Ohio Northern University Law Review

Volume 37 | Issue 1 Article 11

Leveling the Playing Field: Using Rational Basis With A Bite asMeans of Overcoming the NCAA's Violation of Equal Protection

Tyler C. Haslam

Follow this and additional works at: https://digitalcommons.onu.edu/onu_law_review

Part of the Law Commons

Recommended Citation

Haslam, Tyler C. () "Leveling the Playing Field: Using Rational Basis With A Bite asMeans of Overcoming the NCAA's Violation of Equal Protection," *Ohio Northern University Law Review*: Vol. 37: Iss. 1, Article 11.
Available at: https://digitalcommons.onu.edu/onu_law_review/vol37/iss1/11

This Article is brought to you for free and open access by the ONU Journals and Publications at DigitalCommons@ONU. It has been accepted for inclusion in Ohio Northern University Law Review by an authorized editor of DigitalCommons@ONU. For more information, please contact digitalcommons@onu.edu.

Leveling the Playing Field: Using Rational Basis With A Bite as Means of Overcoming the NCAA's Violation of Equal Protection

TYLER C. HASLAM*

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.
>
> The NCAA Principle of Amateurism[1]

I. INTRODUCTION

The National Collegiate Athletic Association ("NCAA") is the largest governing body for intercollegiate athletics in the United States.[2] For the 2009-10 academic year, the active membership comprises more than 1,300 colleges and universities from across the U.S.[3] The membership is divided almost equally between public and private institutions (44% public, 56% private),[4] and the association describes itself as "a bottom-up organization in which the members rule the Association."[5] The responsibility for governing the NCAA is left largely to the chancellors and presidents of the member institutions, who are responsible for the consideration and adoption of legislation for the association and each of its three divisions.[6]

---

* Associate, Offutt Nord, PLLC, Huntington, WV; J.D., Ohio Northern University, 2010; B.A., Emory & Henry College, 2007. I would like to thank my family and friends for their support while I was writing this and Prof. J.H. Huebert for his invaluable input and guidance.

1. NCAA Academic and Membership Affairs Staff, *Principles for Conduct of Intercollegiate Athletics*, 2009-10 NCAA DIVISION I MANUAL, CONST. art. 2, § 2.9 (2009) [hereinafter Division I Manual], *available at* http://www.ncaapublications.com/Uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf.

2. *The NCAA and NCAA Eligibility Center*, 2009-10 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 2 (2009) [hereinafter The Guide], *available at* http://ncaastudent.org/NCAA_Guide.pdf.

3. *Id.*

4. Kadence A. Otto & Kristal S. Stippich, *Revisting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS SPORT 243, 279 (2008).

5. NCAA Organizational Overview, http://www.ncaa.org/wps/ncaa?key=/ncaa/NCAA/About%20The%20NCAA/Overview/ (last visited Nov. 21, 2009).

6. NCAA Committees, http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/ legislation+and+governance/committees (last visited Nov. 21, 2009).

Published by DigitalCommons@ONU,

This comment examines the equal protection problems of the regulations on amateurism adopted by the NCAA and its member institutions, and how those regulations are enforced. Part II reviews the events surrounding the formation of the NCAA and the role the concept of amateurism played in that formation. Additionally, Part II will examine how the concept of amateurism has changed since the inception of the organization. Part III will compare how the amateurism regulations affected the careers of two former student-athletes. And finally, Part IV critiques the NCAA's amateurism regulations in light of the constitutional guarantee of equal protection and the Supreme Court's equal protection jurisprudence.

II. THE NCAA AND THE SHIFTING CONCEPT OF AMATEURISM

The NCAA was born out of a need to reform college football.[7] The prevalence of serious injury and death among collegiate football players at the turn of the century existed at such an alarmingly high rate that many began to call for an outlawing of the game.[8] Due in part to public outcry (and his own son breaking a collar bone in a game at Harvard), President Theodore Roosevelt called leaders from Harvard, Yale, and Princeton to the White House in October 1905 to discuss reforming the rules of football to make the sport safer for the participants.[9] That first meeting eventually led to the creation of the Intercollegiate Athletic Association of the United States ("IAAUS") in March 1906.[10] By 1910, the organization had renamed itself the National Collegiate Athletic Association.[11]

The brutality of college football was not the only issue that the NCAA was charged with resolving. In the early days of college football after the Civil War, student organizations were responsible for many of the tasks now delegated to athletic departments (e.g., recruiting players, hiring coaches, scheduling games), but often without any institutional oversight.[12] Recruiting players often meant paying nonstudents to play with student teams.[13] For example, Amos Alonzo Stagg, considered to be one of the greatest coaches of all time, wrote that the 1893 team at the University of Michigan used seven players who were not students.[14] One of the most

7. *See* JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 7 (digital ed.) (2006).
8. *Id.* at 9-10.
9. *Id.*
10. *Id.* at 10.
11. *Id.*
12. CROWLEY, *supra* note 7, at 4.
13. *See id*.
14. *Id.* (citing AMOS ALONZO STAGG, TOUCHDOWN! 179-80 (1927); 1 THOMAS D. CLARK, INDIANA UNIVERSITY: MIDWESTERN PIONEER 322 (1970)).

famous "amateurs" of the era was twenty-seven year old James Hogan of Yale.[15] In return for his services on the gridiron, Hogan had his tuition paid by the university and he was given a suite of rooms, free meals at the University Club, a $100 scholarship, and a share of the profits from game-day program sales.[16] The university also provided him with an all-expenses paid, ten-day vacation to Cuba during the fall semester, but after football season.[17]

The result of such practices during the early days of college football was that, by the 1890s, many faculties attempted to ban university sponsored football teams.[18] And indeed the faculty at Harvard succeeded in having the football team abolished for a short time after the 1894 season.[19] Football made its return to Harvard's campus by the time President Roosevelt called for his summit at the White House, but the college presidents who recognized the vital role athletics played in education heeded President Roosevelt's advice to create an organization that would oversee college athletics and rid it of the problems of the day.[20] The main problems left to the IAAUS were ensuring that the athletes were indeed amateurs and that the academic integrity of the member institutions was maintained.[21]

Amateurism was one of the key issues discussed at the first meeting of the IAAUS.[22] As such, the representatives present at the first convention agreed to prevent participation in intercollegiate athletics by those who had:

> at any time received, either directly or indirectly, money, or any other consideration to play on any team, or for his athletic services as a college trainer, athletic or gymnasium instructor, or who has competed for a money prize or portion of gate money in any contest, or who has competed for any prize against a professional.[23]

---

15. CROWLEY, *supra* note 7, at 4 (citing JOHN A. LUCAS & RONALD A. SMITH, SAGA OF AMERICAN SPORT 212-13 (1978).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. CROWLEY, *supra* note 7, at 10, 15-21.
21. *Id.* at 15-21.
22. Kay Hawes, *Debate on amateurism has evolved over time*, THE NCAA NEWS, Jan. 3, 2000, http://web1.ncaa.org/web_files/NCAANewsArchive/2000/association-wide/debate%2Bon%2Bamateurism%2Bhas%2Bevolved%2Bover%2Btime%2B-%2B1-3-00.html.
23. THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE U.S., PROCEEDINGS OF THE FIRST NATIONAL MEETING 34 (1906) [hereinafter IAAUS].

