Collegiate Athletic Participation: A Property or Liberty Interest?

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Collegiate Athletic Participation: A Property or Liberty Interest?

Lucrative salaries for professional athletes today are commonplace. In 1982, for instance, the minimum salary in the National Football League was $32,000 per year, and the highest paid player earned approximately $667,000. In baseball, the minimum salary was even higher, at $33,500 per year, with the highest salary estimated at $1.652 million. The average salary in the National Basketball Association was $240,000, and the highest paid player earned $1.6 million per season. To illustrate just how lucrative salaries for professional athletes have become, no athlete in the National Hockey League ranked among the 100 highest paid athletes in sports, even though the top wage in the league was $450,000 per season.

Since lucrative professional contracts may be within grasp, college athletes increasingly have harbored aspirations of playing professional sports. For many college athletes, however, the prospect of a professional career is merely speculation. Only a small percentage of college athletes is talented enough to be drafted by a professional team. An even smaller number of athletes who are drafted actually will earn a spot on a major league roster.

1. See The Sport 100, SPORT MAGAZINE, March, 1983, at 23. Salaries in professional baseball have increased recently because of the free agent draft. For example, the San Francisco Giants recently signed free agent Manny Trillo, a second baseman, to a three-year contract at $800,000 per year. Sacramento Bee, Dec. 22, 1983, at C1, col. 2. Trillo earned $375,000 the previous season. Sacramento Bee, Dec. 14, 1983, at C6, col. 2. Salaries for professional football players have increased recently because of the advent of the United States Football League (USFL), a new league that is attempting to lure players away from the established National Football League (NFL) to attract fans and to gain credibility. For example, the Memphis Showboats, a USFL franchise, offered quarterback Ken Stabler $1 million to leave the New Orleans Saints of the NFL. Sacramento Bee, Dec. 19, 1983, at D6, col. 1. The offer to Stabler is part of a raid on NFL quarterbacks that is expected to force the salary structure of both leagues to rise appreciably. Sacramento Bee, Dec. 23, 1983, at E1, col. 1, continued on E6, col. 1.

3. Id. at 25.
4. Id. at 28.
5. Id. at 24.
6. Id. at 28.
7. Id. at 24.
8. Id. at 23.
9. Id. at 25.
11. Id.
College athletes also face many obstacles on the path to professional sports, not all of them athletic. For example, college athletes must maintain minimum academic standards. College athletes also must follow National Collegiate Athletic Association (NCAA) eligibility rules, like those prohibiting an athlete from accepting money as an incentive to play for a school. Since all college athletes are required to be amateurs, they must comply with the eligibility rules. The NCAA defines an amateur athlete as one who participates in a "particular sport for the educational, physical, mental and social benefits derived therefrom and to whom participation in that sport is an avocation." One of the fundamental policies of the NCAA, therefore, is to maintain a clear demarcation between college athletics and professional sports.

Violations of eligibility rules frequently result in NCAA ordered sanctions. Penalized athletes may be suspended from participation. If this happens, the athletes lose the opportunity to refine their skills and are deprived of the opportunity to demonstrate their talents to professional scouts.

Generally, athletes fear sanctions will decrease their chances of realizing professional careers. Since the NCAA often imposes penalties without allowing the disciplined individuals to appear and defend themselves, athletes increasingly have sought judicial relief. Athletes have claimed that their property and liberty rights in participating in college athletics have been denied by the NCAA without procedural due process of law. Some federal courts have allowed recovery, but others have denied relief. Should recovery become the prevailing view, college athletics will move increasingly away from academia.
and toward professional sports because the college athletic forum will become a minor league for professional sports.\textsuperscript{24}

This comment will demonstrate that college athletes have no property or liberty interest in athletic participation.\textsuperscript{25} The elements constituting a property right will be examined briefly prior to an analysis of whether the claims of college athletes rise to constitutional dimensions.\textsuperscript{26} A discussion of precedents involving high school and college athletes will reveal that athletic participation does not fall within the scope of the protected property right.\textsuperscript{27} Finally, the claims of college athletes to a liberty interest in athletic participation will be explored.\textsuperscript{28} Before courts will decide the constitutional issues, however, they first must be satisfied that NCAA action is state action.\textsuperscript{29}

\textbf{NCAA Disciplinary Measures as State Action}

The fourteenth amendment to the United States Constitution prohibits a state from depriving an individual of life, liberty, or property without due process of law.\textsuperscript{30} The state action requirement means that constitutional protections do not apply to purely private conduct.\textsuperscript{31} College athletes, therefore, first must prove that action by the NCAA constitutes state action before they can allege that NCAA disciplinary measures deprived them of property or liberty without due process.

The NCAA is a private, unincorporated association comprising approximately 840 member institutions.\textsuperscript{32} The private character of the NCAA, however, does not preclude a finding of state action. Private conduct can become so intermingled with governmental activities as to take on a governmental character, thereby invoking constitutional guarantees.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{24} Newsletter from Sports Lawyers Association 3 (spring-summer 1982) (copy on file at the Pacific Law Journal).
\item \textsuperscript{25} This comment addresses the entitlement of a college athlete to participate after he has violated an eligibility rule.
\item \textsuperscript{26} See infra notes 46-75 and accompanying text.
\item \textsuperscript{27} See infra notes 76-233 and accompanying text.
\item \textsuperscript{28} See infra notes 234-46 and accompanying text.
\item \textsuperscript{29} See infra notes 30-45 and accompanying text.
\item \textsuperscript{30} U.S. Const. amend. XIV, §1.
\item \textsuperscript{31} J. Novak, R. Rotunda and J. Young, Constitutional Law 497 (2d ed. 1983).
\item \textsuperscript{32} See Comment, supra note 18, at 484-85.
\item \textsuperscript{33} Howard University v. National Collegiate Athletic Ass’n, 510 F.2d 213, 217 (D.C. Cir. 1975). The entanglement theory advanced in Howard is more appropriate than a public function analysis. The public function theory is that private parties are subject to constitutional restrictions if they perform functions traditionally reserved to the state. A recent United States Supreme Court opinion, however, has interpreted this doctrine as applying only when the private party assumed all the functions of the government entity. See Note, supra note 10, at 602. For NCAA measures to constitute state action under a public function analysis, the NCAA
\end{itemize}
In *Howard University v. National Collegiate Athletic Association*, the plaintiffs, a private university and one of its student athletes, sought injunctive and declaratory relief, claiming their constitutional rights were abridged by the NCAA. The NCAA had imposed sanctions upon the university for allowing ineligible athletes to compete on the soccer team. The district court found that state action was present, and the NCAA disputed that finding.

In affirming the district court, the District of Columbia Circuit Court of Appeals noted that the NCAA is saturated with both state and federal influences. Approximately half of the member institutions of the NCAA receive state or federal funds. Financial contribution to the NCAA is based upon the size of the institution. Public universities generally have a larger student population than private universities, which results in public institutions providing the majority of funds to the NCAA. The majority of individuals who are members of the NCAA governing council, as well as some officers of the council, also work for public institutions. Noting that the degree of public participation and entanglement between the NCAA and its members is so substantial and pervasive, the court found the requisite state action.

The rationale of *Howard University* generally has been accepted. Upon the finding of state action, a court then must determine whether a constitutionally protected interest exists.

