Sports Act of 1978 gives the USOC “exclusive jurisdiction” and authority over participation and representation of the United States in the Olympic Games).

safety of participating athletes as well as the integrity of athletic competition.<sup>7</sup>

The NCAA has developed, and the IOC and USOC have agreed to be subject to, private dispute resolution mechanisms independent of public court systems,<sup>8</sup> which provide very limited judicial review of the merits of their decisions. Through these private dispute resolution systems, experts with specialized knowledge of the sport governing body's rules as well as collective experience interpreting and applying these rules adjudicate athlete rules violations and eligibility disputes. The systems are purposefully designed to achieve consistent and predictable results (by the use of experts) and also to be fast, final, and binding because sports competition requires efficient and timely resolution of disputes. The NCAA resolves disputes internally,<sup>9</sup> with decisions made by committees composed primarily of employees of member institutions or athletic conferences who are selected pursuant to NCAA processes set forth in its bylaws.<sup>10</sup> By contrast, the IOC and

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<sup>7</sup> The IOC Athlete Commission provides Olympic athletes with a voice in IOC governance, including rule-making. The ASA ensures U.S. Olympic sport athletes have a significant voice and vote in USOC rule-making by requiring them to have at least 20% of the membership and voting power of the USOC's Board of Directors and committees. See generally Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 Va. SPORTS & ENT. L. J. 71, 89 n.8, 92 (2008). For a discussion of student-athletes' involvement in the NCAA's rule-making processes see *infra* notes 48–54 and accompanying text.

<sup>8</sup> North American major professional team sports leagues such as Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League also generally resolve disputes between an athlete and his club or the league affecting his eligibility to compete through private systems of adjudication that are collectively bargained between the players' union and representatives of the league's clubs. See generally Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 108–09.

<sup>9</sup> See generally Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257 (2010) [hereinafter NCAA Processes].

<sup>10</sup> The NCAA Division I Administration Cabinet makes appointments to most Division I committees. It operates independently of NCAA senior administrative staff. There are divisional and other demographic criteria for committee service. There also is an NCAA process for filling vacancies that unexpectedly arise. For example, in 2014 an individual's term on the Student-Athlete Reinstatement Committee was extended one year. See February 1, 2014 Memorandum from the Division I Student-Athlete Reinstatement Committee to the Division I Administration Cabinet, Meeting Materials of Division I Administration Cabinet at 143, available at <http://www.ncaa.org/sites/default/files/DI%20Admin.%20Cabinet%20materials%20%202.14.pdf>.

USOC utilize external systems of independent arbitration to resolve Olympic sports athlete eligibility disputes and rules violations. The IOC as well as its recognized International Federations (IFs) and NOCs have agreed to be bound by arbitration awards rendered by the Court of Arbitration for Sport (CAS), an international arbitral tribunal, which resolves disputes arising during the Olympic Games or in connection with other national or international Olympic sports competitions conducted under their auspices, including those affecting athlete eligibility to participate in these events.<sup>11</sup> Pursuant to a federal statute now known as the Ted Stevens Olympic and Amateur Sports Act<sup>12</sup> (“ASA”) that recognizes the USOC’s exclusive regulatory authority over Olympic sports in the United States,<sup>13</sup> the USOC and its recognized National Governing Bodies (NGBs) must comply with American Arbitration Association (AAA) arbitration awards resolving domestic athlete eligibility disputes.<sup>14</sup>

The NCAA, IOC, and USOC oversee national and international athletic competitions across sovereign jurisdictional boundaries – the 50 states and District of Columbia for the NCAA and USOC; 205 nations for the IOC.<sup>15</sup> Although each state and nation has its own body of general domestic laws (some of which are applicable to intercollegiate or Olympic sports governing bodies or competitions within their respective geographical boundaries), state and national courts routinely refuse to invalidate NCAA,<sup>16</sup> IOC,<sup>17</sup>

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<sup>11</sup> See *infra* notes 22–32 and accompanying text.

<sup>12</sup> 36 U.S.C. §§ 220501, et seq. There are no similar sports-specific international or national laws defining or regulating the governing authority of the IOC or NCAA.

<sup>13</sup> 36 U.S.C.A. § 220503(3) (A).

<sup>14</sup> 36 U.S.C. § 220509(a). See USOC BYLAWS, Section 9.7.

<sup>15</sup> OFFICIAL WEBSITE OF THE OLYMPIC MOVEMENT, available at <http://www.olympic.org/national-olympic-committees>.

<sup>16</sup> NCAA bylaws, rules, and policies are not per se exempt from the coverage of applicable state constitutional provisions and statutes or from state common law contract claims. The NCAA also is not *per se* exempt from federal law; many legal challenges are grounded in federal antitrust law. Historically, courts generally characterized NCAA eligibility bylaws as noncommercial regulations that are *per se* legal under federal antitrust law. See, e.g., *Smith v. NCAA*, 139 F.3d 180, 186–87 (3d Cir. 1998), vacated on other grounds 525 U.S. 459 (1999); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *Marshall v. ESPN, Inc.*, No. 3:14–01945, 2015 WL 3606645, at \*14 (M.D. Tenn. June 8, 2015). However, one recent case ruled that NCAA bylaws prohibiting Division I football and men’s basketball players from earning royalties from group licensing of their likenesses violate §1 of the Sherman Act. See *O’ Bannon v. NCAA*, 7 F.Supp.3d 955, 1008 (N.D. Cal. 2014) (finding NCAA cannot require member universities to cap economic value of athletic scholarships at less than full cost of attendance and an additional \$5000 annually.). There also are several pend-

and USOC<sup>18</sup> athlete eligibility rules and uphold their enforcement by these governing bodies. Similarly, courts generally uphold and enforce the merits of NCAA internal committee decisions rendered in individual student-athlete eligibility cases<sup>19</sup> as well as AAA<sup>20</sup> and CAS<sup>21</sup> arbitration awards resolving athlete eligibility disputes, even though these adjudications are the

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ing cases asserting that various NCAA amateurism bylaws are commercial restraints that violate federal antitrust law. *See, e.g., Hartman v. Nat'l Collegiate Athletic Ass'n*, No. 4:15-cv-00178, 2015 BL (N.D. Cal., filed January 13, 2015); *Gregory-McGhee v. NCAA*, Case No. 4:14-cv-01777 (N.D. Cal., filed April 17, 2014); *Jenkins v. NCAA*, Case No. 3:14-cv-01678 (D. N.J., filed March 17, 2014); *Alston v. NCAA*, Case No. 3:14-cv-01011 (N.D. Cal., filed March 5, 2014).

<sup>17</sup> *See, e.g., Martin v. IOC*, 740 F.2d 670, 677 (9th Cir. 1984).

<sup>18</sup> *See, e.g., Walton-Floyd v. U.S. Olympic Comm.*, 965 S.W.2d 35, 40 (Tex. App. 1998).

<sup>19</sup> For the NCAA, judicial upholding of athlete eligibility decisions often comes on appeal, not at trial. *See infra* notes, 90, 103-105 and accompanying text. *See also, e.g., Hall v. NCAA*, 985 F.Supp. 782 (N.D. Ill. 1997); *NCAA v. Lasege*, 53 S.W.3d 77 (Ky.2001); *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); *NCAA v. Brinkworth*, 680 So. 2d 1081 (Fla. Dist. Ct. App. 1996). Student-athlete contract challenges to NCAA rules derive from their status as third party beneficiaries to NCAA bylaws; as such, student-athletes have no greater legal rights than would NCAA member universities. *See, e.g., Bloom v. NCAA*, 93 P.3d at 621; RESTATEMENT (SECOND) OF CONTRACTS § 203; NCAA Processes, *supra* note 9. Courts rarely have invalidated NCAA bylaws or policies on the basis of state law. *See, e.g., Hill v. NCAA*, 865 P.2d 633 (Cal. 1994) (upholding NCAA drug testing program); *Brennan v. Bd. of Trustees for Univ. of Louisiana Systems*, 691 So.2d 324 (La. Ct. App. 1997) (same). *But see Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Ct. Common Pleas 2009) (finding NCAA bylaw prohibits attorney representing a student-athlete from being present during contract negotiations between athlete and a professional sports organization and violates contractual obligation of good faith and fair dealing and Ohio public policy, which subsequently was vacated pursuant to the parties' settlement agreement. To prevail, student-athletes must show inconsistency in bylaw or guideline application so random as to be arbitrary or absence of supporting rationale or factual basis so extreme as to constitute bad faith or targeted bias). *See generally*, NCAA Processes, *supra* note 9, at 279-82. Courts also will grant relief necessary to remedy a college sports governing body's failure to follow its student-athlete eligibility rules. *Gulf S. Conference v. Boyd*, 369 So.2d 553 (Ala. 1979).

<sup>20</sup> *See Matter of Gault* (U.S. Bobsled & Skeleton Fed'n), 179 A.D.2d 881 (N.Y. App. Div. 1992) ("Although we also may disagree with the arbitrator's award and find most unfortunate the increasing frequency with which sporting events are resolved in the courtroom, we have no authority to upset it when the arbitrator did not exceed his authority.").

<sup>21</sup> *Gatlin v. U.S. Anti-Doping Agency, Inc.*, No. 308-CV-241/LAC/EMT, 2008 WL 2567657, at \*1 (N.D. Fla. June 24, 2008) ("Pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ('New York Convention'), claims that have been properly submitted to arbitration

result of private dispute resolution processes to which athletes are required to submit as a condition of being eligible to compete.<sup>22</sup> Thus, these private adjudicatory processes create a body of intercollegiate and Olympic athlete eligibility “laws” and precedent that are recognized and enforced by courts.<sup>23</sup>

The law of private associations,<sup>24</sup> combined with recognition of sport’s unique need for uniform rules (including athlete eligibility requirements) at all levels of competition,<sup>25</sup> underlies and explains the substantial judicial deference afforded to NCAA, IOC, and USOC private dispute resolution procedures and adjudications of athlete eligibility disputes. National and international sports competitions involve diverse (and potentially conflicting) multi-jurisdictional public laws and judicial forums. Judicial deference

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and ruled upon by entities such as CAS are barred from relitigation in this forum.”). See generally Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 86–88.

<sup>22</sup> See generally Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 88–90, 99–100, and 128–31.

<sup>23</sup> See generally GUNTHER TEUBNER, *GLOBAL LAW WITHOUT A STATE* xiii (1997) (“[The] globalization of law creates a multitude of decentred law-making processes in various sectors of civil society, independently of nation-states . . . They claim worldwide validity independently of the law of nation-states and in relative distance to the rules of international public law. They have come into existence not by formal acts of nation-states but by strange paradoxical acts of self-validation.”); Matthew J. Mitten & Hayden Opie, “*Sports Law*”: *Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 *TUL. L. REV.* 269, 289 (2010) (“For legal theorists, the evolving body of *lex sportiva* established by CAS awards is an interesting and important example of global legal pluralism without states, arising out of the resolution of Olympic and international sports disputes between private parties.”); NCAA Processes, *supra* note 9, at 279–82.

<sup>24</sup> The law of private associations affords judicial deference to the bylaws and polices of private associations even if their operations are exclusively internal to one state or nation. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000); *Am. Fed’n of Tech. Eng’rs v. La Jeunesse*, 347 N.E.2d 712 (1976); *Gulf S. Conf. v. Boyd*, 369 So.2d 533, 557–57 (1979); Zechariah Chafee, *The Internal Affairs of Associations Not for Profit*, 43 *HARV. L.REV.* 993, 1022 (1930). Judicial deference to assure uniformity also applies to professional sports. Professional sports are organized under the prevailing North American league or association commissioner models. In the United States they are regulated under the federal labor laws. A discussion of their legal regulation is outside the scope of this Article.

<sup>25</sup> The IOC has been described as “a global legislator in international sport, setting common standards.” Ken Foster, *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport’s Jurisprudence*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004*, 420, 430 (Ian S. Blackshaw, Robert C.R. Siekmann & Jan Willem Soek eds. 2006). See *infra* notes 48–54 and accompanying text for 2004 (2006). The need for uniform rules has been judicially recognized as “the heart of the NCAA.” NCAA v. Miller, 10 F.3d 633, 640 (9th Cir. 1993).

to private systems for resolving sports disputes with national or international dimensions, including those between athletes and their respective governing bodies, is critical to the development of a uniform body of law that is consistently and predictably applied to resolve the legal rights and contractual obligations of participating athletes commensurate with the geographical scope of the particular level of athletic competition.<sup>26</sup> But standing alone, the need for uniformity is insufficient to warrant judicial deference. Courts should defer to eligibility decisions rendered through a private system of sports dispute resolution only if it provides both procedural fairness and substantive justice to the athletes, particularly when, as with NCAA and Olympic athletes, final and binding dispute resolution processes are neither collectively bargained by duly authorized representatives of athletes (as typically occurs only in unionized North American major professional team sports) nor are otherwise the product of arms-length negotiation and agreement.

One of the authors has analyzed the CAS arbitration system, the “gold standard in resolving sports-related disputes,”<sup>27</sup> and concluded that it provides an appropriate level of procedural fairness and substantive justice in resolving Olympic sport athlete eligibility disputes.<sup>28</sup> Because the AAA arbitration system for resolving domestic Olympic athlete eligibility disputes, including adjudication of alleged doping offenses in accordance with the World Anti-Doping Code (WADC), is similar, it also provides the requisite level of procedural fairness.<sup>29</sup>

By contrast, there has been persistent, sometimes strident, criticism of the NCAA’s private internal system for resolving athlete eligibility issues arising out of NCAA rule violations as well as for the seemingly inconsistent

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<sup>26</sup> In that respect, the NCAA faces additional impediments as the judicial deference accorded NCAA decisions often comes on appeal, not at trial. *See infra* notes 104–12 and accompanying text.

<sup>27</sup> James A. R. Nafziger, *International Sports Law*, in *HANDBOOK ON INTERNATIONAL SPORTS LAW* 3, 27–28 (James A. R. Nafziger & Stephen F. Ross eds. 2011).

<sup>28</sup> Matthew J. Mitten, *The Court of Arbitration for Sport and its Global Sport’s Jurisprudence: International Legal Pluralism in a World Without Boundaries*, 30 *OHIO ST. J. ON DISP. RESOL.* 1, 39–41 (2014–2015). However, scholars have suggested several reforms to enhance the existing level of procedural and substantive fairness provided to athletes. *Id.* at 42–44.