Ohio Northern University Law Review, Vol. 37 [], Iss. 1, Art. 11

The IAAUS amateurism rules were indicative of the concept of amateurism in the United States at the time.[24] Amateur athletes were those who engaged in sport "purely for enjoyment and to become well-rounded gentlemen."[25] The difference between amateur and professional athletes was that amateurs did not "deliberate[ly] use . . . athletic skill as a means to a livelihood[.]"[26] In 1916, the NCAA finally included a definition of an amateur in its bylaws.[27] At that time, "[a]n amateur athlete [was] one who participate[d] in competitive physical sports only for the pleasure and the physical, mental, moral and social benefits directly derived therefrom."[28]

But by the 1960s and 1970s the NCAA began receiving a large number of requests for eligibility waivers that would allow student-athletes to compete as professionals in one sport while retaining their amateur status in another.[29] Those requests were largely denied until the NCAA Convention in 1974 when the member institutions adopted a provision allowing student-athletes in one sport to compete professionally in another sport.[30] As it currently stands today, "[a] professional athlete in one sport may represent a member institution in a different sport and may receive institutional financial assistance in the second sport."[31]

As will be shown, the current regulations are beneficial to some athletes and harmful to others. The athletes that benefit from the regulations are those whose professional sport is a traditional, team sport like baseball or basketball. For example, Drew Henson was allowed to collect a $2 million signing bonus and play baseball for the New York Yankees while also quarterbacking the University of Michigan football team.[32] At the same time, the current regulations also harm those athletes whose professional activity is a nontraditional or individual sport, like freestyle skiing.[33] Oftentimes, the athlete needs the revenue from sponsorships and endorsements to be able to compete professionally.[34] This disparity places NCAA athletes on an uneven playing field and, as such, violates the Equal Protection Clause of the Fourteenth Amendment.

---

24. *See* Hawes, *supra* note 22.
25. *Id.*
26. IAAUS, *supra* note 23, at 34.
27. Hawes, *supra* note 22.
28. *Id.*
29. *Id.*
30. *Id.*
31. Division I Manual, *supra* note 1, Bylaw, art. 12, §12.1.3.
32. Alan Goldenbach, *Yanks give Henson $2M*, NEWARK STAR-LEDGER (N. J.), Jul. 25, 1998, at 37, 1998 WLNR 6956311.
33. *See* Chris Isidore, *Amateurs at work*, CNN MONEY, Feb. 27, 2004, http://money.cnn.com/2004/02/27/commentary/column_sportsbiz/sportsbiz/index.htm.
34. *See id*.

https://digitalcommons.onu.edu/onu_law_review/vol37/iss1/11

III. OPPOSITE SIDELINES: ROSCOE CROSBY AND JEREMY BLOOM

The best way to show how NCAA regulations help some athletes and harm others is to compare the examples of two former college football players, Roscoe Crosby and Jeremy Bloom. Both were standout wide receivers coming out of high school in 2001, but they excelled at different professional sports, Crosby at baseball and Bloom at moguls skiing.

At 6'3" and 200 pounds, Crosby was a highly recruited football player who caught 75 passes for 1,385 yards and 23 touchdowns his senior year of high school.[35] In addition to being named South Carolina's "Mr. Football" and Gatorade Player of the Year,[36] he was named an All-American by USA Today and Parade Magazine.[37] On National Signing Day,[38] Crosby picked Clemson over South Carolina, Auburn, and Florida State.[39] But as good as he was on the gridiron, Crosby was just as good, if not better, on the baseball diamond.[40] Touted as a probable top ten selection in the 2001 Major League Amateur Draft,[41] ESPN baseball analyst Peter Gammons called Crosby one of professional baseball's top prospects after he hit .516 and 16 homers in his senior campaign.[42] Crosby was also named a USA Today All-American[43] and the South Carolina Gatorade Player of the Year in baseball.[44] The Kansas City Royals eventually chose Crosby with the fifty-third overall selection in that year's draft[45] and signed him to a contract that included a signing bonus of $1.75 million.[46]

Crosby spent part of the summer of 2001 with the Royals before joining the Clemson football team that fall[47] and setting several freshman receiving

35. Philip M. Bowman, *Union's Crosby named 'Mr. Football,'* POST AND COURIER (Charleston, S.C.), Dec. 9, 2000, at C6.

36. *Id.*

37. Marc Weiszer, *Union Star Fields a Dream*, GREENVILLE NEWS (Greenville, S.C.), May 20, 2001, at 1C.

38. Mick Elliott, *ESPN Lowers National Signing Day to a New Level*, THE TAMPA TRIBUNE (Fla.), Feb. 6, 2003, at Sports 1. (National Signing Day is the first day on which high school athletes may officially accept a scholarship and formalize their agreement to play for a college or university by signing the official NCAA paperwork, known as a National Letter of Intent.)

39. Gene Sapakoff, *Crosby chooses Clemson, for now*, POST AND COURIER, Feb. 8, 2001, at C1.

40. Bowman, *supra* note 35, at C6.

41. *Ken Daley*, DALLAS MORNING NEWS, Jun. 5, 2001, at Sports Day 10B.

42. Weiszer, *supra* note 37, at 1C.

43. Christopher Lawlor, *2001 All-USA Baseball*, USA TODAY, Jun. 29, 2001, at 12C.

44. Bob Castello, *Baseball Expected to call Crosby early*, THE GREENVILLE NEWS, Jun. 5, 2001, at 1C.

45. Marc Weiszer, *Crosby Plans to Play Football*, GREENVILLE NEWS, Jun. 6, 2001, at 1C.

46. Ken Corbitt, *Second-round Choice Crosby Signs With KC*, TOPEKA CAPITAL-J., Jul. 24, 2001, *available at* http://cjonline.com/stories/072401/spo_kccrosby.shtml.

47. Andrew Miller, *Tigers Get First Look at Crosby*, POST AND COURIER, Aug. 7, 2001, at E1.

records.[48] Personal and medical issues eventually forced Crosby to leave Clemson prior to the fall 2002 semester to focus on baseball.[49] But after an eighteen month absence, Crosby decided to return to Clemson to give football another shot.[50] Although his time away from class left him academically ineligible to compete, Crosby was granted a medical waiver by the Atlantic Coast Conference because it was determined that his low grade point average was due in part to his medical problems.[51] Crosby only played one game before withdrawing from school a second time,[52] but his status as an amateur football player was never questioned, nor was it in jeopardy under the NCAA regulations.

Compare Crosby's story with that of Jeremy Bloom. Bloom, from Loveland, Colorado, deferred his scholarship offer at the University of Colorado for one year so that he could focus on training and competing in the 2002 Winter Olympics in Salt Lake City.[53] Bloom finished ninth in the Olympics,[54] then later that year became the youngest freestyle moguls skiing champion in history.[55] Freestyle skiers, unlike baseball players, have no organizational support to help them pay for the costs of training and equipment that are necessary to be able to compete professionally.[56] Whereas professional athletes competing on a team have their training and equipment costs paid for by their teams, professional athletes in individual sports must find the means by which to fund their professional careers.[57] Most often those athletes fund their careers through sponsorship and endorsement contracts.[58] So to help offset the costs of his training and equipment, Bloom signed endorsement contracts with Oakley, Under Armour, and DynaStar Skis.[59]

Bloom was forced to give up his sponsorship deals when the NCAA told him he would not be eligible to play football while receiving

48. Pete Iacobelli, *Crosby, Once a Two-sport Hope, Focuses on NFL*, AUGUSTA CHRON., Jul. 9, 2005, *available at* http://chronicle.august.com/stories/2005/07/09/pro_458203.shtml.

49. *Id.*

50. Duane Rankin, *Crosby Cleared to Play This Season*, GREENVILLE NEWS, Aug. 14, 2003, at 1C.

51. *Id.*

52. Iacobelli, *supra* note 48.

53. Vicki Michaelis, *Colorado Punt Returner Back Into the Skiing Grind,* USA TODAY, Dec. 5, 2002, at 10C.

54. *Id*.

55. Gordon E. Gouveia, *Making a Mountain Out of A Mogul: Jeremy Bloom v. NCAA and Unjustified Denial of Compensation Under NCAA Rules*, 6 VAND. J. ENT. L. & PRAC. 22, 22 (2003).

56. *Id*. at 29.

