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Administration of Amateur Athletics: The Time for an Amateur Athlete's Bill of Rights Has Arrived

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COMMENT

ADMINISTRATION OF AMATEUR ATHLETICS: THE TIME FOR AN AMATEUR ATHLETE'S BILL OF RIGHTS HAS ARRIVED

INTRODUCTION

A state high school athletic association[1] declared a high school basketball player ineligible for further participation in any school sport because he was married. It was, in part, the association's contention that if married students were present in locker rooms, the discussion would center around their sexual experiences. Therefore, a desirable objective, according to the association, was to exclude married students from the locker room to prevent discussions of sex.[2]

The Amateur Athletic Union (AAU)[3] refused to submit an international track meet it was sponsoring to its rival governing body, the National Collegiate Athletic Association (NCAA)[4] for certification. Due to the refusal, six athletes declined to participate in the AAU event for fear of threatened ineligibility and temporary suspension by the NCAA.

These two instances are representative of the types of constraints placed upon amateur athletes' competitive opportunities by the very organizations which are ostensibly designed to serve such individuals. It is interesting to note that the rules and decisions promulgated by these governing bodies which often impede amateur athletic participation are couched in phrases such as "protection of the athlete's own best interests" or "improvement and promotion of [amateur] sports."[5] In some instances these rulings effectively serve those stated purposes.[6] However, an amateur athlete's interest in

1. State high school athletic associations are members of the National Federation of State High School Associations (NFSHSA), a multisport organization which attempts to coordinate the activities of the fifty state members. The individual state associations, however, establish eligibility standards. The NFSHSA and its membership will be discussed in detail, *infra* pt. I (C).

2. Wellsand v. Valparaiso Comm. Schools Corp., No. 71H 122(2) (N.D. Ind. Sept. 1, 1971). Other reasons for such a ruling are that teenage marriages are on the increase, and excluding married students from extracurricular activities may discourage early marriage; married students need to spend more time with their families to insure a greater likelihood of a successful marriage; and married students are more likely to drop out of school, therefore marriage should be discouraged among students. *See* Moran v. School Dist. #7, 350 F. Supp. 1180 (D. Mont. 1972); Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1971).

3. The Amateur Athletic Union of the United States governs a variety of areas in the amateur athletic community. It will be discussed in detail, *infra* pt. I(A).

4. The National Collegiate Athletic Association governs amateur athletic activities on the college level. The NCAA will be discussed in detail, *infra* pt. I(B).

5. *E.g.*, The 1979 Official Handbook of the AAU Code at I [hereinafter cited as AAU Code].

6. For example, in the early days of modern athletics, these organizational rulings aided in protecting amateurism from gambling and competition fixing. *See* H. Savage, American College Athletics (1929). More recently, organizational regulation has been used to police athletes who abuse their amateur status by engaging in such activities as receiving benefits beyond their allotted scholarship or participating in restricted competitions for which they are ineligible because of age or experience. *See generally* Cross, *The College Athlete and the Institution*, 38 Law & Contemp. Prob. 151 (1973); 36 Mo. L. Rev. 400 (1971).

unfettered participation is often improperly infringed upon because of petty rivalries among governing bodies[7] or, more commonly, an inability on the part of the respective governing body to adapt to the rapidly changing role of amateur sports in America.[8]

This Comment will examine situations in which athletic participation is impaired by the actions of certain governing bodies. It will explore the amateur's remedies, both presently and potentially available, when his[9] interest in participation is jeopardized. Part I will familiarize the reader with the parties involved in this controversy: the amateur athlete and the most powerful organizational bodies which govern his activities. These governing bodies are the AAU, the NCAA and the National Federation of State High School Associations (NFSHSA). Part II will discuss the federal government's recognition of organizational problems in amateur sports and an attempted congressional solution, the Amateur Sports Act of 1978 (the Act).[10] It will also discuss how the Act falls short in its attempt to protect the amateur interest in participation. Part III will analyze the appropriateness of judicial intervention in arbitrating these disputes. Finally, the Conclusion and Appendices will evaluate the need for a federally enacted Athletes' Bill of Rights and propose such a bill, which would protect the opportunity to participate in amateur athletics.

I. THE PARTIES INVOLVED

Any analysis of amateur athletics must begin with a basic understanding of the status of the amateur and of the organizational bodies which govern his activities. "Amateur athletes by definition pursue their sports for reasons other than livelihood. There are no owners, no no-cut contracts, no trade offs, no obligations except to oneself and excellence."[11] The AAU offers a representative definition of an amateur as a person "who engages in athletic competition or exhibition soley [*sic*] for the pleasure and physical, mental or social benefits he derives therefrom and to whom sport is nothing more than an avocation."[12]

In the United States, there are essentially two broad types of athletic competition in which an amateur can participate: restricted and unrestricted. Restricted competition, which is the most common form of amateur activity,

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7. *See* Note, *The Government of Amateur Athletics: The NCAA-AAU Dispute*, 41 S. Cal. L. Rev. 464 (1968) [hereinafter cited as *Dispute*].

8. *See, e.g., NCAA Enforcement Program: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 3-15 (1978) [hereinafter cited as *1978 House Enforcement Hearings*] (statement of J. Brent Clark).

9. Masculine pronouns will be used throughout this Comment only to create uniformity and avoid confusion. There is absolutely no question that all athletes, both male and female, find equal difficulty in assuring the viability of their right to compete. Note, *Sex Discrimination and Intercollegiate Athletics*, 61 Iowa L. Rev. 420 (1975); Note, *Sex Discrimination in High School Athletics*, 57 Minn. L. Rev. 339 (1972).

10. 36 U.S.C.A. §§ 371-396 (West Supp. 1979).

11. *Amateur Sports Act: Hearings on S.2036 Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. 54 (1977) [hereinafter cited as *1977 Senate Hearings*] (statement of Kenny Moore).

12. AAU Code, *supra* note 5, at § 101.3(1).

includes all athletic competition which is limited to a specific group or class of amateurs, such as those who participate in high school or college programs.[13] This specific classification or grouping enables athletes from schools with essentially the same characteristics and objectives to compete against each other.[14] Unrestricted competition, however, encourages the participation of all amateur athletes without regard to the classifications contemplated by restricted competition, such as the amateur's age or year in school.[15] International events such as the Olympics and the Pan American Games are customarily unrestricted competitions.[16]

Despite the apparent differences which exist between restricted and unrestricted competitions, the administrative structure of the bodies which regulate their respective activities is quite similar. For example, both types of competitions have a central organization which has a constitution and by-laws governing those amateurs who participate. Infringement upon the amateur's ability to participate occurs in both because of these structural similarities.[17]

The amateur sports organizations, which have emerged over the years to oversee high school, college, and amateur club sports, have often engaged in duplications of effort in conducting athletic programs and competitions.[18] The Amateur Sports Act of 1978[19] was enacted in an attempt to bring some order to the amateur sports community. Unfortunately, this legislation falls short of meeting its objective because it is limited to the reorganization of unrestricted international competition under the auspices of the United States Olympic Committee (USOC). The USOC, which consists of nine multisport organizations and thirty-two national governing bodies, was founded in 1896 to act as this country's representative to the International Olympic Committee.[20]

An amateur athlete must be sanctioned or authorized by his governing organizational body before he may participate in any international competition.[21] Perhaps most representative of such an organization is the AAU. Domestic events, which are usually sanctioned by high school and college organizations, and are generally restricted, are without the purview of the

13. *See* J. Weistart & C. Lowell, The Law of Sports 4 (1979). *See generally* H. Appenzeller, Athletics and the Law (1975).

14. Theoretically, such grouping intensifies competition and allows each athlete to choose the level at which he is best suited to participate. For example, the NCAA has three divisions of restricted competition with allegedly varying degrees of competitive opportunities. *See* 2 The Final Report of the President's Commission on Olympic Sports 333 (1977) [hereinafter cited as PCOS].

15. J. Weistart & C. Lowell, *supra* note 13, at 5.

16. *Id.*

17. *See generally* 2 PCOS, *supra* note 14, at 277-98, 331-82.

18. A good example of this duplication is the struggle to control amateur basketball in the United States. The NCAA pressed for a change in leadership when amateur basketball was controlled by the AAU. This effort resulted in a new governing body, the American Basketball Association of the United States of America, comprised of twelve different groups, including the NCAA and the AAU. *Id.* at 10-11.

19. 36 U.S.C.A. §§ 371-396 (West Supp. 1979).

20. *See* S. Rep. No. 770, 95th Cong., 2d Sess. 2 (1978) [hereinafter cited as 1978 Senate Report].

21. *See* note 121 *infra* and accompanying text.

Act.[22] The NCAA at the college level and the NFSHSA at the high school level regulate the amateur's ability to participate in restricted domestic competitions.[23] A review of some of the history and of the administrative structure of these representative organizations will help provide an understanding of the restrictions imposed upon the amateur athlete's freedom of athletic participation.

A. *The Amateur Athletic Union of the United States*

The AAU was established in 1888 to promulgate rules for amateur athletics in light of long-standing exploitation by individuals who viewed such activities as fair game for gambling and competition fixing.[24] The AAU almost single-handedly regulated the field for both international and domestic participation before the emergence of intercollegiate organizations as a force in amateur athletics.

At present, the AAU consists of more than 7,000 athletic clubs which are organized into fifty-eight associations throughout fifteen regions of the country.[25] In accordance with the Amateur Sports Act of 1978, the AAU serves as the national governing body for eight sports[26] and conducts programs in ten other sports.[27] The local level of the AAU's organizational structure consists of affiliated multisport clubs which are administered by volunteers and offer a variety of competitive opportunities. Any amateur athlete may join a local club and be eligible for competition by registering with the regional association. These associations carry out the rules and regulations of the AAU. Although each association has its own constitution and by-laws, they normally reflect the overall philosophy of the national organization.[28]

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22. 1978 Senate Report, *supra* note 20, at 10.

23. These two associations are representative of the many multisport organizations that regulate restricted participation. Many of these organizations are better known by their grouping of initials. These initials will be set out for purposes of recognition. Some of these organizations include the Association for Intercollegiate Athletics for Women (AIAW), the American Alliance for Health, Physical Education, and Recreation (AAHPER), the United States Military, the National Catholic Youth Organization Federation (CYO), the National Jewish Welfare Board (JWB), the National Association of Intercollegiate Athletics (NAIA), the National Junior Collegiate Athletic Association (NJCAA), the Young Men's Christian Association (YMCA) and the Young Women's Christian Association (YWCA). This list does not include organizations which are structured much like multisport organizations but control only a single sport, such as the United States International Skating Association (USISA), which regulates speedskating. 2 PCOS, *supra* note 14, at iii.