<sup>29</sup> *Armstrong v. Tygart*, 886 F. Supp. 2d 572 (W.D. Tex. 2012) (“On balance, the Court finds the [United States Anti-Doping Agency] arbitration rules, which largely follow those of the American Arbitration Association (AAA), are sufficiently robust to satisfy the requirements of due process.”). *See generally* Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 99–100.

decisions rendered in individual cases.<sup>30</sup> Part of the criticism derives from a

<sup>30</sup> For a full rendition of the student-athlete reinstatement process described in this article, as well as a description of perceived inconsistencies in decisions, see Josephine (Jo) Potuto, *The NCAA Student-Athlete Reinstatement Process: Say What?*, 63 BUFF. L. REV. 297 (2015) (hereinafter *Reinstatement: Say What?*). See, e.g., Marc Tracey, *Tangled Case of a Baylor Football Player Poses a Test for the Rules of Eligibility*, N.Y. TIMES (March 6, 2015), available at [http://www.nytimes.com/2015/03/08/sports/ncaaf-football/baylor-players-tangled-case-poses-a-test-for-the-rules-of-eligibility.html?\\_r=0](http://www.nytimes.com/2015/03/08/sports/ncaaf-football/baylor-players-tangled-case-poses-a-test-for-the-rules-of-eligibility.html?_r=0); Matt Hinton, *NCAA finds pay-for-play, but Cam Newton is in the clear (for now)*, YAHOO SPORTS (Dec. 1, 2011), available at [http://sports.yahoo.com/ncaaf/football/blog/dr\\_saturday/post/NCAA-finds-pay-for-play-but-Cam-Newton-is-in-th?urn=ncaaf-290855](http://sports.yahoo.com/ncaaf/football/blog/dr_saturday/post/NCAA-finds-pay-for-play-but-Cam-Newton-is-in-th?urn=ncaaf-290855); Matt Hinton, *Cam Newton Will Live in NCAA Infamy, But He's Not Reggie Bush*, YAHOO SPORTS (December 2, 2010), available at [http://sports.yahoo.com/ncaaf/football/blog/dr\\_saturday/post/Cam-Newton-will-live-in-NCAA-infamy-but-he-s-no?urn=nxaaf-291314](http://sports.yahoo.com/ncaaf/football/blog/dr_saturday/post/Cam-Newton-will-live-in-NCAA-infamy-but-he-s-no?urn=nxaaf-291314); Jonathan Bass, *Penn State Ruling Confirms NCAA's Only Consistency is Inconsistency*, GAMEDAYR.COM (September 24, 2013), available at <http://gamedayr.com/sports/ncaa-penn-state-scholarships-ruling-inconsistency/>; Dave Curtis, *Suspension Ends Season for Oklahoma State's Dez Bryant*, SPORTING NEWS.COM (October 28, 2009), available at <http://www.sportingnews.com/ncaa-football-news/124137-suspension-ends-season-for-oklahoma-states-dez-bryant>; George Schroeder, *Analysis: the Johnny Manziel Autograph Case*, USA TODAY (August 16, 2013), available at <http://www.usatoday.com/story/sports/ncaaf/sec/2013/08/15/johnny-manziel-texas-am-ncaa-investigation-autographs-for-money/2662257/>; Darren Rovell, *Photo Shows Manziel Signing*, ESPN (September 13, 2013), available at [http://espn.go.com/college-football/story/\\_/id/9669838/photo-shows-johnny-manziel-signing-autographs-south-florida-autograph-broker-drew-tieman](http://espn.go.com/college-football/story/_/id/9669838/photo-shows-johnny-manziel-signing-autographs-south-florida-autograph-broker-drew-tieman); *Half-Game Penalty for Johnny Manziel*, ESPN (August 29, 2013), available at [http://espn.go.com/college-football/story/\\_/id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls](http://espn.go.com/college-football/story/_/id/9609389/johnny-manziel-texas-aggies-suspended-1st-half-season-opener-rice-owls); Josh Peter, *Dealers Argue Ethics Of College Athlete Autographs*, USA TODAY (October 15, 2014), available at <http://www.usatoday.com/story/sports/ncaaf/2014/10/15/james-spence-jameis-winston-todd-gurley-autographs-florida-state-georgia/17301169/>; Paul Newberry, *Georgia's Todd Gurley suspended 4 games by NCAA*, YAHOO SPORTS (October 29, 2014), available at <http://collegefootball.ap.org/article/georgias-todd-gurley-suspended-4-games-ncaa>; Tucker, *AJ Green: "I Sold Jersey for 'Extra Cash' During Spring Break"*, AJC.COM (September 26, 2010), Andrew Coppens, *NCAA Shows Inconsistency Again in Sanctions Against Montana, Crystal Ball Run*, BLOGUIN.COM (July 27, 2013), available at <http://thecomeback.com/crystalballrun/2013-articles/ncaa-shows-inconsistency-again-in-sanctions-against-montana.html>; Kyle Kensing, *Mississippi State Decision Reflects Inconsistencies in the NCAA*, SATURDAYBLITZ.COM (June 7, 2013), available at <http://saturdayblitz.com/2013/06/07/mississippi-state-ncaa/>; Matt Norlander, *NCAA Punishment is Inefficient, Inconsistent, Compromised: Here's How to Fix It*, CBSSPORTS.COM (October 25, 2012), available at <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/20681711/ncaa-punishment-is-inefficient-inconsistent-and-compromised-heres-how-to-fix-it>. Resolution of violations regarding university responsibility is also frequently criticized. See e.g. Fiutak, *USC Paying for NCAA's Inconsistency?*, FOXSPORTS.COM (May 26, 2011), available at <http://www.foxsports.com/collegefootball/>

fundamental misunderstanding of how student-athlete reinstatement processes currently operate.<sup>31</sup> A common complaint is that the NCAA's student-athlete eligibility rules and the NCAA's internal dispute resolution process have been adopted without any effective participation by athletes (e.g., collective voice and/or voting rights).<sup>32</sup> Some critics advocate that intercollegiate athlete eligibility disputes should be resolved by external arbitration procedures similar to CAS or AAA arbitration to provide "timely, independent, impartial, and final review of NCAA [student-athlete] eligibility disputes."<sup>33</sup>

This article was prompted by this misunderstanding and criticism of the NCAA's private internal system for resolving student-athlete eligibility issues along with the unexamined assumption that the external arbitration system used to resolve Olympic sports athlete eligibility disputes would work equally well for the NCAA. The principal question we address is whether the existing NCAA internal system for resolving intercollegiate athlete eligibility disputes provides an appropriate level of procedural fairness and substantive justice for student-athletes, given the predominant academic and extracurricular nature of NCAA athletic competition; the approximately 460,000<sup>34</sup> student-athletes who participate in NCAA sports; and the thousands of violations committed annually by student-athletes, ranging from minor, technical violations to very serious ones that may render them permanently ineligible. In addressing this question, we also consider whether an external dispute resolution system similar to CAS or AAA arbitration would be a feasible and practical alternative that would more effectively achieve these objectives without unduly intruding on the rights of the NCAA to govern itself effectively and to produce intercollegi-

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story/usc-football-hit-harshly-by-inconsistent-ncaa-penalty-052611; James Potter, *The NCAA As State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA. L. REV. 1269 (2007); David A. Skeel, Jr., *Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA*, 1995 WIS. L. REV. 669 (1995); Sherry Young, *The NCAA Enforcement Program and Due Process: The Case for Internal Reform*, 43 SYRACUSE L. REV. 747 (1992); C. Peter Goplerud III, *NCAA Enforcement Process: A Call For Procedural Fairness*, 20 CAP. U. L. REV. 543 (1991).

<sup>31</sup> See *infra* notes 65–86 and accompanying text. For a fuller discussion, see Reinstatement: Say What?, *supra* note 30.

<sup>32</sup> For a discussion of the scope of student-athlete participation in NCAA rule-making, including a Division I governance structure adopted in 2014 that enhanced participation, see *infra* notes 44–53 and accompanying text.

<sup>33</sup> Stephen F. Ross, Richard T. Karcher & S. Baker Kensinger, *Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration*, 40 J.C. & U.L. 79, 113 (2014) (hereinafter Ross & Karcher).

<sup>34</sup> *Student-Athletes, NCAA*, available at <http://ncaa.org/student-athlete>.

ate athletics with uniformly applied and enforced athlete eligibility rules resulting in fair competition.

In Part II of this Article, we briefly describe the NCAA's Committee on Infractions (COI) and Infractions Appeals Committee (IAC) adjudicative processes, which deal with institutional responsibility for bylaw violations committed by those for whom a university is responsible (coaches, staff, athletes, boosters). We then contrast the infractions process with how student-athlete bylaw violations are processed by the Student-Athlete Reinstatement Committee (SARC)<sup>35</sup> and its staff as well as how violations of the NCAA's drug test policy<sup>36</sup> are adjudicated by the Drug Testing Subcommittee (DTS) of the Competitive Safeguards and Medical Aspects of Sports Committee (CSMAS).<sup>37</sup> In Part III, we summarize the corresponding CAS and AAA arbitration systems for resolving Olympic sport athlete eligibility disputes. In Part IV, we set forth the general requirements of a private legal system for resolving sports disputes that justify judicial deference and then we briefly describe how they are satisfied by the CAS, AAA arbitration, and the NCAA's SARC and DTS processes. In Part V we conclude that issues affecting student-athlete eligibility generally are best resolved by the NCAA's existing internal processes, while suggesting 1) increased disclosure and publication regarding the specific facts, resolutions, and rationales of SARC and DTS determinations affecting student-athlete eligibility; and 2) creation of an external arbitration panel to review SARC and DTS determinations that a student-athlete is ineligible for a full season of competition or more under an arbitrary and capricious standard of review with very deferential and limited judicial review by Indiana courts.

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<sup>35</sup> NCAA BYLAWS 14.11; 18.4.1–18.4.3.

<sup>36</sup> NCAA BYLAWS 10.2; 18.4.1.5.

<sup>37</sup> NCAA BYLAWS 12.2.2.2 (d); 31.2.3–31.2.3.8; 2013 NCAA Drug Testing Program Manual, Chapter IV, <https://www.ncaa.org/sites/default/files/5.%20Drug%20Testing%20Program%20Book%202013-14.pdf> [hereinafter "Drug Test Manual"]. CMAS is a 20-member committee comprised of faculty, medical professionals, a lawyer, and a voting member from the national SAAC. *See* [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=SAFEGUARDS](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=SAFEGUARDS). 2015–16 NCAA Drug-Testing Program Appeals Process available at <http://www.ncaa.org/health-and-safety/policy/2015-16-ncaa-drug-testing-program-appeals-process> [hereinafter "Drug Test Appeals"]. Although most NCAA committees are division-centric, CMAS, together with its staff, handles drug appeals for all three divisions. NCAA BYLAWS 21.2.2.1; 18.4.1.5.

## II. NCAA STUDENT-ATHLETE ELIGIBILITY PROCESSES

The NCAA is a private association of approximately 1,200 four-year colleges and universities.<sup>38</sup> NCAA bylaws establish rules applicable to member colleges and universities, coaches, other university athletic department personnel, boosters, and student-athletes,<sup>39</sup> including bylaws that student-athletes must comply with to be eligible to compete in intercollegiate athletics,<sup>40</sup> as well as the processes by which bylaws are enforced and violations are punished.<sup>41</sup> Although there is no direct contractual relationship between the NCAA and student-athletes, NCAA bylaw requirements are incorporated into the scholarship agreement between NCAA member institutions and their student-athletes.<sup>42</sup> Student-athletes annually agree in writing to abide by NCAA bylaws and, before signing, they are directed to review a

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<sup>38</sup> *Membership*, NCAA, available at <http://www.ncaa.org/about/who-we-are/membership>. The 1,200 NCAA members also include the athletic conferences to which colleges and universities belong and affiliated members such as junior colleges.

<sup>39</sup> See, e.g., NCAA BYLAWS 11.1.1 (responsibility for violations) and 6.4.2 (boosters).

<sup>40</sup> Student-athletes must comply with campus academic and conduct requirements applicable to all students. See NCAA BYLAW 14.01.2. They also must comply with NCAA bylaws that set minimum academic standards for competition eligibility. These standards cover full time enrollment, NCAA BYLAW 14.1.7; initial eligibility, NCAA BYLAWS 14.3.1 to 14.3.6; and continuing eligibility, NCAA BYLAWS 14.4.1 to 14.4.3.9. They dictate amateur status. NCAA BYLAW Chapter 12. They prohibit the use of controlled substances. See NCAA BYLAW 18.4.1.5. They prohibit the receipt of extra benefits. See NCAA BYLAW 16.02.3. Benefits are cash, gifts, services, and favors. A benefit is an “extra” benefit, and prohibited, when it is special to student-athletes and not generally available to all students or specific cohorts of them. *Id.*

<sup>41</sup> See NCAA BYLAW 19; 14.11. The underpinning of all NCAA rules enforcement is the obligation of institutions to assure their staff and student-athletes are rules-compliant and to self-report violations. See NCAA Processes, *supra* note 9, at 105, 118–19, and 142–51.

<sup>42</sup> See Big Ten Tender of Financial Aid form, on file in the Office of JR Potuto. In what is called the student-athlete statement, they also agree to report violations they may have committed as well as violations of others of which they have knowledge. NCAA CONST. ART. 3.2.4.6; NCAA BYLAWS 14.1.3.1, 30.12; NCAA Form 12-3a, NCAA Form 08-31, Student-Athlete Statement, NCAA Division 1.

summary of pertinent NCAA bylaws.<sup>43</sup> They also receive regular education on the scope and meaning of bylaws that affect them.<sup>44</sup>

Some critics have expressed concern that requiring student-athletes to comply with NCAA bylaws is unfair because student-athletes have no realistic alternative to NCAA competition and have no formal role in the adoption of NCAA bylaws affecting their intercollegiate athletics eligibility. We generally agree that student-athletes, particularly those with elite athletic abilities, have no viable alternative if they seek both to pursue a college degree and to participate in sports at the highest level of intercollegiate athletic competition.<sup>45</sup> Although alternative opportunities to compete in some professional team or individual sports (e.g., baseball, basketball, football, hockey, soccer, golf, and tennis) are available to some NCAA student-athletes, professional sports governing bodies have various rules effectively restricting athlete eligibility to compete until they reach a particular age.<sup>46</sup> Moreover, major league professional sports offer very few opportunities to compete at a sport's highest level of competition and then only to the most skilled college athletes.<sup>47</sup> Regardless of their future availability to a very small number of NCAA students-athletes with the requisite ability who

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<sup>43</sup> Students (and institutional staff members) commit unethical conduct by “refusing to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so” and by “[k]nowingly furnishing . . . false or misleading information concerning . . . involvement in or knowledge of matters relevant to a possible violation of an NCAA regulation.” NCAA BYLAW 10.1 (a), (d).

<sup>44</sup> NCAA CONST. ART. 3.2.4.6; NCAA BYLAWS 14.1.3.1, 30.12; NCAA Form 12-3a, NCAA Form 08-31, Student-Athlete Statement, NCAA Division I. See OREGON L.REV. —, n.173. The Student-Athlete Reinstatement Committee has adopted guideline reinstatement conditions. NCAA Division I Student-Athlete Reinstatement Guidelines (2014) (hereafter Reinstatement Guidelines), available at <http://www.ncaa.org/sites/default/files/Division%20I%20Guidelines%20%28May%202014%29.pdf>. A mitigating factor under the Reinstatement Guidelines is the failure of a university to provide rules instruction. In addition, bylaws that carry a significant withholding or ineligibility condition involve conduct that is clearly rules-violative—academic fraud, for example—and student-athlete action to conceal that conduct underscores their recognition that they are committing NCAA violations.

<sup>45</sup> The National Association of Intercollegiate Athletics (NAIA) also regulates intercollegiate athletics competition, but on a much smaller scale. Its members generally are part of a state college system. See <http://naia.cstv.com>. Other national collegiate sports governing bodies include the National Christian College Athletic Association, United States Collegiate Athletic Association, and National Junior College Athletic Association. MITTEN ET. AL, SPORTS LAW AND REGULATION, *supra* note 2, at 100.

<sup>46</sup> *Id.* at 620–27.

<sup>47</sup> See *infra* notes 219–20.

satisfy the applicable eligibility requirements, professional sports opportunities do not offer the concomitant ability to attain a college degree.

On the other hand, the claim that student-athletes have no voice or vote regarding NCAA bylaws affecting their athletic eligibility is overstated. Each NCAA college or university has a Student-Athlete Advisory Committee (SAAC) comprised of student-athletes who are members of its intercollegiate athletic teams.<sup>48</sup> University SAAC members serve on the respective conference SAACs<sup>49</sup> and, in turn, on the national SAAC, which formally takes positions on proposals to modify existing NCAA bylaws or add new ones, including those affecting student-athlete eligibility. A revamped NCAA Division I governance structure now provides student-athletes with formal voting authority regarding the adoption of Division I bylaws.<sup>50</sup> They also serve on each of the seven standing committees that

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<sup>48</sup> NCAA BYLAW 21.7.7.3.1.1. At the University of Nebraska each team has at least one representative; the two largest squads (track and field and football) have four representatives each. Policy, Student-Athlete Advisory Committee, University of Nebraska-Lincoln, on file in office of JR Potuto, UNL Law College; January 5, 2015. Email from Keith Zimmer, Associate Director for Life Skills, to JR Potuto, on file in office of JR Potuto, UNL Law College.