57. *Id.*

58. *Id.*

59. Michaelis, *supra* note 53, at 10C.

Haslam: Leveling the Playing Field: Using Rational Basis With A Bite asMe

endorsement money.[60] After ceasing his endorsement activities, he joined the football team at Colorado, set several receiving records, and was named to the Freshman All-America Team.[61] When football season was over, Bloom returned to professional skiing but paid for all of his professional expenses out-of-pocket.[62] He returned to Colorado for his sophomore season before leaving again the next spring to ski professionally.[63] Bloom never played another down of college football.[64]

Bloom's failure to return to the Colorado gridiron for his junior year was not based on a lack of desire to play college football.[65] Rather, Bloom decided that he could no longer afford to play football and ski professionally without the help of his sponsors.[66] The NCAA forced Bloom to choose between college football and his professional skiing career.[67] An appellate court in Colorado upheld a trial court's decision denying Bloom an injunction that would have allowed him to receive endorsement money and still play college football, because it determined that the NCAA bylaws were valid.[68] As a result, Bloom made one final plea to the NCAA to grant him a waiver that would have allowed him to retain both his sponsors and his collegiate eligibility.[69] The NCAA rejected Bloom's final waiver request and he decided that he would not give up his professional career in order to play football for Colorado.[70]

IV. EQUAL PROTECTION AS A MEANS OF LEVELING THE PLAYING FIELD

The NCAA utilizes a double standard when it allows some student-athletes to pursue their chosen professional occupation and prevents others from doing the same. The affected athletes have no realistic means to combat the NCAA regulations because courts almost always side with the NCAA when an athlete challenges the amateurism regulations.[71] Scholars have suggested a number of ways one might use the law to get around the

60. Mike Jensen, *For Skier, Opting to Play Football Proves Costly*, PHILA. INQUIRER, Aug. 21, 2002, at E01.

61. Shelly Anderson, *NCAA Rules too Thorny for Bloom*, PITTSBURGH-POST GAZETTE, Oct. 13, 2005, at C2.

62. *See* Jensen, *supra* note 60, at E01.

63. *See* Anderson, *supra* note 61, at C2.

64. *Id.*

65. *See id.*

66. *See id.*

67. *Id.*

68. Bloom v. Nat'l Collegiate Ath. Ass'n, 93 P.3d 621, 626 (Colo. Ct. App. 2004).

69. Anderson, *supra* note 61, at C2.

70. *Id.*

71. *See, e.g.*, Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180 (3d Cir. 1998); Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992); McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988).

Published by DigitalCommons@ONU,

NCAA's amateurism regulations, but those arguments typically center on the use of antitrust remedies or procedural due process.[72] I propose, however, that the Equal Protection Clause of the Fourteenth Amendment should provide the most viable means for all NCAA student-athletes to have the freedom to pursue a career in the professional sport of their choice.

A. The NCAA as a State Actor

The NCAA holds itself out as a "private voluntary association" of colleges and universities.[73] The Equal Protection Clause of the Fourteenth Amendment is only applicable to seemingly private organizations, like the NCAA, when it can be shown that they are acting on behalf of the State. The Amendment will not apply to the wrongful acts of private organizations unless the organization is a so-called "state actor" – one who is supported by "state authority in the shape of laws, customs, or judicial or executive proceedings."[74] The Supreme Court of the United States has stated that "the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States."[75] State action may be found only if there is such a close relationship "between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself."[76]

In 1982, the Supreme Court decided three cases, known collectively as the *Blum* Trilogy, which shaped the contours of the state action doctrine.[77] In these cases, the Court held that: private entity decisions are not converted to state action simply because the state reacts to the decision;[78] conduct is fairly attributable to the state when it is caused by the exercise of a right created by the state and the actor is one for whom the state is responsible;[79] and private conduct is not state action simply because the private entity

---

72. *See, e.g.*, Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009) (using the tax code as a remedy); Bradley S. Pensyl, Note, *Whistling a Foul on the NCAA: How NCAA Recruiting Bylaws Violate the Sherman Antitrust Act*, 58 SYRACUSE L. REV. 397 (2008); C. Peter Goplerud III, *NCAA Enforcement Process: A Call for Procedural Fairness*, 20 CAP. U. L. REV. 543 (1991) (using due process as a remedy).

73. *See* Answer Brief of Appellee National Collegiate Athletic Ass'n at 19, Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 626 (Colo. Ct. App. 2004) (No. 02CA2302) [hereinafter "Answer Brief"].

74. The Civil Rights Cases, 109 U.S. 3, 18 (1883).

75. Shelley v. Kramer, 334 U.S. 1, 13 (1948).

76. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

77. *See generally* Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

78. *Blum*, 457 U.S. at 1005.

79. *Lugar* 457 U.S. at 937.

serves a public function.[80] As it stands today, the primary idea driving the state action doctrine is that "the State is responsible for the specific conduct" that is alleged to have deprived the plaintiff of his or her federally protected rights.[81]

The determination of whether state responsibility may be assigned to a private entity is made on a case-by-case basis. As the Court recently stated, "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government."[82] Prior to *Blum* and its progeny, a number of lower courts determined that the NCAA was responsible as a state actor.[83] Post-*Blum*, however, the Supreme Court held in *NCAA v. Tarkanian*[84] that the NCAA was not a state actor;[85] a decision that may be overturned with a future challenge.

1. *Tarkanian Changes the Game*

The facts in *NCAA v. Tarkanian* revolve around the actions of Jerry Tarkanian, formerly the head men's basketball coach at the University of Nevada, Las Vegas ("UNLV").[86] In 1976 the NCAA requested that UNLV investigate and provide a detailed response to allegations that the school and Tarkanian had committed violations of the NCAA bylaws.[87] With support from the Attorney General of Nevada, the school investigated the complaints and found that both the school and Tarkanian were completely innocent of violating any rules.[88] The NCAA Committee on Infractions then held a hearing on the evidence and determined that while many of the allegations were unfounded, thirty-eight violations had been committed and Tarkanian personally committed ten violations.[89] As a result, UNLV's basketball program was placed on probation for two years and the school was ordered to show cause as to why it should not suffer additional

80. *Rendell-Baker*, 457 U.S. at 842.
81. *Blum*, 457 U.S. at 1004.
82. Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96 (2001).
83. *See, e.g.*, Parish v. Nat'l Collegiate Athletic Ass'n., 361 F. Supp. 1214 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. of Cal. State Univ.-Sacramento v. Nat'l Collegiate Athletic Ass'n., 493 F.2d 1251 (9th Cir. 1974); Howard Univ. v. Nat'l Collegiate Athletic Ass'n., 510 F.2d 213 (D.C. Cir. 1975).
84. 488 U.S. 179 (1988).
85. *Id.* at 199.
86. *Id.* at 180.
87. *Id.* at 185.
88. *Id.* at 185.
89. *Id.* at 185-86.

penalties under the NCAA bylaws if Tarkanian was not suspended during the probation period.[90]

The president at UNLV ultimately decided that it was in the school's best interest to formally declare that it believed the NCAA was wrong but to nonetheless suspend Tarkanian during the probationary period.[91] Tarkanian filed suit for injunctive relief and his case eventually reached the Nevada Supreme Court, where the NCAA was held to be a state actor.[92] The NCAA appealed the decision and the Supreme Court of the United States held that the NCAA could not be a state actor because it was not acting under color of Nevada law and, even though it voted on NCAA regulations, the NCAA regulations were ultimately not drafted and enacted by Nevada alone.[93] Rather, the regulations were born of the collective efforts of the membership.[94] Additionally, the NCAA was not liable as a state actor because UNLV could withdraw from the association at any time.[95] Finally, the Court determined that the decision to suspend Tarkanian rested with UNLV and that the NCAA could not formally punish Tarkanian.[96] Therefore, responsibility for the infringement of Tarkanian's rights rested with UNLV and not the NCAA.[97]

The Court's decision in *Tarkanian* has been widely criticized as creating immunity for the NCAA.[98] While the Court's final holding seemed to permanently prevent the NCAA from being deemed a state actor, a recent case may have opened the door for the NCAA to be held liable for constitutional violations under the state action doctrine.

---

90. *Tarkanian*, 488 U.S. at 186.
91. *Id.* at 187.
92. *Id.* at 187-88, 190.
93. *Id.* at 193-94.
94. *Id.* at 193.
95. *Tarkanian*, 488 U.S. at 194-95.
96. *Id.* at 197-98.
97. *Id.* at 198.
98. *See, e.g.*, Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409 (1991) (stating that Tarkanian was deprived of his right to Due Process because the Court in *Tarkanian* found that the NCAA was not a state actor, disregarding factors that demonstrated otherwise); Sherry Young, *The NCAA Enforcement Program and Due Process: The Case for Internal Reform*, 43 SYRACUSE L. REV. 747, 773-74 (1992) (explaining that because the Supreme Court of the United States did not find the NCAA to be a state actor in *Tarkanian*, the unlikelihood of lower courts finding otherwise in future cases is very great); Dionne L. Koller, *Frozen in Time: The State Action Doctrine's Application to Amateur Sports*, 82 ST. JOHN'S L. REV. 183, 183-84 (2008) (for close to twenty years since the Court's decision in *Tarkanian*, the courts have not found the NCAA to be a state actor and therefore, its actions are not limited by constitutional protections).

