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COLLEGE SPORTS AND NCAA ENFORCEMENT PROCEDURES: DOES THE NCAA PLAY FAIRLY? *NATIONAL COLLEGIATE ATHLETIC ASSOCIATION V. MILLER*

INTRODUCTION

“The things we were asking for—open hearings, the right to confront accusers—are basic American rights, yet they are wiped out in an arbitrary manner by the Gestapo NCAA.”¹

In 1985, investigators for the National Collegiate Athletic Association (NCAA)² looked into possible recruiting violations involving high school basketball star Lloyd Daniels.³ The NCAA targeted the University of Nevada Las Vegas (UNLV)⁴ basketball coach Jerry Tarkanian⁵ for the alleged foul play.⁶ The subsequent investigations were characteristic of the already bitter relationship between Tarkanian and the NCAA.⁷ Indeed, as early as 1973, the head of the NCAA’s enforcement department vowed that “we are not only going to get [Tarkanian], we are going to run him out of

1. Nevada State Representative Jim McGaughey reflects his opinions, and those of other law makers, that the powerful NCAA conducts unfair investigations of colleges and universities for alleged sports recruiting violations. Douglas Lederman, *Judge Voids Nevada Laws Limiting NCAA Inquiries*, THE CHRONICLE OF HIGHER EDUCATION, June 17, 1992, at A35.

2. “The NCAA is a voluntary, unincorporated association of colleges, universities, and affiliated conferences and organizations. The NCAA consists of approximately one thousand, fifty-six (1,056) members, including most public and private universities and four-year colleges. Its members conduct major athletics programs in all fifty (50) states.” National Collegiate Athletic Ass’n v. Miller, 795 F. Supp. 1476, 1479 (D. Nev. 1992).

3. On July 20, 1989, UNLV’s athletics director said “NCAA investigators had visited the campus to look into possible violations in the recruitment in 1985 and 1986 of Lloyd Daniels, a high-school basketball star who never played for the university.” *Status of Sports Investigations on College Campuses*, THE CHRONICLE OF HIGHER EDUCATION, Sept. 16, 1992, at A40 [hereinafter Status]. “Lloyd ‘Sweet Pea’ Daniels, a 6-foot-8-inch swingman from New York was regarded by many as the most talented schoolboy basketball player to come out of the Big Apple since Lew Alcindor,” a.k.a. Kareem Abdul Jabaar. DON YAEGER, *UNDUE PROCESS: THE NCAA’S INJUSTICE FOR ALL 231* (Sara Chilton, ed., 1991).

4. UNLV is a public branch of the University of Nevada and a member of the NCAA. NCAA v. Tarkanian, 488 U.S. 179, 183 (1988). “The university is organized and operated pursuant to provisions of Nevada’s State Constitution, statutes, and regulations.” *Id.*

5. Jerry Tarkanian was the head men’s basketball coach for the University of Nevada Las Vegas Runnin’ Rebels from 1973-1992. Appellants’ Opening Brief at 5 n.5, National Collegiate Athletic Ass’n v. Miller, 795 F. Supp. 1476 (D. Nev. 1992) (No. 92-16184) (also on file with the California Western Law Review) [hereinafter A.O.B.]. Tarkanian retains the highest winning percentage in college basketball history. *Id.*

6. See generally National Collegiate Athletic Ass’n v. Miller, 795 F. Supp. 1476 (D. Nev. 1992).

7. Dating as far back as 1970, when Tarkanian wrote a scathing article about the NCAA’s unfairness while at Long Beach State, the obsession of toppling Tarkanian has possessed the NCAA. YAEGER, *supra* note 3, at 199-200. See also University of Nevada v. Tarkanian, 594 P.2d 1159 (Nev. 1979), later proceeding, Tarkanian v. National Collegiate Athletic Ass’n, 741 P.2d 1345 (Nev. 1987), *rev’d*, National Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179 (1988).

coaching.”⁸

During the 1973 investigations, Tarkanian attempted to force the NCAA to abide by due process requirements guaranteeing him a “fair” trial.⁹ However, in *National Collegiate Athletic Association v. Tarkanian*, a wide ranging decision which affected collegiate players, coaches and fans across the nation, the United States Supreme Court held 5-4 that the NCAA was not a state actor, and therefore not bound by the due process requirements of the U.S. Constitution.¹⁰ Thus, Tarkanian’s first attempt at securing procedural due process against the NCAA for himself and other coaches failed.

However, in a secondary attempt at securing due process, and after twenty years of conflict with the NCAA,¹¹ Tarkanian succeeded in securing protection under a Nevada law. When the NCAA challenged the federal constitutionality of that statute in June 1992, Tarkanian once again turned from the basketball court to the courtroom. In the United States District Court of Nevada, Tarkanian¹² argued that any NCAA investigation into recruiting infractions would violate his due process rights as protected by a 1991 Nevada Due Process Statute.¹³ Under Tarkanian’s interpretation, the statute would force the NCAA to give him minimum procedural due process

8. A.O.B., *supra* note 5, at 6 (citing Trial Record 108, Reference 11 at 20).

9. *See generally* University of Nevada v. Tarkanian, 594 P.2d 1159 (Nev. 1979), *later proceeding*, Tarkanian v. National Collegiate Athletic Ass’n, 741 P.2d 1345 (Nev. 1987), *rev’d*, National Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179 (1988).