<sup>49</sup> See 2013–14 Big Ten Handbook, Rule 4.4.2.2.C.3.; NCAA BYLAW 21.7.6.2. Under the Division I governance structure in place through 2014, SAAC conference representatives attended NCAA Council meetings and served on NCAA cabinets and on committees with impact on student-athletes or their experience. NCAA BYLAWS 21.7.5.1.1.1; 21.7.5.2.1.1; 21.7.5.3.1.1; 21.7.5.2/1.1; 21.7.5.5.1.1; 21.7.5.6.1.1. As time of publishing, it is unclear how many of the cabinets and committees will be maintained. The authors nonetheless provide some description here of the level of student-athlete participation to put in perspective claims that the student-athlete voice was missing from the former governance structure. Under the former structure, there were four association-wide committees, including the Olympic Sports Liaison Committee; NCAA BYLAW 21.2.5; and Sportsmanship and Ethical Conduct Committee; NCAA BYLAW 21.2.8. Each had a student-athlete member from each of the three divisions who collectively shared one vote. Among other committees, there was a student-athlete on CMAS and a student-athlete who served in an advisory capacity to the SARC. See *supra* note 37 and *infra* note 75. There were two voting members on the Men's Basketball Issues Committee (16 members); NCAA BYLAW 21.7.5.5.3.1.1; Women's Basketball Issues Committee (16 members); NCAA BYLAW 21.7.5.5.3.2.1; and Football Issues Committee (24 members); NCAA BYLAW 21.7.5.5.3.3.1. There were no student-athletes on any committee charged with interpreting bylaws or granting waivers from their operation, however. See NCAA BYLAWS 19.1.1; 21.7.5.1.3.1 to 21.7.5.1.3.2; 21.7.7.2; 23; and 22.1.1.

<sup>50</sup> There also are two student-athlete voting members on the 40-member Division I Council; there is one student-athlete voting member on the 24-member Division I Board. Hosick, *Board Adopts New Division I Structure*, (Aug. 7, 2014, 11:49

report to the Division I Council.<sup>51</sup> For those areas in which the five major conferences<sup>52</sup> are autonomous, 15 of the 80 votes are allocated to student-athletes.<sup>53</sup> Autonomy subject areas cover many issues directly relevant to student-athlete interests, including financial aid, time demands, and awards and benefits.<sup>54</sup>

The NCAA's internal processes for resolving student-athlete eligibility issues through the SARC and DTC are final and binding dispute resolution procedures. As such, these student-athlete eligibility dispute resolution processes constitute a form of arbitration, which is broadly defined as "a private process of adjudication in which the parties in dispute with each other choose decision-makers . . . and the rules of procedure, evidence, and decision by which their disputes will be settled."<sup>55</sup> More specifically, the NCAA, its member universities and colleges, and their student-athletes "1) . . . agree or consent to arbitrate the dispute between them; 2) . . . select a method of dispute resolution intended to obtain a fair decision by a neutral third party in less time and at less cost than would be expected in court; and 3) the decision or award of the arbitrator is . . . final."<sup>56</sup> Like other forms of arbitration, the NCAA's agreed upon internal dispute resolution processes are "an inexpensive, speedy, informal, and private alternative to the judicial system."<sup>57</sup>

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a.m.), *available at* <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure>.

<sup>51</sup> Hosick, *Student Voice Vote Continues to Grow Stronger*, *available at* <http://www.ncaa.org/about/resources/media-center/news/student-voice-vote-continues-grow-stronger> (Feb. 5, 2015).

<sup>52</sup> These are the Atlantic Coast, Big Ten, Big 12, Pacific 12, and Southeastern Conferences.

<sup>53</sup> Hosick, *Board Adopts New Division I Structure*, (Aug. 7, 2014, 11:49 a.m.), *available at* <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure>.

<sup>54</sup> Marc Tracy, *Areas of Autonomy, What Do They Mean*, N.Y. TIMES (Aug. 6, 2014), *available at* [http://www.nytimes.com/interactive/2014/08/06/sports/ncaa-autonomy-translation.html?\\_r=0](http://www.nytimes.com/interactive/2014/08/06/sports/ncaa-autonomy-translation.html?_r=0). Other subject areas are career pursuits, insurance, and recruiting restrictions. *Id.*

<sup>55</sup> Carrie J. Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 949 (2002).

<sup>56</sup> Ian R. Macneil, et. al, FEDERAL ARBITRATION LAW §2.1.1 (1994).

<sup>57</sup> STEPHEN K. HUBER & MAUREEN A. WESTON, ARBITRATION: CASES & MATERIALS 4 (3d. ed. 2011).

### A. INSTITUTIONAL BYLAW ADJUDICATION PROCESS

Every student-athlete violation of NCAA rules (except for positive drug tests for substances prohibited by the NCAA, which generally are his or her individual responsibility) also is a violation for which an institution is responsible and may be sanctioned.<sup>58</sup> NCAA bylaw violations run the gamut from minor, technical violations that are committed inadvertently,<sup>59</sup> such as a student-athlete's one-time receipt of an "extra benefit"<sup>60</sup> of minimal value (e.g., a hamburger), to serious, intentional violations such as academic fraud or the receipt of big dollar cash payments."

The NCAA enforcement staff investigates and presents allegations and proof of bylaw violations for which institutions can be held responsible. Institutional and coach responsibility and punishment (but not that of student-athletes) is determined through the NCAA's enforcement/infractions process,<sup>61</sup> which for serious violations involves adversarial hearings<sup>62</sup> before the COI<sup>63</sup> and a right of appeal to the IAC.<sup>64</sup> Universities generally appear before the COI and IAC represented by legal counsel.<sup>65</sup> The COI writes

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<sup>58</sup> NCAA Processes, *supra* note 9, at 297–301.

<sup>59</sup> NCAA BYLAW 19.1.4; List of Incidental Infractions (Level IV), as of August 1, 2013, [http://ncaa.org/sites/default/files/Violation%2BStructure\\_Level%2BIV\\_Conference%2BInfractions.pdf](http://ncaa.org/sites/default/files/Violation%2BStructure_Level%2BIV_Conference%2BInfractions.pdf). There are four categories of NCAA violations. NCAA BYLAWS 19.1.1–19.1.4. Incidental violations, classified as Level IV, are handled by Conference offices. NCAA BYLAW 19.12.2.

<sup>60</sup> Extra benefits are any item or service provided to a student-athlete that is not also available to students who are not athletes. NCAA BYLAW 16.02.3. The seriousness of an extra benefit violation depends on the value of the benefit and the knowledge and intent of a student-athlete who receives it. Level I and II violations are handled by the Committee on Infractions. Level I, the most serious violations, provide or are intended to provide a substantial recruiting or competitive advantage or substantial impermissible benefits. NCAA BYLAW 19.1.1. Level II violations provide more than a minimal but less than a substantial recruiting or competitive advantage or impermissible benefit. NCAA BYLAW 19.1.2. Level III violations are isolated or limited in nature and provide no more than a minimal recruiting or competitive advantage to a university or minimal impermissible benefit to a student-athlete. NCAA BYLAW 19.1.3. They violations constitute what formerly were known as secondary violations. *See* 2011 NCAA Division I manual, NCAA BYLAW 19.02.2.1; NCAA BYLAW 19.9.4 (d).

<sup>61</sup> NCAA BYLAW 19. Violations committed by other institutional employees also are handled through the enforcement/infractions process.

<sup>62</sup> NCAA BYLAW 19.7.

<sup>63</sup> NCAA BYLAW 19.7. The responsibility of coaches and other institutional staff members also is handled through the enforcement/infractions process. *Id.*

<sup>64</sup> NCAA BYLAW 19.10.

<sup>65</sup> NCAA BYLAWS 19.02.1; 19.7.1.2; 19.7.2, 19.7.3.

detailed infractions reports setting forth the reasons for its findings and the penalties it imposes;<sup>66</sup> the IAC does so in more truncated fashion.<sup>67</sup>

## B. STUDENT-ATHLETE ELIGIBILITY REINSTATEMENT PROCESS

The consequences to a student-athlete for committing an NCAA bylaw violation are determined by the SARC and its staff<sup>68</sup> (adjudication of responsibility and sanctions for a drug testing violation is determined by the DTS<sup>69</sup>). In academic year 2010-11, the last year for which data are reported, approximately 1,850 student-athlete violations were sufficiently serious to trigger the formal involvement of the NCAA student-athlete reinstatement process.<sup>70</sup> Student-athletes are ineligible to compete from the point at which they commit a violation until their eligibility status is resolved.<sup>71</sup>

Even for the most serious student-athlete violations, the NCAA enforcement staff conducts no investigation, makes no allegation of violations, and compiles no evidence to support allegations.<sup>72</sup> Instead, the university at which a student-athlete is enrolled investigates, determines the relevant

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<sup>66</sup> See NCAA BYLAW 19.8.1.2. There also is a right of appeal to the Infractions Appeals Committee. NCAA BYLAW 19.10.

<sup>67</sup> An analysis of proposals to externalize the NCAA's rules enforcement/infractions process to independent third parties is outside the scope of this article. For a description of the College Athlete Protection Act, proposed federal legislation that would do so, see Brian L. Porto, *New Rules for an Old Game: Recent Changes to the NCAA Enforcement Process and Some Suggestions for the Future*, 92 ORE. L. REV. 1057, 1087-90 (2014).

<sup>68</sup> See Reinstatement: Say What?, *supra* note 30. For a schematic that diagrams the reinstatement process, see Student-Athlete Reinstatement Process, *available at* <http://www.ncaa.org/sites/default/files/Student-Athlete%2BReinstatement%2BProcess%2BChart.pdf>.

<sup>69</sup> See Drug Test Manual, *supra* note 37, Chapter IV, art. 8.2.4. at 10.

<sup>70</sup> See Student-Athlete Reinstatement Frequently Asked Questions [hereinafter Reinstatement Questions] 4, *available at* <http://www.ncaa.org/compliance/reinstatement/student-athlete-reinstatement-frequently-asked-questions>. Less serious violations are resolved by an institution's report of a violation to its conference office. See *supra* note 56.

<sup>71</sup> They are resolved either by an institution's conclusion that a student-athlete committed no violation or by reinstatement to eligibility through the student-athlete reinstatement process. Certification of continuing eligibility is the responsibility of the institution at which a student-athlete is enrolled. Pre-enrollment, eligibility certification is handled by the NCAA Eligibility Center.

<sup>72</sup> The most the staff may do is to request that an institution gather and submit additional information. NCAA Divs. I, II, III Comms. on Student-Athlete Reinstatement Policies and Procedures 6 [hereinafter Policies and Procedures].

facts,<sup>73</sup> decides whether a violation was committed,<sup>74</sup> reports any findings of violations to the NCAA enforcement staff,<sup>75</sup> and typically reports those findings to the SARC staff and requests reinstatement to eligibility of the culpable student-athlete.<sup>76</sup> There is no fact-finding by any NCAA committee, no adversarial hearing before an adjudicatory body analogous to the COI, and no appeal of a SARC decision to an internal NCAA appellate body equivalent to the IAC. The exclusive role of the SARC and its staff is to ensure that a university provides a fully developed factual record to support its conclusion as to the seriousness of the violation reported,<sup>77</sup> to assess the degree of student-athlete culpability based on the facts that an institution reports, and to decide whether and under what conditions a student-athlete may be reinstated to competition eligibility.

The SARC has five members<sup>78</sup> who are full-time employees of NCAA member institutions or conferences, plus a nonvoting student-athlete from the national SAAC.<sup>79</sup> Because of the very large volume of reinstatement requests, the minor nature of many of the violations, and the need for speed in resolving eligibility issues, the reinstatement staff handles reinstatement requests in the first instance; the SARC hears university appeals from staff

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<sup>73</sup> Policies and Procedures, *supra* note 72, at 2. A fundamental obligation of NCAA membership is that institutions must be rules compliant, investigate, and promptly report suspected violations. NCAA CONST. Arts. 2.1, 2.8; 6.01; NCAA BYLAWS 19.2.1; 19.2.3; 10.2.2.

<sup>74</sup> See Reinstatement Questions, *supra* note 70, at 2–3; Policies and Procedures, *supra* note 72, at 2.

<sup>75</sup> Because a student-athlete's violation is a violation for which a university is responsible, the university also reports the violation to the NCAA enforcement staff.

<sup>76</sup> In a unique case, *Paxson v. University of Kentucky*, No. 09-C1-6404 (Ky. Cir. Ct., filed Jan. 15, 2010), a student-athlete requested a judicial order requiring his university to determine whether he violated NCAA amateurism rules based on a journalist's blog post suggesting his lawyer may have communicated with a Major League Baseball club that drafted him. The university declined to do so, but withheld him from intercollegiate competition because he refused to be interviewed by NCAA staff regarding his "unresolved eligibility questions." The court denied his motion for a temporary injunction, and he subsequently left the university without any official determination of his eligibility to compete. Ross & Karcher, *supra* note 33, at 107–08.

<sup>77</sup> See Policies and Procedures, *supra* note 72, at 2.

<sup>78</sup> See NCAA BYLAW 21.7.7.3.1. As with all NCAA committees, members of the SARC are faculty and administrators at member institutions and conferences, not NCAA staff members. NCAA BYLAW 21.7.1. They are appointed through formal NCAA processes. NCAA BYLAW 21.7.3.

<sup>79</sup> See NCAA BYLAW 21.7.7.3.

decisions.<sup>80</sup> To limit the scope of the reinstatement staff's discretion and enhance the likelihood that cases with similar facts are treated similarly across all NCAA member institutions, the SARC has adopted guidelines that prescribe reinstatement conditions (sanctions) for particular violations.<sup>81</sup> For minor violations, there is no withholding of a student-athlete from competition.<sup>82</sup> Serious violations can result in withholding for a substantial number of competitions (including permanent ineligibility),<sup>83</sup> a decrease in the total number of years (five) a student-athlete has to compete,<sup>84</sup> and sometimes both consequences.<sup>85</sup>

Only an institution may appeal a staff refusal to depart downward from a guideline reinstatement condition or a staff assessment of student-athlete culpability greater than the university believes is warranted.<sup>86</sup> The SARC

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<sup>80</sup> See Reinstatement Questions, *supra* note 70, at 2; Policies and Procedures at 20. See Division I Student-Athlete Reinstatement Committee Duties & Responsibilities [hereinafter Reinstatement Duties]

<sup>81</sup> See Reinstatement Questions *supra* note 70, at 2; Reinstatement Policies and Procedures, *supra* note 72, at 20. See Reinstatement Duties, *supra* note 80. There are 28 pages of guidelines for staff to use in dealing with the consequences to student-athletes attendant on their commission of violations. See Reinstatement Guidelines *supra* note 44. The SARC also specifies how reinstatement conditions are calculated, including which student-athlete competitions count in the withholding calculation. Policies and Procedures, *supra* note 72, at 15.

<sup>82</sup> Violations involving money benefit of less than \$100, for example, require disgorgement of the benefit but no withholding. See Reinstatement Guidelines, *supra* note 44; BYLAW 16.11.2.1.

<sup>83</sup> Violations involving benefits worth more than \$100 involve disgorgement of the benefit and also competition withholding calculated on the value of the benefit. See Reinstatement Guidelines, *supra* note 44. Extra benefit withholding penalties, for example, begin at 10 percent of a year's competitions for benefits over \$100 up to 30 percent for benefits over \$700. *Id.* at 20, 21; NCAA BYLAW 16.11.2.1. See, e.g., Reinstatement Guidelines, *supra* note 44, at 5; Reinstatement Questions *supra* note 70, at 4.

<sup>84</sup> Only about one percent of all cases result in a student-athlete's permanent ineligibility. See Reinstatement Questions, *supra* note 70, at 4.

<sup>85</sup> When a penalty is a year's withholding and also a season of eligibility, a student-athlete loses two seasons of competition.