Haslam: Leveling the Playing Field: Using Rational Basis With A Bite asMe

2. *Brentwood and the Pervasive Entwinement Test*

In 2001, the Court determined in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*. that state action may exist on a theory of "pervasive entwinement."[99] Specifically in *Brentwood*, the Court found that a state high school athletics association ("TSSAA") could be held as a state actor when there is "pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it."[100] In the majority opinion, Justice Souter expressly distinguished *Tarkanian* from *Brentwood*. Souter supported the Court's prior holding that the NCAA's connection with Nevada was "too insubstantial to ground a state action claim," but he relied on a note from *Tarkanian* in determining that state action existed when the athletic association was made-up of member schools entirely from one state.[101]

Souter determined that the TSSAA was a state actor for a number of reasons: 1) its membership was composed of 84% of Tennessee public schools; 2) under the TSSAA bylaws each member is represented in the association's legislative council by a faculty member or that school's principal; 3) those representatives elected a governing board "from eligible principals, assistant principals and superintendents;" and 4) the public school officials were acting "within the scope of their duties" by representing their institutions in the association.[102] Souter went on to provide language that ultimately undermines the notion that the NCAA cannot be held as a state actor:

> In sum, to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms. Only the 16% minority of private school memberships prevents this entwinement of the Association

---

99. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 290, 291 (2001).
100. *Id.* at 298.
101. *Id.* at 297-98.
102. *Id.* at 298-99.

> and the public school system from being total and their identities totally indistinguishable.[103]

The language is particularly damning because the TSSAA largely mirrors the NCAA in form and substance. Without the support of its member institutions and the efforts of many public school officials serving as NCAA officials on behalf of their institutions, the NCAA could not exist.

The revenue generated by the public schools that make up the NCAA allows it to operate.[104] The NCAA is currently composed of 1,051 member institutions across its three divisions.[105] The membership is divided almost equally between public and private institutions (44% public, 56% private), but the bulk of total revenue generated by the NCAA comes from Division I public schools.[106] Approximately 98% of the NCAA's total revenue is generated by its Division I members and public institutions account for two-thirds of the active Division I membership.[107] Additionally, Otto and Stippich note that the chancellors and presidents of public colleges and universities do the majority of NCAA governance work.[108] Further, the NCAA regulations mandate that schools act in a particular fashion when it comes to matters of recruiting student-athletes, ensuring that athletes meet particular academic requirements, and eligibility for financial aid.[109] Finally, because the NCAA lacks any enforcement power of its own, it relies on member institutions to use state resources in carrying out enforcement of the bylaws.[110]

As Otto and Stippich point out, it seems that there is such pervasive entwinement between the NCAA and its public school members that the NCAA falls under the state action doctrine.[111] To paraphrase Justice Souter, to the extent of its public school membership, the NCAA is composed of university chancellors and presidents acting in their official capacities to perform the ministerial, fundraising, and enforcement procedures necessary for the survival of the organization.[112] Without the public school

---

103. *Id.* at 299-300.
104. *See* Otto & Stippich, *supra* note 4.
105. The Guide, *supra* note 2, at 2.
106. Otto & Stippich, *supra* note 4, at 279-80.
107. *Id.*.at 281.
108. *Id.* at 281-82.
109. *Id.* at 282.
110. *Id.* at 285.
111. Otto & Stippich, *supra* note 4, at 274, 291-92.
112. *Id.* at 281-83.

membership and resources, there would be no recognizable association, legal or tangible.[113]

B. Equal Protection Should Protect Athletes Like Jeremy Bloom

If the NCAA is classified as a state actor after *Brentwood*, then athletes like Jeremy Bloom may be able to prevent the NCAA from restricting their ability to pursue employment in the professional sport of their choice. The NCAA regulations impinge upon the liberty of certain student-athletes to pursue the trade or occupation of their choice, i.e. nontraditional or individual sports in which the athletes rely on sponsorships and endorsements in order to be able to compete.[114] The Supreme Court has long recognized that implicit in the "liberty" concept of the Fourteenth Amendment is the freedom to engage in the career of one's choice, but the Court has rarely upheld constitutional challenges to discriminatory laws based on this freedom.[115] At one time the Court was willing to invalidate such economic regulations through substantive due process, but the Court has not invalidated a government economic regulation on the basis of substantive due process since 1937.[116]

This leaves the Equal Protection Clause of the Fourteenth Amendment as the best means of attacking discriminatory economic regulations. The Fourteenth Amendment requires that a State treat all citizens equally under its laws[117] and the Supreme Court has determined that "[t]he purpose of the equal protection clause . . . is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[118] While the aim of the amendment is to prevent the State from discriminating against its citizens, "[e]qual protection

113. *See id.* at 291.

114. Division I Manual, *supra* note 1, rule 12.5.2.1.

115. *See, e.g.*, Powell v. Pennsylvania, 127 U.S. 678, 684 (1888) (prohibition of the manufacture of imitation butter was not found to be in violation of an individual's right of liberty, as set forth in the Fourteenth Amendment, because the state statute was enacted in good faith, for the purpose of protecting the health and welfare of the general public); Allgeyer v. Louisiana, 165 U.S. 578, 590 (1897); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (a state statute that prohibited teachers from instructing students in any language other than English was found to be a constitutional violation of the teacher's liberty because it did not rationally further a legitimate governmental interest); Bd. of Regents v. Roth, 408 U.S. 564, 572-73 (1972) (the Court held that when an employer declines to renew an employee's employment contract, the employee's liberty is not Constitutionally violated because he has the freedom to seek employment elsewhere).

116. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 629 (3d ed. 2006).

117. U.S. CONST. amend. XIV, § 1.

118. Sunday Lake Iron Co. v. Twp. of Wakefield, 247 U.S. 350, 352 (1918); *accord* Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

does not require that all persons be dealt with identically, but it does require that a distinction made [by the State] have some relevance to the purpose for which the classification is made."[119] Therefore, the State is not prohibited from treating its citizens differently, but there must be "an appropriate governmental interest suitably furthered by the differential treatment" when it does treat citizens differently.[120]

To determine whether an equal protection violation has occurred, three questions must be answered.[121] First, how is the government making distinctions between its citizens?[122] Second, what level of scrutiny must a court apply when reviewing the law?[123] And third, is the government action appropriate given the level of scrutiny to be applied?[124] Each question will be addressed in turn below.

1. The NCAA Distinguishes Between People Based on Which Professional Sport they Choose to Play

The first issue to determine is how the government is distinguishing between people. All student-athletes are provisionally eligible to compete as "a professional athlete in one sport" and "represent a member institution in a different sport."[125] No student-athlete, however, is eligible to compete as an amateur in any sport if they receive payment for "the use of [their] name or picture to advertise, recommend or promote directly the sale or use of a commercial product," nor may an athlete receive payment for "endorsing a commercial product or service through [their] use of such product or service."[126] Once a student-athlete accepts money or goods from any sort of endorsement or sponsorship contract deriving from his or her athletic ability, that student loses collegiate eligibility unless granted a waiver by the NCAA.[127] The rules prohibit student-athletes from receiving sponsorship and endorsement monies, even if it is to facilitate their competition in professional sports while the student-athletes in question are competing in intercollegiate athletics at the same time.[128] The end result is that student-athletes like Jeremy Bloom, who rely on endorsements to fund

119. Baxstrom v. Herold, 383 U.S. 107, 111 (1966).
120. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).
121. CHEMERINSKY, *supra* note 116, at 670.
122. *Id.*
123. *Id.*
124. *Id.*
125. Division I Manual, *supra* note 1, Bylaw, art. 12, §12.1.3.
126. *Id.* at § 12.5.2.1.
127. *Id.* at § 12.5.2.1; art. 14, § 14.12.1.
128. *Id.* at art. 12, § 12.5.2.1.

their professional careers, are denied the equal opportunity to pursue a career in the professional sport of their choice.