24. *Id.* at 277; *see* note 6 *supra*.

25. 2 PCOS, *supra* note 14, at 277.

26. These sports include aquatics (diving, swimming, and water polo), track and field, boxing, bobsledding, luge, judo, weightlifting, and wrestling. It should be noted that an arbitration panel has ruled that the NCAA shall now serve as the governing body for wrestling. 2 PCOS, *supra* note 14, at 277. *See* note 122 *infra*.

27. As of 1977, the AAU supervised programs in basketball, baton-twirling, gymnastics, handball, horseshoe pitching, karate, synchronized swimming, taekwondo, trampoline and tumbling, and volleyball. 2 PCOS, *supra* note 14, at 277.

28. The Pacific AAU Association is the largest of these associations with over 30,000 registered athletes in more than 500 member clubs organized in 15 regional associations in 50 states. Like the vast majority of its counterparts, this association is operated almost exclusively out of the homes of volunteers. *Id.* at 279.

The national headquarters organization concentrates primarily on the maintenance of a comprehensive set of rules governing over 300,000 amateurs who participate in AAU sponsored events. It is at this policy and rule-making level that the amateur interest in athletic participation is jeopardized. Therefore, it is necessary to examine the rules concerning athletic eligibility and the procedural review of the enforcement proceedings as codified in The 1979 Official Handbook of the AAU Code.[29] These rules are not enacted by the individual sports committees, but by a Board of Governors which represents all the sports in which the AAU is actively involved.[30] The effect of this arrangement is to create a general set of rules as to eligibility, with an apparent disregard for the unique characteristics of some sports. It would be more appropriate to offer governing bodies for each AAU sport greater autonomy, particularly in the development of eligibility rules, in order to avoid the hardship of improperly declaring an athlete ineligible because of uniform multi-sport rules.[31]

An amateur athlete who is declared ineligible to participate because of the overly general nature of the present rules must proceed through AAU administrative channels which redress grievances arising from the application of any rule or regulation.[32] State and federal courts have traditionally refused to rule on the fairness of AAU rules or the consequences resulting from their enforcement because of the AAU's status as a private voluntary association.[33] Some amateurs have been forced to seek judicial relief because the AAU remedial channels have proved to be ineffective. In 1978, Tom Allison, an amateur who had been in good standing[34] with the AAU for several years, was inexplicably suspended without a hearing, four days prior to participating in the Boston Marathon, an AAU sanctioned event. Allison resorted to the AAU grievance proceedings without success and filed a complaint in federal court.[35] At this point, the AAU agreed to formally review his suspension, and, aware of the capricious nature of its actions, lifted the suspension and paid damages in an out-of-court settlement. One cannot help but conclude that this remedy was too little and too late for an amateur who, by the time settlement was agreed

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29. There are essentially two types of rules promulgated by the AAU—rules of play and rules of eligibility. Rules of play are enacted by a committee for each sport, with the assistance of individual clubs and associations. Rules of eligibility are set forth by the Board of Governors of the AAU. AAU Code, *supra* note 5, at §§ 203.15(c), 208.10.

30. *Id.* at § 204.1(c).

31. General eligibility rules as to age or sex requirements may be of some importance in contact sports, such as wrestling, but are of no consequence in non-contact sports such as track and field or swimming. *See generally* A. Flath, A History of Relations Between the National Collegiate Athletic Association and the Amateur Athletic Union of the United States (1964).

32. AAU Code, *supra* note 5, at § 212.3.

33. *E.g.*, Samara v. NCAA, 1973-1 Trade Cas. (CCH) ¶ 74,536 (E.D. Va. 1973) (court refused to order the AAU to reverse a policy decision not to apply for NCAA certification to avoid an interorganizational dispute). The status of governing bodies as private voluntary associations is discussed in note 44 *infra*.

34. Good standing is generally considered to be the maintenance of one's status as an amateur. The AAU offers a more comprehensive definition of good standing. AAU Code, *supra* note 5, at § 203.15(c)(2)(i)-.15(c)(2)(iv).

35. Allison v. AAU, No. 78 915F (W.D. Pa. Aug. 21, 1978).

upon, was denied the right to participate in two major athletic events.[36] Tom Allison is one of the few amateurs who had the time and the money to challenge an arbitrary ruling by such a governing body. This situation is not peculiar to the AAU, as the NCAA and the state high school associations have acted in similarly arbitrary fashions.[37]

B. *The National Collegiate Athletic Association*

The role of collegiate athletics in the United States has undergone a dramatic transformation since its birth in the mid-nineteenth century as a student-run extracurricular activity.[38] As athletic programs have grown in importance, student involvement in the management and control of athletics has been eclipsed by the development of complex organizations under the direction of school administrators.[39] Today, colleges and universities are second only to high schools in offering comprehensive amateur athletic programs. The largest governing organization at the college level is the NCAA. It is comprised of more than 730 educational institutional members, roughly forty percent of the nation's four-year colleges and universities.[40]

Initially, the NCAA existed solely to formulate official playing rules for the individual sports and to aid in the recruitment of faculty members.[41] At present, the NCAA is the primary governing body for intercollegiate sports and is often emulated by other athletic associations.[42] Through the representatives of its member institutions, the NCAA promulgates regulations for the conduct of intercollegiate athletics, investigates and disciplines alleged violations of its regulations, and determines whether an investigated institution or athlete has violated the regulations. Now that the NCAA is a hybrid amalgamation of executive, legislative, and judicial bodies, Congress and the judiciary have intervened on behalf of amateurs whose ability to participate has been infringed upon by the NCAA.[43]

The NCAA purports to be a voluntary association,[44] therefore its members

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36. Allison was later barred from participating in the Cleveland-Revco Marathon because of his earlier AAU suspension from the Boston Marathon. *Id.*

37. *See* Introduction, *supra,* and notes 53-57, 61, 67-72 *infra* and accompanying text.

38. *See* Hollis, *Intercollegiate Athletics,* in College Life 245 (M. Fulton ed. 1921). *See generally* H. Savage, *supra* note 6.

39. The present organizational structure of college sports offers no provision for student participation. *E.g.,* NCAA Const. 3-2, National Collegiate Athletic Association, 1979-80 Manual of the National Collegiate Athletic Association 15 [hereinafter cited as NCAA Manual].

40. 2 PCOS, *supra* note 14, at 331. Other governing bodies on the college level include the National Association of Intercollegiate Athletics (NAIA), which governs more than 500 small colleges and universities, *id.* at 325; the Association for Intercollegiate Athletics for Women (AIAW), which coordinates nearly 800 women's sports programs, *id.* at 305; and the National Junior College Athletic Association (NJCAA), which governs approximately 600 two-year college programs, *id.* at 383.

41. *See* Hollis, *supra* note 38, at 2; H. Savage, *supra* note 6, at 11.

42. See the discussion on the Association for Intercollegiate Athletics for Women, the National Association of Intercollegiate Athletics, and the National Junior Collegiate Athletic Association in 2 PCOS, *supra* note 14, at 305-14, 325-29, 383-92.

43. *See* notes 90-125, 133-77 *infra* and accompanying text.

44. A voluntary association consists of a group or organization whose members are brought together to achieve a common purpose or objective. Since membership is purportedly voluntary,

must agree to certain conditions and obligations of membership. Member institutions agree: "To conduct themselves in a manner consistent with NCAA legislation adopted by a majority of votes of delegates at the NCAA's annual convention, and such rules and regulations as are promulgated pursuant thereto by the NCAA Council, an elected 18-member body that rules the association between conventions."[45] The member institutions further agree to be monitored for compliance with these rules by the NCAA Infractions Committee[46] enforcement staff. Members are encouraged to contact the enforcement staff for ad hoc interpretations as questions arise concerning the application of the rules and regulations.

It is the responsibility of the enforcement staff's twelve investigators to examine any allegation of an infraction on the part of a member institution or its athletes. If an allegation is deemed serious enough, an investigation may be conducted during which the accused institution is informed of the specific allegations of infractions being made against it. At this point, the member institution conducts its own investigation concurrent with that of the Infractions Committee enforcement staff.[47] Both parties present their findings to the Infractions Committee, which then rules on the charges. If the allegations are substantiated by the enforcement staff, penalties, such as institutional probation[48] or student-athlete ineligibility,[49] may be assessed. Numerous occasions have arisen wherein member institutions and individual athletes have sought judicial relief to overturn what they have considered unjust results stemming from this enforcement program.[50] Such judicial activity encouraged Congress to initiate an inquiry of its own.[51] A recently concluded House of Representatives investigation of the NCAA enforcement program resulted in a series of proposed changes in the program designed to avoid the imposition of unnecessary hardship on a member institution or on an amateur eager to compete.[52] Throughout the congressional proceedings,

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it is deemed to be a privilege which can be accorded or withheld at the discretion of the association. Furthermore, because of its voluntary status, the association may adopt any rules concerning eligibility for membership, provided that they are not in contravention of overriding legal principles. *See* Comment, *Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 983 (1963).

45. NCAA Const. 4-2, NCAA Manual, *supra* note 39, at 25. In particular, the individual athletic conferences promulgate rules of eligibility during the regular season, while the NCAA Council formulates eligibility rules for post-season competition.

46. The Infractions Committee is a five member body appointed by the NCAA Council. NCAA bylaw 10-3-j, NCAA Manual, *supra* note 39, at 142.

47. The investigatory stage is actually a two-step process. Following the preliminary inquiry, the Infractions Committee reviews the results and may then authorize an Official Inquiry. Enforcement Procedure § 1, NCAA Manual, *supra* note 39, at 142.

48. Enforcement Procedure § 7, NCAA Manual, *supra* note 39, at 145-46. The penalized institution may appeal an adverse decision to the Council, which considers the matter *de novo*. The Council may reverse, expand, or completely alter the findings and penalties of the Infractions Committee.

49. Student-athletes are declared ineligible by the member institution rather than by the NCAA. Enforcement Procedure §§ 6-7, NCAA Manual, *supra* note 39, at 145-46.

50. *See* notes 153-57 *infra* and accompanying text.

51. *See* notes 75-123 *infra* and accompanying text.