<sup>86</sup> See Reinstatement Questions, *supra* note 70, at 1. A student-athlete may not independently trigger the SARC process or appeal from SARC imposition of a reinstatement condition. See *infra* notes 183–84 and accompanying text. A student-athlete's statement is included in a university's submission, however. Reinstatement Questions, *supra* note 70, at 1. In addition to challenging downward departures or assessment of student-athlete culpability, an institution also may try to persuade the committee to reconsider its guideline withholding condition or challenge the authority of the SARC to adopt a particular guideline against it. Appeals are scheduled based on when they are submitted and the date of a student-athlete's next

may revise a staff decision, but only to decrease a withholding condition or otherwise reduce the adverse impact on a student-athlete (e.g., it cannot impose an increased period of student-athlete ineligibility).<sup>87</sup>

NCAA bylaws that affect athlete eligibility cover a very broad range of subject matter that includes amateurism (e.g., involvement with agents or signing a professional contract), academic eligibility and misconduct, financial aid requirements, and extra benefits. These bylaws often are complicated in their own right, and even more so in combined operation. In addition, application, interpretation, and enforcement of student-athlete eligibility criteria depend on familiarity with campus admissions, grading, degree-completion, and other protocols. By staffing the SARC with faculty and staff from member universities, the NCAA student-athlete reinstatement process incorporates expertise in both the areas of NCAA bylaws and also campus protocols.

An approach by which student-athletes are ineligible from the time they commit a violation until their eligibility is restored incentivizes a university with information about his or her possible violation of an NCAA rule to work expeditiously to investigate and report it. It is consistent with the NCAA's guiding principle of institutional control, including an institution's obligation to educate student-athletes regarding eligibility requirements; to monitor for potential violations; to cooperate with the NCAA to ensure bylaw compliance; and to report violations when uncovered.<sup>88</sup> Putting the onus for rules compliance squarely on member institution facilitates enforcement of NCAA rules by precluding student-athletes from competing

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scheduled competition. Policies and Procedures, *supra* note 72, at 8. The SARC has one or two weekly times scheduled to hear and consider appeals.

<sup>87</sup> See Reinstatement Questions, *supra* note 70, at 1. Case summaries of student-athlete reinstatement staff decisions typically are posted on the NCAA website. Policies and Procedures, *supra* note 72, at 7, 14. They are brief renditions of the facts, with neither institution nor student-athlete identified. See *infra* notes 203, 220 and accompanying text. See generally, Reinstatement: Say What?, *supra* note 30. The SARC decides an appeal immediately after a hearing ends. Its decision is added to the staff report. January 5, 2015 Email from Laure Ragoss, Director of Compliance, University of Nebraska, to Josephine (Jo) R. Potuto, on file in office of JR Potuto. If the SARC affirms the reinstatement staff's decision, that information is added to the online staff reinstatement decision.

<sup>88</sup> A fundamental obligation of NCAA membership is that institutions must be rules compliant. NCAA CONST. ART. 2.8; NCAA BYLAW 19.2.1; NCAA Processes, *supra* note 9, at 105, 118–19, and 142–51 and accompanying text. Pursuant to the cooperative principle, universities are required promptly to report suspected violations and to cooperate with an NCAA investigation. See NCAA CONST. ARTS. 2.1, 2.8, 6.01; NCAA BYLAWS 10.2.2, 19.2.1, 19.2.3; NCAA Processes, *supra* note 9, at 289–92.

pending determination of their eligibility to do so, thereby avoiding the problem of attempting to offset any institutional competitive advantage gained if they competed but ultimately were determined to have been ineligible.

From the NCAA's perspective, however, there are two significant flaws in the current system, but neither of them directly impact or adversely affect student-athletes' legitimate interests. The first flaw is the likelihood of uneven rules enforcement that impact competitive equity among NCAA member institutions that are not equally adept at uncovering violations or willing to undertake the same thorough and probing job of deciding whether violations were committed. A student-athlete who committed a violation that adversely affects his or her eligibility should not be heard to complain of a lack of substantive fairness because a student-athlete at another school managed to escape detection or sanction.

Another significant flaw is the current widespread perception of inconsistent decisions across cases considered by the SARC.<sup>89</sup> In its own right, a perception of internal inconsistency and unfairness ill serves the NCAA,<sup>90</sup> which also may contribute to a reluctance by trial judges and juries to defer to NCAA decisions that result in a student-athlete's ineligibility.

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<sup>89</sup> Reinstatement: Say What?, *supra* note 30.

<sup>90</sup> Increasing the public confidence in the fairness of NCAA reinstatement processes is a worthwhile goal independent of its possible impact on trial verdicts. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 273-74, 278 (2d ed. 2006); Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 *POL. BEHAV.* 119, 135 (2003); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 *LAW & SOC'Y REV.* 103, 132 (1988); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 *LAW & SOC'Y REV.* 809, 827 (1994).

DIAGRAM OF STUDENT-ATHLETE REINSTATEMENT PROCESS

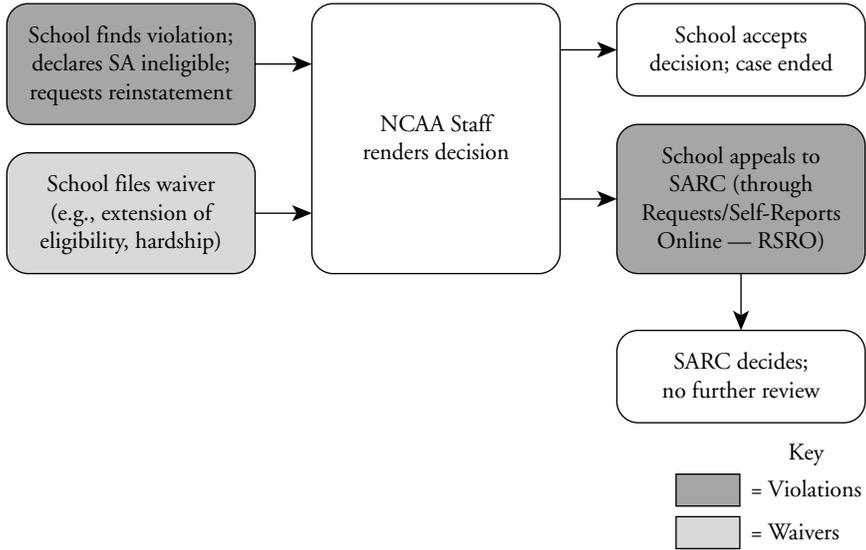


Chart derived from [ncaa.org/sites/ama/sar/DocumentLibrary/Technology/Website/2015WebsiteUpdates/StudentAthleteReinstatementProcessChart.docx](http://ncaa.org/sites/ama/sar/DocumentLibrary/Technology/Website/2015WebsiteUpdates/StudentAthleteReinstatementProcessChart.docx);MR:tas

C. STUDENT-ATHLETE DRUG TESTING VIOLATION ADJUDICATION PROCESS

The NCAA’s drug testing program was established to ensure that athletes reap no competitive advantage from using performance-enhancing drugs; to avoid pressures on athletes to ingest drugs to be competitive; and to protect the health and safety of athletes.”<sup>91</sup> The CSMAS adopts drug testing policies and procedures,<sup>92</sup> and its DTS resolves drug testing appeals.<sup>93</sup>

As a condition of participating in intercollegiate athletics, all student-athletes must provide written consent to random, suspicionless drug testing

<sup>91</sup> Drug-Test Manual, *supra* note 37, Chapter IV at 4. NCAA member institutions may develop their own drug testing programs (several universities have done so), but student-athletes’ positive tests are not required to be reported to the NCAA and are not subject to NCAA sanctions.

<sup>92</sup> The NCAA Executive Committee has final approval for these procedures and ultimate authority for implementation of the NCAA drug testing program. NCAA CONST. Art. 2.1.

<sup>93</sup> NCAA BYLAWS 21.2.2, 12.2.2.2, 31.2.3, 31.2.3.8; Drug Test Manual, *supra* note 37.

for the presence of NCAA prohibited controlled substances<sup>94</sup> at NCAA championships and Division I football bowl games.<sup>95</sup> Except in Division III, student-athletes also are subject to random out-of-season testing. Collection and testing of specimens is handled by an independent drug testing consultant selected by the NCAA.<sup>96</sup>

The presumptive sanction for a student-athlete's first-time positive test for a banned substance (a quasi-strict liability offense)<sup>97</sup> is ineligibility to participate in intercollegiate competition for one calendar year and loss of one season of eligibility.<sup>98</sup> The presumptive penalty may be reduced to one-half season of ineligibility or eliminated entirely if a student-athlete can show circumstances that mitigate his or her degree of fault for the violation.<sup>99</sup>

As is the case for other NCAA rules violations, a student-athlete is ineligible to compete from the date of being notified of a positive drug test

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<sup>94</sup> The NCAA's list of banned substances includes performance-enhancing drugs such as anabolic steroids, stimulants (e.g., cocaine and amphetamines), and certain illegal recreational drugs such as marijuana and heroin. Drug Test Manual, *supra* note 37, Chapters I and IV, Art. 1 at 2, 4. Although the United States Supreme Court has not evaluated specifically the adequacy of the NCAA drug testing program because it does not constitute state action, this program complies with the elements the Court has identified as needed to make random, suspicionless drug testing of athletes by public educational institutions constitutional. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995). See also *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (random urinalysis of treasury department employees on promotion or when carrying guns); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989); *Board of Education v. Earls*, 536 U.S. 822, 824 (2002); *Hill v. NCAA*, 865 P.2d 633 (Cal.1994). Courts have ruled that the NCAA's drug testing program satisfies applicable state constitutional law requirements. See e.g., *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994); *Brennan v. Bd. of Trustees for Univ. of Louisiana Systems*, 691 So.2d 324 (La. App. 1997).

<sup>95</sup> NCAA BYLAW 14.1.4. The consent form is signed by student-athletes in all three divisions; consent to testing at bowl games is specific to Division I, the only division whose football teams play in bowl games.

<sup>96</sup> Currently this responsibility is handled by the National Center for Drug-Free Sport.

<sup>97</sup> NCAA BYLAW 18.4.1.5.1; Drug Test Appeals, *supra* note 37, ¶¶5 (a)-(c), 10. The penalty applies even if the drug violation occurs outside the playing season. NCAA BYLAW 18.4.1.5.

<sup>98</sup> NCAA BYLAW 18.4.1.5. After serving the required suspension, a student-athlete must test negative for any banned drugs and be cleared by the SARC for his or her eligibility to compete in intercollegiate athletics to be restored. Drug Test Manual, *supra* note 37, Chapter IV, Art.9.0 at 11.

<sup>99</sup> Drug Test Appeals, *supra* note 37, ¶ 5(a)-(c).

unless and until an appeal to the DTS is resolved in his or her favor.<sup>100</sup> A quorum of three DTS members can hear an appeal,<sup>101</sup> which are heard by telephone and are not governed by formal rules of evidence.<sup>102</sup> Institutions and athletes may be represented by counsel. Like the SARC, the DTS attempts to resolve an appeal before the student-athlete's next scheduled competition if possible. The DTS members who hear the appeal deliberate and vote immediately after the hearing, and prompt notification of their decision is communicated by phone to the university's athletics director.

#### D. DEFERENTIAL APPELLATE COURT JUDICIAL REVIEW

In trial litigation against the NCAA challenging a determination by the SARC or DTS that a student-athlete is ineligible to compete for violating one of its rules (whose respective decisions constitute final internal resolution of the subject dispute), the NCAA generally is perceived as a heartless national organization with plenary authority that overreaches and exploits student-athletes. The NCAA does not have any fan base or institutional loyalty to offset a jury's likely sympathy for a student-athlete who plays a popular sport at one of its local member universities and is resorting to litigation to have his or her eligibility restored.<sup>103</sup> Even in bench trials, or in preliminary injunction proceedings before a judge, there is evidence of trial court reluctance to adhere to traditionally applied principles of judicial deference to the NCAA's private association decision-making.

Although the NCAA typically prevails, its success often comes on appeal.<sup>104</sup> By that time the damage to competitive equity has been done. By the time the litigation has finally concluded, a student-athlete who pre-

<sup>100</sup> Drug Test Manual, *supra* note 37, Chapter IV, Art.8.2.4. at 10.

<sup>101</sup> Drug Test Manual, *supra* note 37, at ¶ 1. The CSMAS chair and other designated committee members also may hear appeals. Like all NCAA committees, a member must recuse himself or herself when the appeal is brought by one's institution or an institution in his or her conference.

<sup>102</sup> *Id.* at ¶ 8.

<sup>103</sup> Potuto, *NCAA State Actor Controversy*, *supra* note 3, at 15n.47.

<sup>104</sup> See Paul M. Barrett, *When Students Fight the NCAA in Court, They Usually Lose*, BLOOMBERG BUSINESS WEEK (July 2, 2014), available at <http://www.businessweek.com/articles/2014-07-02/when-students-fight-the-ncaa-in-court-they-usually-lose>. The data are that student-athletes prevail in whole or part at trial in 49 percent of the cases they bring, but that more than 70 percent of intermediate appellate courts reverse the trial decision in whole or part and, of those that do not, another 70 percent are reversed on appeal to a state supreme court. See *id.* 34 student-athlete trial wins (70 percent of 45) will be reversed by an intermediate appellate court; of the remaining 15 trial wins, another 11 (70 percent of 15) will be reversed by a state supreme court.

vailed at trial and competed during the pendency of appellate review may have exhausted his or her collegiate athletics eligibility (or left the university for another reason), thereby avoiding any individual consequence for an NCAA rules violation if the trial court's ruling is reversed. Pursuant to its Restitution Rule,<sup>105</sup> the NCAA may vacate competition results and impose penalties on a university that, while the litigation was pending, competed with a student-athlete whose ineligibility was ultimately upheld by an appellate court. Although perceived as draconian, the purpose of the Restitution Rule is to create a significant disincentive for the university to allow a student-athlete to participate in intercollegiate athletics while appellate review of a trial court's refusal to enforce the SARC's determination of his or her ineligibility is pending.

The NCAA is not subject to the constraints of the federal constitution,<sup>106</sup> and student-athletes do not have a constitutionally protected property right or liberty interest in intercollegiate athletics competition, a prospective athletics scholarship, or a future professional playing career.<sup>107</sup> Consistent with the law of private associations, appellate courts provide very deferential judicial review of SARC and DTS final adjudications that affect a student-athlete's eligibility to participate in NCAA intercollegiate athletics. Deferential judicial review avoids unwarranted judicial micromanagement of NCAA student-athlete eligibility determinations and upholds the First Amendment freedom of association rights of member institutions.<sup>108</sup>

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<sup>105</sup> NCAA BYLAW 19.13.

<sup>106</sup> *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

<sup>107</sup> *Hall v. NCAA*, 985 F.Supp. 782, 799800 (N.D. Ill. 1997); *Bloom v. NCAA*, 93 P.3d 621 (Colo. App.2004); *Hart v. NCAA*, 550 S.E.2d 79, 86 (W. Va. 2001); *Hall v. NCAA*, 985 F. Supp. 782, 799–800 (N.D. ILL. 1997); *Graham v. NCAA*, 804 F.2d 953, 955 (6th Cir. 1986); *Hebert v. Ventetuolo*, 638 F.2d 5 (1st App. Ct. 1981); *Colo. Seminary v. NCAA*, 570 F.2d 321 (10th Cir. 1978); *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975).

<sup>108</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Roberts v. Jaycess*, 468 U.S. 609, 623 (1984). Deferential judicial review in the context of state regulation also upholds the strictures of the dormant commerce clause. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988); *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *Edgar v. Mite Corp.*, 457 U.S. 624 (1982); *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *Bibbs v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The Nevada Supreme Court held unconstitutional a state statute that imposed procedural requirements on NCAA enforcement policies and infractions hearings due to its effect on interstate commerce. See *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993).