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would have to be involved in all activities that a state would perform in regard to education. *Id.* at 603. However, the NCAA only regulates athletics. *Id.*

34. 510 F.2d 213 (D.C. Cir. 1975).
35. *Id.*
36. *Id.* at 214. Three students had exhausted their eligibility for varsity competition, and one student had been admitted to the university with inadequate academic credentials. *Id.* at 215-16.
37. *Id.* at 216-17.
38. *Id.* at 217.
39. *Id.* at 219.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 220.
THE CONSTITUTIONALLY PROTECTED PROPERTY INTEREST

Prior to the decision of the United States Supreme Court in *Board of Regents v. Roth*, an interest was considered property under the United States Constitution if it was a right, not a privilege. If a governmental entity created a benefit without having a duty to do so, the benefit conferred was deemed to be a privilege that could be withdrawn without due process. Since the *Roth* decision, however, the definition of property has involved a concept of entitlement. Courts will recognize a property interest in a benefit if the individual is found to be entitled to the benefit.

In *Goss v. Lopez*, the United States Supreme Court applied the *Roth* rationale to suspensions of students from public high schools. The entitlement concept was refined further in *Bishop v. Wood*, a case involving a claim for continued employment. To understand how the entitlement concept of property rights is applied, the factual setting of *Roth* must be examined.

A. Board of Regents v. Roth

The United States Supreme Court, in *Board of Regents v. Roth*, rejected the rigid distinction between rights and privileges that once was determinative of the applicability of procedural due process. In *Roth*, the plaintiff was hired as an assistant professor at Wisconsin State University at Oshkosh. Plaintiff's employment contract was for a fixed term of one academic year. Plaintiff was released without explanation after the first year. Under Wisconsin law, Roth was not entitled to tenure. Roth brought suit, claiming the university had does not convert the act of the organization into state action. *Id.* The *McDonald* decision, however, was overruled *sub silentio* by the Ninth Circuit Court of Appeals. See *Associated Students of California State University—Sacramento v. National Collegiate Athletic Ass'n*, 493 F.2d 1251, 1254 (1974). In *Associated Students*, the court held that NCAA disciplinary measures were state action because the NCAA controls public schools by ordering them either to discipline athletes who violate eligibility rules or to face stiff sanctions. The Ninth Circuit relied on precedent in other circuits and did not discuss *McDonald*. *Id.*

48. *Id.*
49. *Id.* at 547.
50. *Id.*
54. *Id.* at 566.
55. *Id.*
56. *Id.*
57. *Id.* at 568.
deprived him of a property right without procedural due process because he did not receive a hearing prior to his release.  

The Court denied Roth's claim. The Court stated that property interests are created and defined by existing principles that stem from independent sources and which support genuine claims of entitlement to benefits.  

A property interest exists when a person has a legitimate claim of entitlement to a benefit, not just a unilateral expectation of that benefit. The nature of the interest, not its weight, therefore determines the applicability of due process safeguards.

The Court held that Roth's contract must be interpreted with reference to state law. Since Wisconsin law afforded procedural due process only to tenured teachers who were dismissed, Roth was not deprived of a property right because he was not entitled to tenure and thus had no legitimate claim of entitlement to a hearing. The Roth entitlement concept, which requires a legitimate claim to a benefit created by an independent source, was applied to suspensions of students from public schools in Goss v. Lopez.

B. Goss v. Lopez

In Goss, nine Ohio high school students had been suspended from public schools for ten days because of disruptive and disobedient conduct. None of the students received a hearing to determine the facts giving rise to the suspensions, but all students, after suspension, were permitted to attend a conference to discuss their future. The United States Supreme Court held that the suspended students clearly had a legitimate claim of entitlement to public education that could not be withdrawn absent due process. This claim was based on an Ohio law that provided for free education to all children between the ages of six and twenty-one. The nine students facing suspension, therefore, were entitled to notice of the charges against them and an opportunity to present evidence in their behalf.

58. Id. at 569.  
59. Id. at 577.  
60. Id.  
61. Id. at 571.  
62. See id. at 578.  
63. See id.  
64. 419 U.S. 565 (1975).  
65. Id. at 569.  
66. Id. at 570.  
67. Id. at 573-74.  
68. Id. at 567.  
69. Id. at 581.
scope of the property right advanced in Roth was defined more precisely in Bishop v. Wood.\textsuperscript{70}

C. Bishop v. Wood

In Bishop, the petitioner was a policeman for the city of Marion, North Carolina, until he was dismissed without explanation or opportunity to contest his discharge.\textsuperscript{71} Bishop claimed that as a "permanent employee," he had a property right in his continued employment and thus was entitled to a hearing.\textsuperscript{72} Applying the holding in Roth, the Court held that the petitioner was entitled to continued employment only if his contract or other independent source, like state law, provided for that guarantee.\textsuperscript{73} The ordinance upon which Bishop relied was construed as only granting employment at the will of the city.\textsuperscript{74} Bishop's discharge, therefore, did not deprive him of a property right protected by the fourteenth amendment because his "at-will" work agreement with the city did not provide for continued employment.\textsuperscript{75}

As discussed previously, state law and other independent sources may create property rights. Under the fourteenth amendment, due process is required before individuals can be deprived of property. In Roth and Bishop, the laws relied upon did not create claims of entitlement. In Goss, however, state law did create a property right.

The scope of the property right defined in Goss is unclear. The Goss decision, for example, may protect students only when they are denied all access to education.\textsuperscript{76} Under this view, a student is deprived of a property interest only when he is suspended from school.\textsuperscript{77} Conversely, Goss may have recognized separate property rights in every activity related to the educational process.\textsuperscript{78} If this is the case, a student is deprived of a property interest when he is suspended from athletic participation or any other extracurricular activity, regardless of whether he is prohibited from attending school.\textsuperscript{79} The following section examines the impact of Goss on suspensions of athletes and

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\textsuperscript{70} 426 U.S. 341 (1976); see also J. Weis\textsc{t}art and C. Low\textsc{w}ell, The Law of Sports 95 (1979) (United States Supreme Court adopts restrictive view of "entitlement").
\textsuperscript{71} Id. at 342-43.
\textsuperscript{72} Id. at 344.
\textsuperscript{73} Id. at 345.
\textsuperscript{74} Id.
\textsuperscript{75} See id. at 347.
\textsuperscript{76} See infra notes 85-126 and accompanying text.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\end{flushright}
concludes that athletics, whether high school or college, are not a protected part of an education. A discussion of the pre-Goss arguments advanced by courts that found athletic participation to be unworthy of protection is presented first.

ATHLETIC PARTICIPATION AS INSUFFICIENT TO MERIT SEPARATE PROTECTION

Prior to the decisions of the United States Supreme Court in Roth and Goss, courts that confronted the issue of a property right in athletic participation were guided by the right/privilege dichotomy. The pre-Goss decisions have remained important, however, because courts have continued to rely on them even though the right/privilege analysis is no longer a correct application of constitutional law. Courts that have found athletic participation to be unworthy of due process protection in the post-Goss era have interpreted Goss as protecting only the total educational process, not each individual component of education. These courts have found high school and college athletes to be similarly situated. Athletic participation also does not receive protection under an analysis pursuant to Bishop because Bishop’s claim for continued employment is comparable to the student athletes’ argument for continued participation.