52. *See* H.R. Rep. No. 69, 95th Cong., 2d Sess. 8-54 (1978) [hereinafter cited as 1978 Subcomm. Report].

the NCAA organization was characterized by many of those who function within it as a darkly closed structure which does not always fairly resolve its internal problems. "[M]ost member institutions bow down without a whimper; those that stand up against the NCAA do so with trembling and continuing fears of retaliatory retribution that can be dispensed without warning by a powerful arm of arbitrary force."[53]

The House made a number of recommendations to the NCAA calling for self-reform measures designed to insure fair treatment of participating members. The subcommittee found that the investigatory stage of the enforcement proceedings was heavily weighted in favor of the NCAA.[54] It was recommended that the Infractions Committee should not perform the functions of both investigator and judge.[55] It was further suggested that due process protections were not being provided at the hearing stage.[56] This is an important consideration when penalties are being assessed against institutions and individuals and their participatory interests are at stake. The subcommittee recommended "readily ascertainable evidentiary standards or policy on burden of proof . . . to [assure] fundamental fairness in the system."[57] Finally, the House, in a series of recommendations, suggested a restructuring of the appeals process to create a true *de novo* review and a reorganization of the system for assessing penalties. All eighteen of the recommendations for internal reform were initially rejected by the NCAA on the same day that the subcommittee report was issued. Walter Byers, the executive director of the NCAA, best summarized the attitude of the association by saying: "It seems to me it's difficult to justify within Congress . . . that a subcommittee of the House is going to dictate what a private voluntary association of education institutions must do."[58] In an attempt to appease the subcommittee, the NCAA has recently modified its position and acquiesced in six of the subcommittee's recommendations.[59]

This "holier than thou" attitude of both the NCAA and the AAU has resulted in power struggles between the two organizations when they exercise concurrent jurisdiction over restricted and unrestricted competitions.[60] Such disputes have invariably harmed the amateur athlete by infringing upon his right to participate. The 1973 AAU-sponsored track meet between the United States and the Soviet Union provides one illustration of the effect of these disputes. Due to the AAU refusal to apply to the NCAA for certification, six

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53. This statement by Mississippi State University's attorney is representative of those presented by a variety of witnesses to the subcommittee. *1978 House Enforcement Hearings, supra* note 8, at 125 (statement of Erwin C. Ward). For a further discussion of the arbitrary acts of the NCAA, *see* J. Weistart & C. Lowell, *supra* note 13, at 98-107.

54. 1978 Subcomm. Report, *supra* note 52, at 25.

55. *Id.* at 26.

56. *Id.* at 25-26.

57. *Id.* at 34.

58. N.Y. Times, Jan. 11, 1979, § D, at 21, col. 5.

59. The proposals adopted include elimininating the Infractions Committee's role of supervising the investigative staff and establishing standards for the admission of evidence at the enforcement hearing. This partial acquiescence may not be sufficient to deter further congressional inquiry. *Id.*, July 13, 1979, § A, at 16, col. 6.

60. *See* note 61 *infra* and accompanying text.

NCAA athletes declined the opportunity to compete on the national team rather than risk NCAA ineligibility or expulsion. The two athletes who did compete without certification were declared ineligible by the NCAA.[61] The abuses that have resulted under the auspices of groups, such as the NCAA and the AAU, have also occurred on the high school level through the regulatory activities of the NFSHSA's member associations.

C. *National Federation of State High School Associations*

The NFSHSA is the organizational body of autonomous state associations encompassing more than 20,000 high schools in fifty states and the District of Columbia.[62] It was established nearly a century ago in response to charges that high school athletic competitions were run primarily for profit, with little or no regard for the athletes involved.[63] Despite its size and potential influence, the NFSHSA is not authorized by its membership to create organizational athletic policy.

Furthermore, the NFSHSA does not attempt to regulate high school athletic activities. Its rule-making efforts focus on the rules of play of restricted competition rather than on developing rules pertaining to an athlete's eligibility to compete. Eligibility standards, like all the other important organizational decisions, are determined exclusively by the individual state high school associations.[64] As the president of the NFSHSA has stated, "the Federation should not sit in Elgin, Illinois [NFSHSA headquarters] and decide what they should do in Florida and California."[65] This attitude has resulted in eligibility standards that vary considerably from state to state. The unfortunate result is that an athlete's ability to participate is more often a function of geographical happenstance than athletic ability or dedication. To assure that such a questionable approach goes unchallenged, the NFSHSA has vowed that "the National Federation will work diligently to assure no government or private agency attempts to interfere in the use of school-operated facilities and with regularly scheduled school sponsored athletic events."[66]

Although the NFSHSA serves to perpetuate the existing system, it is the individual state associations that are responsible when a high school amateur is denied an opportunity to compete. Two criticisms of state association regulation of high school sports are the tenor of the eligibility rules[67] promul-

61. Samara v. NCAA, 1973-1 Trade Cas. (CCH) ¶ 74,536 (E.D. Va. 1973). For further background on the long-standing dispute between the NCAA and the AAU, see *Dispute*, *supra* note 7. It is interesting to note that some of these athletes had competed in the 1972 USA-USSR track meet, which was also uncertified, and no penalties were imposed by the NCAA. 2 PCOS, *supra* note 14, at 342.

62. *Id.* at 359.

63. *See* 36 Mo. L. Rev. 400 (1971).

64. 2 PCOS, *supra* note 14, at 362.

65. *Public Hearings of the President's Commission on Olympic Sports*, June 11, 1976, at 160 (statement of Floyd Lay).

66. *Id.* at 166.

67. A representative eligibility rule promulgated by the Kansas State High School Association provides: "Athletic events for any student who has been or is a member of a large instrumental or vocal ensemble are not approved on Friday of the state music festival weekend if these ensembles

gated and the subsequent manner of enforcement.[68] The various association rules that prohibit married students from participating in team sports provide one example of a situation which many observers ironically view as innocuously whimsical.[69] Unfortunately, some high school association rules pose serious problems for the individual athlete as well as his school. After several years of intensive training, Bart Conner, a high school gymnast from Illinois, qualified to compete for the United States in the 1975 Pan American Games. He competed and won three medals, including one Gold Medal. Upon returning to Illinois, he found himself disqualified from competing in events regulated by the state association for the remainder of the school semester because his absence from school for more than ten consecutive days violated a state association eligibility rule.[70] This situation raised two interesting problems. First, Conner was ruled ineligible by the state association rather than by his own high school, which presumably was better equipped to evaluate the effect of Conner's absence from school. Second, the absenteeism rule would have been reasonable if it was designed to protect the athlete against unfavorable academic consequences. The focus of the rule, however, is directed toward athletics. It is designed to insure that high school athletes compete solely on the high school level. The rule, therefore, forces a young amateur such as Conner to choose between representing his school in interscholastic competition and representing the United States in international competition, even if the two do not conflict.

Many state associations extend their regulation of extra-curricular competition through the summer by restricting participation in camps or clinics.[71] Other rules regulate in-season extra-curricular competition even when the athlete is competing as an individual and not as the representative of a non-school organization.[72] This supervision of high school amateurs has frequently been so extensive that the associations often act *in loco parentis*.[73]

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are entered in the state festival. This applies on the weekend a school's state music festival is scheduled only. This will not apply on Easter weekend since music festivals will be held on Wednesday and Thursday. In these years, this regulation shall apply to any athletic events scheduled on Wednesday." The Kansas State High School Activities Association, 1975-76 Handbook 22. An example of the effect of this rule is that a tuba-playing track star in Kansas cannot run for his high school team if his school's ensemble participates in the state music festival on the same day as a scheduled track meet.

68. *See* Note, *High School Athletics and Due Process: Notice of Eligibility Rules*, 57 Neb. L. Rev. 877 (1978).

69. *See* note 2 *supra* and accompanying text.

70. Illinois High School Association Bylaw A-1 § 8, 1974-75, Official Handbook 15. The regulatory language reads: "If his school connection shall have lapsed for a period of more than ten consecutive days (disabling sickness of self or immediate family excepted) he shall be ineligible for the remainder of the semester."

71. *E.g.*, Kite v. Marshall, 454 F. Supp. 1347 (S.D. Tex. 1978) (high school basketball player barred from summer camp participation by the state association).

72. *E.g.*, Maine State Principal's Association Handbook 1974-75, at 36 (a pupil shall be ineligible to participate in high school athletics if the pupil plays on an outside team to which the school authorities object); The 51st Annual Official Handbook of the Minnesota State High School League 1973-74, at 61 (student shall not participate on an independent team in the same sport in which he participates during the school year).

73. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non Constitutional Analysis*, 117 U. Pa. L. Rev. 373 (1969).

The associations cannot defend their actions on the grounds that the high school athlete is unable to decide when and where he should participate in sports. Most high school students have parents who are presumably capable of making decisions in the best interests of their children. Moreover, it has been suggested that a high school principal, after consultation with coaches and teachers, would be able to make a more informed decision about a student's athletic endeavors than a state high school association.[74]

There is no question that the regulation of high school athletics must be reformed to avoid further infringement upon the amateur's right to participate. Restricted high school competitions would be better coordinated if the NFSHSA were granted greater authority to revise and uniformly adapt many of the archaic regional association rules, particularly with regard to eligibility requirements, that have gone unchallenged for years.

II. GOVERNMENTAL INTERVENTION IN AMATEUR ATHLETICS

In 1974, the Senate Committee on Commerce concluded that "it is no longer advisable to permit elements of the present amateur sports structure in the United States to continue without substantial reform . . . [and] that needed change will not come about voluntarily, nor will further efforts on the part of the Congress to seek voluntary change be successful."[75] This statement is representative of the conclusions drawn by the various congressional committees that have sought to remedy the organizational problems in amateur athletics. The Amateur Sports Act of 1978[76] is the culmination of these legislative efforts. Prior governmental attempts to resolve problems within the amateur athletic community must be examined in order to better understand the 1978 Act.

A. *The Need for Legislative Intervention*

Almost without exception, the thrust of all legislative proposals dealing with amateur athletic reform, including the 1978 Act, has been toward international athletic participation. This type of amateur competition is significant and undoubtedly more glamorous to the general public, but the vast majority of amateurs are not involved in international competitions.[77] Therefore, an athlete with a grievance pertaining to a restricted domestic competition is forced to rely upon the amorphously defined judicial remedy.[78]

The need for legislative intervention in the administration of American participation in international amateur athletic competition arises from two interrelated problems. One concern has been the unresponsive role of the USOC in representing amateurs as the governing body for American participation in the Olympics.[79] The 1974 Senate Committee concluded that the USOC,

74. Interview with John A. McCahill, general counsel for the PCOS, Feb. 17, 1979.

75. S. Rep. No. 850, 93d Cong., 2d Sess. 6-7 (1974) [hereinafter cited as 1974 Senate Report].

76. 36 U.S.C.A. §§ 371-396 (West Supp. 1979).