10. National Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179 (1988).

11. A.O.B., *supra* note 5, at 30.

12. Defendants include Robert F. Miller, Governor, State of Nevada and among others, Jerry Tarkanian. Because Miller was dismissed from this action by previous order of the court, *Miller*, 795 F. Supp. at 1479, all defendants are hereinafter referred to as Tarkanian.

13. *Miller*, 795 F. Supp. at 1480; *see also* NEV. REV. STAT. §§ 398.155-398.255 (1991). Specifically, the Nevada Due Process Statute guarantees an accused the following:

1. The right to a hearing, after reasonable notice of the nature of the proceeding, the governing rules of the proceeding, and the factual basis for each violation. *Id.* § 398.155(1).
2. The right to be represented by counsel. *Id.* § 398.155(2).
3. The right to confront and respond to all witnesses and evidence. *Id.* § 398.155(2).
4. The right to the exchange of all evidence 30 days before any proceeding. *Id.* § 398.155(3).
5. The right to have all statements signed under oath and notarized. *Id.* § 398.155(4).
6. The right to have an official record kept of all proceedings. *Id.* § 398.165.
7. The right to receive transcriptions of all oral statements upon request. *Id.* § 398.175.
8. The right to exclude irrelevant evidence. *Id.* § 398.185(1).
9. The right to have an impartial person presiding over the proceeding. *Id.* § 398.195.
10. The right to have a decision rendered within a reasonable time, with findings of fact based upon substantial evidence in the record and supported by a preponderance of such evidence. *Id.* § 398.205.
11. The right to a judicial review under the Nevada Administrative Procedures Act. *Id.* § 398.215.

A.O.B., *supra* note 5, at 10.

rights during its enforcement proceedings.¹⁴ In response, the NCAA contended that the Nevada Due Process Statute violated the Commerce and Contracts Clauses of the Constitution and therefore the NCAA was not bound by the Nevada due process requirements.¹⁵

In *National Collegiate Athletic Association v. Miller*¹⁶ the United States District Court of Nevada broke new ground on the issue of whether state statutes may impose due process restrictions on the NCAA. The court held that Tarkanian was not entitled to state enacted due process protections during NCAA investigations or enforcement proceedings.¹⁷ The court invalidated the Nevada statute on the grounds that it violated the Commerce and Contract Clauses of the U.S. Constitution.¹⁸ First, the court found the Nevada Due Process Statute violated the Commerce Clause because the statute's public purpose of affording "basic due process safeguards to the careers, livelihoods, and reputations of all Nevadans"¹⁹ was outweighed by the fact "the statute effectively invalidated the NCAA's system of internal governance and enforcement and imposed procedural requirements with which the NCAA could not comply."²⁰ Second, the court ruled that the statute violated the Contract Clause because 1) the court felt the Nevada Due Process Statute specifically targeted the NCAA and not a broad societal problem, and 2) the court felt the statute was not necessary to effectuate change because Nevada schools could modify the NCAA's procedures at NCAA conventions or get Congress to enact legislation limiting the NCAA.²¹

Part I of this Note contrasts the NCAA enforcement procedures in theory, with those in practice between the NCAA and Tarkanian. This Part begins by introducing the NCAA's four step enforcement process which appears theoretically functional. Next, by focusing on the dispute between Tarkanian and the NCAA, Part I exposes the prejudicial nature of the NCAA's system in actual practice. This noticeable disparity between theory and reality lays the foundation for the further exploration of the reasons state legislatures are fighting to put due process limitations on the NCAA.

Part II traces the historical context and recent developments of both the Contract and Commerce Clauses. This Part lays the constitutional framework necessary to discuss whether the *Miller* court correctly applied existing case law.

The following section, Part III, analyzes the Nevada District Court's opinion. Part III critiques each of the court's arguments concluding that the

14. A.O.B., *supra* note 5, at 9-10.

15. *Miller*, 795 F. Supp. at 1482.

16. 795 F. Supp. 1476 (D. Nev. 1992).

17. *Miller*, 795 F. Supp. at 1488.

18. *Id.*

19. *Id.* at 1483.

20. *Id.* at 1485.

21. *Id.* at 1485-88.

Miller court misapplied precedent and erred by striking down the Nevada statute.

Part IV discusses the implications of the court's decision. This Part compares the Nevada statute with similar legislation in Florida, Nebraska, and Illinois. Part IV analyzes the impact the *Miller* holding has on existing and pending state due process statutes.²²

The Note concludes that few avenues exist for feasible NCAA restructuring. Therefore, the only available means to successfully limit the NCAA are to either reverse the *Miller* court's decision or lobby Congress to enact due process legislation.