A. Pre-Goss

Prior to Goss, some jurisdictions determined that due process was not applicable to suspended athletes because athletic participation was not a vested right. In Sanders v. Louisiana High School Athletic Association, a transfer student sued to enjoin application of a residency requirement that rendered him ineligible for high school athletic participation because he had not been enrolled at his new school for one full year. Plaintiff, an outstanding football player, argued that he was deprived of a “substantial pecuniary property right” since he could not display his athletic talents to college coaches, thereby impairing his chances of obtaining a college football scholarship.

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80. See infra notes 85-97 and accompanying text.
81. See supra notes 46-75 and accompanying text.
82. See infra notes 98-108 and accompanying text.
83. See infra notes 109-19 and accompanying text.
84. See infra notes 120-26 and accompanying text.
85. 242 So. 2d 19 (La. 1970).
86. Id. at 22-23.
87. Id. at 28.
A Louisiana appellate court held that plaintiff had no vested property right in participating in interscholastic high school athletics.\textsuperscript{88}

Other courts denied relief on the ground that athletic participation was a mere privilege. In \textit{Marino v. Waters},\textsuperscript{89} plaintiff, an outstanding football prospect, challenged a high school transfer rule that he claimed deprived him of a property right without due process of law.\textsuperscript{90} Plaintiff argued that since his participation in football would attract a college scholarship worth a substantial sum of money, the rule that rendered him ineligible resulted in a deprivation of property.\textsuperscript{91} The court held, however, that participation in athletics is a mere privilege and that the plaintiff’s chances of obtaining a scholarship were too speculative to warrant protection.\textsuperscript{92}

The pre-Goss line of cases came to fruition with the decision of the Fifth Circuit Court of Appeals in \textit{Mitchell v. Louisiana High School Athletic Association}.\textsuperscript{93} In \textit{Mitchell}, the plaintiff voluntarily chose to repeat the eighth grade even though he could have advanced to high school because he had successfully completed his studies.\textsuperscript{94} When plaintiff advanced to high school, he was disqualified from participation in interscholastic athletics during his senior year because he had violated an eligibility rule.\textsuperscript{95}

Mitchell argued he was denied due process because the Louisiana High School Athletic Association had failed to give reasonable notice to grammar schools that anyone who voluntarily repeated a grade would lose a year of eligibility.\textsuperscript{96} The Fifth Circuit held that the due process clause of the fourteenth amendment could not eradicate all wrongs and that participation in interscholastic athletics is a privilege that falls outside the protection of the amendment.\textsuperscript{97}

\textsuperscript{88} \textit{Id.}, see also \textit{Morrison v. Roberts}, 82 P.2d 1023, 1025 (Okla. 1938) (17-year-old football player had no vested right in eligibility for high school football); \textit{Kissick v. Garland Independent School District}, 330 S.W.2d 708, 712 (Tex. 1959) (16-year-old football player with potential for college scholarship had a contingent or expectant right, not a vested one).

\textsuperscript{89} 220 So. 2d 802 (La. 1969).

\textsuperscript{90} \textit{Id.} at 804.

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} \textit{Id.} at 806; see also \textit{Scott v. Kilpatrick}, 237 So. 2d 652, 655 (Ala. 1970) (participation in high school athletics, like any extracurricular activity, is a privilege); \textit{Tennessee Secondary School Athletic Ass’n v. Cox}, 425 S.W. 2d 597, 602 (Tenn. 1968) (the “right” to participate is a mere privilege).

\textsuperscript{93} 430 F.2d 1155 (1970).

\textsuperscript{94} \textit{Id.} at 1156. This author speculates that the athletes may have decided to repeat eighth grade because they would be physically stronger and more coordinated than their new classmates and thus would have an advantage in athletic competition.

\textsuperscript{95} \textit{Id.} Mitchell violated the “Eight Semester Rule,” which provided for forfeiture of a year of eligibility in high school if a student repeated any grade that he had passed. \textit{Id.}

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.} at 1157-58. The holding in \textit{Mitchell} also was followed in three other pre-Goss cases.
Courts, therefore, denied protection to athletics prior to *Goss* because they viewed participation as a contingent interest or as a mere privilege. This view culminated with the *Mitchell* decision, which held that athletic participation was not constitutionally protected. The value of *Mitchell* as precedent, however, is questionable. The Fifth Circuit in *Mitchell* did not address the scope of the protection afforded to the educational process, an issue left unresolved in *Goss*. The *Mitchell* holding, in addition, is a valid precedent for the rejection of college athletes' due process claims only if high school and college athletes are similarly situated. When confronted with these issues in the post-*Goss* era, several courts have concluded that athletic participation still does not deserve constitutional protection.

B. *Post-Goss*

Several courts have considered and rejected the notion that *Goss* requires high school or college athletes to be afforded notice and opportunity to be heard before being disciplined. In *Albach v. Odle*, plaintiff asked the Tenth Circuit Court of Appeals to enjoin application of a transfer rule that bars from interscholastic competition for one year any student who transfers from his home district to a high school boarding house, or vice versa. The plaintiff argued that *Goss* protected the component parts of the educational process and therefore his participation in athletics was a property right that could not be withdrawn without due process of law.

The Tenth Circuit rejected the argument. Citing *Goss*, the *Albach* court noted that the educational process is a broad and comprehensive concept that includes numerous separate parts like athletic participation, which combine to provide a healthy intellectual and moral atmosphere. The Tenth Circuit did not interpret *Goss* as creating a property interest requiring constitutional protection of each component part.

The *Albach* rational was refined further in *Dallam v. Cumberland Valley School District*, another case in which a high school student

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98. 531 F.2d 983 (10th Cir. 1976).

99. Id. at 984.

100. Id. at 985.

101. Id.

102. Id.

challenged a transfer rule. In *Dallam*, the plaintiff argued that he had a property interest in interscholastic participation because *Goss* protected every aspect of the educational process. The *Dallam* court, however, distinguished *Goss* by stating that *Goss* was concerned with total exclusion from the educational process and that students were deprived of a property interest only when they were suspended from all school activities. Specifically, the district court said "[t]he myriad activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights, each cognizable under the Constitution." To hold otherwise, the court said, would "too greatly strain the concept of property."

Courts that have denied relief to college athletes who claimed they were deprived of property without due process have relied on pre-*Goss* decisions, particularly *Mitchell*. As discussed previously, those particular pre-*Goss* decisions involved high school athletes. Courts apparently have discerned no difference between the interests of high school and college athletes.

*Colorado Seminary v. National Collegiate Athletic Association* is one decision in which the court relied on precedents involving high school athletes. In *Colorado Seminary*, the University of Denver and its student athletes brought suit to enjoin the NCAA from suspending several hockey players who had accepted money as an incentive to play for the school in violation of NCAA eligibility rules. The plaintiffs argued that they had been deprived of the property right to compete in intercollegiate athletics because the college athletic forum provides a vital training ground for professional careers. The district court rejected this contention. The court considered the interest in future professional careers to be speculative and perceived

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104. *Id.* at 359.
105. *See id.* at 361.
106. *Id.*
107. *Id.*
108. *Id.* at 362; *see also* Kulovitz v. Illinois High School Athletic Ass'n, 462 F. Supp. 875, 878 (N.D. Ill. 1978) (citing Albach); *Colorado Seminary v. National Collegiate Athletic Ass'n*, 417 F. Supp. 885 (D. Colo. 1976), aff'd, 570 F.2d 320, 321 (1978) (per curiam) (citing Albach). The *Colorado Seminary* decision is significant since the Tenth Circuit Court of Appeals applied the *Albach* rationale to a case involving college athletes. 570 F.2d at 321.
109. This author speculates that courts have continued to rely on *Mitchell* because that case specifically held that athletes have no property right in participation. At least one court, however, has indicated that *Goss* applies to college athletes. *See supra* note 108 and accompanying text.
111. 417 F. Supp. at 891.
112. *See id.* at 893-94.
113. *Id.* at 895.
no constitutional distinction between the loss of a forum for attracting a college scholarship and the similar loss of a forum for attracting a professional contract. The athletes, therefore, had no property interest in participation.