77. *See* notes 11-13 *supra* and accompanying text.

78. *See* pt. III *infra*.

79. The USOC is the only organization recognized by the International Olympic Committee, a status enjoyed by the USOC since the Olympics were revived in 1896. *See* 2 PCOS, *supra* note 14, at 393 *et seq.* The USOC is empowered by federal charter to act in this capacity. 36 U.S.C.A. §§ 371-382b (West Supp. 1979).

as then structured,[80] often did not respond directly to the needs of amateur athletes. Moreover, the Committee found that the organization was not affected by public criticism because "their source of authority and power lies in their recognition by private international organizations, which are beyond the influence of the American people and the Congress."[81]

The second problem is the long-standing disputes which have permeated the administration of international amateur athletics. The administrative bodies have frequently failed to adequately serve the amateur and have quite often demonstrated "an inordinate capacity to engage in petty disputes coupled with a fierce determination to perpetuate their own rule over amateur sports."[82] Comments such as these have been directed at the NCAA and the AAU in their almost century long struggle over the administrative control of amateur athletics.[83] Initially, the struggle involved basketball,[84] but it has recently spread to other sports such as track and field.[85] The results of such disputes which abridge the amateur's opportunity to compete are that the United States' ability to administer amateur athletics is seriously questioned in international circles, and the amateur's opportunity to compete is jeopardized.[86]

In the early 1960's, the NCAA and the AAU were in dispute as to which organization should govern American participation in international track and field. The NCAA contended that the AAU should share its long-standing

80. The USOC is an organization of organizations Many of the individual organizations serve as governing bodies for the various Olympic sports. *See* 2 PCOS, *supra* note 14, at 404.

81. 1974 Senate Report, *supra* note 75, at 11. The Committee specifically found that:

"*First,* neither the public nor the athletes governed by USOC rules have a voice in the selection of the organizations which rule individual amateur sports and which control American participation in the international Olympic Games. Private, international groups make such basic decisions, with no possibility of the athletes or the public having a role in the selection process.

"*Second,* once selected, some national sports federations have used their position to insulate themselves and the USOC from challenges by groups which believe they can better perform the function of a national sports federation. The USOC rules cited above are part of that effort.

"*Third,* groups which received charters half a century ago, when they were the dominant organizations in particular sports, have continued to be the controlling national sports federations, even though other groups have developed larger and more comprehensive programs in those sports. The AAU, with its eight sports (and sparse programs in many of them), is the most prominent example of this problem.

"The cumulative effect of these elements is twofold. First, the individuals administering the organizations are not always directly responsible to the athletes, who are most affected by their rules, policies, and squabbling. Second, the organizations are not responsive to public criticism, because their source of authority and power lies in their recognition by private international organizations, which are beyond the influence of the American people and the Congress." *Id.* at 10-11.

82. *The Amateur Athletic Act of 1974: Hearings Before the Senate Comm. on Commerce,* 93d Cong., 1st Sess. 3 (1973) [hereinafter cited as 1973 Senate Hearings] (statement of Senator James B. Pearson).

83. *See generally* A. Flath, A History of Relations Between the National Collegiate Athletic Association and the Amateur Athletic Union of the United States (1964); *Dispute, supra* note 7.

84. *See* 1974 Senate Report, *supra* note 75, at 12-13; J. Weistart & C. Lowell, *supra* note 13, at 110; note 18 *supra.*

85. *See* 2 PCOS, *supra* note 14, at 221.

86. *See* notes 60-61 *supra* and accompanying text.

control over the sport because the NCAA was responsible for the welfare of the student athletes who participated. The AAU rejected this suggestion and refused to approve track and field events if the sponsor permitted the NCAA to sanction the event, contending that under international rules only the AAU could sanction such an event.[87] The effect of this position was to banish from international competition any amateur who sought to compete in an event not approved by the AAU. Moreover, if a college athlete were to compete in an AAU approved, non-NCAA approved event, he risked being declared ineligible for further NCAA competition.

The amateur who sought to compete internationally was placed in a precarious position by the organizations that purportedly represented his interests. President Kennedy, cognizant of the potentially disastrous consequences such a situation would have on Olympic competition, requested that General Douglas MacArthur attempt to resolve the dispute. General MacArthur initially regarded his role as that of a mediator, but after a few meetings with the rival organizations concluded that their respective positions were intractable. MacArthur, convinced that the organizations would not voluntarily reach a compromise, assumed the role of arbitrator and offered a solution to the problem.[88] The arbitration provided a temporary truce to this athletic warfare which lasted through the 1964 Olympic games but then disintegrated into the previous state of petty rivalry.[89]

In 1965, the Senate proposed a resolution of the dispute. The Commerce Committee[90] unanimously recommended that the Senate authorize the Vice President of the United States to appoint an independent board of arbitration to consider the issues and render a final, binding settlement between the NCAA and the AAU.[91] It was the Committee's desire that such a solution serve to "protect and provide for the welfare of the individual amateur athlete, . . . achieve the broadest possible participation by amateur athletes in competitive sports, and . . . maintain a harmonious and cooperative relationship among all amateur athletic organizations."[92] Both organizations initially agreed to be bound by the decision of the arbitrators; however, the NCAA reneged on this agreement when the report was made public in 1968.[93] This turn of events led Theodore W. Kheel, the chairman of the arbitration panel, to conclude that "dealing with the teamster problem is nothing when compared with working with the NCAA and the AAU."[94]

87. *See Dispute, supra* note 7, at 470-74.

88. General MacArthur's efforts are described in detail by Colonel Earl Blaik, his principal assistant, in *Providing for the Settlement of Disputes Involving Amateur Athletics: Hearings Before the Senate Comm. on Commerce,* 89th Cong., 1st Sess. 272-87 (1965).

89. *Id.*

90. The Commerce Committee was assigned to review the disputes in amateur athletics because of the nationwide organizational contacts of the NCAA and the AAU. Congress derives such power to review activities of interstate commerce from the Commerce Clause of the Constitution. U.S. Const. art. I, § 8.

91. S. Rep. No. 753, 89th Cong., 1st Sess. 2 (1965).

92. *Id.*

93. The NCAA purportedly rejected the decision because it awarded total sanctioning power to the AAU. J. Weistart & C. Lowell, *supra* note 13, at 110 n.595.

94. *1973 Senate Hearings, supra* note 82, at 149 (attributed to Mr. Kheel by Senator James B. Pearson).

The Committee reluctantly concluded that voluntary reform would never occur. Several years later, the same committee reported out, and the Senate passed,[95] the Amateur Athletic Act of 1974.[96] The 1974 Act never became law because the Ninety-third Congress adjourned before the House acted on the proposed Act;[97] however, it provided an impetus to solve many of the administrative problems that have plagued amateur sports.

B. *The Amateur Athletic Act of 1974*

The legislative objectives of the 1974 Act were to: (1) create a public device to insure that the most representative and capable private organizations would manage international competition;[98] (2) protect the rights of amateurs to participate without arbitrary controls;[99] (3) provide for the complete coordination of all amateur athletic activities;[100] and (4) create a national sports development program that would not only stimulate athletic competition but would provide and disseminate information on sports medicine to insure the health and safety of the athlete.[101]

The 1974 Act would have provided for a new and independent federal agency, the Amateur Sports Board, to implement the Act's objectives[102] and to issue charters to the most representative organization[103] for each Olympic sport. It would have protected the athlete's right to participate in international competitions by establishing mandatory mediation procedures.[104] Furthermore, the 1974 Act would have required that a chartered sports association sanction events in its sport that were sponsored by other sports groups, provided the event would have conformed with the general requirements for sanctioning.[105]

The thought of federal intervention in the area of amateur athletics and its "private voluntary" associations was considered too extreme a measure by many members of Congress.[106] Others believed that the legislation did not go far enough, as no remedy was provided for the problems in restricted domestic competitions.[107] The combination of these attitudes apparently

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95. The Act passed by a vote of 62-29. 120 Cong. Rec. 22462 (1974).

96. S.3500, 93d Cong., 2d Sess. (1974), *reported in* 1974 Senate Report, *supra* note 75, at 32-46.

97. *See* notes 106-07 *infra* and accompanying text.

98. Amateur Athletic Act of 1974, § 201(b)(2), *reprinted in* 1974 Senate Report, *supra* note 75, at 34.

99. *Id.* at § 202(d)(3), *reprinted in* 1974 Senate Report, *supra* note 75, at 38. The right to participate is discussed indirectly throughout the Act's enforcement provisions.

100. *Id.* at § 202(g), *reprinted in* 1974 Senate Report, *supra* note 75, at 39.

101. *Id.* at § 301(c), *reprinted in* 1974 Senate Report, *supra* note 75, at 42-43.

102. *Id.* at § 201, *reprinted in* 1974 Senate Report, *supra* note 75, at 33-35.

103. *Id.* at § 202(b), *reprinted in* 1974 Senate Report, *supra* note 75, at 36-37. This section outlines the prerequisites necessary to qualify as the most representative organization.

104. *Id.* at § 203(b), *reprinted in* 1974 Senate Report, *supra* note 75, at 39.

105. *Id.* at § 204, *reprinted in* 1974 Senate Report, *supra* note 75, at 40-41.

106. *See* Lowell, *Federal Administrative Intervention in Amateur Athletics*, 43 Geo. Wash. L. Rev. 729, 736 (1975).

107. *Id.* at 733.

provided the death knell for the 1974 Act and perpetuated the long-standing state of haphazard organization in the amateur sports community.