I. BACKGROUND: THE TUMULTUOUS RELATIONSHIP BETWEEN TARKANIAN AND THE NCAA

A. *The NCAA's Enforcement Procedures in Theory*

The basic purposes of the NCAA are 1) to keep intercollegiate sports a part of education, 2) to include the athlete in the student body, and 3) to retain a clear distinction between college and professional sports.²³ In order to promote and enforce these goals, the NCAA follows the rules set forth in the NCAA Manual.²⁴ These rules are determined by the NCAA member institutions at their annual conventions.²⁵ "By joining the NCAA, each member institution agrees to comply with and enforce the rules of the NCAA,"²⁶ and in exchange members may participate in NCAA championship events.²⁷

The NCAA Committee on Infractions enforces all rules violations,²⁸

22. The states of Kansas, Ohio, Missouri, South Carolina, and Kentucky are also debating similar legislation. *Miller*, 795 F. Supp. at 1485.

23. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1992-93 NCAA MANUAL Const. art 1.3.1 at 1 [hereinafter NCAA MANUAL].

24. See generally NCAA MANUAL, *supra* note 23.

25. *Id.*, Const. art. 5.01.1, at 27.

26. *Miller*, 795 F. Supp. at 1479 (citing NCAA Const. art. 2.5.1).

27. "The NCAA conducts seventy-six (76) annual NCAA championship events throughout the United States involving member teams and individual student athletes from across the country." *Miller*, 795 F. Supp. at 1482.

28. NCAA MANUAL, *supra* note 23, Bylaw art. 19.1 at 322.

Among the disciplinary measures that may be imposed by the committee against an institution for major violations are:

- (a) Reprimand and censure;
- (b) Probation for one year;
- (c) Probation for more than one year;
- (d) Ineligibility for one or more NCAA Championship events;
- (e) Ineligibility for invitational and post season meets and tournaments;
- (f) Ineligibility for any television programs involving coverage of the institution's intercollegiate athletics team or teams in the sport or sports in which the violations occurred; (*Revised: 1/10/92*)
- (g) Ineligibility of the member to vote or its personnel to serve on committees of the

and follows a four step enforcement process to investigate and impose punishment.²⁹ First, after the Committee receives a reasonable charge of a rule violation from a "responsible source," the Committee begins a preliminary inquiry.³⁰ The preliminary inquiry is a thorough investigation of the charge to determine whether adequate evidence exists to warrant an official inquiry.³¹ The NCAA immediately notifies the member institution of all preliminary inquiries.³²

Second, if adequate evidence of recruiting violations exists, the Enforcement Committee begins an official inquiry.³³ During an official

Association, or both;

(h) Prohibition against an intercollegiate sports team or teams participating against outside competition for a specified period;

(i) Prohibition against the recruitment of prospective student-athletes for a sport or sports for a specified period;

(j) A reduction in the number of financial aid awards that may be awarded during a specified period;

(k) Forfeiture of all or a portion of the institution's share of the broad-based revenue distribution monies for a specified period; (*Adopted: 1/10/92*) . . .

NCAA MANUAL, *supra* note 23, Bylaw art. 19.4.2 at 324.

29. *See generally* NCAA MANUAL, *supra* note 23, Administrative Bylaw, art. 32 at 425. Also, for a flow-chart describing the processing of a typical infractions case, *see* Appendix A.

During enforcement proceedings, institutions have a responsibility to cooperate:

The enforcement procedures are an essential part of the intercollegiate athletic program of each member institution and require full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA investigative staff, Committee on Infractions or Council during the course of an inquiry.

NCAA MANUAL, *supra* note 23, Bylaw art. 19.01.2 at 321; *see also* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 184-85 (1988).

30. NCAA MANUAL, *supra* note 23, Administrative Bylaw art. 32.2.2.3 at 427.

The enforcement staff, so far as practicable, shall make a thorough investigation of all charges that are received from responsible sources and that are reasonably substantial. The enforcement staff may conduct a preliminary inquiry for a reasonable period of time to determine whether there is adequate evidence to warrant an official inquiry; and in conducting this inquiry, the services of an enforcement representative may be used.

Id.

31. NCAA MANUAL, *supra* note 23, Administrative Bylaw art. 32.2.2.3 at 427.

32. *Id.* at art. 32.2.2.4 at 427.

33. *Id.* at art. 35.5.1 at 429. An NCAA official described the nature of an official inquiry as follows:

Once the institution has collected all available information, it then meets with the Committee on Infractions to discuss the information which it has obtained and previously submitted to the Committee in writing. The purpose of this hearing before the Committee on Infractions is for both the institution and the NCAA investigative staff, for the first time, to present specific information to the Committee concerning alleged violations of NCAA legislation. This procedure provides an adequate opportunity for the institutional representatives to debate any of the information presented to the Committee by the investigative staff or the institution, and to be

inquiry, the enforcement staff sends a letter to the president of the institution involved, listing all charges, suggesting a meeting date, and asking for general cooperation.³⁴ Furthermore, the NCAA enforcement staff asks the institution to independently investigate the allegations and report its findings to the Committee on Infractions.³⁵

Third, after the Committee issues the official inquiry, it conducts a pre-hearing conference.³⁶ The pre-hearing conference includes the affected individuals, the institution, and the NCAA staff.³⁷ At the pre-hearing conference, the Committee discloses all evidence it intends to use to support the allegations in the official hearing.³⁸ Also, the parties may review memoranda and documents relating to the alleged infractions.³⁹

Fourth, the Committee holds an official hearing.⁴⁰ At the official hearing, institution representatives and affected parties may present arguments and information to the Committee and contest the allegations.⁴¹ After the official hearing, "the Committee issues written findings of violations and recommends corrective action."⁴² Appeals may be taken to the NCAA Council or to the full membership of the NCAA.⁴³ However, no school has

advised of the source of the information upon which each allegation is based. Both the Committee on Infractions and the University will be informed at the hearing of the identity of the source of evidence upon which an allegation is based as well as any actual details or evidence reported by individuals interviewed.