Another case in which college athletes claimed they were deprived of a property interest without due process was Parish v. National Collegiate Athletic Association. In Parish, the NCAA had placed Centenary College on indefinite probation for violating an eligibility rule by providing scholarships to five basketball players whose grades in high school and scores on college entrance examinations indicated that they would not succeed academically in college. The five players sought to enjoin the NCAA from applying the rule.

At oral argument, however, the players abandoned their claim that the NCAA had deprived them of a property right without due process, in this instance, tournament experience and television exposure. The Fifth Circuit noted that the players “wisely abandoned” their due process claim, citing Mitchell and hypothesizing that any property interest was too speculative under Roth, which required a legitimate claim of entitlement to a benefit, not just a unilateral expectation of benefit.

The Fifth Circuit, therefore, implicitly reaffirmed Mitchell, which held that participation in interscholastic athletics is not a constitutionally protected right, by indicating that the Mitchell holding applies to college athletes. As discussed above, the Fifth Circuit also suggested that the student athletes’ claims of entitlement to participation could not withstand analysis under Roth. An analogy to Bishop, which applied Roth, is also of little assistance to advocates of a property right in athletic participation. Bishop’s claim for continued employment, which was rejected by the United States Supreme Court, is

114. Id.
115. 506 F.2d 1028 (5th Cir. 1975).
116. Id. at 1030. The school had violated the 1.600 rule, which prohibited an NCAA member from awarding a scholarship to or allowing athletic participation by an entering freshman who did not have a predicted minimum grade point average of 1.600, based on a maximum of 4.0, as determined by prediction tables of the NCAA. California State University, Hayward v. National Collegiate Athletic Ass’n, 47 Cal. App. 3d 533, 538, 121 Cal. Rptr. 85, 87-88 (1975). The NCAA repealed the 1.600 rule in 1973, replacing it with the 2.00 rule, which only requires an entering freshman to have earned an overall 2.00 grade point average in high school. 506 “F.2d at 1030 n.1.
117. 506 F.2d at 1031.
118. Id. at 1034 n.17.
119. Id. Mitchell also has remained good precedent for high school cases in the post-Goss era, as at least two courts have cited the holding with approval. See Hamilton v. Tennessee Secondary School Athletic Ass’n, 552 F.2d 681, 682 (1976); Walsh v. Louisiana High School Athletic Ass’n, 428 F. Supp. 1261, 1265 (1977).
similar to the student athletes' claim for continued athletic participation.

C. Bishop Analysis

In Bishop, the United States Supreme Court looked to an independent source, which in that situation was a city ordinance, and determined that Bishop's employment was terminable by the city at any time for any valid reason. According to the Court, Bishop had only a unilateral expectation of, and not a legitimate claim of entitlement to, continued employment. Bishop, therefore, was not deprived of a property right.

The situation in Bishop is analogous to the student athlete's claim of entitlement. By awarding a scholarship to the athlete, the school becomes the independent source that creates the entitlement to intercollegiate competition. The scope of the entitlement, therefore, is defined by the eligibility rules of the school. A school that is a member of the NCAA agrees to administer athletic programs in accordance with the NCAA constitution, bylaws, and legislation. NCAA member institutions are obligated to withhold student athletes

120. See supra notes 70-75 and accompanying text.
121. Id.
122. Id.
123. Some commentators have suggested the athletic scholarship is a contract between the student-athlete and the school that creates a property right in participation. Comment, A Student-Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions, 10 Conn. L. Rev. 318, 345-48 (1978). The law on whether an athletic scholarship is a contract, however, is far from settled. Those courts that have confronted the issue, usually in the context of workers' compensation, are not in agreement. Compare Van Horn v. Industrial Accident Comm'n, 219 Cal. App. 2d 457, 466, 33 Cal. Rptr. 169, 174 (1963) and University of Denver v. Nemeth, 257 P.2d 423, 428 (Colo. 1953) (scholarship a contract) with State Compensation Ins. Fund v. Industrial Comm'n, 314 P.2d 288, 289 (Colo. 1957) and Rensing v. Indiana State University Bd. of Trustees, 444 N.E. 2d 1170, 1175 (Ind. 1983) (scholarship not a contract). These cases apparently turn on how the scholarship is structured. Generally, a student athlete will not be considered an employee because he receives financial aid. WeisTaRT AND Lowell, supra note 70, at 12. When, however, the scholarship is structured so that performance of athletic services is the quid pro quo for the aid, then the athlete may be an employee under contract to the school. Id. at 12-13. See also Taylor v. Wake Forest University, 191 S.E. 2d 379 (N.C. 1972) (contractual relationship existed because aid would cease upon athlete's failure to participate in athletics). The NCAA mandates, however, that athletic participation not be the major criterion used by member schools in deciding whether to award financial aid. NCAA Const. art. 3, §4(a)(3), reprinted in NCAA Manual, supra note 12, at 18. The conclusion that a college athlete is under contract is troublesome, moreover, since the athlete who accepts a scholarship may be found to have violated amateur rules. WeisTaRT AND Lowell, supra note 70, at 11. A finding of a contractual relationship also may render the athlete ineligible for international competition. Id. at 15.


125. NCAA Const. art. 4, §2(a), reprinted in NCAA Manual, supra note 12, at 27.

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from all intercollegiate competition if the athletes are ineligible under NCAA rules.\textsuperscript{126} Student athletes suspended for rule violations, therefore, are not deprived of a property right protected by the fourteenth amendment because their scholarship agreements do not provide for continued participation in athletics after they violate eligibility rules. In this type of a situation, the athletes’ expectation of continued participation is unilateral.

Despite \textit{Goss}, which extended constitutional protection to the educational process, many courts have refused to recognize college athletes’ due process claims. These courts have interpreted \textit{Goss} as protecting the whole educational experience and not each individual component of the educational process. Courts have continued to rely on precedents in which high school athletes were denied relief, indicating that high school and college sports are “two rungs” of the same “athletic ladder.” An analogy to \textit{Bishop}, a case in which the \textit{Roth} entitlement theory was applied, also demonstrates that college athletes have no property right in athletic competition because they have a unilateral expectation of continued participation after they violate eligibility rules. This reasoning generally is not accepted by advocates who believe that athletic participation merits constitutional protection. The arguments of those advocates are examined in the next section.