In *NCAA v. Lasege*,<sup>109</sup> the Kentucky Supreme Court upheld the SARC's sanction of permanent ineligibility for a Nigerian student-athlete who professionalized himself under NCAA amateurism bylaws by being paid to play professional basketball in Russia. The court explained that "[i]n general, the members of [private associations such as the NCAA] should be allowed to 'paddle their own canoe' without unwarranted interference from the courts," adding that judicial relief is warranted only if the NCAA "act[s] arbitrarily and capriciously toward student-athletes."<sup>110</sup> Reversing the intermediate appellate court's affirmation of the trial court's injunction that permitted Lasege to compete for the University of Louisville during the 2000-01 season, it held that the trial court erroneously applied *de novo* review by substituting its judgment and reaching "a different conclusion as to [plaintiff's] intent to professionalize."<sup>111</sup> It ruled that mere judicial disagreement does not make a decision arbitrary or capricious; instead, a determination must be "clearly erroneous," we mean unsupported by substantial evidence."<sup>112</sup>

The Kentucky Supreme Court also validated the NCAA's Restitution Rule and upheld its authority to offset the competitive advantage gained by Louisville when Lasege played intercollegiate basketball during the 2000-01 season by retroactively imposing sanctions on the university, including forfeiture of wins in the games he played:

The trial court's belief that the NCAA's Restitution Rule 'thwarts the judicial power' is simply without foundation. NCAA Bylaw 19.8 . . . '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.' The authority of the courts is thus in no way compromised, and NCAA Bylaw 19.8 merely allows for post-hoc equalization when a trial court's erroneously granted temporary injunction upsets competitive balance. If the trial court's preliminary conclusions carry the day, and a student-athlete's eligibility is confirmed by

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<sup>109</sup> *NCAA v. Lasege*, 53 S.W.3d 77 (Ky. 2001). See also *Brennan v. Bd. of Trustees for Univ. of Louisiana Systems*, 691 So.2d 324 (La. App. Cir. 1 3/27/97) (upholding student-athlete's unsuccessful DTS appeal resulting in loss of one-year of competition eligibility for violating the NCAA drug testing program).

<sup>110</sup> *Lasege*, 53 S.W.3d at 83.

<sup>111</sup> *Id.* at 85.

<sup>112</sup> *Id.* Courts have adopted and applied the arbitrary and capricious standard in analyzing the validity of an NCAA committee's refusal to grant a waiver to an NCAA rule that would provide eligibility to participate in intercollegiate athletics. *Hall*, 985 F.Supp. at 794 (N.D. Ill.); *Bloom*, 93 P.3d at 623 (Colo. App.); *Brinkworth*, 680 So.2d (Fla. App.).

final determination, no restitutionary remedy is warranted or appropriate, and NCAA Bylaw 19.8 provides for none.<sup>113</sup>

### III. OLYMPIC SPORT ATHLETE ELIGIBILITY ADJUDICATION PROCESSES

#### A. CAS ARBITRATION

The CAS is a private international arbitral body based in Lausanne, Switzerland, whose jurisdiction is based on agreement of the parties, which provides final and binding resolution of sports disputes. It was created in response to “the need for a unitary international legal system that protects the integrity of Olympic and international athletics competition, while also safeguarding athletes’ legitimate rights and adhering to fundamental principles of natural justice.”<sup>114</sup> The International Council of Arbitration for Sport (ICAS), a group of 20 distinguished jurists and lawyers with a sports and/or arbitration background (some of whom are former Olympians) also based in Lausanne, oversees the CAS and its group of approximately 300 arbitrators, and manages its budget, appoints its member arbitrators, and promulgates the Code of Sports-Related Arbitration (Code).<sup>115</sup> All parties in a CAS proceeding have the right to be represented by counsel.<sup>116</sup>

At the site of each Olympic Games, the CAS operates an ad hoc Division that consists of a pool of 9-15 CAS arbitrators chosen by the ICAS, which provides expedited resolution of all disputes arising during the Games or within a period of ten days preceding the Opening Ceremony, including athlete eligibility disputes with the IOC or an IF.<sup>117</sup> Disputes are resolved by a panel of three arbitrators appointed by the president of the CAS ad hoc Division, who is a member of the ICAS.<sup>118</sup> Generally, the panel must render a written reasoned arbitration award within 24 hours of the filing of a request for CAS adjudication,<sup>119</sup> which ensures “fast, fair, and

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<sup>113</sup> *Lasege*, 53 S.W.3d at 88.

<sup>114</sup> Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 9–10.

<sup>115</sup> CAS, Code of Sports-Related Arbitration (hereinafter “Code”), available at <http://www.tas-cas.org/en/index.html>.

<sup>116</sup> *Id.* at R30. CAS proceedings usually are conducted in either English or French (the two official languages of the CAS).

<sup>117</sup> Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 11.

<sup>118</sup> *Id.* at 12. The Olympic Charter and the general principles and rules of law that the arbitration panel deems appropriate constitute the governing substantive law applied by the panel to the facts of the case. *Id.*

<sup>119</sup> *Id.*

free' resolution of disputes involving an athlete's eligibility to participate in the Olympic Games."<sup>120</sup>

For disputes occurring outside of the Olympic Games, the CAS appeals arbitration procedure is used to resolve appeals from final decisions of the IOC or an IF affecting an athlete's competition eligibility, including doping, disciplinary, and other issues.<sup>121</sup> In addition to the authority to interpret and apply athlete eligibility rules in individual cases, CAS panels are empowered to invalidate sport governing body rules when appropriate to do so.<sup>122</sup> These proceedings usually are conducted before a three-person panel with each party choosing one arbitrator and the president of the CAS appeals arbitration procedure (who is an ICAS member) appointing the third arbitrator who serves as the panel's chair.<sup>123</sup> The Code requires the CAS panel to issue a written reasoned award that resolves the parties' dispute within three months after receiving the case file.<sup>124</sup>

In both CAS ad hoc Division and appeals arbitration proceedings, the arbitration panel exercises *de novo* review,<sup>125</sup> and not the very narrow 'arbitrary and capricious' or 'rational basis' standards that national courts generally apply when reviewing sport governing body rules and decisions."<sup>126</sup> In either type of proceeding, the CAS panel resolves the parties' dispute by majority decision. All CAS ad hoc Division and most appeals arbitration

<sup>120</sup> Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 79.

<sup>121</sup> Code, *supra* note 116, at R.47.

<sup>122</sup> See, e.g., *British Olympic Ass'n v. World Anti-doping Agency*, CAS 2011/A/2658, award of 30 April 2012 (invalidating British Olympic Association bylaw providing that an athlete found guilty of a doping offense is ineligible for selection to the British Olympic team because it is inconsistent with WADC's exclusive sanctions); *USOC v. IOC*, CAS 2011/O/2422, award of 4 October 2011 (invalidating IOC rule prohibiting an athlete sanctioned for a doping violation with a suspension of more than six months from participating in the next Olympic Games because it is inconsistent with WADC's exclusive sanctions).

<sup>123</sup> Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 12. The applicable substantive laws generally are the relevant sport governing body rules (e.g., IOC or IF rules, or the WADC for doping cases) and the law of the country in which the governing body is domiciled, although the CAS panel has authority to resolve the dispute according to the "rules of law" it deems appropriate. Code, *supra* note 116, at R.58.

<sup>124</sup> Code, *supra* note 116, at R.59.

<sup>125</sup> Code, R. 57 provides: "The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance." *Id.* at R.57. Similarly, Article 16 of the Arbitration Rules for the Olympic Games states "[t]he Panel shall have full power to establish the facts on which the application is based;" and Article 17 authorizes it to "rule on the dispute" in accordance with the applicable law.

<sup>126</sup> Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 14.

awards are published on the CAS website.<sup>127</sup> These awards are binding only on the parties, but CAS panels often cite and rely on prior awards that address the same or similar issues in an effort to create a uniform body of Olympic sports law. As one CAS panel observed: “In CAS jurisprudence there is no principle of binding precedent, or *stare decisis*. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel. Whether that is considered a matter of comity, or an attempt to build a coherent corpus of law, matters not.”<sup>128</sup>

CAS ad hoc Division and appeals arbitration awards are subject to judicial review by the Swiss Federal Tribunal (SFT), Switzerland’s highest court. The SFT has ruled that “the CAS is a true arbitral tribunal independent of the parties,” which “offers the guarantees of independence upon which Swiss law makes conditional the valid exclusion of ordinary judicial recourse.”<sup>129</sup> In a 2003 case, the SFT rejected the plaintiffs’ contention that the CAS is not impartial when it decides a dispute between an athlete and the IOC.<sup>130</sup> It ruled that the CAS, whose operations have been overseen by the ICAS since 1994, is sufficiently independent from the IOC for its arbitration decisions “to be considered true awards, equivalent to the judgments of State courts.”<sup>131</sup>

Article 190(2) of the Swiss Federal Code on Private International Law of December 18, 1987 sets forth only very limited procedural and substantive grounds for judicially challenging a CAS award before the SFT,<sup>132</sup>

<sup>127</sup> See [tas.cas.org](http://tas.cas.org) under “Jurisprudence” tab.

<sup>128</sup> International Assn. of Athletics Federations v. USA Track & Field and Jerome Young, CAS 2004/A/628, award of June 28, 2004, at ¶ 19. See also *Anderson, et al. v. IOC*, CAS 2008/A/1545, award of July 16, 2010, at ¶ 55 (“although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect.”).

<sup>129</sup> *G. v. Federation Equestre Internationale (Gundel)*, in Digest of CAS Awards 1986–1998 (Matthieu Reeb ed., 1998) at 561, 568–69.

<sup>130</sup> *A. and B. v. IOC and FIS (Lazutina)*, *A. and B. v. IOC and FIS*, in Digest of CAS Awards III 2001–2003 (Matthieu Reeb ed., 2004) at 674.

<sup>131</sup> *Id.* at 689. It concluded: “As a body which reviews the facts and the law with full powers of investigation and complete freedom to issue a new decision in place of the body that gave the previous ruling, the CAS is more akin to a judicial authority independent of the parties.” *Id.* at 686.

<sup>132</sup> Switzerland’s Federal Code on Private International Law, CAS (1987), available at [http://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20в%20перед.%202007%20\(англ\).pdf](http://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20в%20перед.%202007%20(англ).pdf). Procedural grounds for vacating an award include: an irregularity in the composition of the arbitration panel (e.g., lack of independence or

which has vacated very few CAS awards.<sup>133</sup> As a foreign arbitration award in all countries except Switzerland,<sup>134</sup> a CAS award is subject to judicial review in national courts of countries, including the U.S., that are parties to Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), an international treaty,<sup>135</sup> and its enforcement may be refused on substantially the same grounds. Pursuant to Article V(2)(b) of the New York Convention, a national court may refuse to recognize and enforce a CAS arbitration award if doing so “would be contrary to the public policy of that country.”<sup>136</sup> Similar to the SFT, U.S. courts have construed this defense very narrowly and enforced the one CAS award that has been judicially reviewed to date.<sup>137</sup>

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impartiality); an erroneous assertion of jurisdiction; a failure to comply with the scope of an arbitration agreement by not ruling on a submitted claim or ruling on extraneous matters; or a violation of the parties’ rights to be heard or to be treated equally. See generally Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 55–58 (2009). The sole basis for challenging the substantive merits of a CAS award is its incompatibility with Swiss public policy, a defense that the SFT has stated “must be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states.” *N., J., Y., W. v. FINA*, 5P.83/1999 (1999) (Switz.), in CAS, Digest of CAS Awards II: 1998-2000 at 775, 779 (Matthieu Reeb ed., 2002). It has ruled that “even the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings.” *Id.* at 779.

<sup>133</sup> Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 16–17. See generally Despina Mavromati & Matthieu Reeb, *The Code of the Court of Arbitration for Sport—Commentary, Cases, and Materials* (Wolters Kluwer International 2015).

<sup>134</sup> To ensure uniform procedural rules consistent with Swiss law for all CAS arbitrations, the “seat” of all CAS arbitration proceedings is always deemed to be Lausanne, Switzerland regardless of where it is geographically held. Code, *supra* note 116, at R28.

<sup>135</sup> U.N. Conference on International Commercial Arbitration, *Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. A/CONF (June 10, 1958) June 10, 1958, 21 U.S.T. 2517 [hereinafter “New York Convention”], 9 U.S.C. § 201 et seq.

<sup>136</sup> *Id.* at Art. V(2)(b).

<sup>137</sup> In *Gatlin v. U.S. Anti-Doping Agency, Inc.*, No. 3:08-cv-241, 2008 WL 2567657 (N.D. Fla. 2008), a federal district court ruled that a CAS arbitration award rejecting an athlete’s claim that his prior doping violation for taking prescribed medication violated the Americans with Disabilities Act, which the court characterized as “arbitrary and capricious,” did not violate the New York Convention’s public policy exception and justify its refusal to recognize the award. *Id.* at \*1.

## B. AAA ARBITRATION

The USOC is authorized by the IOC and ASA to represent the United States in all matters relating to its participation in the Olympic Games. The USOC selects an NGB as the unitary governing authority for each Olympic sport within the United States,<sup>138</sup> which is a member of the corresponding IF that governs the sport on a worldwide level. Pursuant to a series of hierarchical contractual agreements with the IOC and IFs, the USOC and its NGBs are required to adopt, apply, and enforce IOC and IF rules that determine or affect U.S. athletes' eligibility to qualify for, or participate in, Olympic or other international sports competitions as well as to comply with CAS awards resolving issues concerning the eligibility of American athletes that arise in connection with the Olympic Games or in disputes with an IF or the World Anti-Doping Agency.

The USOC and all NGBs must comply with the ASA, which establishes a legal framework for protecting the participation opportunities of Olympic sport athletes.<sup>139</sup> It mandates that the USOC establish a procedure for "swift and equitable resolution" of disputes "relating to the opportunity of an amateur athlete . . . to participate" in the Olympic, Paralympic, Pan-American Games, and world championship competitions ("protected competitions").<sup>140</sup> It also requires the USOC to hire an athlete ombudsman to provide free, independent advice to athletes regarding resolution of disputes regarding their eligibility to participate in protected competitions.<sup>141</sup>

Section 9 of the USOC's Bylaws creates both procedural and substantive rights for athletes regarding their participation in protected competitions. The USOC Bylaws prohibit an NGB from "deny[ing] or threaten[ing] to deny . . . the opportunity to participate" to an athlete otherwise qualified<sup>142</sup> to do so, who has the right to file a complaint with it

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<sup>138</sup> An NGB has no authority to regulate intercollegiate or interscholastic competition in the sport it regulates. 36 U.S.C. § 220526(a).

<sup>139</sup> The ASA requires an NGB to provide all athletes under its jurisdiction with an equal opportunity to participate "without discrimination on the basis of race, color, religion, sex, age, or national origin." 36 U.S.C. § 220522(a)(8).

<sup>140</sup> 36 U.S.C. § 220509(a).

<sup>141</sup> 36 U.S.C. § 220509(b).

<sup>142</sup> USOC BYLAW, Section 9.1. An athlete has no federal constitutional right to participate in the Olympic Games, *DeFrantz v. USOC*, 492 F. Supp. 1181 (D.D.C. 1980), and the ASA does not create any substantive athletic participation rights that athletes can enforce in litigation against the USOC or an NGB. 36 U.S.C. § 220505(b)(9). *See generally*, Mitten & Davis, *supra* note 7, at 94–97. As one Seventh Circuit judge remarked, "there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the

against an NGB that allegedly adversely affected his or her athletic eligibility by denying him or her the opportunity to participate.<sup>143</sup> Pursuant to the ASA, an athlete dissatisfied with USOC's resolution of the complaint may submit the dispute to final and binding arbitration in accordance with the Commercial Rules of the AAA<sup>144</sup> and may be represented by counsel. The AAA proceeding is held in person or telephonically before a single arbitrator selected by the parties from a closed pool maintained by the AAA (most of whom are U.S. CAS arbitrators). The arbitrator is required to render a timely written and reasoned award, which is published on the USOC's website.<sup>145</sup>

A Section 9 arbitration award is subject to very limited judicial review, largely on procedural grounds. The award will be judicially confirmed and enforced if the arbitrator had jurisdiction and authority to resolve the issues therein and the award involved no "corruption,' 'fraud,' 'evident partiality,' or any similar bar to confirmation".<sup>146</sup> The reviewing court does not exercise *de novo* review and will not vacate an arbitration award simply because it disagrees with the arbitrator's resolution of the merits of its claims or defenses.<sup>147</sup>

### C. AAA/U.S. CAS DOPING ARBITRATION

In the U.S. there is a specialized arbitration proceeding for resolving alleged doping violations that the United States Anti-doping Agency (USADA), an independent private anti-doping agency for Olympic sports in the U.S., has jurisdiction to prosecute.<sup>148</sup> An athlete who chooses to chal-

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eligibility, of athletes to participate in the Olympic Games." *Michels v. USOC*, 741 F.2d 155, 159 (7th Cir. 1984) ( Posner, J., concurring).