C. *The Amateur Sports Act of 1978*

The frustration resulting from the governmental failure to aid in the reform of amateur athletics created pressure for yet another examination of this country's international sports organizations. In 1975, President Ford appointed a Commission on Olympic Sports to determine the factors that impeded or tended to impede the United States from fielding its best teams in international competition. The President's Commission on Olympic Sports (PCOS), conducted a series of hearings over the course of almost two years. The principal features of its 1977 report included (1) the creation of a central sports organization, similar to the one proposed in the 1974 Act, to act as a national governing body;[108] (2) the establishment of a fair mechanism for arbitration of national governing body disputes;[109] and (3) the creation of procedures designed to guarantee the athlete's right to compete in important international competitions and to provide freedom from unreasonable organizational restraint.[110] The PCOS made it clear that it did not want the federal government running amateur athletics, but suggested that Congress legislate the PCOS recommendations by reorganizing the USOC and amending its 1950 charter.[111] The PCOS recommendations led to the creation of S.2727,[112] which was fully endorsed by the AAU, NCAA, and USOC.[113] The USOC also received encouragement from the AAU and the NCAA to begin its reorganization efforts.[114]

In December of 1978, the Amateur Sports Act of 1978[115] was signed into law. The Act enlarges the purposes and powers of the USOC to permit it to carry out its expanded role as the coordinating body for amateur athletic participation in unrestricted competition. The USOC's principal functions are to "promote and coordinate amateur athletic activity in the United States, to recognize certain rights for United States amateur athletes, to provide for the resolution of disputes involving national governing bodies, and for other purposes."[116] The USOC is empowered to achieve these purposes by (1) serving as the coordinating body for amateur athletics in the United States for

108. 1 PCOS, *supra* note 14, at 17.

109. *Id.* at 47-55.

110. *Id.* at 59-65.

111. *Id.* at 1.

112. In August of 1977, Senators Stevens, Culver, and Stone, all members of the PCOS, introduced S.2036 to implement the recommendations of that Commission. Shortly thereafter, the Senate Committee on Commerce, Science, and Transportation held hearings which led to the creation of S.2727, a revised version of the earlier bill. *1977 Senate Hearings*, *supra* note 11, at 3-35.

113. 1978 Senate Report, *supra* note 20, at 36-51.

114. The NCAA had resigned from membership in the USOC after the 1972 Olympic Games in Munich because of what it viewed as unresponsiveness and mismanagement on the part of the USOC. The commitment to reorganization led to a reconciliation between the two organizations and the NCAA was readmitted to the USOC in 1978. 1978 Senate Report, *supra* note 20, at 3.

115. 36 U.S.C.A, §§ 371-396 (West Supp. 1979).

116. 1978 Senate Report, *supra* note 20, at 1.

international competitions;[117] (2) recognizing an amateur sports organization as national governing body for any sport involving the Olympic games or the Pan American games[118] and (3) facilitating the resolution of conflicts and disputes involving its members and any national governing body, amateur sports organization, athlete or participant in protected competition as defined in the USOC's constitution and bylaws.[119]

The grant of authority to recognize appropriate amateur athletic organizations as national governing bodies for sports included in the Olympic and Pan American games is significant because (1) the Act requires that certain eligibility requirements be met before a national governing body will be recognized and (2) the USOC will have the responsibility of monitoring and overseeing these national governing bodies to insure that they are properly complying with the eligibility provisions of the Act. The Act expressly provides that no amateur sports organization is eligible to be recognized as a national governing body unless it—

> (3) agrees to submit . . . to binding arbitration conducted in accordance with the commercial rules of the American Arbitration Association in any controversy involving its recognition as a national governing body, as provided for in section 395 of this title, or involving the opportunity of any amateur athlete . . . to participate in amateur athletic competition, as provided for in the Corporation's constitution and bylaws; . . .
>
> (5) demonstrates that its membership is open to any individual who is an amateur athlete, . . . or to any amateur sports organization which conducts programs in the sport for which recognition is sought, or to both;
>
> (6) provides an equal opportunity to amateur athletes . . . to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, age, sex, or national origin, and with fair notice and opportunity for a hearing to any amateur athlete . . . before declaring such individual ineligible to participate.[120]

These provisions go some distance in protecting the amateur's interest in participating, but fall short of an express provision recognizing a right to compete. The Act also provides that amateur sports organizations, such as the NCAA and the state high school associations, which conduct restricted competitions, shall retain exclusive jurisdiction over such competitions. If one of these organizations seeks to sponsor an international competition, however, it must be sanctioned by the appropriate national governing body.[121]

The Act provides for federal funding of the USOC, which is significant inasmuch as it serves to demonstrate that amateur athletics are no longer a casual weekend activity, but instead a major industry. It authorizes a one-time federal grant of $16 million to the USOC for the further development and improvement of its programs and control over amateur sports.[122]

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117. 36 U.S.C.A. § 375(a)(1) (West Supp. 1979).

118. *Id.* at § 375(a)(4).

119. *Id.* at § 375(a)(5).

120. *Id.* at § 391(b)(3), (5), (6).

121. *Id.* at § 396.

122. The federal grant of $16 million was a reduction from an original allocation of $30 million. Pub. L. No. 95-482, 92 Stat. 1603 (1978). The $16 million grant is to be used to finance construction and improvement of athletic facilities, as well as to defray the costs of operating a complete amateur sports program. Pub. L. No. 95-482, 92 Stat. 1605 (1978).

The USOC grant, viewed in conjunction with the operating budgets of organizations such as the NCAA,[123] suggests that the public can no longer take a passive interest in the regulation of amateur athletics.

If these organizations are to continue to operate free from regulation from outside the sports world, some assurances must be made that the rights of the individual amateur are properly protected. Unfortunately, the 1978 Act falls short of offering adequate protection.

The Act does not directly provide for an Athlete's Bill of Rights to assure that the amateur's right to participate is protected. The provision relating to the athlete's opportunity to participate in amateur competition represents a compromise reached between Congress and the amateur sports community. Language contained in the first version of the Act, S.2036, included a substantive provision on athletes' rights.[124] This provision met strong opposition from high school and college organizations. Ultimately, the compromise provided that most of the substantive provisions on athlete's rights be included in the USOC Constitution and not the Act. As enacted, the statute provides that:

> [I]n its constitution and bylaws, the [USOC] shall establish and maintain provisions for the swift and equitable resolution of disputes involving any of its members and relating to the opportunity of an amateur athlete . . . to participate in the Olympic Games, the Pan-American Games, world championship competition, or other such protected competition as defined in such constitution and bylaws.[125]

The present grant has been challenged by the NCAA, which claims that no funding should be allocated until an arbitration involving the United States Wrestling Federation (USWF) and the AAU has been finally resolved. A dispute arose between the NCAA-sponsored USWF and the AAU over the regulatory control of United States participation in international wrestling. The AAU, longtime governing body for the sport, lost the arbitration because the arbitrators concluded that the USWF would be a more effective governing body. Although the decision of the arbitrators has been recently upheld in federal court, the AAU has refused to recognize the decision. USWF v. AAU, Wrestling Div., No. 78C430F (N.D. Ill. Feb. 22, 1979). This dispute is the first test of the 1978 Act's enforcement provisions. If the USOC is unable to enforce this decision it may indicate that the 1978 Act is inadequate to effectively deal with the organizational problems of amateur sports.

123. "The NCAA today regulates and polices the activities of members employing over 6,000 coaches, with athletic budgets of over one-half billion dollars. It negotiates television contracts which now range over $35 million a year, and dictates who, when, and through what medium 100 million fans witness collegiate sporting events." *1978 House Enforcement Hearings, supra* note 8, at 1 (statement of Representative John E. Moss).

124. *See* Appendix II, *infra*.

125. 36 U.S.C.A. § 382b (West Supp. 1979). The U.S.O.C. Constitution, as amended in 1979, provides in pertinent part that:

"No member of the U.S.O.C. may deny or threaten to deny any amateur athlete the opportunity to compete in the Olympic Games, the Pan-American Games, a world championship competition, or other such protected competition . . . nor may any member, subsequent to such competition, censure, or otherwise penalize, (a) any such athlete who participates in such competition, or (b) any organization which the athlete represents. The U.S.O.C. shall, by all lawful means at its disposal, protect the right of an amateur athlete to participate if selected (or to attempt to qualify for selection to participate) as an athlete representing the United States in any of the aforesaid competitions.

"Any amateur athlete who alleges that he or she has been denied by a U.S.O.C. member a right established by Article IX, Section 1, shall immediately inform the Executive Director of the

This provision represents the first legislative recognition of the amateur athlete's right to participate.

The weakness of this compromise provision of the Act is that it lacks adequate enforcement measures. S.2036 had provided for civil preventive relief including preliminary or permanent injunctions, as well as temporary restraining orders.[126] The availability of such devices would permit an aggrieved athlete to continue to participate while a dispute as to his eligibility is being settled. Furthermore, the bill's provision on arbitration was strengthened by its grant of jurisdiction to the United States district courts to enforce the decision of arbitrators.[127] No such mechanism for the enforcement of an arbitration decision exists in the 1978 Act.

Perhaps the greatest shortcoming of the Amateur Sports Act of 1978 is that it does not apply to athletes who only participate domestically. The only mention of restricted domestic competition is in the provision which states that the Act retains no jurisdiction over the bodies which govern such events.[128] One Congressman, aware that this troublesome situation was not addressed by the Act, proposed an amendment which would have required the observance of due process by the governing bodies of restricted domestic competitions before an amateur was denied the opportunity to compete.[129] The amendment was rejected, largely due to the efforts of the NCAA and the high school associations.[130]

The criticisms of the Amateur Sports Act's treatment of athlete's rights are not novel. Similar legislative initiatives have been greeted with much the same response: no protection is afforded the amateur who participates in restricted domestic competitions, and the extent of protection on the international level is not forceful enough. Unless these problems are reconsidered by Congress, the Act will have been instrumental only in placing the USOC in control of a group of independent governing bodies that defy centralized

U.S.O.C., who shall promptly cause an investigation to be made and steps to be taken to settle the controversy without delay. Without prejudice to any action that may be taken by the U.S.O.C., if the controversy is not settled to the athlete's satisfaction, the athlete may submit to any regional office of the American Arbitration Association for binding arbitration, a claim against such U.S.O.C. member documenting the alleged denial not later than six months after the date of denial. . . ." *USOC Constitution,* art. IX §§ 1-2, *to be codified at* 36 U.S.C.A. § 382b (West Supp. 1979).

126. *1977 Senate Hearings, supra* note 11, at 32.

127. *Id.* at 35.

128. 36 U.S.C.A. § 396 (West Supp. 1979).

129. Representative Santini's amendment provided that: "No amateur sports association which sponsors or arranges interstate amateur athletic competition may deny any athlete the right to participate in such amateur athletic competition for failure to meet the eligibility standards established by such association for participation in such amateur athletic competition (other than standards of athletic ability), unless such denial is based on a determination made by such association on the record after notice and an opportunity for a hearing. Such athlete shall have the right to be represented by counsel and to cross examine witnesses at any such hearing and shall be entitled to receive a copy of the record of such hearing." *Proposed Amendment to the Amateur Sports Act of 1978: Hearings on H.R. 12626 Before the Subcomm. on Administrative Law & Government Relations of the House Comm. on the Judiciary,* 95th Cong., 2d Sess. 37 (1978).