University of Nevada v. Tarkanian, 594 P.2d 1159, 1160 (Nev. 1979), *later proceeding*, 741 P.2d 1345 (Nev. 1987), *rev'd*, 488 U.S. 179 (1988).

34. NCAA MANUAL, *supra* note 23, Administrative Bylaw art. 32.5.1-32.5.1.1 at 429.

35. *Id.*

36. *Miller*, 795 F. Supp. at 1480.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* The NCAA punishes member institutions and not individual representatives or student athletes of the institution. *Id.*

Upon finding that misconduct by a member institution employee caused NCAA rules to be violated, the Committee may require the institution to show cause why:

(i) a penalty or an additional penalty should not be imposed if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against athletic department personnel involved in the infractions case, any other institutional employee if the circumstances warrant, or representatives of the institution's athletic interests; or

(ii) a recommendation should not be made to the membership that the institution's membership in the Association be suspended or terminated if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against the head coach of the sport involved, any other institutional employee if the circumstances warrant, or representatives of the institution's athletic interests.

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 184 n.7 (1988) (citation omitted).

43. *Miller*, 795 F. Supp. at 1480.

ever overturned an Infractions Committee penalty decision.⁴⁴ Indeed, the NCAA has a 100% conviction rate, finding at least one allegation in each proceeding.⁴⁵

B. *The NCAA's Enforcement Procedures in Practice*

Because college sports now represent big business,⁴⁶ the pressure is immense for coaches and boosters to recruit the best players in the world.⁴⁷ Accompanying this pressure comes the temptation to entice athletes with cars, stereos, cash and even homes to play for their school. To deter coaches and officials from succumbing to this temptation, the NCAA has an enforcement staff "that can crisscross the country on an anonymous tip, to determine if inducements were offered to a college recruit in violation of NCAA rules."⁴⁸ Besides avoiding major violations, colleges and universities must guard against such seemingly trivial events as meeting a recruit off-campus or giving the recruit a soft drink or a ride to the train station.⁴⁹ These types of actions can mean the loss of the school's eligibility to participate in college athletics.⁵⁰

However, according to one court, the NCAA is not only "an association which exists for the purpose of seeing that there is fair play; it also has the obligation to play fairly."⁵¹ As part of its duty to play fairly, the NCAA itself realizes the necessity of guaranteeing schools procedural due process.⁵² Nevertheless, by refusing to make changes in its investigative and

44. A.O.B., *supra* note 5, at 15.

45. Kevin M. McKenna, *Courts Leave Legislatures to Decide the Fate of the NCAA in Providing Due Process*, 2 SETON HALL J. SPORT LAW 77, 81 (1992) (citing YAEGER, *supra* note 3, at VIII.).

NCAA official Steve Morgan, speaking on the NCAA's 100% conviction rate, said "I think that [conviction rate] really is reflective of the good work done by the enforcement staff and the fact that, if we don't have a case, we don't try one." However, when told of Morgan's quote, Nebraska Senator Ernie Chambers replied, "I think it [the conviction rate] reflects a system that is stacked. . . From the moment they step on your campus to the time you lose your appeal, the NCAA is in a no-lose situation. And for too long, we've all sat back and let them work that way. It has got to stop. And I'm looking forward to being the one putting the brakes on." YAEGER, *supra* note 3, at 247.

46. J. Steven Beckett, *Law Tackles NCAA's Lack of 'Due Process,'* CHICAGO DAILY LAW BULLETIN, Wednesday, Feb. 12, 1992, at 5. CBS and the NCAA signed a 7 year \$1 billion contract for the rights to televise the NCAA college basketball tournament. *Id.* "Similarly, the amount of money paid for post-season football bowl appearances is staggering." *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. 1984 Preliminary Statement, Findings of Fact, Conclusions of Law, Opinion, Order and Judgment at 16, *University of Nevada v. Tarkanian*, 594 P.2d 1159 (Nev. 1979) [hereinafter *Order*].

52. McKenna, *supra* note 45, at 98-99. In September of 1978, members of the NCAA's infractions committee acknowledged that reforms to secure procedural due process for schools were necessary. *Id.* Indeed, in 1991 the NCAA formed a Special Committee to Review the

enforcement proceedings, the NCAA remains an unchecked power with the capability of using any tactics it deems necessary to prosecute infractions violations. A brief look at the history between the NCAA and Tarkanian reflects the unfairness that permeates NCAA investigative and enforcement procedures.