<sup>143</sup> USOC BYLAWS, Section 9.2.

<sup>144</sup> USOC BYLAWS, Section 9.7.

<sup>145</sup> These awards are available at <http://www2.teamusa.org/About-the-USOC/Organization/Legal/Arbitration-and-Hearing-Panel-Cases/Section-9.aspx>.

<sup>146</sup> *Lindland v. U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000, 1003 (7th Cir. 2000).

<sup>147</sup> *Gault v. United States Bobsled and Skeleton Fed'n*, 578 N.Y.S.2d 683 (N.Y. App. Div. 1992).

<sup>148</sup> USADA handles the initial adjudication procedure that most IFs require its U.S. member NGB to undertake when a U.S. athlete tests positive for a banned substance. Applying the IF's rules (which are based on the WADC), a USADA Review Board of 3-5 persons considers written submissions by USADA and the athlete charged with a doping violation to determine whether the evidence is sufficient to warrant a hearing. U.S. Anti-doping Agency, Protocol for Olympic and Paralympic Movement Testing, Section 11 (2014). If so, USADA proposes doping charges and sanctions against the athlete consistent with the IF's rules. WADA or an IF may challenge USADA's disposition of a doping matter by appealing to the

lenge USADA's alleged doping violation and proposed sanction may request a hearing before a three-person AAA panel<sup>149</sup> whose members are also U.S. CAS arbitrators<sup>150</sup>. In the AAA/U.S. CAS arbitration proceeding,<sup>151</sup> USADA and the athlete are adverse parties.<sup>152</sup> After hearing the parties' evidence, the AAA/U.S. CAS panel issues a written arbitration award with reasons for its decision.<sup>153</sup> The athlete or USADA may appeal this award<sup>154</sup> to a three-person CAS panel that exercises *de novo* review and renders a final and binding award,<sup>155</sup> which is subject to very limited judicial review by the SFT (and potentially a U.S. federal court under the New York Convention).<sup>156</sup>

#### IV. REQUISITES OF PROCEDURAL FAIRNESS AND SUBSTANTIVE JUSTICE THAT JUSTIFY JUDICIAL RECOGNITION AND DEFERENCE TO PRIVATE DISPUTE RESOLUTION SYSTEMS

To justify judicial recognition and deference, a private legal system to resolve sports disputes should provide procedural fairness and substantive justice, particularly to athletes who are required to be bound by its decisions as a condition of participating in a sport. Procedural fairness requires that athletes receive reasonable notice of a governing body's rules and the poten-

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CAS. See, e.g., *WADA v USADA, USBSEF, and Zachery Lund*, CAS OG 06/001 (2006) (successful WADA challenge to sanction USADA imposed on U.S. athlete for doping violation because too lenient).

<sup>149</sup> This is a right provided by the ASA because a doping violation and sanction may affect an athlete's ability to participate in a protected competition.

<sup>150</sup> This is a necessary requirement because the IFs and WADA have agreed to be subject only to CAS arbitration.

<sup>151</sup> Special AAA Supplementary Procedures apply to USADA doping arbitrations, including rules that provide the panel with broad discretion to "determine the admissibility, relevance, and materiality of evidence offered." Rule R-28 and that permit the panel "[to] 'consider the evidence of witnesses by declaration or affidavit', but shall give it only such weight as [it] deems it entitled to after consideration of any objection made to its admission." Rule R-29. *Jacobs v. USA Track & Field*, 374 F.3d 85 (2d Cir. 2004) (rejecting athlete's petition to compel arbitration pursuant to general AAA Commercial Rules).

<sup>152</sup> The IF for the particular sport may observe the proceeding or participate as a party.

<sup>153</sup> USADA Arbitration Decisions, available at <http://www.usada.org/testing/results/arbitration-decisions/> (last visited Nov. 5, 2015).

<sup>154</sup> The IF or WADA also may appeal.

<sup>155</sup> See, e.g., *Landis v. USADA*, CAS 2007/A/1394 (2008) (affirming AAA/U.S. CAS arbitration award finding that Floyd Landis committed a doping violation and sanction imposed).

<sup>156</sup> See *supra* notes 137–140 and accompanying text.

tial consequences for violations as well as the opportunity to present their case to an unbiased decision maker if violations are alleged or disputes arise.<sup>157</sup> Substantive justice — “just results in individual cases” — requires procedural fairness combined with a reasoned decision based on the information in the record that both follows applicable precedent and does not discriminate against those challenging the decision.<sup>158</sup>

At a minimum, a system that provides procedural fairness and substantive justice must have the following components: 1) an open forum accessible to all those who may be adversely affected by a decision, including the right to be represented by counsel; 2) independent, impartial, and unbiased decision-makers, 3) a full and fair opportunity for all parties to be heard; 4) timely, reasoned, and final decisions; and 5) the development of a clearly articulated uniform body of law that applies equally to all those similarly situated and that provides a consistent and predictable application of the regulations and rules that govern the private entity.<sup>159</sup> In the following sections we evaluate, respectively, the CAS, AAA, SARC, and DTS processes for handling student-athlete eligibility issues to determine whether they meet the foregoing five criteria for procedural fairness<sup>160</sup> and substantive

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<sup>157</sup> Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 18. For purposes of federal constitutional due process, the U.S. Supreme Court has described procedural fairness as meaning that individuals with interest that that may be abridged by a decision must have notice of that action and a reasonable opportunity to show an unbiased fact finder that the action should not be enforced against them. See *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975). Constitutional claims require a state actor. See *Barron v. Balt.*, 32 U.S. 243 (1833). See also *United States v. Stanley*, 109 U.S. 3 (1883).

<sup>158</sup> Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 18–19.

<sup>159</sup> *Id.* at 20.

<sup>160</sup> The United States Constitution applies to state actors, not private ones. See *Barron*, 32 U.S. at 250–51 (1833); *Civil Rights Cases*, 109 U.S. 3, 17 (1883). Because the NCAA is not a state actor, *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 199 (1988), the NCAA is not required to comply with the due process requirements of the 14th Amendment. See, e.g., *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91 (1978); *Goss v. Lopez*, 419 U.S. 565, 583 (1975); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Moreover, student-athletes do not have a constitutionally protected property right to compete in a college sport or a liberty interest subject to due process protection. See, e.g., *Grabam v. NCAA*, *Nat'l Collegiate Athletic Ass'n*, 804 F.2d 953, 955 (6th Cir. 1986); *Colo. Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n*, 570 F.2d 320, 321 (10th Cir. 1978); *Bloom v. NCAA*, 93 P.3d 621, 624 (Colo. App. 2004); *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005) (stating that “the overwhelming majority of jurisdictions” find no due process constitutional right of students to participate in college athletics competition); *Hart v. NCAA*, 550 S.E.2d 79, 86 (W. Va. 2001). The USOC and NGBs are not state actors. See *S.F. Arts & Ath.*,

justice that a private legal system for resolving Olympic and intercollegiate athlete eligibility disputes should have to justify judicial recognition and enforcement of its decisions.

### A. CAS

*Open Forum.* The CAS system provides an open forum that is fully accessible to athletes, who have the right to directly initiate an arbitration proceeding and to be represented by counsel. Athletes frequently are represented by volunteer pro bono lawyers in CAS ad hoc Division proceedings, and ICAS has established a legal aid fund to pay attorneys' fees to enable them to have access to CAS arbitration. CAS appeals arbitration proceedings are free of charge except for a filing fee of approximately \$1,000, which is waived if an athlete qualifies for legal aid. If an athlete prevails in a dispute with an IF, the CAS panel has the discretion to order the IF to contribute towards his or her attorneys' fees and expenses (unless he or she received legal aid).<sup>161</sup>

*Independent and Impartial Adjudicators.* In *Canas v. ATP Tour*, the SFT held that an athlete's agreement to arbitrate a dispute before the CAS as a condition of being eligible to participate in a sports event is enforceable because it "promotes the swift settlement of [sports] disputes . . . by specialized arbitral tribunals that offer sufficient guarantees of independence and impartiality."<sup>162</sup>

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*Inc. v. United States Olympic Comm.*, 483 U.S. 522, 545 (1987); *Behagen v. Amateur Basketball Asso.*, 884 F.2d 524, 530 (10th Cir. 1989), and Olympic sport athletes have no constitutionally protected property rights or liberty interests protected by the due process clause. See *De Frantz v. United States Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C. 1980).

<sup>161</sup> Mitten, *Arbitration for Sports Jurisprudence*, supra note 28, at 21–22.

<sup>162</sup> *Canas v. ATP Tour*, Tribunal federal [Tf] [Federal Supreme Court] Mar. 22, 2007, 4P.172/2006 (Switz.), at 4.3.2.3. But see *Pechstein, C v. Deutsche Eisschnelllauf-Gemeinschaft e. V. (DESG)*, U 1110/14 Kart (Munich Higher Regional Ct., January 15, 2015) (mandatory CAS arbitration provision violates German antitrust law because the International Skating Union abused its worldwide monopoly governance of skating by requiring athletes to consent to an arbitration system with a structural defect "which places the neutrality of CAS fundamentally in question" because "the majority or perhaps the entirety of the persons included on the list of arbitrators are more closely connected to the governing bodies than to the athletes"). This case is being appealed to the Bundesgericht, Germany's highest court. Christian Keider, *Guide to the Higher Regional Court's Decision in the Pechstein Case*, LawinSport (January 29, 2015), available at [http://www.lawinsport.com/articles/item/a-guide-to-the-higher-regional-court-s-decision-in-the-pechstein-case?highlight=WY\]wZWNoc3Rla](http://www.lawinsport.com/articles/item/a-guide-to-the-higher-regional-court-s-decision-in-the-pechstein-case?highlight=WY]wZWNoc3Rla)

The SFT has upheld the independence of the CAS from the IOC and IF,<sup>163</sup> although many of its arbitrators (particularly the European ones) have historical or current connections with the IOC or an IF. In *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano*,<sup>164</sup> the SFT held that “the independence and the impartiality demanded from the members of an arbitral tribunal extend to the party appointed arbitrators as well as to the chairman of the arbitral tribunal.”<sup>165</sup> However, it acknowledged that “absolute independence by all arbitrators is an ideal which will correspond to reality only rarely,”<sup>166</sup> observing that there is a closed list of CAS arbitrators required to have legal training and recognized expertise regarding sport and that many CAS arbitrators have pre-existing associations and contacts with Olympic sports organizations, administrators, and counsel as well as others associated with the Olympic Movement. It determined that “an arbitrator may not be challenged merely because he was chosen by one of the parties to the dispute”<sup>167</sup> and there is “no justification for a special treatment of CAS arbitrators, namely to be particularly strict in reviewing their independence and impartiality,”<sup>168</sup> requires a case-by-case determination rather than “immutable rules.”<sup>169</sup>

*Full and Fair Opportunity to be Heard.* Because CAS ad hoc Division and appeals arbitration panels exercise *de novo* review over the decisions of the IOC and IFs affecting an athlete’s eligibility to compete in Olympic and international sports events, athletes have a full and fair opportunity to be heard and to raise any relevant factual and legal issues, thereby enabling any procedural defects in the governing body’s resolution of the dispute to be remedied.<sup>170</sup>

*Timely, Reasoned Decision.* Both CAS ad hoc Division and appeals arbitration proceedings provide timely (within 24 hours of filing or three months from when the file is transmitted to the arbitrators, respectively) and reasoned written awards, which constitute a final and binding resolution

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<sup>163</sup> See *supra* notes 132–134 and accompanying text.

<sup>164</sup> A\_234/2010 (1st Civ. Ct. 2010).

<sup>165</sup> *Id.* at 12–13.

<sup>166</sup> *Id.* at 13.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 14.

<sup>169</sup> *Id.* at 15. The Code prohibits CAS arbitrators from representing any party in a CAS arbitration proceeding. Code, *supra* note 116, at 18.

<sup>170</sup> Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 25–26.

of the parties' dispute subject to very limited judicial review by the SFT and national courts pursuant to the New York Convention treaty.<sup>171</sup>

*Consistent, Uniform Body of Law.* Although CAS ad hoc Division and appeals arbitration awards bind only the parties, this collective body of CAS awards resolving athlete eligibility disputes “provide guidance in later cases, strongly influence later awards, and often function as precedent,” which reinforce and help elaborate “established rules and principles of international sports law.”<sup>172</sup> Based on an illustrative sample of CAS doping violation and sanction awards as well as sport nationality requirement awards, it appears that the CAS arbitration system generally is facilitating “the development of a clearly articulated uniform body of law and its predictable application in a consistent manner.”<sup>173</sup>

In sum, the CAS system for providing final and binding resolution of disputes affecting the eligibility of athletes satisfies procedural fairness. However, as one of the authors of this article observed, it is “very difficult to objectively measure the extent to which [it] produces substantive justice.”<sup>174</sup>

## B. AAA

AAA arbitration of domestic athletic eligibility and participation opportunity disputes (including those involving doping violations and sanctions) also appears to provide procedural fairness and substantive justice to U.S. Olympic sport athletes based on application of the foregoing same five requirements. An athlete who believes his or her opportunity to participate in a “protected competition” has been denied by an NGB has the right to institute Section 9 or AAA/U.S. CAS doping arbitration and to be represented by counsel. Although there is no legal aid fund to finance the costs of these arbitration proceedings, an athlete is entitled to receive free, independent advice concerning the dispute from the USOC athlete ombudsman, who maintains a list of attorneys willing to provide pro bono representation

<sup>171</sup> See *id.* at 26–27.

<sup>172</sup> Nafziger, *International Sports Law*, *supra* note 4, at 48–61.

<sup>173</sup> Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 28–39. See also Lorenzo Casini, *The Making of Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317, 1327 (2011) (observing that “the CAS has made a crucial contribution to the making of global sports law . . . [by] develop[ing] common legal principles among sporting bodies . . . [and] interpret[ing] and harmoniz[ing] sports law”).

<sup>174</sup> Mitten, *Arbitration for Sports Jurisprudence*, *supra* note 28, at 39–40. On the other hand, the CAS’s “procedural fairness increases the likelihood of substantive justice, or at least tends to alleviate any potential concerns about a lack of systematic substantive justice.” *Id.* at 40.

to athletes. All AAA sports arbitration proceedings are heard and resolved by independent and impartial arbitrators (most of whom are U.S. CAS arbitrators) who provide *de novo* review and are required to provide the parties (including athletes) with a full and fair opportunity to be heard and to issue a timely, reasoned, and final award. AAA Section 9 and AAA/U.S. CAS doping arbitration awards are published on the USOC and USADA websites respectively and prior awards in both categories of cases frequently are cited and relied on by arbitrators in subsequent proceeding involving similar issues, which facilitates the development of a clearly articulated uniform body of U.S. law regarding Olympic athlete eligibility disputes with consistent, predictable application.<sup>175</sup>

### C. SARC

The student-athlete reinstatement process involves responsibility divided between NCAA institutions and the SARC, and we evaluate their respective roles. Before doing so, we note that the NCAA rules waiver process has important implications for the procedural fairness and substantive justice afforded student-athletes in connection with athlete eligibility issues because it permits them to prospectively challenge the substantive scope and application of an NCAA bylaw before committing a violation and rendering themselves ineligible, an action that triggers the SARC process.<sup>176</sup> In *NCAA v. Brinkworth*, a Florida appellate court described this waiver process and concluded:

Under the NCAA procedure, the university submits a waiver request on behalf of the student-athlete to the eligibility staff. If the staff turns the waiver request down, then the university may submit an appeal on behalf of the student-athlete to the Eligibility Committee. In this case, after a rejection by the Eligibility Committee, the Committee also entertained a request for reconsideration. As we view the matter, these procedures are both adequate and fair.<sup>177</sup>

*Open Forum.* Although only an NCAA member institution may bring an athletic eligibility reinstatement request and present a case in favor of

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<sup>175</sup> AAA Section 9 arbitration awards are not subject to judicial second guessing on the merits, but AAA/U.S. CAS doping arbitration awards may be appealed and are subject to *de novo* review by the CAS.