\textbf{Athletic Participation as Worthy of Separate Protection}

Persons who contend that athletic participation is a property right have advanced three arguments in support of their position, all of which will be refuted in this section. Advocates have argued that athletic participation is an integral aspect of education deserving of protection.\textsuperscript{127} Further, they urge that the potential economic benefit of a professional sports contract justifies relief\textsuperscript{128} and that athletes, like students in professional programs, deserve procedural due process prior to suspensions.\textsuperscript{129} Two California courts have found athletics to be a substantial interest worthy of protection.\textsuperscript{130} In one case, however, the court based its holding on a statutory interpretation and, in the other case, the court considered only the interests of the university, not the interests of the student athletes.\textsuperscript{131} California decisions, therefore, do not support college athletes’ contentions that the United

\textsuperscript{126} \textit{Id.} \S2(a), O.I. 11.
\textsuperscript{127} \textit{See infra} notes 133-68 and accompanying text.
\textsuperscript{128} \textit{See infra} notes 169-205 and accompanying text.
\textsuperscript{129} \textit{See infra} notes 206-13 and accompanying text.
\textsuperscript{130} \textit{See infra} notes 214-29 and accompanying text.
\textsuperscript{131} \textit{Id.}
States Constitution protects athletic participation.\textsuperscript{132} This section begins with an examination of the decisions that have found athletics to be related integrally to education.

\textbf{A. Athletics as an Integral Aspect of Education}

Many courts have held that athletics, as an integral component of education, are protected by the Constitution. These cases, however, have involved clearly defined constitutional issues in the context of athletic regulation. An analysis of these cases will show that they cannot stand for the proposition that athletic participation alone is sufficient to invoke constitutional guarantees.\textsuperscript{133}

1. Alienage discrimination

In \textit{Buckton v. National Collegiate Athletic Association},\textsuperscript{134} two Boston University hockey players, both Canadian citizens, were found ineligible by the NCAA because they had accepted money for room, board, and books while participating in a Canadian amateur hockey league.\textsuperscript{135} The district court noted that the plaintiffs were skilled hockey players whose potential for careers in teaching, coaching, and professional hockey would be enhanced by a college hockey career.\textsuperscript{136}

The court, however, did not enjoin the NCAA from applying the eligibility rule because of the athletes' interest in participation. Rather, the NCAA rules that prohibited play in Canadian amateur hockey leagues were held to impose disparate eligibility standards on student athletes who played hockey in the United States as compared to those who played in Canada.\textsuperscript{137} The rules, according to the court, violated the fourteenth amendment because of arbitrary discrimination based on alienage.\textsuperscript{138} The \textit{Buckton} case, therefore, does not establish a property right in athletic participation because the court found the alienage issue to be controlling.

2. Marital privacy

In \textit{Davis v. Meek},\textsuperscript{139} the plaintiff, an eighteen-year-old varsity...

\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} Albach v. Ode, 531 F.2d 983, 984 (10th Cir. 1976).
\textsuperscript{136} \textit{Id.} at 1154.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.} at 1157.
\textsuperscript{139} 344 F. Supp. 298 (N.D. Ohio 1972).
baseball player, challenged a regulation that prohibited him from participating in extracurricular activities because he was married. The court observed that the plaintiff had a substantial interest in playing baseball because four major league scouts had talked to him and at least four colleges indicated that they might grant him a scholarship. The court also noted the economic potential of professional baseball, but refused to enjoin the application of the rule because of the plaintiff's interest in participation. Rather, the challenged regulation was found to invade marital privacy, which is protected by the United States Constitution, and hence the regulation was unconstitutional. The Davis case, therefore, did not establish the existence of a property right in athletic participation because the court treated the interference with the marital relationship as the controlling issue.

3. Racial discrimination

Racial discrimination was alleged in Kelley v. Metropolitan County Board of Education of Nashville. In Kelley, an all-black high school was suspended from interscholastic competition for one year for alleged misconduct following a closely contested basketball game that the school team lost. The suspension was recommended by a committee of sixteen members, only five of whom were black. The district court expressly found that racial discrimination was absent, although plaintiffs argued throughout trial and in their briefs that racism was a controlling factor. In fact, the court held that regardless of race, the right to engage in athletics was of such significance and worth as to require procedural due process for its withdrawal.

Advocates of property rights for athletes regard Kelley as uncertain authority because the case involved overtones of racial discrimination. The validity of the Kelley holding, moreover, was

140. Id.
141. Id.
142. Id. at 301. The court said: "However much one may share Thomas Jefferson's scorn for games that are played with a ball, . . . it is difficult to refute the argument that a secondary school system that deprives a student of the opportunity to develop his full potential for entering the field of professional baseball is not functioning as it should." Id.
143. Id. at 302; see also Moran v. School Dist. #7, Yellowstone County, 350 F. Supp. 1180, 1184 (D. Mont. 1972) (eligibility rule held invalid because it discriminates against married persons).
144. 293 F. Supp. 485 (M.D. Tenn. 1968).
145. Id. at 488.
146. Id.
147. Id. at 498.
148. Id. at 492.
149. Comment, supra note 18, at 491.

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questioned in *Taylor v. Alabama High School Athletic Association*.\(^{150}\) In *Taylor*, a high school basketball team was suspended from participation in tournament play for one year because of misconduct by spectators during a championship game.\(^{151}\) Prior to the suspension, no specific charges of misconduct were made against the school, and no notice of specific charges was given.\(^{152}\) The plaintiffs argued that they were deprived of property without due process because the *Kelley* decision established a property right in athletic participation.\(^{153}\) The district court, however, said that *Kelley* did not analyze thoroughly whether athletic participation was a federally protected property right, and denied relief.\(^{154}\) The validity of the *Kelley* holding, therefore, is questionable because the holding was challenged and rejected by the *Taylor* court, which was confronted with a similar situation.

4. Religious discrimination

A first amendment issue was raised in *Chabert v. Louisiana High School Athletic Association*.\(^{155}\) In *Chabert*, plaintiff, a high school football player, sought to enjoin the application of a rule prohibiting transfer.\(^{156}\) Plaintiff had lost one year of eligibility due to the rule because he enrolled in a parochial school located within a public school district other than the district in which he resided.\(^{157}\) The Catholic school in which plaintiff enrolled was the only one in the area.\(^{158}\) Had he lived in the district in which the school was situated, he would not have lost a year of eligibility.\(^{159}\)

The court noted that extracurricular activities were an integral part of education.\(^{160}\) The issue in the case, however, was not whether plaintiff had the absolute right to participate in athletics, but whether he could be denied the benefits that accrue to other Catholic children similarly situated.\(^{161}\) Applying a rational basis test, the Supreme Court of Louisiana held that the transfer rule was reasonably related to the

\(^{151}\) Id. at 55.
\(^{152}\) Id. at 55-56.
\(^{153}\) Id. at 56.
\(^{154}\) Id. at 57.
\(^{155}\) 323 So. 2d 774 (La. 1975).
\(^{156}\) Id. at 775.
\(^{157}\) Id. at 776.
\(^{158}\) Id.
\(^{159}\) Id.
\(^{160}\) Id. at 778.
\(^{161}\) Id. at 777.
purpose of discouraging unethical recruiting, and the rule was upheld. Because religious discrimination was the dispositive issue in this case, Chabert is not authority for a property right in athletic participation.

5. **Gender discrimination**

In Brenden v. Independent School District, female high school students sought an injunction barring enforcement of a rule prohibiting females from participating in interscholastic activities with males. The plaintiffs wanted to participate in noncontact interscholastic sports in which the school did not provide separate teams for females. The court observed that the plaintiffs' interest in participating in interscholastic sports was substantial and cognizable, and that athletics were an integral part of the total educational process. The plaintiffs were granted relief, however, on the basis that the rule discriminated against females on account of their sex, thereby depriving them of equal protection of the law. Brenden, therefore, is not authority for a property right in athletic participation because gender discrimination was the reason for which the court enjoined application of the eligibility rule.