130. The NCAA and the high school associations continue to maintain that as "private voluntary association[s]" they should not be subject to congressional or judicial scrutiny. *See* notes 44, 58 *supra* and accompanying text.

leadership. Thus far, as evidenced by its inability to resolve the wrestling controversy between the NCAA and the AAU,[131] the USOC has not demonstrated the abilities needed to reform amateur sports. The amateur must, therefore, continue to rely upon the often haphazard administrative policies of the individual governing bodies, which have in the past infringed upon his ability to participate, or seek judicial remedies, which at present have not been fully defined.

III. JUDICIAL INTERVENTION

Judicial relief is a recourse of last resort for an amateur whose opportunity to participate has been infringed upon. He must either submit his grievance to a governing body ruling which may strip him of his opportunity to compete or challenge such a ruling in court.[132]

To date, no court has found that an absolute right exists to participate in amateur athletics. Instead, the judiciary has attempted to protect the opportunity to participate by following a rather tortuous route of policing the administration of amateur sports. This section will review the judicial use of the Due Process Clause of the fifth and fourteenth amendments[133] and, to a lesser extent, use of the Equal Protection Clause of the fourteenth amendment.[134] Other available constitutional safeguards which may provide greater assurances of protection for the amateur's interest in participation will also be examined.

Amateur participation in restricted domestic competition ordinarily arises in conjunction with the athlete's educational experience.[135] The NFSHSA has expressly stated that:

> Interscholastic athletics shall be an integral part of the total secondary school education program that has as its purpose to provide educational experiences not otherwise provided in the curriculum, which will develop learning outcomes in the areas of knowledge, skills and emotional patterns and will contribute to the development of better citizens. Emphasis shall be upon teaching 'through' athletics in addition to teaching the 'skills' of athletics.[136]

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131. *See* note 122 *supra*.

132. Judicial relief is normally sought only after all administrative remedies have been exhausted. *See* Note, *Judicial Review of Disputes Between Athletes and the NCAA*, 24 Stan. L. Rev. 903, 914 (1972).

133. U.S. Const. amends. V, XIV, § 1.

134. U.S. Const. amend. XIV, § 1. A detailed discussion of the court's use of the Equal Protection Clause in the context of amateur athletics, is beyond the scope of this Comment. The commentary in notes 158-65 *infra* and accompanying text is necessary to illustrate the role this constitutional device has played in developing recognition of an interest in amateur sports participation.

135. Although most restricted domestic competitions are governed by educationally affiliated organizations such as the NCAA and the state high school associations, some are governed by groups like the AAU which are unattached to the academic community. These competitions are also not covered by the 1978 Sports Act, thereby providing even less of a guarantee that an amateur may compete without organizational infringement. *See* note 148 *infra* and accompanying text.

136. 1970-1971 National Federation of State High School Sports Ass'n. Official Handbook.

The judiciary has also concluded that a "school's athletic program is an integral part of the student's total educational experience."[137]

It is clear that a student's interest in public education is protected by constitutional guarantees.[138] This protection stems in large part from the Due Process Clauses of the fifth and fourteenth amendments which provide that "no person shall be deprived of life, liberty or property without due process of law."[139] Since participation in athletics is an integral part of a student's educational experience, administrative organizations, such as the NCAA and the various state high school associations, should be compelled to observe constitutional constraints in the regulation of amateur sports.

This integral relationship of sports and education has not been judicially accepted as sufficient to warrant constitutional protection. Two factors must be present before the courts will apply the constitutional requirements of due process to the administration of amateur sports. First, the regulatory act must be undertaken by the "state".[140] The second requirement is that the deprivation of the right or interest be sufficiently important so as to require constitutional protection.[141]

The term state action encompasses all persons or organizations who are in some way involved in the activities of the state. Although the Supreme Court has recently applied a rather restrictive definition to this concept,[142] state action has been found to exist in a variety of ways ranging from the receipt of governmental assistance[143] or encouragement[144] to the performance of gov-

137. Kelley v. Metropolitan Cty. Bd. of Educ. 293 F. Supp. 485, 494 (M.D. Tenn. 1968), *rev'd on other grounds*, 436 F.2d 856 (6th Cir. 1970), *cert. denied*, 409 U.S. 1001 (1972); *see* Brenden v. Independent School Dist. 724, 477 F.2d 1292 (8th Cir. 1973); Moran v. School Dist. # 7, 350 F. Supp. 1180 (D. Mont. 1972); Curtis v. NCAA, No. C-71-2088-ACW (N.D. Cal. 1972). *See also* Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503, 512 (1969).

138. *See* Goss v. Lopez, 419 U.S. 565, 573 (1975); Brown v. Board of Educ., 347 U.S. 483 (1954). The right to an education is not, however, a fundamental right in the sense of requiring strict judicial scrutiny. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35-39 (1973).

139. U.S. Const. amends. V, XIV, § 1.

140. The inclusiveness of this term is to be measured by the standard that applies to the "state action" concept of the fourteenth amendment. J. Weistart & C. Lowell, *supra* note 13, at 49.

141. *See* Behagen v. Intercollegiate Conf. of Faculty Reps., 346 F. Supp. 602 (D. Minn. 1972).

142. In narrowing the scope of state action, the Court, in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), held that a utility which was extensively regulated by the state and which enjoyed an almost complete monopoly was not affected with state action when it terminated service in a manner that the state regulatory commission found permissible under state law. In an earlier decision, the Court ruled that a state's grant of a liquor license, pursuant to a regulatory scheme, to a private club did not make the club's discriminatory membership policy state action. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

Despite these decisions, a number of federal courts have expressly ruled that state action does exist in the context of organizational regulation of amateur sports. *See* notes 151-54, *infra* and accompanying text. In a representative opinion, the court in Howard University v. NCAA, 510 F.2d 213 (D.C. Cir. 1975), concluded that: "neither *Moose Lodge*, analyzing state action through the grant of a benefit, or *Jackson*, addressing state action through regulation of a monopoly and delegation of a public function, offer any analysis to resolve the question before us of entanglement through dominant membership and participation." *Id.* at 219 n.10.

143. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Jacobson v. New York Racing Ass'n, 41 A.D.2d 87, 341 N.Y.S.2d 333 (2d Dep't), *modified on appeal*, 33 N.Y.2d 144, 305 N.E.2d 765, 350 N.Y.S.2d 639 (1973); Garofano v. United States Trotting Ass'n, 78 Misc. 2d 33, 355 N.Y.S.2d 702 (Sup. Ct. 1974).

ernmental functions[145] or the receipt of the imprimatur of governmental enforcement.[146] State involvement is undoubtedly present with regard to the regulation of educational activities in public schools because of the governmental control and funding of these programs.[147] Furthermore, private schools, on the high school and college levels, may be within the confines of state action, provided any one of the foregoing situations exists.[148]

Due to the integral role athletics play in an educational setting, it is submitted that the athletic associations which govern intercollegiate and statewide high school athletic programs are engaged in state action. In *Louisiana High School Athletic Association v. St. Augustine High School,*[149] the court implemented representative criteria for determining the extent of state involvement in high school athletic programs:

> There can be no substantial doubt that the conduct of [the state high school athletic association] is state action in the constitutional sense. The evidence is more than adequate to support the conclusion . . . that the Association amounts to an agency and instrumentality of the State of Louisiana. Membership of the Association is relevant—85 per cent of the members are state public schools. The public school principals, who nominally are members, are state officers, state paid and state supervised. . . .
>
> Funds for support of the Association come partly from membership dues, largely from gate receipts from games between members, the great majority of which are held in state-owned and state-supplied facilities. The paid staff of [the Association] is covered in part by the Louisiana Teachers Retirement Act and staff members are legally defined as teachers.[150]

The court's reliance on state control and funding to demonstrate state action with respect to a state high school athletic association is a common approach in linking the regulation of education to state action.[151]

Furthermore, the NCAA, despite its purported status as a private voluntary association,[152] engages in state action because of its entanglement with

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144. Reitman v. Mulkey, 387 U.S. 369 (1967).

145. Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946).

146. Shelley v. Kraemer, 334 U.S. 1 (1948). The imprimatur concept has, however, been somewhat undermined by Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), where a warehouseman's proposed sale of goods, permitted by the self-help provision of the New York Uniform Commercial Code, was deemed insufficient to constitute state action.

147. *See* Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503 (1969); Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970).

148. The Supreme Court has ruled that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a government character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966). *See also* O'Neil, *Private Universities and Public Law*, 19 Buffalo L. Rev. 155 (1970); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 Colum. L. Rev. 656 (1974).

149. 396 F.2d 224 (5th Cir. 1968); *see* Wright v. Arkansas Activities Ass'n, 501 F.2d 25 (8th Cir. 1974); Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973); Kite v. Marshall, 454 F. Supp. 1347 (S.D. Tex. 1978); Dallam v. Cumberland Valley School Dist., 391 F. Supp. 358 (M.D. Pa. 1975).

150. 396 F.2d at 227.

151. *See* note 147 *supra*.

152. *See* notes 44, 58 *supra* and accompanying text.

public concerns. In *Howard University v. NCAA*,[153] the court specifically ruled that the NCAA activities are tantamount to state action because:

> Approximately half of the NCAA's 655 institutional members are state- or federally-supported. Since financial contribution to the NCAA is based upon institutional size, and since public universities generally have the largest student bodies, the public institutions provide the vast majority of the NCAA's capital (the NCAA's annual administrative budget at the time of the suit being $1.3 million). . . . [T]he state instrumentalities are a dominant force in determining NCAA policy and in dictating NCAA actions. That conclusion is buttressed by reference to the record before us which documents that both the President and Secretary-Treasurer were representatives of public instrumentalities and that state instrumentalities traditionally provided the majority of the members of the governing Council and the various committees. . . . Thus, governmental involvement, while not exclusive, is "significant", and all NCAA actions appear "impregnated with a governmental character."[154]

Although the regulatory activities of the various athletic governing bodies are appropriately termed state action, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[155] In the past, the judiciary has refused to extend fourteenth amendment protections to participation in amateur sports, except in instances in which racial discrimination has been involved,[156] because it could otherwise discern no sufficiently protectible property interests.[157] More recently, the rational basis test of the Equal Protection Clause[158] has been used to protect the rights of females[159]

153. 510 F.2d 213 (D.C. Cir. 1975); *see* Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974). *But see* McDonald v. NCAA, 370 F. Supp. 625 (C.D. Cal. 1974) (court held that the NCAA was not affected with state action).