Therefore, the rules create two classes of student-athletes: those who are permitted to compete as professionals and those who are not. Student-athletes may compete professionally in traditional, team-based sports, but may not compete in a sport that requires signing an endorsement deal to be able to afford to compete.[129] This classification is important because it creates an arbitrary and irrational distinction about which sports an athlete may compete in professionally and still retain collegiate eligibility.

2. The Appropriate Level of Scrutiny for the NCAA Regulations is Rational Basis Review

The Supreme Court uses three levels of scrutiny when reviewing government classifications: strict,[130] intermediate,[131] and rational basis review.[132] Strict scrutiny is the most exacting level of review and is utilized where the government classification is based on race[133] or alienage,[134] or impinges on a fundamental right.[135] Intermediate scrutiny is reserved for classifications that discriminate based on gender[136] or on the status of nonmarital children.[137] Rational basis review is the lowest level of scrutiny

---

129. *See id.*

130. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 223-24 (1995) (the Court explained that all laws requiring racial classifications need to be subject to strict judicial scrutiny when reviewed under the Equal Protection Clause).

131. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204 (1976) (Oklahoma statute that permitted females to purchase 3.2% beer at the age of eighteen, but males not until age twenty-one, was found to be discriminatory and in violation of the Equal Protection Clause of the Fourteenth Amendment because it could not be shown that the difference in genders was substantially related to the purpose of the statute).

132. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631-32 (1996) (the Court held that if legislation is rationally related to a legitimate government purpose, and was not enacted to purposefully discriminate against a particular class of individuals, classifications of citizens can be permitted).

133. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (children of different races were not being afforded the same educational advantages under laws that permitted racial segregation in schools, and the Court held that these laws were in violation of the Equal Protection Clause of the Fourteenth Amendment).

134. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216-17 (1944) (an Executive Order which required all people of Japanese descent in the Western Coast military zones to obey a curfew was reviewed by the Court using strict scrutiny because it limited the civil rights of a specific nationality).

135. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (strict scrutiny was used by the Court to review the Constitutionality of Virginia statutes that prohibited the marriage between white and colored people because the right to marry is a fundamental right).

136. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531-34 (1996) (the Virginia Military Institute's enrollment policy that only permitted male students to attend was found to be in violation of the Equal Protection Clause of the Fourteenth Amendment because Virginia could not demonstrate "exceedingly persuasive justification" for accepting only male students).

137. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 766 (1977) (holding that an Illinois Probate Act violated the Equal Protection Clause of the Fourteenth Amendment because it distinguished between the

and is utilized for all other types of classifications.[138] Because the NCAA amateurism regulations draw distinctions based on the source of an athlete's professional salary, the regulations amount to economic legislation that is subject to rational basis review.[139]

3. The NCAA Regulations Would Most Likely be Deemed Constitutional Under Rational Basis Review

Rational basis review is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause."[140] Economic regulations are presumptively valid and will only be overturned "by a clear showing of arbitrariness and irrationality."[141] If "there is any reasonably conceivable state of facts that could provide a rational basis for the classification" then the law or regulation will be upheld under rational basis review.[142] The intent of the governing body in enacting the provision is irrelevant and the burden of proof is on the challenger "to negat[e] every conceivable basis which might support" the law or regulation.[143] As Erwin Chemerinsky points out, "[v]irtually any goal that is not forbidden by the Constitution will be deemed sufficient to meet the rational basis test."[144] The result is that courts have been reluctant to use rational basis review as a means of overturning legislation, and normally only do so in rare circumstances.[145] On numerous occasions the Supreme Court has noted that it is not for the courts to declare legislation unconstitutional, but rather it is up to the people to use the democratic processes to change the law.[146]

heredity rights of legitimate and illegitimate children, yet was not sufficiently rationally related to a legitimate state purpose).

138. *See, e.g*., Plyer v. Doe, 457 U.S. 202, 216-18 (1982) (a Texas state statute that allowed public schools to discriminate against and deny enrollment to children who were not legal aliens of the United States was found to violate the Equal Protection Clause of the Fourteenth Amendment. The statute was not infringing on an explicitly defined Constitutional right, so the Court used rational basis review).

139. *Cf.* Hodel v. Indiana, 452 U.S. 314, 331 (1981) "Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." *Id.*

140. City of Dallas v. Stanglin, 490 U.S. 19, 26 (1989).

141. *Hodel*, 452 U.S. at 332.

142. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

143. *Id.* at 315.

144. CHEMERINSKY, supra note 116, at 681.

145. Very few cases that come before the Court seeking to overturn some piece of legislation by using rational basis review ever succeed. *See, e.g*., *Romer v. Evans*, 517 U.S. 620 (1996) (state constitutional amendment prohibiting all state and local governmental action designed to protect homosexuals); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (zoning ordinance requiring special permit to operate group home for mentally disabled); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (state law taxing in-state companies at lower rate than out-of-state companies).

146. *See, e.g*., Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) "For protection against abuses by legislatures the people must resort to the polls, not to the courts." *Id.* (quoting Munn v. Illinois, 94 U.S. 113, 134 (1877).

Under rational basis review, economic regulation "will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose."[147] Therefore, for purposes of economic regulations, rational basis review is a two-part inquiry.[148] First, the challenger must set forth that the government does not have a legitimate purpose for the classification it enacted and must rebut every "conceivable" legitimate purpose, regardless of whether it was one the government used or considered in drafting and enacting legislation.[149] Second, if there is a legitimate purpose, the challenger must show that the legislation in question is not rationally related to serving that purpose.[150] If the challenger can present evidence sufficient to overcome either prong of the inquiry, the questioned regulation will not survive rational basis review.[151]

It is difficult, if not impossible, for athletes who rely on endorsements to compete professionally to demonstrate that the NCAA does not have any legitimate purpose in restricting their abilities to receive endorsements. The Supreme Court has recognized a number of purposes as being legitimate for enacting legislation. For example: discouraging minors from using drugs and alcohol and engaging in promiscuous sex by limiting admission to certain dance halls to people between fourteen and eighteen years old;[152] protecting the public by imposing a mandatory retirement age on state police officers;[153] and operating a safe and efficient public transportation system by not hiring any person in a methadone treatment program.[154] Almost as a matter of course, a court will find that there is *some* conceivable legitimate purpose for enacting a challenged regulation that is sufficient to survive the first prong of rational basis review.[155]

Most likely the NCAA will argue, as it did with Bloom, that the legitimate purpose for its restrictions is "to maintain a clear line of demarcation between intercollegiate sports and professional sports."[156] The Supreme Court expressly held that economic classifications do not violate equal protection just because they are not crafted with perfect precision.[157]

147. Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983).
148. *See id.* at 195-96.
149. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).
150. *See Cleburne*, 473 U.S. at 448.
151. *See Exxon*, 462 U.S. at 195-96.
152. *City of Dallas v. Stanglin*, 490 U.S. 19, 20-28 (1989).
153. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314-15 (1976).
154. New York City Transit Auth. v. Beazer, 440 U.S. 568, 576-77, 592 (1979).
155. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-17 (1993).
156. Answer Brief, supra note 67, at 2.
157. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

Ohio Northern University Law Review, Vol. 37 [], Iss. 1, Art. 11

Further, the challenger's case is made even more difficult by the fact that the Supreme Court recognized, at least with respect to college football as a commercial brand, that the NCAA "product" is dependent on athletes not being paid for their participation in collegiate sports and on that basis the NCAA has a legitimate purpose in ensuring that its student-athletes are amateurs.[158] Therefore, courts are likely to determine that the NCAA has a legitimate purpose in promoting amateurism by restricting the ability of student-athletes to sign endorsement contracts.