These cases have found athletics to be a significant interest that, pursuant to Goss, is part of the total educational process. These cases, however, also have contained clearly defined constitutional issues. The traditional constitutional questions were decisive for those courts granting relief. In contrast, other courts extending due process protection to college athletes have relied mainly on the potential economic benefit of athletic participation. This rationale, however, ignores the standards advanced in Roth.

**B. Potential Economic Benefit**

When college athletes have sued to enjoin disciplinary measures, courts that have granted relief focused on the potential economic interest at stake, not on the protection given to the educational pro-

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162. *Id.* at 779-80. The court applied a rational basis test because the transfer rule applied to public and private schools and hence did not impair the exercise of a fundamental right or discriminate against a suspect class. *Id.*

163. 477 F.2d 1292 (8th Cir. 1973).

164. *Id.* at 1294.

165. *Id.*

166. *Id.* at 1299.

167. *Id.* at 1298.

168. *Id.* at 1302; see also Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258, 261 (D. Neb. 1972); Haas v. South Bend Community School Corp., 289 N.E.2d 495, 499 (Ind. 1972) (relief granted because of gender discrimination).
cess. By focusing on economic benefit, however, these courts have disregarded the language in Roth that the nature of the interest, not its weight, determines whether due process rights are invoked. An analysis of these cases will show that they are not authority for a property right in athletic participation.

The case most frequently cited for recognizing the college athlete's property right in participation is Behagen v. Intercollegiate Conference of Faculty Representatives. In Behagen, two members of the University of Minnesota varsity basketball team were suspended from competition for one season because of their participation in a fight that occurred during a game with Ohio State University. The athletes, however, did not argue that they were deprived of a property right without due process. They claimed, instead, that the Big Ten Conference had established a disciplinary procedure that provided for proper notice and opportunity to be heard, and that due process was violated when the Big Ten disregarded the rules.

The Behagen court acknowledged that "big time" college athletics may lead to multimillion dollar professional contracts. The court took judicial notice that to many athletes the chance to display their skills is worth more in economic terms than a college education. The actual holding of the court, however, was that the Big Ten had denied the athletes due process of law because the athletic conference failed to adhere to the established procedure for disciplinary actions. Behagen, therefore, did not establish that athletes have a property right in participation.

The dictum in Behagen, that college athletics are a forum in which participants may attract lucrative professional contracts, was thought sufficient by the district court to establish a property right in participation in Regents of the University of Minnesota v. National Collegiate Athletic Association. In that case, the NCAA ordered the University of Minnesota to suspend three basketball players for eligibil-

169. See supra notes 53-63 and accompanying text.
171. Id. at 603.
172. Id. at 606.
173. Id. at 603.
174. Id. at 604.
175. Id.
176. Id. at 606. Since the Big Ten rules entitled schools and student athletes to appear and defend themselves, the plaintiff under a Roth analysis probably had a property right in this disciplinary procedure. The Big Ten in no way created an entitlement to participation, however. The scope of that entitlement is defined by the agreement between the student athlete and his school. See supra notes 120-26 and accompanying text.
177. 422 F. Supp. 1158 (D. Minn. 1976), rev'd on other grounds, 560 F.2d 352 (8th Cir. 1977).
ity violations. After conducting hearings consistent with procedural due process, the university decided that no violations had occurred, and the school refused to comply with the demands of the NCAA. The NCAA responded by placing all of the athletic teams at the university on indefinite probation.

Although contractually bound to the NCAA, the university contended that a superior constitutional duty was owed to the student athletes because athletic participation falls within the due process protection of the fourteenth amendment. The district court agreed, citing the dictum in Behagen to support the proposition that athletic participation is a substantial property interest. The court explained that the opportunity to play basketball was protected because the activity may lead to a very profitable professional career in exceptional circumstances. The court also noted that athletics are an important part of the student athletes' educational experience.

On appeal, the Eighth Circuit accepted for the sake of argument that the suspended athletes had a property right in participation, but reversed the decision of the district court on other grounds. After reviewing the facts, the Eighth Circuit decided that due process was satisfied because the university had uncovered eligibility violations after conducting a hearing at which the three athletes were given notice of the charges against them and were allowed an opportunity to defend themselves. Based on the findings of the hearing, the university could have declared the athletes ineligible without violating the fourteenth amendment even if the athletes had a property right in participation. Since the Eighth Circuit reversed the decision without deciding the property right issue, the holding of the district court that athletic participation is a protected property interest is of uncertain authority as precedent.

The most recent decision that restored an athlete’s eligibility because

178. 422 F. Supp. at 1159.
179. Id.
180. Id.
181. See supra notes 30-45 and accompanying text.
182. 422 F. Supp. at 1160-61.
183. Id. at 1161.
184. Id. at 1161-62.
185. Id. at 1162.
187. Id. at 368. The district court had reported that the university, after conducting hearings, decided no violations occurred. 422 F. Supp. at 1159. The university actually found mitigating circumstances, and that was why the school ignored the directive of the NCAA. 560 F.2d at 359.
188. 560 F.2d at 368.
of the potential economic interest at stake was Hall v. University of Minnesota. In Hall, the plaintiff twice was not accepted into his chosen field of study, a separate school within the university that required students to apply for admission. As a result, Hall became ineligible to play basketball.

The court issued an injunction compelling Hall's admission to the program. The court gave three reasons for the decision: (1) the plaintiff had been recruited as a basketball player, not a scholar, and he lived up to those expectations; (2) he had a good chance of being a second round choice in the National Basketball Association player draft if he played basketball during his senior year, but his chances of realizing a professional career would be impaired if he were denied the opportunity to play; and (3) he had decided to use his college career as a means of entry into the professional leagues, not as a means to a college degree, and therefore he would suffer a substantial loss if he could not play.

The rationale behind Hall, that the potential economic reward to an athlete with the chance of securing a professional contract outweighs the enforcement of eligibility rules, at first seems persuasive. This reasoning, however, does not withstand close examination. Implicit in the decision is the notion that if the plaintiff had no realistic aspirations of reaching the professional ranks, then relief would not be granted. This violates the equal protection clause of the fourteenth amendment.

The fourteenth amendment provides that no state shall deny to any person the equal protection of the law. This clause, accordingly, guarantees that similarly situated individuals will be treated in a similar manner by a government entity. This principle is violated if a few suspended athletes can have their eligibility restored while others can-

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189. 530 F. Supp. 104 (D. Minn. 1982).
190. Id. at 105.
191. Id.
192. Id. at 110-11.
193. Id. at 106.
194. Id.
195. Id.
196. This apparently is not uncommon. For instance, only 57% of all Division I college football players graduate, and only 10% of all players in the National Football League are college graduates. Chicago Sun-Times, Nov. 25, 1983, at 137, col. 1.
197. 530 F. Supp. at 108.
198. See id. at 106, 108.
199. See infra notes 200-05 and accompanying text.
not, merely because the former have brighter professional prospects.\textsuperscript{202}

The equal protection clause violation is demonstrated in the case of \textit{Jones v. National Collegiate Athletic Association}.\textsuperscript{203} In \textit{Jones}, the plaintiff-hockey player petitioned the court to restore his collegiate eligibility even though he had been paid to play hockey for two previous years.\textsuperscript{204} The court declined, saying that any athlete would be ineligible if he violated the challenged rules, and hence a decision to restore the plaintiff’s eligibility would place him in a superior, not merely an equal, position in comparison to other student athletes.\textsuperscript{205} This rationale applies with equal force to the situation in \textit{Hall}.