154. 510 F.2d at 219-20 (footnote and citations omitted).

155. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). *See also* 42 U.S.C. § 1983 (1977), which specifically states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The jurisdiction of the court may also be based on due process. 28 U.S.C. §§ 1331, 1343(3), (4) (1977).

156. *E.g.*, Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968); Wesley v. City of Savannah, 294 F. Supp. 698 (S.D. Ga. 1969).

157. Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963).

158. See L. Tribe, American Constitutional Law 991-1003 (1978) for an exhaustive discussion of the Equal Protection Clause.

159. Sexual discrimination which has resulted in the infringement of a female amateur's opportunity to compete in athletics has long been the source of litigation. Typically, an athletic association will promulgate a rule that provides: "Boys and girls shall not be permitted to participate in interschool athletic games as united teams, nor shall boys' teams and girls' teams participate against each other in interschool athletic contests." J. Weistart & C. Lowell, *supra* note 13, at 70 n.380. Such infringement has been judicially overturned because "[f]ull and equal opportunity to participate in the curricular and extra-curricular educational activities of our public schools, with full and equal opportunity to receive the benefits flowing from such participation, is guaranteed to all public school students, be they male or female, by the equal protection clause of the Fourteenth Amendment." Haas v. South Bend Comm. School Corp., 259 Ind. 515, 527,

and married students[160] from discriminatory rules promulgated by governing bodies which have excluded them from participating in amateur athletics. In *Brenden v. Independent School District 742*,[161] females were prohibited by the state high school association from participating with males in non-contact high school sports. The Eighth Circuit reasoned that "[t]he question in this case is not whether the plaintiffs have an absolute right to participate in interscholastic athletics, but whether the plaintiffs can be denied the benefits of activities provided by the state for male students."[162] In following this reasoning, the court concluded that "[d]iscrimination in high school interscholastic athletics constitutes discrimination in education."[163] Therefore, a female must be given an equal opportunity to participate, unless the state can demonstrate a substantial relationship to a significant state interest.

The court in *Brenden* indicated that when viewed in an educational context, the "interest in participating in interscholastic sports is a substantial and cognizable one."[164] Although *Brenden* was decided on equal protection grounds, a federal court in Nebraska has relied on this dictum and expressly ruled that participation in amateur athletics, within an educational setting, is a property interest protected by due process.[165] The court's reasoning was also based on *Board of Regents v. Roth*,[166] which acknowledged that the fourteenth amendment's protection of property extends to those interests which stem from state law,[167] and *Goss v. Lopez*,[168] which held that even a temporary suspension from public school infringes on a property interest protected by the due process clause.[169]

Despite this educational interest[170] in athletic participation, a number of

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289 N.E.2d 495, 502 (1972) (Debruler, J., concurring). *See generally* Stroud, *Sex Discrimination in High School Athletics*, 6 Ind. L. Rev. 661 (1973); Note, *Sex Discrimination and Intercollegiate Athletics*, 61 Iowa L. Rev. 420 (1975); Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 Syracuse L. Rev. 535 (1974). *See also* Gilpin v. Kansas High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1973); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972).

160. *E.g.*, Moran v. School District # 7, 350 F. Supp. 1180 (D. Mont. 1972); Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972). *See generally* Knowles, *High Schools, Marriage, and the Fourteenth Amendment*, 11 J. Fam. L. 711 (1972); Comment, *Marriage vs. Education: A Constitutional Conflict*, 44 Miss. L. J. 248 (1973).

161. 477 F.2d 1292 (8th Cir. 1973).

162. *Id.* at 1297.

163. *Id.* at 1298.

164. *Id.* at 1299.

165. Compagno v. Nebraska School Activities Ass'n, No. CV77-L-192 (D. Neb. Sept. 16, 1977); Teare v. Board of Educ., No. CV77-L-190 (D. Neb. Sept. 16, 1977). The court overturned an eligibility rule which denied two students the opportunity to participate in high school football. The court held that this participation in high school athletics is a significant part of the public education program provided for by the state. No. CV77-L-192, slip op. at 3; No. CV77-L-190, slip. op. at 4.

166. 408 U.S. 564 (1972).

167. *Id.* at 577.

168. 419 U.S. 565 (1975).

169. *Id.* at 574.

170. One's interest in education has been recognized as a matter of the utmost importance by the Supreme Court: "Today, education is perhaps the most important function of state and local

courts have ruled that for the purposes of due process protection, no significant property interest is jeopardized.[171] The majority view is clearly stated in *Hamilton v. Tennessee Secondary School Athletic Association:*[172]

For better or worse, the due process clause of the fourteenth amendment does not insulate a citizen from every injury at the hands of the state. "Only those rights, privileges and immunities that are secured by the Constitution of the United States or some Act of Congress are within the protection of the federal courts. Rights, privileges and immunities not derived from the federal Constitution or secured thereby are left exclusively to the protection of the states." The privilege of participating in interscholastic athletics must be deemed to fall in the latter category and outside the protection of due process.[173]

An alternative property right in amateur athletic participation is in its potential economic value.[174] This idea was developed in *Behagen v. Intercollegiate Conference of Faculty Representatives,*[175] where the court held that:

[T]o participate in intercollegiate athletics is of substantial economic value to many students. In these days when juniors in college are able to suspend their formal educational training in exchange for multi-million dollar contracts to turn professional, this Court takes judicial notice of the fact that, to many, the chance to display their athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education.[176]

Furthermore, amateur athletic participation may be of economic importance to the extent that the athlete, through media exposure, becomes a public personality and thereby enhances his prospects for lucrative employment opportunities by capitalizing on that status.[177]

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governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

171. Albach v. Odle, 531 F.2d 983 (10th Cir. 1976); Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970).

172. 552 F.2d 681 (6th Cir. 1976).

173. *Id.* at 682 (citations omitted).

174. While athletic participation may serve as an integral part of a student's overall educational experience, it may also be an indispensable means through which secondary school students of modest resources may obtain a college education through an athletic scholarship. Wellsand v. Valparaiso Comm. School Corp., No. 71H 122(2) (N.D. Ind. 1971). Therefore, when athletic eligibility is withdrawn from a high school amateur, he is not only immediately deprived of this integral part of his education, but also runs the risk of losing a future educational opportunity on the college level.

175. 346 F. Supp 602 (D. Minn. 1972).

176. *Id.* at 604.

177. This economic interest exists in both educational and non-educational settings. A declaration of ineligibility by a non-educational group, such as the AAU, may substantially impinge upon an amateur's opportunity to participate and deny him the necessary exposure to take advantage of professional competition or the possible status as a public personality.

This economic interest in athletic participation, however, runs contrary to the basic notions of amateur athletic participation.[178] Furthermore, the courts have viewed this economic interest as far too speculative to be considered a property right which would merit constitutional protection.[179] It is submitted that the judiciary is not likely to recognize this potential economic interest as property for the purposes of the due process clause.

Even though the judiciary has utilized a rather restrictive interpretation of the term property,[180] constitutional protection is mandated if an organizational action deprives an individual of a liberty interest.[181] This liberty interest "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[182]

The liberty to freely participate in amateur athletics is consistent with the basic notion that the average amateur participates for the enjoyment of the sport or the desire for physical training.[183] This interest has not been judicially addressed in conjunction with litigation concerning amateur sports.[184] The liberty to participate freely in amateur athletics may be a more legitimate basis to afford constitutional protection than the interests in educational or economic advancement, for without such liberty these opportunities would never exist. Unfortunately, due to this lack of judicial recognition, an amateur is even less assured of due process protections for the infringement of this liberty interest than he is of recognition of his educational or economic concerns.

Without a fully recognized property or liberty interest attached to participation in amateur sports to trigger due process safeguards, the amateur must look elsewhere for constitutional protection. The concept of freedom of association is part of the basic idea underlying amateur participation. The Supreme Court has declared that freedom of association is a fundamental right that is grounded in the first amendment and applies to state actions by virtue of the fourteenth amendment.[185] In *NAACP v. Alabama ex rel. Patterson,*[186] the court expressly held that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an

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178. *See* notes 11-12 *supra* and accompanying text.

179. *See, e.g.*, Samara v. NCAA, 1973-1 Trade Cas. (CCH) ¶ 74,536 (E.D. Va. 1973).

180. *E.g.*, Bishop v. Wood, 426 U.S. 341 (1976) (state law may play a role in narrowing property interests).

181. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (right of the poor to participate in the public process).

182. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *But cf.* Paul v. Davis, 424 U.S. 693 (1976) (liberty interest does not encompass injuries to reputation alone).

183. 1 PCOS, *supra* note 14, at 1.

184. *See* Stanley v. Big Eight Conf., 463 F. Supp. 920 (W.D. Mo. 1978) (football coach has a liberty interest in retaining his job in the face of NCAA suspension); Kite v. Marshall, 454 F. Supp. 1347 (S.D. Tex. 1978) (family has a liberty interest which aids in the development of a child's athletic skills).

185. *See* Gibson v. Florida Leg. Invest. Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

186. 357 U.S. 449 (1958).

inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces [First Amendment] freedom of speech."[187]

While it is true that many of these "freedom of association" cases involve labor union membership,[188] political party membership,[189] or organizations such as the National Association for the Advancement of Colored People (NAACP),[190] this freedom also includes the rights of individuals to choose their friends and associations on the various levels of day to day life.[191] It is not unreasonable to suggest a similarity between the right to join an organization, such as the NAACP, and the right of an amateur athlete to participate in a particular sports event[192] or summer training program.[193] Both spring from the right to freely associate. The former activity is deemed to be constitutionally protected,[194] while the latter has received little or no judicial consideration.[195]

At present, the judiciary has not recognized an absolute right to participate in amateur sports. Had such an absolute right been recognized, oft-needed organizational regulation would be eliminated. Courts have, however, generally been unwilling to fully recognize either a property or liberty interest in participation in amateur athletics that would assure the application of due process safeguards. Such protection would at least provide for notice and an opportunity to be heard before an amateur could be declared ineligible for athletic participation.

The enactment of the Amateur Sports Act of 1978, with its indirect reference to an interest in participating in unrestricted international competition, may encourage the judiciary to place greater emphasis on the interest in restricted domestic participation. It is, however, unlikely that the courts will recognize an interest that Congress has considered at length and elected not to specifically create. Therefore, in order to provide any assurances that an amateur's opportunity to participate will not be unduly restricted, Congress must either amend the Amateur Sports Act or introduce new legislation to require adherence to these constitutional guarantees.