<sup>176</sup> See NCAA Processes, *supra* note 9, at 275–76. This is precisely the path taken by Jeremy Bloom in his challenge to NCAA amateurism bylaws. *Id.* at 281–82.

<sup>177</sup> *NCAA v. Brinkworth*, 680 So.2d 1081, 1084 (Fla. Dist. Ct. App. 1996).

reinstatement,<sup>178</sup> student-athletes provide written statements that are included as part of a university's reinstatement request,<sup>179</sup> participate in appeals to the SARC, and may be represented by counsel.<sup>180</sup> An important feature of this internal process, which is advantageous to student-athletes, is that they pay neither filing fees nor any costs in connection with any stage of this process and usually do not incur attorneys' fees because the university generally represents their interests in a full and adequate manner.<sup>181</sup> In addition, NCAA bylaws permit an institution to pay a lawyer to represent a student-athlete before the SARC or in communications with its staff.<sup>182</sup>

*Independent and Impartial Adjudication.* Unlike CAS and AAA arbitration, which are external processes utilizing independent arbitrators, the NCAA's athletic eligibility determination processes are internal forms of arbitral adjudication. First, the university at which a student-athlete is enrolled determines whether he or she committed a violation; second, the SARC decides the reinstatement condition to be imposed based on the facts presented to it regarding a student-athlete's culpability based on his or her conduct, knowledge, and intent. Because of its interest in maintaining a student-athlete's eligibility and also because a student-athlete's violation is an institutional violation for which it can be sanctioned, the university does its best to find facts that mitigate his or her culpability for a violation and

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<sup>178</sup> Reinstatement Questions, *supra* note 70. Generally in private associations, only its members may avail themselves of association processes and only members are directly responsible to the association.

<sup>179</sup> Policies and Procedures, *supra* note 72, at 1. See *Bloom v. NCAA*, 93 P.3d 621, 628 (Colo. App. 2004); *NCAA v. Brinkworth*, 680 So.2d 1081, 1084-85 (Fla. App. 1996).

<sup>180</sup> Policies and Procedures, *supra* note 72, at 8-10.

<sup>181</sup> In addition, should a student-athlete seek the Assistance of a lawyer, lawyer fees may be covered by the student-athlete's university. NCAA BYLAW 16.3.2

<sup>182</sup> NCAA BYLAW 16.3.2 (NCAA proceedings related to a student-athlete's eligibility). Measured against the process due in student challenges to adverse consequences to their student status—"an informal give and take" where students have an opportunity to tell their story, the NCAA student-athlete reinstatement process readily passes due process muster. *Goss v. Lopez*, 419 U.S. 546 (1975). Students rarely succeed in challenges to university decisions regarding admissions, continued matriculation, academic standards and academic dismissals, or to challenges to decisions in disciplinary processes. See, e.g., *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978); *Harris v. Blake*, 798 F.2d 419 (10th Cir. 1986); *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Davis v. Regis College, Inc.*, 830 P.2d 1098 (Colo. App. 1991); *Shabrabani v. Nova Univ.*, 779 F. Supp. 599 (S.D. Fla. 1991). Challenges to a grade or grading practice require evidence of serious wrongdoing. See, e.g., *Naragon v. Wharton*, 737 F.2d 1403 (1984); *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992).

prevent or reduce any period of ineligibility. A majority of its members are institutional faculty members and others outside the athletic departments of NCAA colleges and universities. The SARC appointment process,<sup>183</sup> composition,<sup>184</sup> length of service,<sup>185</sup> and procedures<sup>186</sup> all underscore its independence and impartiality despite being an internal NCAA committee. Its members are prohibited from hearing cases involving an institution from the same athletic conference as their institution. To date, no student-athlete or court has expressed any general or individualized concerns regarding the independence or impartiality of the SARC or its members.<sup>187</sup>

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<sup>183</sup> The NCAA Division I Administration Cabinet makes appointments to most NCAA committees, including to the SARC. It operates independently of NCAA senior administrative staff.

<sup>184</sup> The SARC includes faculty and others who are not part of the competitive athletic environment. There are subdivisional and other demographic requirements. The Committee includes a non-voting member of the national student-athlete advisory committee. For a list of current members, see NCAA Division I Student-Athlete Reinstatement Committee, *see* [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=1REINSTATE](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1REINSTATE).

<sup>185</sup> Committee members serve two three-year terms. *See id.* On occasion the term is extended to assure continuity of experience on a committee. *See, e.g.*, Memorandum from the Div. I Student-Athlete Reinstatement Comm. to the Div. I Admin. Cabinet, Meeting Materials of Div. I Admin. Cabinet at 143 (Feb. 1101, 2014) (requesting one-year extension of a member's term), *available at* <http://www.ncaa.org/sites/default/files/DI%20Admin.%20Cabinet%20materials%20%202.14.pdf>. One of the authors served nine years on the Division I Committee on Infractions. During that time, several resignations occurred because of the heavy time demands, and one member resigned because of appointment to another NCAA committee. She knows of no instance in which a member of the Infractions Committee or, for that matter, any NCAA committee, failed to complete a term because of pressure to resign related to committee decisions. Committee members are appointed through conferences. Another reason for a committee member to resign is movement to a position at a university in a different conference.

<sup>186</sup> Committee members may not hear cases involving institutions from the same athletic conference as their institution. Policies and Procedures, *supra* note 72, at 14–15. Ex parte communications with NCAA staff are prohibited. *Id.* at 12–13.

<sup>187</sup> In employment and consumer transaction disputes, courts have invalidated a “take-it-or-leave-it” provision in an arbitration agreement providing one party with unilateral control over selection of the arbitrator(s) because it does not provide a process for ensuring a fair and impartial arbitration proceeding that is an effective substitute for a neutral judicial forum. *See, e.g., McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2004); *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. 2015), reh'g denied (June 30, 2015); *Nishimura v. Gentry Homes, Ltd.*, 134 Haw. 143, 338 P.3d 524 (2014). 2015 WL 2061986 (Mo.). Unlike these types of cases, NCAA student-athlete eligibility disputes generally do not involve the alleged violation of a federal or state statutory right that cannot be effectively vindicated because the arbitration proceeding is unfair or biased. Moreover, the application of even the very deferen-

*Full and Fair Opportunity to be Heard.* The most significant element of the reinstatement process that inures to the benefit of student-athletes is that a student-athlete's own university conducts the factual investigation and decides whether a student-athlete committed violations, not the SARC or its staff. A university's interests typically are co-extensive with those of its student-athletes. It shares the goal of surfacing any facts that might exculpate its student-athlete or mitigate culpability, both to protect a student-athlete's interests and facilitate his or her return to competition as well as to avoid liability and a sanction for a student-athlete's rules violation, which also constitutes a violation by the institution.<sup>188</sup>

The SARC's decision regarding the athletic eligibility effects of an NCAA rule violation focuses on a student-athlete's culpability for it, and does not involve consideration of whether he or she committed a violation. In addition, student-athlete reinstatement guidelines regarding the reinstatement conditions to be applied limit the scope of the SARC's discretion and, therefore, also limit the extent to which a student-athlete's independent presentation of exculpatory evidence might influence its decision.<sup>189</sup>

*Timely, Reasoned Decision.* The effective governance of sports competition requires speedy resolution of athlete eligibility disputes. Because there are a limited number of intercollegiate athletic competitions in which stu-

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tial arbitrary and capricious review standard of SARC decisions permits courts to resolve the merits of NCAA student-athlete eligibility disputes in extreme cases, which does not occur under the traditional scope of judicial review of arbitration awards resolving employment or consumer transaction disputes. On the other hand, courts have upheld a collectively bargained provision in an employment agreement giving one party the unilateral authority to select the arbitrator(s) to resolve a future dispute because "the parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Williams v. NFL*, 582 F.3d 863, 885 (8th Cir. 2009) (citing *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 551 (8th Cir. 2007)).

<sup>188</sup> See *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); *NCAA v. Brinkworth*, 680 So.2d 1081, 1084-85 (Fla. App. 1996).

<sup>189</sup> Claims cognizable on appeal are restricted to a SARC refusal to depart downward from a guideline reinstatement condition or a staff decision assigning a greater degree of student-athlete culpability than a university believes is warranted. Policies and Procedures, *supra* note 72, at 8. It may relitigate a factual conclusion or its conclusion that particular violations were committed only if it produces new evidence on appeal. *Id.* See NCAA Division I Request to Appeal Decision of Student-Athlete Reinstatement Staff, on file in office of JR Potuto. Appeals are handled either by telephone or on the paper record. Telephone appeals typically take 30 minutes, with SARC staff, university, and student-athlete each allocated ten minutes. NCAA BYLAW 21.7.7.3.3.1; Policies and Procedures, *supra* note 72, at 8. The reinstatement staff attempt to resolve a case before a student-athlete's next date of competition.

dent-athletes can participate annually, and they have only four years of competition eligibility within a five-year window,<sup>190</sup> student-athlete eligibility to disputes need speedy resolution. Many student-athlete violations are resolved as soon as a student-athlete repays any extra or impermissible benefits received without any adverse consequences on their athletic eligibility.<sup>191</sup> Other NCAA rules violations disqualify a student-athlete from competing in only one or two games or athletic events.<sup>192</sup> The potentially more significant adverse consequences of other violations may be ameliorated by a showing of a student-athlete's lack of any intent to commit a violation or by some other mitigating circumstance.<sup>193</sup> Even when a student-athlete is held out of competition for significant periods or is rendered permanently ineligible, he or she often disputes neither the commission of a violation nor a university's factual rendition of how and why it occurred.<sup>194</sup> Brief summaries of SARC appeals decisions without identification of the involved institution or

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<sup>190</sup> NCAA BYLAWS art. 12.8 (Seasons of Competition: Five-Year Rule). There also are only a specified number of competitions per season, and individual sports often have 10 or fewer. Nebraska women's swimming and diving team, for example, competed in 10 regular season competitions in 2013-14. See *Swimming and Diving: 2012-13 Schedule*, NEBRASKA ATHLETICS, available at [http://www.huskers.com/SportSelect.dbml?SPSID=85&SPID=31&Q\\_SEASON=2012](http://www.huskers.com/SportSelect.dbml?SPSID=85&SPID=31&Q_SEASON=2012) (last visited Jan. 26, 2015). The Alabama women's outdoor track and field team, as another example, competed in six meets. See <http://www.rolltide.com/sports/c-ctrack/sched/alab-c-xc-track-sched.html>.

<sup>191</sup> See NCAA BYLAW 16.01.1.1. See, e.g., Reinstatement Guidelines, *supra* note 44; BYLAW GUIDELINE 12.1.2.1.6 (3), at 5; NCAA BYLAW 16.11.2.1 (3), at 23. Unless other violations are involved (payment was made by an agent, for example), disgorgement of the benefit is the only consequence when the benefit is worth \$100 or less. For a full discussion of NCAA reinstatement guidelines, see Reinstatement Processes, *supra* note 9.

<sup>192</sup> Extra benefit withholding penalties, for example, begin at 10 percent of a year's competitions for benefits over \$100 up to 30 percent for benefits over \$700. Reinstatement Guidelines, *supra* note 43; NCAA BYLAW 16.11.2.1(3). Receipt of prize money over necessary expenses pre-enrollment, as another example, triggers a withholding penalty of 10 percent of a year's competitions for net prize money over \$500 up to 30 percent for net prize money over \$1000. Reinstatement Guidelines, *supra* note 44, at 4.

<sup>193</sup> See, e.g., NCAA BYLAW 10.1(b); Reinstatement Guidelines, *supra* note 44, at 4. The mitigating circumstances are narrowly defined, however. See *infra* note 225 and accompanying text.

<sup>194</sup> *Lasege*, 53 S.W.3d at 84 ("The NCAA's eligibility determinations are entitled to a presumption of correctness—particularly when they stem from *conceded* violations of NCAA regulations.").

student-athlete are readily accessible on the NCAA website and may be relied upon as precedent in future similar cases.<sup>195</sup>

*Consistent, Uniform Body of Law.* Although a particular reinstatement guideline may be criticized as ill-advised or too harsh, guidelines substantially reduce the likelihood of biased treatment of a student-athlete in a particular case or inconsistency across cases. Consistency is also enhanced by having the same five-member SARC resolve all appeals in a given year rather than utilizing different panels of adjudicators, as is the case with different three-person combinations of CAS and AAA arbitrators. In addition, the availability of published summaries of SARC decisions contributes to the development of consistent treatment of student-athletes pursuant to the SARC appeals process for resolving athletic eligibility issues arising out of their violation of NCAA rules.

#### D. DTS

The DTS student-athlete drug testing violation adjudication process equals or exceeds the procedural protections of SARC processes.<sup>196</sup> The appointment of DTS members follows the same procedures as the appointment of SARC members. As a whole, the DTS is more independent than SARC because it includes at least one member — a high school representative — not employed by an NCAA university or conference, as well as medical professionals and a lawyer.<sup>197</sup> The impartiality and neutrality of the DTS is enhanced by its adjudication process, which maintains the anonymity of the student-athlete and institution bringing an appeal. In contrast to the SARC process for student-athlete reinstatement, a student-athlete who desires to challenge a positive drug test or the consequences for his or her athletic eligibility has a right to require the university to bring an appeal on his or her behalf.<sup>198</sup> Both the student-athlete and university may be represented by counsel, present evidence and witness testimony, and ask questions of those involved in the sample collection, chain of custody, and testing procedures.<sup>199</sup> Notice of the result of the DTS's adjudication is generally provided

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<sup>195</sup> See Policies and Procedures, *supra* note 72, at 7–14.

<sup>196</sup> For a general description of the procedure for challenges to positive drug test result, see Drug Test Appeals, *supra* note 37.

<sup>197</sup> See Drug-Test Manual, *supra* note 37.

<sup>198</sup> *Id.*

<sup>199</sup> Drug Test Appeals, *supra* note 37, ¶ 5, ¶ 8. The Drug Test Subcommittee deliberates and decides the appeal immediately after the appeal is concluded. *Id.* at ¶ 9.

to the student-athlete's university immediately after the hearing, which is usually before his or her next scheduled athletic competition.

Unlike SARC decisions, DTS decisions are not posted on the NCAA website, even in a truncated form similar to SARC reports. Thus, summaries of past DTS decisions in similar cases are not available to a university or to student-athletes and their counsel for use as precedent in DTS proceedings. Although the DTS has published guidelines for eliminating or reducing the presumptive one-year period of intercollegiate athletics eligibility for a positive drug test, its failure to publish even brief summaries of its adjudications inhibits the documented development of a uniform body of NCAA drug testing law with consistent, predictable application to all student-athletes.<sup>200</sup>

## V. CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, the authors disagree with critics who believe that a wholesale systematic move from the current NCAA internal system for resolving student-athletes' rule violations that adversely affect their athletic eligibility to an external dispute resolution system would materially enhance procedural fairness and substantive justice for student-athletes. On the contrary, the authors believe that an external process risks narrowing those protections. In this part, we evaluate some of the reasons proffered by commentators for moving to an external system. We then suggest reforms to enhance the procedural fairness and substantive justice afforded student-athletes without intruding on NCAA associational rights, its prerogatives as a private association, or the central requisites of NCAA enforcement and management of student-athlete eligibility issues.