No clear precedent seems to exist for the recognition of a property right in college athletic participation. As discussed previously, the dictum of \textit{Behagen} was applied in \textit{Regents of the University of Minnesota}, a case whose value as precedent was left in doubt after a reversal on other grounds at the appellate level. \textit{Hall}, meanwhile, apparently would authorize relief when the athlete can demonstrate a real opportunity for a professional career, while denying relief to the athlete suspended for the same violation who had no realistic professional chances. Those who challenge NCAA procedures as being violative of due process also have attempted to compare student athletes with students in professional programs. This comparison, however, is equally unpersuasive.

\section*{C. Comparisons with Professional Students}

Advocates for athletes’ property rights have suggested that the college athlete is comparable to a law student or medical student who is pursuing a chosen occupation.\textsuperscript{206} Under this view, the right to pursue a professional sports contract deserves protection because the similar right to pursue a profession, such as law or medicine, cannot be denied without due process.\textsuperscript{207} This argument, which apparently has not been tested in court, is not persuasive because college athletes and students in professional programs are not similarly situated.

The comparison between students in professional programs and student athletes has three flaws. First, a person cannot become an at-

\begin{itemize}
  \item \textsuperscript{202} See infra notes 203-05 and accompanying text.
  \item \textsuperscript{203} 392 F. Supp. 295 (D. Mass. 1975).
  \item \textsuperscript{204} Id. at 296-97.
  \item \textsuperscript{205} Id. at 301.
  \item \textsuperscript{206} See Comment, supra note 18, at 503-04.
  \item \textsuperscript{207} Id.; see also North v. West Virginia Bd. of Regents, 233 S.E.2d 411, 415 (W. Va. 1977) (due process required for expulsion from professional school because “the higher the level of achievement, the greater the loss on removal”).
\end{itemize}
An athlete, however, need not pursue a course of study at college or participate in collegiate athletics to play professional sports. Second, when a law or medical student is suspended, he is excluded from the entire educational process, a total denial of benefit that requires procedural due process under *Goss*. A suspended athlete is not similarly deprived of all educational benefits. Third, the primary purpose of law and medical schools is to produce competent professionals. The primary purpose of universities and colleges, however, is not to produce professional athletes.

The premise of the argument that students in professional programs and student athletes are similarly situated also is incorrect because all athletes, unlike law students and medical students, cannot pursue a profession. Intercollegiate competition is the pinnacle of athletic participation for most women athletes because few opportunities in

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208. *See* 233 S.E.2d at 417 (student expelled from professional school must continue his academic career at another institution). In California, a person may become an attorney after studying law under the personal supervision of a judge or attorney. *See Rules Regulating Admission to Practice Law in California* 22 (1982). The prospective attorney must devote at least 18 hours each week for at least 48 weeks each year to the study of law and must take a written examination each month. *Id.* Four years of study are required before the prospective attorney qualifies to take the bar examination. *Id.* at 18. Even under this approach, therefore, a person cannot become a lawyer without devoting substantial time and effort to the study of law. In contrast, no comparable restrictions are placed on student athletes who aspire to professional careers. *See infra* note 209 and accompanying text.


210. Since the NCAA does not require a member institution to cancel financial aid awarded to a student athlete who violated an eligibility rule, that student may still attend school. *See NCAA Const. Art. 3, § 4(c)(2), reprinted in NCAA Manual, supra* note 12, at 19. Of course, the university may decide to cancel aid, but it is not required to do so. *Id.*

211. *See* Comment, *supra* note 123, at 344 (purpose of an institution of higher learning is to train the mind).

212. The fallacy in this argument is evident from the comments of John Mengelt, a former professional basketball player. He said:

"The primary function of any educational institution is to educate its constituency. Other ancillary functions such as ... intercollegiate athletic programs are important but should always take a back seat to education. The scholar may not be able to find a job in his chosen field, but he should, indeed, be able to find a job because of his overall education. The athlete is no different. He must focus on his overall collegiate experience and not that one-in-a-million shot at professional sports."

Wilmette (Ill.) News Advertiser, Dec. 1, 1983, at 19, col. 3. Kevin Ross, a former basketball player for Creighton University, was one student athlete who gambled and lost on a professional career. Ross said he gave 150% to basketball and received only 50% of an education. Ross played basketball at Creighton for four years, averaging 4.2 points per game. Academically, he completed 96 of 128 credits needed for graduation and compiled a D average. Many of Ross' passing grades were in "comfort courses," like theory of basketball and squad participation. Omaha World-Herald, June 18, 1983, at 21, col. 1, *continued on* 25, col. 1. Ross recently graduated from Westside Preparatory School in Chicago, however, where he enrolled to learn how to read. *See* Chicago Sun-Times, May 31, 1983, at 31, col. 1.
professional sports are available to women at this time.\textsuperscript{213} In addition, even some male athletes, such as those who participate in swimming, track, and gymnastics, have only limited professional sports opportunities.

As discussed above, comparisons between students in professional programs and college athletes do not support the athletes' claim of entitlement to athletic participation. Students in professional programs and college athletes are not similarly situated in terms of educational requirements or career opportunities. California case law also does not support college athletes' claims of entitlement to athletic competition.\textsuperscript{214} Two California courts have found collegiate athletic participation to be a substantial interest, but the courts did not address the due process contentions of student athletes in either case.\textsuperscript{215} As a result, California cases do not establish a property interest in athletic participation.

D. California Case Law

Two California courts have found that participation in college athletics is a substantial interest worthy of protection. In \textit{Cabrillo Community College District v. California Junior College Association},\textsuperscript{216} the plaintiff college district brought suit to enjoin the application of a rule prohibiting athletes from competing in intercollegiate athletics until they satisfied a residency requirement.\textsuperscript{217} The appellate court did not decide whether athletes have a property right in participation,\textsuperscript{218} holding instead that sections 25503 and 25505.7 of the Education Code prohibit community colleges from using residency requirements as a basis for denying admission to high school graduates.\textsuperscript{219} The Junior College association, as an agent of the community colleges, could not impose a residency requirement because the member colleges had no power to set residency rules.\textsuperscript{220}

Another case in which a California court found athletics to be worthy of protection is \textit{California State University, Hayward v. National Collegiate Athletic Association}.\textsuperscript{221} In that case, the university sought

\begin{itemize}
\item \textsuperscript{213} Women can make a decent living in only three sports—golf, tennis, and bowling. Sacramento Bee, Dec. 18, 1983, at I1, col. 1.
\item \textsuperscript{214} See infra notes 216-29 and accompanying text.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} 44 Cal. App. 3d 367, 118 Cal. Rptr. 708 (1975).
\item \textsuperscript{217} Id. at 369-70, 118 Cal. Rptr. at 709-10.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id. at 371, 118 Cal. Rptr. at 710-11.
\item \textsuperscript{220} Id. at 372, 118 Cal. Rptr. at 711.
\item \textsuperscript{221} 47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (1975).
\end{itemize}
to enjoin the NCAA from enforcing an indefinite probation against the entire athletic program on the ground that the probation violated the due process clause of the fourteenth amendment. The NCAA had ordered the university to declare two freshmen ineligible for academic violations. When the university refused to comply, the NCAA imposed the probation.