If the restrictions are deemed to constitute a legitimate purpose, the question then becomes whether the regulations are reasonably related to the purposes they serve.[159] The Supreme Court has stated that legislation does not violate equal protection "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[160] But litigants have found it difficult to have a law declared unconstitutional because legislation is given "a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality."[161] The rational basis standard is so deferential that there are very few cases in which a challenged law has been held to be overly discriminatory.[162] Moreover, the Court's prior jurisprudence offers little guidance as to when the government's disparate treatment of a class of persons is so far attenuated from a legitimate purpose as to be unconstitutional.

For example, in *Zobel v. Williams*[163] the Court determined that an Alaska statute paying dividends to residents from a statutory fund that was based on the length of time they had resided in the State was not rationally related to the legitimate purposes of encouraging people to become residents of Alaska and ensuring proper management of the fund.[164] In *Williams v. Vermont*,[165] the Court determined that a Vermont tax statute requiring nonresidents to pay a sales tax on cars purchased and used out-of-state before becoming residents of Vermont was discriminatory on its face and violated equal protection when residents were given a tax credit for cars purchased and used out-of-state.[166] The distinction between residents and non-residents was deemed unrelated to the statute's purpose of helping to

---

158. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101-02 (1984).
159. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).
160. Heller v. Doe, 509 U.S. 312, 320 (1993).
161. *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981) (citations omitted).
162. *See, e.g*, *Cleburne*, 473 U.S. at 435-50; Williams v. Vermont, 472 U.S. 14, 27 (1985); Zobel v. Williams, 457 U.S. 55, 65 (1982).
163. 457 U.S. 55 (1982).
164. *Id.* at 56, 61-62, 65.
165. 472 U.S. 14 (1985).
166. *Id.* at 15, 26-27.

https://digitalcommons.onu.edu/onu_law_review/vol37/iss1/11

fund the cost of maintaining roads in Vermont and the classification drawn by the State was done on a "wholly arbitrary basis."[167] And in *Hooper v. Bernalillo County Assessor*,[168] the Court held that a New Mexico property tax exemption that was given to Vietnam veterans if they had established residency before a certain date was not rationally related to rewarding veterans for their military service when other veterans were denied the benefit if they did not establish residency prior to the cutoff date.[169] Finally, in *City of Cleburne v. Cleburne Living Center, Inc.*,[170] the Court determined that a zoning ordinance requiring a special permit to operate a group home for the mentally disabled was unconstitutional and based on private bias when a waiver was not required for the operation of similar facilities, such as nursing homes and boarding houses, in the same area.[171]

But in many more cases the Court has held seemingly arbitrary and irrational distinctions to be constitutional. For example, in *Fitzgerald v. Racing Ass'n of Central Iowa*,[172] a tax on slot machine revenues was held to be constitutional even though the revenues from racetrack and riverboat slot machines were taxed at different rates.[173] The Court found that promoting the health of one industry over the other was a valid policy reason for taxing one revenue source at a higher rate than the other.[174] Likewise, in *Heller v. Doe*,[175] a Kentucky statute requiring a higher evidentiary standard for the involuntary commitment of mentally ill people compared to mentally retarded people was held to be valid and related to the State's legitimate purpose of protecting the community from dangerous mentally retarded persons.[176] Finally, in *City of New Orleans v. Dukes*,[177] the Court upheld a New Orleans ordinance that prevented foodstuffs from being sold by pushcart vendors in the historical area of the city known as the *Vieux Carre* or French Quarter.[178] But the ordinance allowed vendors who had been working in the area eight years or longer to continue operating on the basis that they had built up a reliance on the income they derived from their jobs and that they had become "part of the distinctive character and charm that

167. *Id.* at 23.
168. 472 U.S. 612 (1985).
169. *Id.* at 622-24.
170. 473 U.S. 432 (1985).
171. *Id.* at 447-50.
172. 539 U.S. 103 (2003).
173. *Id.* at 105.
174. *Id.* at 109-10.
175. 509 U.S. 312 (1993).
176. *Id.* at 314-15, 332.
177. 427 U.S. 297 (1976).
178. *Id.* at 304-05.

distinguishes the *Vieux Carre*."[179] The Court held that the discriminatory statute was valid because it furthered the city's legitimate purpose of preserving the ambiance of the French Quarter.[180]

Based on prior cases, it cannot be stated with any definite certainty how the Court would rule regarding the rationality of the NCAA amateurism regulations. While there is a legitimate purpose for the NCAA to ensure that its student-athletes are amateurs in their collegiate sport, it can also be argued that there is no rational reason for allowing some students to pursue their professional careers and denying others the same opportunities by restricting their abilities to use endorsement monies as a means to compete professionally. Calling Roscoe Crosby an amateur in football and Jeremy Bloom a professional is an arbitrary, irrational, and semantic difference. Both are professional athletes in the sense that they were paid to compete in a sport other than football. The only difference between the two is how they were paid for their professional endeavors. Therefore, the question of whether the NCAA regulations would pass constitutional muster depends on how a court would view the reasonableness of the regulations in light of their purpose of promoting amateurism. The answer is unclear, but a court would more than likely find that the regulations are constitutional because rational basis review is such a deferential standard.[181]

C. Recommendations for the Courts

If we are to accept the Supreme Court's longstanding command that equal protection requires all similarly situated people to be treated alike,[182] then the NCAA cannot be allowed to restrict the ability of its student-athletes to fund their professional careers through endorsements. Treating all student-athletes equally requires that every athlete be given the opportunity to pursue a professional career in the sport of their choice without running afoul of the amateurism regulations, so long as that sport is not their collegiate sport. As previously demonstrated, a challenge to the NCAA's amateurism regulations will likely fail under traditional rational basis review. Therefore, courts should apply a more stringent form of review to claims brought by student-athletes seeking to use sponsorship or

---

179. *Id.* at 305.

180. *Id.*

181. *See Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 105 (2003); *Heller*, 509 U.S. at 314-15; *Dukes*, 427 U.S. at 304-05.

182. *See, e.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 540 (1942); Reynolds v. Sims, 377 U.S. 533, 565 (1964); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); Vacco v. Quill, 521 U.S. 793, 799 (1997); Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

endorsement monies to become professionals in nontraditional or individual sports.

The Court traditionally gives the government wide latitude when reviewing economic regulations because it is presumed that the democratic process will be used to correct bad legislative decisions.[183] An effective democratic process, however, is unavailable to student-athletes. Student-athletes do not have the ability to vote directly on the regulations affecting their amateur eligibility,[184] nor do they have the ability to vote for their legislative representatives within the NCAA.[185] Because of the NCAA's structure and the manner in which it is governed, student-athletes are effectively left without a voice within the NCAA's legislative ranks. As such, if student-athletes must rely on some democratic process to change the NCAA legislation, their only option is to appeal to the legislators at the state and federal levels.[186] In the past several years, student-athletes in California and Nebraska have appealed to their state legislatures to institute legislation aimed at providing student-athletes with benefits beyond those provided by the NCAA (and in violation of the NCAA regulations); however, none of the proposed legislation directly addressed the prohibition on endorsements, nor has any other legislative attempt to reform the NCAA through outside democratic processes been successful to date.[187] Regardless, courts still have the power to protect the economic rights of affected student-athletes.

In his dissent in the *Slaughterhouse Cases*,[188] Justice Bradley recognized that "[the] right to choose one's calling is an essential part of that liberty which it is the object of the government to protect; . . . [and] Liberty and property are not protected where these rights are arbitrarily assailed."[189] The Supreme Court has continually recognized that implicit in

---

183. *Cleburne*, 473 U.S. at 440.

184. *See generally*, Division I Manual, supra note 1, at art. 5.

185. *See generally id.* at art. 4.

186. State legislators in both California and Nebraska introduced bills that prohibit colleges and universities from following the NCAA's student-athlete compensation guidelines by allowing the athletes to earn monies based on their athletic abilities, but neither measure has ultimately proved successful. *See* Michael Aguirre, *From Locker Rooms To Legislatures: Student-Athletes Turn Outside the Game to Improve the Score*, 36 ARIZ. ST. L.J. 1441 (2004); Greg Skidmore, *Payment for College Football Players in Nebraska*, 41 HARV. J. ON LEGIS. 319 (2004); *see also* sources cited *infra* note 187.