Tarkanian has long been a target of the NCAA. In the early 1970's, while Tarkanian was coaching the Long Beach State 49ers, he wrote two articles chastising the NCAA for investigating only smaller schools while letting the "powerhouses" go free.⁵³ Shortly thereafter, the NCAA investigated the 49ers basketball team, with an end result of three years probation for twenty-three rules violations.⁵⁴ When Tarkanian moved from Long Beach State to UNLV, the NCAA Infractions Committee re-opened an inactive investigation of UNLV scarcely six days after Tarkanian became a UNLV "Runnin' Rebel."⁵⁵ After the NCAA followed Tarkanian from Long Beach State to UNLV, Tarkanian and others became convinced the NCAA had a vendetta against him.⁵⁶

The subsequent NCAA investigations of Tarkanian and UNLV further indicated the NCAA's prejudice against Tarkanian. In 1979, a Nevada state trial court described the prejudice in detail.⁵⁷ The court noted that the case the NCAA presented against Tarkanian consisted of 100% hearsay without a scrap of documentation to support the charges.⁵⁸ "The Committee on Infractions and its staff conducted a star chamber proceeding and a trial by ambush against [Tarkanian]."⁵⁹ The court found the denial of Tarkanian's due process rights exacerbated by a record "replete with lies, distortions and half-truths."⁶⁰ Concluding, the court found "no legal credible evidence to support the findings and actions of the NCAA."⁶¹

In addition, a vivid example offered by the Nevada District Court

NCAA Enforcement Process consisting of leaders of the legal, athletic and educational communities. *Id.* The Special Committee proposed recommendations in October of 1991 offering an accused additional due process protections including 1) the use of impartial judges as hearing officers, 2) the preparation of enforcement hearing transcripts, and 3) safeguards to ensure objective summarization of witnesses' testimony. A.O.B., *supra* note 5, at 13 n.14. But, to date none have been implemented in any proceeding. A.O.B., *supra* note 5, at 13.

53. YAEGER, *supra* note 3, at 200.

54. *Id.* at 201.

55. *Id.* at 199.

56. Michael G. Dawson, *National Collegiate Athletic Association v. Tarkanian: Supreme Court Upholds NCAA's Private Status Under the Fourteenth Amendment, Repelling Shark's Attack on NCAA's Disciplinary Powers*, 17 PEPP. L. REV. 217, 237 n.167 (1989) (citing J. TARKANIAN & T. PLUTO, *TARK-COLLEGE BASKETBALL'S WINNINGEST COACH* 160 (1988)).

57. A.O.B., *supra* note 5, at 7 (citing *University of Nevada v. Tarkanian*, 594 P.2d 1159, 1160 (Nev. 1979)).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

illustrated the NCAA's prejudice against Tarkanian.⁶² NCAA investigators alleged that Tarkanian bought an airline ticket for a prospective basketball star, "Jeep" Kelly, to fly from his home to Las Vegas, Nevada.⁶³ Even though UNLV presented the ticket, an affidavit from Kelly's high school coach stating he, the coach, paid for the ticket, and the coach's canceled check showing payment, the NCAA nonetheless found Tarkanian guilty of buying the ticket for Kelly.⁶⁴

The Nevada District Court concluded "this case presents a classic example of how misperception becomes suspicion, which in turn becomes hostility, which leads, inevitably, to a deprivation of one's rights."⁶⁵ The court characterized David Berst, one of the NCAA's investigators, as "a man possessed and consumed with animosity toward Tarkanian."⁶⁶ Berst "swore he would get Tarkanian if it was the last thing he ever did to act as investigator, judge and jury."⁶⁷ In addition Berst inspired, authored and drafted nearly all documented charges, findings, and sanctions against Tarkanian.⁶⁸ "These practices might be considered 'efficient,' but so was Adolph Eichmann and so is the Ayatollah."⁶⁹

Not only did Nevada courts find shortcomings in the NCAA's enforcement procedures, but so did the United States government. U.S. House of Representatives Subcommittee examined the NCAA's enforcement program in 1978.⁷⁰ The Subcommittee set out to investigate charges of unfairness in the NCAA's enforcement process and found deficiency at the investigations and hearings levels.⁷¹

At the NCAA's investigative stage, the Subcommittee found that cooperation between the NCAA and member institutions did not exist, and that investigations were "one-sided in the extreme."⁷² Furthermore, member institutions were "put to unnecessary expense and trouble" and have been subjected to inappropriate penalties.⁷³ Also, the NCAA produced "an

62. Order, *supra* note 51, at 14.

63. *Id.*

64. *Id.*

65. *Id.* at 11.

66. A.O.B., *supra* note 5, at 7.

67. *Id.* (citing *University of Nevada v. Tarkanian*, 594 P.2d at 1160).

68. Order, *supra* note 51, at 13. Berst drafted in whole or in part "the NCAA preliminary investigation; the authority to issue an inquiry to UNLV; the Official Inquiry; the minutes of the Committee on Infractions wherein the Committee's rules . . . appeared; the Confidential Report of that Committee; the Findings and penalty imposed by that Committee; the Expanded Confidential Report . . . used on appeal; and the order of the Council and the widely-promulgated press release about the supposed violations of NCAA's legislation." *Id.*

69. Order, *supra* note 51, at 14.

70. See SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95th Cong., 2d Sess., ENFORCEMENT PROGRAM OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, (Comm. Print 1978) [hereinafter Report].

71. *Id.* at 25, 34.

72. *Id.* at 25.