The appellate court granted the injunction, holding that the university had a substantial interest in terminating the probation. The court noted that the sanctions that had been imposed would impair the ability of the university to recruit, and ineligibility for postseason tournaments would lead to a loss in revenue. This analysis, which applies to the interest of the university, and not the interests of the student athletes, undoubtedly is correct. The economic benefit accruing to the university is real and immediate, while the benefit to the student athletes is only speculative.

Neither California case is sound precedent for the proposition that college athletes have a property right in participation. Cabrillo did not reach the constitutional issue of whether athletic participation is a property right. California State University, Hayward stressed the interest of the university in athletic participation.

The due process protection given to athletics is tenuous at best. Courts that have granted relief to athletes have held that athletics were related integrally to the educational process or that the potential economic benefit outweighed the enforcement of eligibility rules. The courts that found athletics to be related integrally to the educational process did so because a clearly defined constitutional issue justified the result. When courts have held participation to be a protected property right because of potential economic benefit, they apparently relied on dictum or implicitly approved unequal treatment of athletes. The language in Roth, stating that the nature of the in-

222. Id. at 537, 121 Cal. Rptr. at 87.
223. Id. at 540, 121 Cal. Rptr. at 89.
224. Id. at 539, 121 Cal. Rptr. at 88.
225. Id.
226. Id. at 541, 121 Cal. Rptr. 90.
227. Id.
228. Id. at 544, 121 Cal. Rptr. at 91.
229. See Note, The National Collegiate Athletic Ass'n: Fundamental Fairness and the Enforcement Program, 23 Ariz. L. Rev. 1065, 1091-92 (1981) (loss of revenue from penalties imposed by the NCAA can harm the entire athletic program of the university); McDonald v. National Collegiate Athletic Ass'n, 370 F. Supp. 625, 632 n.10 (1974). In McDonald, the court said "[t]he players' share of the intangible assets is—at best—a fleeting instant in the history of athletics. How many can remember the players in 7 out of the last 9 NCAA national championship basketball tournaments? But, no one can really forget U.C.L.A." Id.
230. See supra notes 33-68 and accompanying text.
terest is controlling, was ignored by the courts. Moreover, the comparisons between students in professional programs and college athletes inherently are inadequate because the two groups are not similarly situated. Finally, the California cases did not confront the due process issues raised by student athletes, and thus these cases do not establish a property right in athletic participation. Since college athletes have no tangible interest in athletic participation then the athletes also are not deprived of liberty if their reputations are harmed because sanctions are imposed upon them for violating NCAA eligibility rules.

**LIBERTY INTEREST**

The United States Supreme Court clarified the scope of the protected liberty right in *Paul v. Davis*. In *Paul*, the Louisville Police Department circulated photographs of "active shoplifters." Davis' picture was included, but in fact, he had never been convicted of shoplifting at the time the photos were circulated. Charges against him later were dismissed. Davis argued that circulation of the photographs deprived him of a protected liberty interest without due process because the damage to his reputation seriously impaired his future employment opportunities.

In reversing the appellate court and reinstating the decision of the district court, the United States Supreme Court held that mere stigma, apart from a tangible interest such as employment, is not a deprivation of liberty that requires procedural due process safeguards. The Court noted that this holding was consistent with the *Goss* decision. *Goss* held that suspended students had been deprived of a liberty interest because the withdrawal of the entitlement to education, created by Ohio law, could impact adversely on the students' reputations.

The *Paul* rationale was applied to college athletes in *Colorado Seminary v. National Collegiate Athletic Association*. In that case,
the plaintiffs argued that NCAA sanctions harmed their reputations and impaired their ability to realize professional careers. As a result, the plaintiffs claimed they had been deprived of a liberty interest without due process.

In *Colorado Seminary*, the court first held that no constitutionally protected property interest exists in collegiate athletic participation. Because no other tangible, constitutional interest was denied, the court, citing *Paul*, held that the athletes were not deprived of liberty merely because the NCAA sanctions may have harmed their reputations. Because sanctions imposed for violations of NCAA eligibility rules did not deprive the athletes in *Colorado Seminary* of a tangible interest, complaints by college athletes that NCAA sanctions deprived them of liberty, therefore, do not merit constitutional protection.

**CONCLUSION**

College athletes who violate eligibility rules increasingly have sought judicial relief, claiming that NCAA sanctions deprive them of a property or liberty interest without procedural due process. The athletes are attracted by the lucrative salaries paid to professional athletes, and the collegians fear that NCAA sanctions will harm their chances of realizing professional sports careers. This comment has demonstrated, however, that college athletes have no property or liberty interests in intercollegiate competition that require procedural due process before sanctions are imposed by the NCAA.

This comment has demonstrated that NCAA disciplinary measures constitute state action because the authority of the NCAA over collegiate athletics is substantial and pervasive. Since the threshold requirement of state action is met, courts must decide whether athletic participation is protected constitutionally. *Roth* held that property rights

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244. See id. Theoretically, stigma from sanctions imposed by the NCAA may be detrimental to a student athlete’s professional hopes. Practically, however, if the athlete is talented enough then sanctions are not an impediment. For instance, in 1982, Quintin Dailey, an All-American basketball player at the University of San Francisco, pleaded guilty to assaulting a student nurse. In exchange for the guilty plea, the authorities dropped three other charges, one of which was attempted rape. Dailey was selected by the Chicago Bulls in the first round of the National Basketball Association player draft, and he became an instant millionaire. Sacramento Bee, Dec. 25, 1983, at C1, col. 1.
245. 417 F. Supp. at 895; see supra notes 110-14 and accompanying text.
246. 417 F. Supp. at 896. The district court noted that precedent in the 10th Circuit indicated that suspension from athletic participation was not a deprivation of liberty. See id. The court also observed that under a *Paul* analysis, the plaintiff-university was not deprived of liberty either. Id. Of course, the plaintiffs in *Colorado Seminary* may have a cause of action for defamation. See 424 U.S. at 712.
are created and defined by independent sources, such as state law. The subsequent decision of *Goss* interpreted *Roth* as protecting the educational process when an entitlement exists. Those courts that have declined to recognize a property right in participation have held either that *Goss* protects the entire educational process and not the separate parts, or that *Goss* was concerned with total exclusion from the educational process. These courts have continued to rely on pre-*Goss* precedents involving high school players. An analysis under *Bishop*, a case in which the United States Supreme Court applied the *Roth* entitlement theory while denying a claim for continued employment, further indicates that no right to athletic participation exists. Bishop's claim for employment is similar to the student athletes' claim for participation.

This comment has established that court decisions supporting protection for athletics are of limited authority as precedent and that other arguments offered by advocates for athletes' property rights are unpersuasive. Moreover, since no tangible interest is denied, college athletes suspended from athletic participation are not deprived of liberty under a *Paul* analysis. The determination that college athletes have no property or liberty interests in intercollegiate competition is consistent with the policy of the NCAA in maintaining a clear separation between amateur and professional sports. This determination further ensures that college athletics will not move toward becoming a minor league for professional athletics but instead will remain closely related to academia.

*Keith Randall Solar*