### A. *Advocates for Change Misunderstand Reinstatement Process*

In calling for an external student-athlete reinstatement process, critics proceed from a fundamental misunderstanding of how athlete eligibility issues currently are handled internally by the NCAA. In other words, they erroneously assume that, similar to the NCAA process for adjudicating rules violations by member institutions and imposing sanctions, NCAA staff investigate student-athlete rules violations and bring charges that are resolved

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<sup>200</sup> As a justification for not doing so, the NCAA takes the position that each case, which typically focuses on the student-athlete's culpability for a positive drug test, should be decided on its own merits. Given that the SARC's appeal process generally focuses on a student-athlete's culpability for violation of other NCAA rules, this is not a convincing rationale.

by an internal NCAA adversarial hearing.<sup>201</sup> Based on this misunderstanding, they advocate the need for an external system similar to CAS or AAA arbitration to offset what they see as an internal NCAA system stacked against student-athlete interests.

Critics also fail to consider the literally thousands of student-athlete eligibility issues that arise annually, and what that portends for an external system to resolve disputes. First, the nature and scope of potential student-athlete NCAA rules violations are much broader than those of Olympic and professional sport athlete rules violations, which involve primarily disciplinary issues for on-field or off-field misconduct and drug use that do not require specialized consideration of academic requirements or extra benefits rules. Second, there are hundreds of thousands more student-athletes who participate in intercollegiate sports and also many more college competi-

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<sup>201</sup> See e.g., Ross & Karcher, *supra* note 33, at 80 (“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.”). Critics and commentators also regularly discuss college athletics and student-athletes as though they all were elite athletes, all competed in the FBS, and all were concentrated in revenue sports with professional analogues. See, e.g., RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* (University of Illinois Press, 2011); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 71 (2006); Frank G. Splitt, *Time for Accountability in Sports: Corrupt Collegiate Athletics Overshadow Faltering Academic Mission*, NATIONAL CATHOLIC REPORTER, Nov. 14, 2008, at 11a; Report of the Knight Found., *Comm’n on Intercollegiate Athletics, A Call to Action: Reconnecting College Sports and Higher Education* (2001); MURRAY SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION* (2000); The Coalition on Intercollegiate Athletics (COIA), *A Framework for Comprehensive Athletics Reform* (2003); F. WILLIAM G. BOWEN & SARAH A. LEVIN, *RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES* (Princeton Univ. Press 2003); H. JAMES J. DUDERSTADT, *INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE* (2000). Because of the potentially big payoffs for professional athletes, the impact of eligibility decisions on student-athletes with professional prospects may have particularly significant consequences. These student-athletes constitute only a minuscule proportion of all NCAA student-athletes, however. See Tony Manfred, *Here Are The Odds That Your Kid Becomes A Professional Athlete (Hint: They’re Small)*, BUS. INSIDER (Feb. 10, 2012), available at <http://www.businessinsider.com/odds-college-athletes-become-professionals-2012-2?op=1>. Even assuming, as the authors do not, that the current NCAA system ill-serves elite athletes, it is hardly wise policy to dismantle a system that works well for the great majority in preference to one that focuses on a small minority.

tions than Olympic and professional athletes and sports competitions,<sup>202</sup> for which eligibility disputes between athletes and their respective governing bodies are generally resolved by external arbitration.<sup>203</sup> An extremely conservative estimate of the total number of intercollegiate competitions involving the 120 NCAA Division I Football Bowl Subdivision (FBS) universities held annually is more than 25,000;<sup>204</sup> the total number of all annual intercollegiate athletic competitions in NCAA Divisions I, II, and III likely is more than 50,000.<sup>205</sup> Third, the vast majority of student-athlete

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<sup>202</sup> More than 1100 colleges and universities field varsity athletic teams on which more than 460,000 NCAA student-athletes compete. See text accompanying *supra* note 38. Approximately 13,300 athletes competed in the most recent summer and winter games (2780 in the 2014 Sochi Winter Games; registration.olympic.org/en/faq/detail/id/194; 10,500 in the 2012 London Summer Games, www.englishclub.com/vocabulary/sports-olympics-2012-london.htm). There are 1200 Major League Baseball players (40 players on a roster and 30 teams), and 1696 National Football League players (53 players on a roster and 32 teams). Major League Baseball Official Info, MLB.COM, [http://mlb.mlb.com/mlb/official\\_info/about\\_mlb/rules\\_regulations.jsp](http://mlb.mlb.com/mlb/official_info/about_mlb/rules_regulations.jsp); <http://mlb.mlb.com/team/index.jsp>, NFL.COM, <http://www.nfl.com/teams>; Marc Illibridge, The Anatomy of a 53-Man Roster in the NFL, available at <http://bleacherreport.com/articles/1640782-the-anatomy-of-a-53-man-roster-in-the-nfl>.

<sup>203</sup> Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 143 (“Although arbitration is an efficient process that works well for resolving athletic eligibility disputes for the few thousand U.S. professional and Olympic sport athletes, it probably is not a feasible alternative for resolving eligibility disputes affecting the nation’s more than . . . four hundred thousand NCAA student-athletes.”).

<sup>204</sup> Division I FBS universities must sponsor at least 16 intercollegiate sports. NCAA BYLAW 20.9.9.1. I. Virtually all of them sponsor many more; for example, The Ohio State University sponsors 37 sports. Even using just the minimum number that is required, there are 1920 teams in Division I FBS alone. Division I FBS varsity competitions for individual sports teams average at least eight competitions per team annually exclusive of post season. As one example, the Nebraska women’s swimming and diving team competed in 12 regular season competitions in 2012-13. [http://www.huskers.com/SportSelect.dbml?&DB\\_OEM\\_ID=100&SPID=31&SPSID=85](http://www.huskers.com/SportSelect.dbml?&DB_OEM_ID=100&SPID=31&SPSID=85). Team sports generally have many more competitions. Baseball heads the list, with 56 possible regular season games. NCAA BYLAW 17.2.5.1. Men’s and women’s basketball teams may play 29 regular season games. NCAA BYLAW 17.3.5. Football trails with 12 regular season games. NCAA BYLAW 17.9.5.1. Assuming only ten competitions annually for each FBS team and the minimum number of sports teams sponsored, the number of competitions is 9,840 (5 x 19,680). This number is an undercount, as FBS teams routinely play teams from the other subdivisions in Division I. Some sports also play teams in Divisions II and III. The actual number of annual FBS competitions likely is more than 25,000.

<sup>205</sup> Team sponsorship requirements are fewer in the other two Division I subdivisions and in Divisions II and III. The number of total competitions, therefore, would not be four times the number in Division I FBS, but likely is higher than

rules violations are not serious and are resolved with no or minimal impact on their athletic competition eligibility.

### B. *Proposed Reforms*

Although the authors do not believe a wholesale move to an external arbitration system to adjudicate student-athlete eligibility disputes is warranted or advisable, we believe the two following reforms would potentially enhance the procedural fairness and substantive justice provided to student-athletes without jeopardizing the NCAA's needed autonomy or ability to manage its affairs in an efficient and effective manner consistent with its legitimate objectives.

#### 1. Sunshine to Ensure Consistent Resolution of Student-Athlete Eligibility Issues.

The arbitration appeal would be heard by a panel of three experts in intercollegiate sports law (e.g., sports law professors, AAA arbitrators with specialized intercollegiate sports knowledge).<sup>206</sup> The appeals panel either could be a permanent panel appointed to hear appeals or one selected from a predetermined pool of at least 15 experts (one selected by the student-athlete, one selected by the NCAA, and the panel chair selected by agreement of the two experts). The advantage to the first alternative is the likelihood of enhanced consistency among the cases.

#### 2. Student-Athlete Limited Right to External Arbitration Appeal

When the SARC imposes a reinstatement condition resulting in a student-athlete's loss of eligibility for more than one calendar year, we propose that the student-athlete should have the right to external arbitral review of the SARC's decision. It is outside the scope of this Article to provide a full description of how this process might be formulated, but it should have the following elements.

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twice the number in Division I FBS. There are approximately 8560 annual Olympic and national team competitions in Olympic years (205 countries, 400 events in Olympic years, 28 summer and 7 winter sports each held every two years, plus a number of additional national competitions). Olympic.org, *available at* <http://www.olympic.org/national-olympic-committees>; *see* MITTEN ET. AL, SPORTS LAW AND REGULATION 261. There are 2430 annual major league baseball games (15 x 162), more than in any other professional sport.

<sup>206</sup> For a fuller discussion of this and other reforms to the current student-athlete reinstatement process, see generally Reinstatement: Say What?, *supra* note 30.

(1) The arbitration appeal would be heard by a three-person panel of independent arbitrators<sup>207</sup> (with one selected by the student-athlete, one selected by the NCAA, and the panel chair selected by agreement of the parties' chosen arbitrators) who would be drawn from a specialized pool of at least 15 AAA arbitrators with expertise in intercollegiate athletics sports law. Alternatively, all appeals could be resolved by a permanent panel of arbitrators comprised of three individuals with specialized knowledge in intercollegiate sports law. The advantage to the latter alternative is the likelihood of enhanced consistency among the cases it resolves.

(2) The arbitral panel would apply an "arbitrary and capricious" standard of review, meaning the SARC's decision would be overturned only if "clearly erroneous" (i.e., "unsupported by substantial evidence").<sup>208</sup> We acknowledge that CAS and AAA arbitral review generally employs a *de novo* review standard that permits the arbitrators to substitute their judgment for that of the sport governing body in resolving athlete eligibility issues,<sup>209</sup> but cases arising in the context of Olympic sports do not embody the unique features of the NCAA student-athlete reinstatement process. First, the conclusion that a violation was committed is made by a student-athlete's institution, a fact-finder most inclined to advance a student-athlete's interests by discovering exculpatory evidence regarding his or her commission of a violation and any mitigating factors that ameliorate culpability for a violation. Second, the SARC promulgates reinstatement conditions embodied in reinstatement guidelines that constrain the reinstatement staff's discretionary decisions and, in particular, preclude it from imposing an increased reinstatement condition beyond an applicable guideline. Third, there is a narrow range of factors that justify mitigation of a student-athlete's responsibility for a rules violation.<sup>210</sup> This narrow range of factors that may

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<sup>207</sup> We suggest that this pool be comprised exclusively or at least primarily of tenured law professors who teach and write in the field of college sports law. In our opinion, sports law professors have the best and broadest background in sports law issues as well as the requirements of procedural due process. Although they are employees of NCAA universities, we also believe that tenured sports law professors will be impartial (particularly if they are precluded from reviewing any cases involving their own university or another one in its athletic conference) and, compared to practitioners, will have no potential professional stake in the outcome of cases.

<sup>208</sup> See *supra* note 114 and accompanying text.

<sup>209</sup> See *supra* note 128 and accompanying text.

<sup>210</sup> One of the authors prosecuted criminal cases and also was a reporter for a sentencing and corrections drafting project. She can attest that mitigation in SARC assessment of culpability does not typically consider the type mitigation that is available in criminal sentencing. She worked on an appeal involving a student-athlete who violated NCAA bylaws by selling his complimentary tickets for a foot-

be considered eliminates the opportunity for nuanced exercises of discretion by reinstatement staff. Fourth, the SARC has authority to decline to impose a reinstatement guideline condition or to overturn a staff decision, but it is only permitted to decrease the reinstatement condition (e.g., student-athlete's period of ineligibility) imposed by the reinstatement staff.

(4) The arbitration panel would complete its review of a case, which would not necessarily require a hearing (but if it did would be by telephone), and provide a brief reasoned decision in writing within seven days after the filing of an appeal unless the parties agree to an extended time of time.<sup>211</sup>

(5) It is important to ensure needed uniformity in the resolution of student-athlete reinstatement appeals and to avoid a potential Dormant Commerce Clause problem arising out of judicial review of the arbitration panel's awards by courts in different jurisdictions, which creates the risk of potentially conflicting judicial decisions. Therefore, the NCAA (which is based in Indianapolis), its member institutions, and student-athletes should agree that Indiana courts have exclusive jurisdiction and authority to review the arbitration panel's awards,<sup>212</sup> which would apply Indiana law and the traditional very limited scope of judicial review of arbitration awards.<sup>213</sup>

As we discussed previously, the NCAA employs an ineligible-until approach in reinstatement cases to incentivize prompt institutional investigations and reports of violations, to decrease the competitive advantage an institution would obtain if an ineligible student-athlete could compete until

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ball game (at the same market price that other students sold their tickets). SARC provided no mitigation for the fact that the athlete came from a family of limited means, that the sale was the first such activity by the athlete, that it was prompted by a particular family emergency. Limited mitigation was accepted for the fact that the athlete came forward of his own volition to report the violation.

<sup>211</sup> This would be an adequate period of time for the arbitrators to resolve most cases. By comparison, the CAS ad hoc Division resolves cases within 24 hours after their filing. One of the authors has resolved several AAA Section 9 cases within seven days of their filing by aggrieved Olympic sport athletes.

<sup>212</sup> Mitten & Davis, *Athlete Eligibility Requirements*, *supra* note 7, at 144 n.354 ("Establishing a uniform national substantive law for resolving intercollegiate athletic eligibility disputes would be consistent with the CAS objective of establishing a worldwide, uniform *lex sportiva* for Olympic and international sports.").

<sup>213</sup> *See supra* notes 132–140, 149–150, and accompanying text. In reviewing the arbitration award, an Indiana court will apply an extremely deferential standard of review (i.e., even lower than arbitrary and capricious review) that is virtually the same in all jurisdictions and won't resolve the merits of the case even if it determines the arbitration award is so flawed on procedural or substantive grounds that it will not be judicially enforced. The court vacates the award, which would effectively uphold the SARC determination.

a final determination is made that he or she was ineligible, and to minimize the instances in which an ineligible student-athlete who competed avoids any adverse consequences because he or she leaves a university before an ineligibility sanction can be enforced. The NCAA adopted its Restitution Rule to handle instances in which the SARC's ineligibility sanction is enjoined by a trial court during the pendency of litigation, but is reversed on appeal.<sup>214</sup> The policy considerations underlying the ineligible-until approach and the Restitution Rule need to be considered if student-athletes are able to appeal the SARC's ineligibility determination to an arbitration panel.

In part, we address these considerations by requiring that an arbitration panel resolve an appeal within seven days of its filing, which should be required to be done within three business days after written notification of the SARC's ineligibility sanction determination.<sup>215</sup> What cannot be controlled, however, is how long it will take a court to review the arbitration panel's award. We believe that the optimum accommodation of the parties' competing interests is the following proposal. A student-athlete would be able to compete during the seven-day period during which an arbitration appeal is filed and the panel renders its decision. If the panel affirms the SARC's ineligibility determination: (a) the institution would be subject to the Restitution Rule if the student-athlete competed during that week; (b) if the student-athlete requests judicial review of the arbitration award by an Indiana court, the student-athlete would be ineligible to compete during the pendency of the judicial appeal, which is very unlikely to result in vacation of the panel's decision under the traditional standard of review. If the arbitration panel eliminates or reduces the SARC's ineligibility determination and the NCAA appeals to an Indiana court, the student-athlete would be eligible to compete during the pendency of the appeal and the Restitution Rule could not be applied against his or her institution even if the panel's decision is judicially vacated.

### C. *Final Thoughts*

Rulemaking authority, including the ability to adopt private dispute resolution procedures, derives directly from the system that spawns it. Sports dispute resolution processes are tailored to respond to the individual-

<sup>214</sup> See *supra* notes 114–15 and accompanying text.

<sup>215</sup> We believe this period of time would be sufficient, given that all relevant documents and information regarding the case have already been developed. Arbitration appeal forms should be available on the NCAA website, and appeals could be required to be filed electronically.

ized needs of the particular system to ensure effective and efficient internal governance of athletic competition.<sup>216</sup> Although the rulemaking and dispute resolution processes for NCAA and Olympic sports are different, each corresponds to the specific demographics, geographical scope, and requisites of their respective athletic competitions, governing bodies, and athletes. Their respective private systems of dispute resolution provide procedural fairness and substantive justice to athletes whose eligibility is affected by their decisions, thereby warranting the significant degree of judicial deference afforded to their respective internal or external adjudication processes.

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<sup>216</sup> See, e.g., Potuto & Parkinson, *If It Ain't Broke, Don't Fix It: An Examination of the NCAA Division I Infractions Committee's Composition and Decision-Making Process*, 89 NEB. L. REV. 101 (2011); *supra* notes 117, 142–146 and accompanying text.