187. *See, e.g.*, S.B. 193, 2003 Leg. (Cal. 2003); Neb. Rev. Stat. §§ 85-1, 131-37 (2003). The California bill was submitted to the California General Assembly in 2004, but it has not been voted on, presumably because of a fear that the bill's requirement that state schools not compete in the NCAA would be detrimental to school budgets. *See* David Davenport, *California politics meets NCAA sports*, S. F. CHRON., Feb. 17, 2004, at A21. The Nebraska legislation does not become operative until at least four other states with schools competing in Nebraska's conference adopt similar legislation. Neb. Rev. Stat. § 85-1, 136 (2003).

188. 83 U.S. (16 Wall.) 36 (1873).

189. Id. at 116 (1873) (Bradley, J., dissenting).

the Fourteenth Amendment is the right to engage in the profession of one's choice, but that right, while "essential to the orderly pursuit of happiness," is not fundamental.[190] The Government may not prohibit a person from pursuing a specific career path because all persons under the Constitution have a "generalized due process right" to work in the field of their choice.[191] That right, however, is subject to reasonable regulation and reviewed under rational basis.[192] But, as has been shown, almost any economic regulation is deemed reasonable on review.[193] The right to engage in a chosen occupation has little value if it has no real protection against infringement by the state. Therefore, it is incumbent on the courts to protect that right.

The Court should formally adopt the "rational basis with a bite" standard of review that it has implicitly utilized in some cases and employ this standard when economic regulations are challenged.[194] Rational basis with a bite is a heightened form of scrutiny in which courts look to a legislative body's actual purpose in enacting a regulation, rather than any conceivable purpose, to determine if the regulation's means justify its ends. The original formulation of this test sought to ensure that legislative purposes have a substantial relationship to their legislative means in the context of equal protection.[195] As stated by Judge Alex Kozinski, when considering economic regulations courts should no longer "shut their eyes to reality or even invent justifications for upholding government programs," but rather economic regulations should be reviewed under "robust and realistic rational basis review . . . where the courts consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it."[196] Judge Kozinski's statement came from a concurring opinion in which he proffered applying a lesser standard of review than strict scrutiny to a Seattle public school desegregation plan because race was used as a tiebreaker in deciding which students would be given their preference of schools.[197] Kozinski's argument was that race was not used to disadvantage a minority group or to rectify past harms caused by segregation, but rather as a means of promoting diversity and teaching students how to interact

190. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *accord Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972).

191. *See* Conn v. Gabbert, 526 U.S. 286, 292 (1999).

192. *See id.*

193. *See Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 105 (2003); *Heller v. Doe*, 509 U.S. 312, 314-15 (1993); *City of New Orleans v. Dukes*, 427 U.S. 297, 304-05 (1976).

194. *See, e.g.*, *Cleburne*, 473 U.S. at 447-50.

195. Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 20 (1972).

196. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc), *rev'd* 551 U.S. 701 (2007) (Kozinski, J., concurring) (citations omitted).

197. *Id.* at 1169-71 (majority opinion).

with peers from different cultural backgrounds.[198] Therefore, Kozinski felt the plan should be reviewed using rational basis because it furthered a compelling government interest.[199] For Judge Kozinski, rational basis is a common sense review of the reasons for adopting specific government plans.[200] He specifically quoted the rational basis framework from *Cleburne* that has come to be known as "rational basis with a bite."[201] Thus, by adopting Judge Kozinski's position, rational basis with a bite is a two-pronged inquiry requiring the court to look at the totality of the circumstances to determine: 1) why the classification was created and 2) if the regulation(s) is rationally related to its stated purpose. If the regulation is not rationally related to its purpose, then it is unconstitutional.[202]

A formal adoption of this form of rational basis with a bite in economic regulation challenges would provide three benefits to the legal community. First, applying rational basis with a bite to economic regulations strikes the perfect balance between traditional rational basis review, intermediate scrutiny, and strict scrutiny. Traditional rational basis review is employed as a means to keep the judiciary from second-guessing legislative judgment.[203] A higher standard of review is appropriate, however, to protect the rights envisioned by the Framers as "implicit in the concept of ordered liberty."[204] Among the economic rights advocated by the Framers is the idea that people have a liberty interest in using their abilities to pursue the career of their choice.[205] Accordingly, economic regulations that restrict that right are subject to review by the judiciary at a heightened level of scrutiny than traditional rational basis.

While traditional rational basis review affords economic regulations too much deference, strict scrutiny and intermediate scrutiny do not provide the legislature with enough deference. Subjecting every State economic regulation to strict scrutiny would unnecessarily frustrate the State's police power in promoting the public health, safety, and welfare because it would be almost impossible to draw economic classifications that serve a compelling government interest while also being narrowly drawn. Likewise, economic regulations would often be struck down under intermediate scrutiny if they were not reasonably tailored to serve a

---

198. *Id.*at 1194-95 (Kozinski, J., concurring).
199. *Id.* at 1194.
200. *Id.*
201. *Parents Involved*, 426 F.3d at 1194.
202. *Id.* at 1194-95.
203. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985).
204. *See* Bowers v. Hardwick, 478 U.S. 186, 194 (1986).
205. Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 181 (2003).

substantial government interest.[206] The intermediate scrutiny standard is too indeterminate and subject to too much judicial leeway in reviewing legislative decisions. Rational basis with a bite gives the judiciary a better ability to protect economic rights by allowing judges to second-guess the legislature when necessary, but it does not provide the judiciary with an indiscriminate right of veto.

Second, it would offer predictability. Many commentators have pointed out that the Court currently uses a number of different formulations of rational basis and that litigants cannot predict what level of scrutiny courts are likely to apply to their case.[207] This lack of predictability, in fact, formed part of Justice Marshall's dissent in *Massachusetts Bd. of Retirement v. Murgia*.[208] In *Murgia*, the Court used rational basis review and refused to invalidate a Massachusetts statute that forced state police officers to retire at age fifty because Massachusetts had a legitimate purpose in making sure its officers were capable of physically performing their jobs and the statute was reasonably related to achieving those ends.[209] At the time *Murgia* was decided, the Court outwardly manifested that it would only apply either strict scrutiny or traditional rational basis when reviewing legislative decisions.[210] Marshall argued that, in reality, the Court utilized a number of standards when reviewing legislative decisions, and he cited a number of cases in which the Court improperly applied either standard to reach the decision it felt was appropriate.[211]

As a result, Marshall argued that lower court judges were left to determine constitutionality on an *ad hoc* basis and the Court could pick and choose which relevant factors it wanted to consider when deciding whether legislation was constitutional.[212] That problem was somewhat remedied by Marshall's suggestion of requiring the government to demonstrate "a reasonably substantial interest" in its classification and that its legislative "scheme [was] reasonably closely tailored to achieving that interest."[213]

---

206. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

207. *See, e.g.*, Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 803, 814-15 (2006) (discussing "the Court's schizophrenic oscillation" between traditional rational basis and rational basis with a bite); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 242-43 (2002); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 360 (1999).

208. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 322 (1976).(Marshall, J., dissenting).

209. *Id.* at 314-17 (majority opinion).

210. *Id.* at 319-20 (Marshall, J., dissenting).

211. *Id.* at 320-21.

212. *Id.* at 321.

213. *Murgia*, 427 U.S. at 325 (Marshall, J., dissenting).

Marshall's recommendation later became known as intermediate scrutiny.[214] While he arguably envisioned intermediate scrutiny being applied to a number of different types of government classifications, its application has been limited to the review of classifications based on gender and legitimacy.[215] The application of intermediate scrutiny to those classifications, however, has led to more predictability in gender and illegitimacy cases.

Marshall's arguments about needing more judicial predictability are just as pertinent today as they were when *Murgia* was decided. Therefore, to remedy the problem, the Court should formally recognize rational basis with a bite since it already utilizes the test. Such a formal recognition of rational basis with a bite, even in a narrow scope of cases, allows the parties to more accurately forecast when a law will be deemed unconstitutional.