73. *Id.*

intolerable incidence of spurious and petty allegations."⁷⁴ Member institutions were "presumed guilty until proved innocent, which the Subcommittee finds fatally offensive to its sense of fair play."⁷⁵

In addition, the Subcommittee found equal problems with the hearing phase.⁷⁶ The hearing process lacked consistent evidentiary standards essential to the fundamental fairness of the system.⁷⁷ The Subcommittee found an irreconcilable conflict of interests among NCAA investigators who acted as "investigators, prosecutors, judges, juries, and executioners all at the same time."⁷⁸ Significantly, the Subcommittee made its conclusions by interviewing coaches and university officials intimidated by the NCAA's power, and therefore reluctant to testify openly before the Subcommittee.⁷⁹

However, even though the Subcommittee found glaring problems with the NCAA's enforcement proceedings it passed no federal legislation.⁸⁰ The Subcommittee refrained from passing legislation in exchange for the NCAA's promise to make changes.⁸¹ However, nearly none of the deficiencies found by the Subcommittee have been rectified.⁸² Therefore, Congress is once again considering the issue.⁸³ The current query into the fairness of NCAA practices started in August of 1991 at the session of the Annual Meeting of the National Conference of State Legislatures entitled "NCAA—Threat of Outside Intervention."⁸⁴ Congressional findings have yet to be released.

Amidst the discontent with the NCAA's enforcement procedures, Nevada

74. *Id.*

75. *Id.*

76. *Id.* at 34.

77. *Id.*

78. *Id.*

79. *Id.* at 3. A representative for Mississippi State University stated: ". . . most 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." *Id.* (citing *Enforcement Program of the National Collegiate Athletic Association: Hearings Before the Subcommittee on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 125 (1978)* (statement of Erwin C. Ward, Attorney for Mississippi State University) [hereinafter *Hearings*]). Also, a former Michigan State University assistant football coach expressed concern, "I felt like I did not want my name associated with this hearing against the NCAA because I feel like it has hurt my future in coaching and will continue to hurt my future in coaching. . . . I feel like the administrators of this country are intimidated by the NCAA." *Id.* (citing *Hearings* at 127.) Even the NCAA president candidly admitted that ". . . there are those who feel it unwise to express their concerns about what has happened and about their impression of fairness by the NCAA." *Id.* (citing *Hearings* at 195 (Mar. 14, 1978.))

80. A.O.B., *supra* note 5, at 13.

81. *Id.* (citing Trial Record 108, Reference 1 at 11-16; and Trial Record 108, Reference 11 at 55-59).

82. *Id.*

83. Brief of Amicus Curiae to the United States at 26 (citing H.R. 2157, 102d Cong., 1st Sess. (1991)), *National Collegiate Athletic Ass'n v. Miller*, 795 F. Supp. 1476, 1479 (D. Nev. 1992) (also on file with the California Western Law Review) [hereinafter B.A.C.].

84. *Id.* at 26 n.30. The moderator of the session was Don Yaeger. *Id.*

passed its Due Process Statute. Indeed, Nevada was neither the first nor the last to propose due process controls on the NCAA.⁸⁵ Nebraska,⁸⁶ Florida,⁸⁷ and Illinois⁸⁸ also have enacted due process statutes.⁸⁹ Such statutes have also been introduced in Iowa,⁹⁰ California,⁹¹ Kansas,⁹² South Carolina⁹³ and New York.⁹⁴

C. Remedying the Situation

The Nevada Due Process Statute would remedy most of the problems encountered between Tarkanian and the NCAA by forcing any national collegiate athletic association to conform to basic standards of due process within Nevada. For instance, the right to confront and cross-examine witnesses⁹⁵ gives schools the capability of exposing untruthful witnesses while also protecting against one-sided investigations by pointing out the gaps in method and evidence collection. Furthermore, by requiring the NCAA to support all rules violations findings by a preponderance of the evidence,⁹⁶ spurious and petty allegations along with Kelly-type scenarios would be disallowed. Also, the requirement of an impartial presiding person⁹⁷ would prevent men like Berst from acting as investigator, judge, and jury. Lastly, by requiring a record of the proceedings,⁹⁸ judicial review,⁹⁹ and monetary sanctions,¹⁰⁰ the NCAA would be forced to hold an accused innocent until proven guilty. Then, only after guilt was established by a preponderance of the evidence, could the NCAA impose appropriate sanctions on guilty

85. Supplemental Brief of Defendant Jerry Tarkanian, at 1, National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476 (D. Nev. 1992) [hereinafter Supp. Brief].

86. "Nebraska Collegiate Athletic Association Procedures Act," NEB. REV. STAT. § 85-1201 to 85-1210 (1990).

87. "Collegiate Athletic Association Compliance Enforcement Procedures Act," FLA. ANN. STAT. §§ 240.5339-240.5349 (West 1992).

88. "Collegiate Athletic Association Compliance Enforcement Procedures Act," ILL. ANN. STAT. ch. 144, para. 2901-2903 (Smith-Hurd 1991).

89. Supp. Brief, *supra* note 87, at 1-2.

90. *Id.* at 2 n.6 (citing Proposed new Section 266(a).1 et seq. introduced by Peterson, Harbor & Siegrist into general assembly of the State of Iowa on March 11, 1991).

91. *Id.* at n.5 (citing Senate Bill No. 974 introduced by Senator Hill on March 8, 1991).