CONCLUSION

The history and ongoing development of amateur athletics dictates that uniform organizational regulation is necessary to monitor amateurism.[196]

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187. *Id.* at 460.

188. *E.g.*, United States v. Brown, 381 U.S. 437 (1965) (executive of a labor union).

189. *E.g.*, DeGregory v. Attorney General, 383 U.S. 825 (1966) (citizen not required to answer questions about membership in Communist Party).

190. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (NAACP not required to disclose membership list).

191. *See id.* at 466. *See generally* L. Tribe, American Constitutional Law 700-10 (1978); Raggi, *An Independent Right to Freedom of Association*, 12 Harv. Civ. Rts.-Civ. Lib. L. Rev. 1 (1977).

192. *See* Samara v. NCAA, 1973-1 Trade Cas. (CCH) ¶ 74,536 (E.D. Va. 1973).

193. *See* Art Gaines Baseball Camp v. Houston, 500 S.W.2d 735 (Mo. App. 1973).

194. *See* note 185 *supra.*

195. *See* Kite v. Marshall, 454 F. Supp. 1347 (S.D. Tex. 1978); Brobin v. Minnesota State High School League, Civ. 4-76-107 (D. Minn. Mar. 11, 1976).

196. *See* note 6 *supra.*

Legislation must, however, be enacted to insure that an amateur has the opportunity to participate free from unnecessary organizational restraint. The combined effect of the Amateur Sports Act of 1978[197] and the present tenor of judicial involvement[198] unfortunately suggest that an amateur has no comprehensive guarantee that this opportunity to participate will be insulated from unnecessary organizational infringement.

Congress must, therefore, either amend the Amateur Sports Act or introduce legislation that will protect an amateur from the antiquated organizational rules[199] and unnecessary inter-organizational disputes[200] which impinge upon the opportunity to participate. Despite the apparent desirability of an absolute right to participate, this legislation must be structured to accommodate the necessary administrative functions of the governing bodies. This may be best achieved by requiring governing organizations to revise their enforcement procedures to conform to the basic tenets of due process and to provide the amateur with the necessary tools to see that such safeguards are carried out. The legislative initiatives concerning amateur sports serve as an appropriate basis for the proposed bill of rights outlined in Appendix I.

APPENDIX I

AN AMATEUR ATHLETE'S BILL OF RIGHTS

Sec. 1. The term—

(a) "amateur athlete" means any athlete who meets the standards for amateurism as defined by the national governing body for the sport in which the athlete competes;

(b) "amateur athletic competition" means a contest, event, game, meet, match, tournament, or other program in which amateur athletes are permitted to compete, on either a domestic or international level;

(c) "domestic amateur athletic competition" means any amateur athletic competition not involving direct participation with or against any foreign country or international organization;

(d) "eligible amateur athlete" means an athlete who is qualified for amateur athletic competition under applicable age, amateurism, and athletic ability or performance standards as prescribed by the national governing body or sports organization for the sport in which the athlete competes;

(e) "international amateur athletic competition" means any amateur athletic competition between (1) any athlete or athletes representing the United States, either individually or as part of a team, and (2) any athlete or athletes representing any foreign country; and any amateur athletic competition used to qualify United States amateur athletes for such competition;

(f) "national governing body" means a not-for-profit corporation which is recognized by the United States Olympic Committee to regulate United States participation in international competitions;

(g) "restricted competition" means any amateur athletic competition which is limited to a specific class of amateur athletes, such as high school athletes, college athletes, members of the armed forces, or any other such group or category;

(h) "sanction" means a certification of approval issued by a national governing body;

(i) "sports organization" means a club, federation, union, association, or other group, except a "national governing body", which sponsors or organizes any domestic amateur athletic competition; and

197. *See* notes 115-31 *supra* and accompanying text.

198. *See* notes 135-77 *supra* and accompanying text.

199. *E.g.*, notes 67-72 *supra* and accompanying text.

200. *E.g.*, note 61 *supra* and accompanying text.

(j) "unrestricted competition" means any amateur athletic competition which is not limited to a specific class of amateur athletes, such as high school athletes, college athletes, members of the armed forces, or any other such group or category.[201]

Sec. 2. (a) No national governing body, educational institution, or sports organization may deny or threaten to deny any eligible amateur athlete the opportunity to participate in any sanctioned amateur athletic competition, nor may any of these groups, subsequent to the event, censure or penalize, any eligible athlete who participates in such a competition.

(b) No national governing body, educational institution, or sports organization may declare an amateur ineligible for participation (as provided in subsection (2)), unless such a declaration is based on a determination made by one of these groups on the record after notice and opportunity for a hearing. Such an athlete shall have the right to be represented by counsel and cross-examine witnesses at any such hearing and shall be entitled to receive a copy of the record of such hearing.[202]

Sec. 3 (a) Whenever a national governing body, educational institution, or sports organization is engaged in proceedings which are in contravention with Section 2 and may result in an infringement upon the opportunity to participate, a civil action for preventive relief, which may include a preliminary or permanent injunction, temporary restraining order, or other applicable order, may be instituted by the amateur athlete, or a suitable representative, such as a parent or sports group in which he is a member.[203]

(b) In the event of a dispute among any national governing body, educational institution, or sports organizations, which may result in an infringement upon an amateur athlete's opportunity to participate, the U.S.O.C., upon petition by a competent party, may order the disputants to submit to binding arbitration in accordance with the rules of the American Arbitration Association. The resolution of the dispute by an arbitration panel is deemed final and may be enforced by a United States district court.[204]

APPENDIX II

S.2036

S.2036 had designated a separate title for an Amateur Athlete's Bill of Rights. The bill provided in pertinent part that:

SEC. 303. (a) No national governing body, educational institution, or sports organization may deny or threaten to deny any eligible amateur athlete, coach, trainer, manager, or administrator the opportunity to participate in any sanctioned unrestricted international competition if selected by a national governing body or one of its members, nor may it censure subsequent to the event, or otherwise penalize for having participated in such competition, any athlete, association, institution, corporation, educational institution, or school, coach, trainer, manager or administrator.

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201. The definitional section for the proposed Bill of Rights is largely based on those of the Amateur Sports Act of 1978. 36 U.S.C.A. § 373 (West Supp. 1979).

202. Section two of the proposed bill incorporates the due process protection suggested by Representative Santini in his proposed amendment to S.2727. *See Proposed Amendment to the Amateur Sports Act of 1978: Hearings on H.R. 12626 Before the Subcomm. on Administrative Law & Government Relations of the House Comm. on the Judiciary,* 95th Cong., 2d Sess. 37 (1978).

203. Section three provides judicial protection to assure the availability of immediate relief from arbitrary action on the part of a governing body. *See* Appendix II *infra.*

204. The use of arbitration to resolve organizational disputes has been incorporated into the Amateur Sports Act. 36 U.S.C.A. § 391 (West Supp. 1979). The original draft of the Act provided for the enforcement of an arbitration decision by a United States district court. *See* Appendix II *infra.*

(b) No national governing body, educational institution, or sports organization may deny or threaten to deny any eligible amateur athlete, coach, trainer, manager, or administrator the opportunity to participate in any international competition (except as provided in subsection (a)), nor may it censure subsequent to the event, or otherwise penalize for having participated in such competition, any athlete, associate [*sic*], institution, corporation, educational institution, or school, coach, trainer, manager, or administrator, unless the national governing body, educational institution, or sports organization can show that such denial or censure is reasonable.

Enforcement

SEC. 304. (a)(1) Whenever any person is engaged in, or there are reasonable grounds to believe that any person is about to engage in, conduct resulting in a denial of opportunities to participate under section 303 of this title, a civil action for preventive relief, including an application for preliminary or permanent injunction, temporary restraining order, or other applicable order, may be instituted by the amateur athlete, coach, trainer, manager, or administrator claiming to be aggrieved, or on behalf of the athlete, coach, trainer, manager, or administrator by the United States Olympic Committee, by any national governing body, or by any sports organization of which such individual or institution is a member.

(2) The district courts of the United States shall have jurisdiction to enjoin the commission of any acts or threatened acts which would result in a denial of the opportunity to participate.

(3) Upon finding that a person is engaged in or is about to engage in conduct resulting in a denial of rights under section 303 of this title, the court shall issue such preliminary or permanent injunction, temporary restraining order, or other applicable order.

(b)(1) Upon mutual agreement of the parties, actions for relief under the provisions of this title may be submitted to any regional office of the American Arbitration Association for binding arbitration.

(2) The arbitration shall proceed in accordance with the rules of the American Arbitration Association in effect at the time of the filing of the action. The arbitration shall be before a panel of three arbitrators and shall begin as soon as possible but, in any event, no later than thirty days after the dispute is submitted to the American Arbitration Association. However, if the Association determines that it is necessary to expedite the arbitration in order to resolve a matter relating to an amateur athletic competition which is so scheduled that compliance with regular procedures would not be likely to produce a sufficiently early decision by the Association to do justice to the affected parties, the Association is authorized, upon forty-eight-hour notice to the parties, to hear and decide the matter under such procedures as it deems appropriate.

(3) Each contesting party may be represented by counsel or by any other duly authorized representative at the arbitration proceeding.

(4) The parties may offer evidence as they desire and shall produce such additional evidence as the arbitrators may deem necessary to an understanding and determination of the dispute. The arbitrators shall be the sole judges of the relevancy and materiality of the evidence offered. Conformity to statutory rules of evidence shall not be necessary.

(5) Upon application, the district courts of the United States shall have jurisdiction for the purpose of issuing subpoenas to compel the attendance and testimony of witnesses and the production of documents which the arbitrators reasonably deem to be necessary or advisable for a better understanding of the dispute.

(6) All decisions by the arbitrators shall be by majority vote unless the concurrence of all is expressly required by the contesting parties. The arbitrators shall make their decisions within thirty days after the closing of the hearings.

(7) The hearings may be reopened by the arbitrators upon their own motion or

upon the motion of any contesting party, at any time before the decision is made. If reopened the arbitrators shall make their decision within ninety days of the close of the original hearing.

(8) The district courts of the United States shall have jurisdiction to enforce decisions of the arbitrators. Such action may be brought by any party to the final decision.[205]

Donald L. Shiick, Jr.

205. *1977 Senate Hearings, supra* note 11, at 31-35.