Third, formally adopting the test and specifically delineating the factors to be used on review will serve to further distance the judiciary from legislative functions. Particularly, rational basis with a bite takes the judiciary out of the legislative arena by requiring judges to determine if a law's means are related to the purposes set forth by the enacting body. Requiring legislation to be rationally related to a stated purpose imposes a standard of objective reasonableness on judges that is not present under the current "any conceivable legitimate purpose standard" articulated in *F.C.C. v. Beach*.[216] Under traditional rational basis review, the objective standard is lacking because judges can choose to develop any number of potential purposes for enacting the legislation. The *Beach* rule thus makes traditional rational basis a malleable standard whereby judges can contour laws to meet the burden of constitutionality. This essentially allows the judiciary to act as a super-legislature that has the ability to develop policy rationales and justifications for legislation as it sees fit. Therefore, rational basis with a bite is preferable because it requires the legislature to tailor laws to legitimate governmental purposes and prevents the judiciary from tailoring purposes to the laws.

1. Applying Rational Basis with a Bite to the NCAA Regulations

As previously mentioned, rational basis with a bite is a two-pronged inquiry. The reviewing court must determine: 1) why the classification was created and 2) if the regulation is rationally related to its ends in light of the

---

214. *See Craig v. Boren*, 429 U.S. 190 (1976).
215. *Id.*; Clark v. Jeter, 486 U.S. 456, 461 (1988).
216. 508 U.S. 307 (1993).

Ohio Northern University Law Review, Vol. 37 [], Iss. 1, Art. 11

circumstances surrounding its creation.[217] The classification created by the NCAA results in some student-athletes being allowed to pursue a career in the professional sport of their choice, while others are not. This classification is the direct result of a number of conflicting provisions. Assuring amateurism in intercollegiate athletics was one of the founding goals of the NCAA.[218] The NCAA continually asserts that it seeks to keep "a clear line of demarcation between intercollegiate athletics and professional sports."[219] But, at the same time, student-athletes are allowed to compete professionally in another sport.[220]

It was not until 1974 that the NCAA adopted the provision granting student-athletes the option to compete professionally in another sport.[221] The adoption of this provision was less about keeping a clear line of demarcation between collegiate and professional athletics and more about allowing the NCAA to retain control over its largest source of revenue.[222] The provision can be seen as a concession to growing student demand for waivers during the 1960s and 1970s.[223] As noted by Walter Byers, the first Executive Director of the NCAA, it was during this same period that the NCAA began to realize the potential revenue it could draw from licensing its television rights to the major networks.[224] Byers himself acknowledged that the NCAA focused more and more on how much money it could make.[225] Although never expressly stated by NCAA officials, the inference to be drawn is that the student/professional rule was enacted purely so that the NCAA would not lose control over its most marketable commodity, i.e. the student-athletes. Therefore, the classification was implicitly created to protect the economic interests of the NCAA and explicitly to keep a clear dividing line between amateur and professional athletics.

The next step is to determine if the classification is rationally related to its goals. The main goal of the NCAA is to sell itself as an amateur organization. As the Supreme Court held, the NCAA has a legitimate purpose in promoting the amateur status of its student-athletes in order to sell its "brand" of athletics.[226] Allowing the NCAA to capitalize off the use

217. *See supra* Part IV., C.
218. *See supra* Part II.
219. Division I Manual, *supra* note 1, CONST. art. 1, § 1.3.1.
220. *Id.* at Rule 12.1.2.
221. Hawes, *supra* note 22.
222. *Id.*
223. *Id.*
224. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 135-40 (1995).
225. *Id.* at 142.
226. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101-02 (1984).

Haslam: Leveling the Playing Field: Using Rational Basis With A Bite asMe

of student-athletes' images generates a significant amount of revenue each year.[227] An economic study in the late 1980s estimated that Patrick Ewing generated approximately $12 million in revenue over a four-year span for Georgetown University while he played on their basketball team.[228] And in 1999, the NCAA sold the rights to broadcast the sixty-three games of the Final Four tournament to CBS for $6.3 billion.[229] One year later, the NCAA agreed to let ABC broadcast the football Bowl Championship Series in exchange for $400 million.[230] As a result of similar deals in recent years, the budgeted NCAA revenues for the 2009-10 fiscal year were $710 million.[231]

Today the potential exists for individual student-athletes to make millions of dollars a year off of their reputations,[232] but they are not permitted to do so by the NCAA regulations.[233] And while the student-athletes may not capitalize on their fame, the NCAA member institutions divide the yearly profits from commercial licensing fees amongst themselves.[234] The NCAA may claim that it exists to promote amateurism by protecting student-athletes from exploitation by commercial enterprises, but it has in fact become a very large commercial enterprise itself.

Because rational basis with a bite looks at a legislative body's stated reasons for enacting regulations and "the actual reasons for the plan in light of the real-world circumstances,"[235] the NCAA amateurism regulations violate equal protection. The stated goal of the regulations is to promote amateurism in collegiate athletics, [236] but the actual goal of the NCAA is to retain control over its largest source of revenue. Clearly, allowing student-athletes to retain amateur eligibility while competing professionally in any sport is contrary to the founding principles of the Association.[237] In that

227. Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 694 (2003).

228. *Id.* (citing PAUL C. WEILER & GARY R. ROBERTS, SPORTS & THE LAW 796 (2d ed. 1998)).

229. Freedman, *supra* note 227, at 694.

230. *Id.*

231. NCAA 2009-10 Budget, *available at* http://www.ncaa.org/wps/wcm/connect/6d3874004e51aadc96e0d622cf56f2f3/2008-09+BUDGET+(Budget+moves+in+08-09)_FINAL.pdf?MOD=AJPERES&CACHEID=6d3874004e51aadc96e0d622cf56f2f3.

232. See Sean Hanlon & Ray Yasser, *"J.J. Morrison" and His Right of Publicity Lawsuit Against the NCAA*, 15 VILL. SPORTS & ENT. L.J. 241, 267 (2008).

233. Division I Manual, *supra* note 1, at rule 12.5.1.

234. Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 505-45 (2008).

235. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (en banc), *rev'd* 551 U.S. 701 (2007) (Kozinski, J., concurring).

236. Answer Brief, *supra* note 67, at 19-20.

237. *See supra* Part II.

Ohio Northern University Law Review, Vol. 37 [], Iss. 1, Art. 11

respect, the means used by the NCAA to accomplish its amateurism ends are irrational.

Further, it is unreasonable for the NCAA to restrict the ability of its student-athletes to pursue a professional career in a second sport by preventing all student-athletes from receiving endorsement monies. In this instance, the NCAA can create an exception for student-athletes to use endorsement and sponsorship monies to compete professionally. The NCAA already allows a number of exceptions to its general prohibition on promotional activities.[238] Particularly, the NCAA allows national Olympic teams to use student-athletes' images in promotional items.[239] The NCAA can craft the rule in such a manner that any effect on the NCAA's legitimate purpose of raising revenue, as recognized by the Supreme Court,[240] is *de minimus*. Balancing the need of the NCAA to retain control over the marketability of its student-athletes against the right of those very same student-athletes to have a career and compete professionally in a sport that is not their collegiate sport is irrational. And therefore, the NCAA amateurism regulations do not pass constitutional muster under the rational basis with a bite standard.

V. CONCLUSION

As demonstrated, the NCAA rule allowing student-athletes to compete professionally in a second sport unfairly discriminates against athletes in nontraditional and individual sports. Further, the rule allowing student-athletes to compete professionally is contrary to the founding purposes of the NCAA. While student-athletes may have previously been barred from brining Constitutional claims against the NCAA, the Supreme Court's recent decision in *Brentwood* opens the door for the NCAA to be held liable under the state action doctrine. If that is the case, then there is an imperative duty on the courts to protect the freedom of student-athletes to pursue a professional career in a secondary sport of their choice without running afoul of the NCAA's amateurism regulations. The most prudent way for that right to be protected is for the Supreme Court to formally adopt and employ the rational basis with a bite standard of review.

238. Division I Manual, *supra* note 1, § 12.5.
239. *Id.* at Rule 12.5.1.9.
240. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101-02 (1984).