92. *Id.* at n.7 (citing Senate Bill No. 234 introduced by Senators Winter, et al., 1991).

93. *Id.* at n.8 (citing Assembly Bill to adopt the South Carolina Collegiate Athletic Associations Procedures Act).

94. *Id.* at n.9 (citing Proposed Section 6450-A et seq. of the Education Law introduced by Senator Stafford in 1991).

95. NEV. REV. STAT. § 398.155(2) (1991).

96. *Id.* § 398.225(2). All evidence must be "of the type commonly relied upon by reasonable and prudent men. . . ." *Id.*

97. *See id.* § 398.195.

98. *Id.* § 398.165.

99. *Id.* § 398.215.

100. *Id.* § 398.245.

parties.¹⁰¹ Therefore, because the Nevada Due Process Statute provides Nevada schools with much needed protection, the *Miller* court's decision to invalidate the statute must be scrutinized. A brief look at Commerce and Contract Clause history serves as a predicate to a description of how the Nevada District Court arrived at its decision on June 5, 1992.

II. THE *MILLER* DECISION: ITS CONSTITUTIONAL BASIS AND RATIONALE

A. *The Dormant Commerce Clause: Modern Application*

The Commerce Clause gives Congress the power to "regulate Commerce . . . among the several States . . ."¹⁰² The Commerce Clause in form and language affirmatively grants Congress the power to pass laws limiting interstate commerce.¹⁰³ However, even if Congress fails to pass legislation, the negative implications of the Commerce Clause, commonly called the Dormant Commerce Clause, still impose judicial limits on the states' power.¹⁰⁴

The Dormant Commerce Clause allows the courts to strike down state statutes that act as "barriers" to interstate commerce without sufficient justification.¹⁰⁵ Otherwise, states might impede the flow of commerce, block free trade channels, or damage the national market.¹⁰⁶ Nonetheless, under the Dormant Commerce Clause, a state may still regulate interstate commerce in certain areas.¹⁰⁷ States may pass laws of local concern that protect citizens from dangers to their health, safety, and welfare.¹⁰⁸ "As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens."¹⁰⁹

In analyzing a state statute under the Dormant Commerce Clause, the Supreme Court has adopted a two-tiered approach, articulated in *Brown-Forman Distillers Corp. v. New York Liquor Authority*.¹¹⁰ First, a court must ask if the statute discriminates against interstate commerce facially or in effect.¹¹¹ A discriminatory statute is "one that overtly blocks the flow

101. *Id.* §§ 398.225(2)-(3).

102. U.S. CONST. art. I, § 8, cl. 3.

103. *Miller*, 795 F. Supp. at 1482.

104. *Id.* (citing *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).

105. Sam Kalen, *Reawakening The Dormant Commerce Clause In Its First Century*, 13 U. DAYTON L. REV. 417, 417 (1988).

106. *Id.*

107. *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 669 (1981).

108. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949).

109. A.O.B., *supra* note 5, at 18 (quoting *Maine v. Taylor*, 477 U.S. 131, 151 (1986)).

110. 476 U.S. 573, 578 (1986).

111. *Id.* at 579.

of interstate commerce at a State's borders."¹¹² If the court finds discrimination, it must strike down the statute unless there is no reasonable, nondiscriminatory alternative for accomplishing the State's legitimate goals.¹¹³ However, if the court finds no discrimination, then it applies the *Pike*¹¹⁴ balancing test.¹¹⁵

Where the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.¹¹⁶

Courts applying the *Pike* test must first determine whether the statute serves a legitimate local public interest.¹¹⁷ If not, the query ends and the statute is unconstitutional.¹¹⁸ However, if the statute does serve a legitimate local public interest, the court must next determine whether the burden on interstate commerce clearly exceeds the local benefits.¹¹⁹ If the burdens on interstate commerce clearly outweigh the benefits, then the court voids the statute.¹²⁰ But if the burdens do not clearly exceed the local benefits, then the statute will withstand Commerce Clause analysis, retaining constitution-

112. *Miller*, 795 F. Supp. at 1483 (citing *Evergreen Waste Sys. v. Metro. Serv. Dist.*, 820 F.2d 1482, 1488 (9th Cir. 1987)).

113. *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

114. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

115. *Brown-Forman*, 476 U.S. at 579.

116. *Pike*, 397 U.S. at 142. The case itself illustrates how the balancing is done. In *Pike*, the defendant company grew cantaloupes in Arizona and shipped them to California to be sorted, inspected, and packed in containers bearing the name of the California packer. *Id.* at 137. The Arizona Fruit and Vegetable Standardization Act required that "fruits and vegetables shipped from Arizona meet certain standards of wholesomeness and quality, and that they be packed in standard containers in such a way that the outer layer or exposed portion of the pack does not 'materially misrepresent' the quality of the lot as a whole. The impetus for the Act was the fear that some growers were shipping inferior or deceptively packaged produce, with the result that the reputation of Arizona growers generally was being tarnished and their financial return concomitantly reduced." *Id.* at 142-43 (citations omitted). The plaintiff, acting under a statute designed to prevent deceptive packaging, sued the defendant requiring him to identify the cantaloupes as of Arizona origin. *Id.* The issue was whether the statute forcing the defendant to build packing facilities in Arizona to label the cantaloupes at a cost of \$200,000 was constitutional under the Commerce Clause. *Id.* The U.S. Supreme Court held the statute unconstitutional because it violated the Commerce Clause. *Id.* at 145. The Court employed a balancing test and reasoned that Arizona's minimal interest in identifying Arizona cantaloupes to enhance the reputation of Arizona producers did not outweigh the burden of requiring the defendant producer to build, at substantial capital expense, a packaging plant that it did not need. *Id.* at 137.

117. *Id.* at 142.

118. *Id.*

119. *Id.*

120. *Id.*

ality.¹²¹

The limitations of balancing tests are well known. As with any burden-benefit balancing approach, the court faces a difficult task. "Even expert economists might be hard-pressed to determine whether the overall economic benefits and burdens of a state regulation favor local inhabitants or outsiders."¹²² Indeed, individual Justices have recently questioned the theoretical underpinnings of the "balancing test."¹²³

B. The Contract Clause

The Contract Clause provides that "[n]o State shall . . . pass any . . . Laws impairing the obligation of Contracts. . . ."¹²⁴ The drafters of the Contract Clause intended to prevent state legislatures from interfering with contracts between private citizens by relieving debtors of their obligation to pay creditors.¹²⁵ However, although the language of the Contract Clause seems absolute, a state may pass legislation that safeguards the vital interests of its people.¹²⁶ The general rule is that even if a statute *substantially impairs* the contract, the statute is constitutional if it is *reasonable* and

121. *Id.*

122. Russell Chapin, *Chadha, Garcia and the Dormant Commerce Clause Limitation on State Authority to Regulate*, 23 URB. 163, 168 (Spring 1991). "Thus, the Court reserves the right to pick and choose among the various tests and touchstones to arrive at the result it wishes to achieve. Consistency . . . is not the hallmark of adjudication in this area of the law." *Id.* at 169.

123. Kalen, *supra* note 105, at 419. In *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), Justice Scalia noted in his concurring opinion that the *Pike* balancing test "is ill suited to the judicial function and should be undertaken rarely if at all." Kalen, *supra* note 105, at 419 (quoting *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 94 (1987)). Furthermore, Scalia reiterated his view with Chief Justice Rehnquist in *Tyler Pipe Industries v. Washington Department of Revenue* 107 S. Ct. 2810 (1987), where he mentioned that historically, dormant commerce clause analysis lacked theoretical underpinning in the Constitution. Kalen, *supra* note 105, at 419 (citing *Tyler Pipe Industries v. Washington Department of Revenue*, 107 S. Ct. 2810, 2826 (1987) (citations omitted)). In *Tyler*, Scalia noted:

[t]he fact is that the 114 years since the doctrine of the negative Commerce Clause was formally adopted as holding of this Court, and in the 50 years prior to that in which it was alluded to in various dicta by the Court, our applications of the doctrine have, not to put too fine a point on the matter, made no sense.

Id. Scalia's opinion in *Tyler* was "perhaps the most critical remark on the dormant commerce clause to date by a sitting Justice" which "may prove to be the prelude to a new jurisprudence." *Id.* Scalia argued that the Court should not use the balancing test, but rather should look at state statutes under clause IV of the Constitution using a privileges and immunities analysis. *Id.*

124. U.S. CONST. art. I, § 10, cl. 1.

125. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 395 (4th ed. 1991). Specifically, the primary focus of the Contract Clause "was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy." *Id.*

126. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983) (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)).

necessary in achieving a vital public purpose.¹²⁷

The initial inquiry in determining if a statute violates the Contract Clause is whether the statute “substantially impairs” the contractual relationship.¹²⁸ “Substantial impairment” occurs only when the statute imposes a *loss* on the other party.¹²⁹ If only a small impairment exists, the inquiry may end and the statute is constitutional.¹³⁰ Even if a statute substantially impairs a contractual agreement, the statute is constitutional if it is both *reasonable* and *necessary* to achieve an important public purpose.¹³¹ The “reasonableness” element concentrates on what the legitimate expectations of the parties were when they entered into the agreement.¹³² The “necessary” requirement focuses on whether an obvious and less damaging alternative would serve the state’s interest just as well.¹³³ If the statute is both reasonable and necessary under this analysis, then it is constitutional.

III. NCAA v. MILLER

A. *The Situation Leading to Miller’s Rejection of the Nevada Due Process Statute*

The NCAA received information of possible rule violations at UNLV and after a preliminary inquiry, the NCAA Committee on Infractions¹³⁴ sent an official inquiry to UNLV in late 1990 describing recruitment violations of Lloyd Daniels.¹³⁵ Daniels was identified as a suspect in the theft of Final Four basketball tickets from UNLV and allegedly received cash, a car, and a motorcycle to play for the Rebels.¹³⁶ Subsequently, both the NCAA and UNLV conducted separate investigations of the UNLV intercollegiate basketball program.¹³⁷ During that time, NCAA investigators also reviewed the recruitment of Ed O’Bannon.¹³⁸ The O’Bannon in-

127. *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25 (1977).

128. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

129. *Id.* at 244-47.

130. *Id.* at 245.

131. *Energy Reserves*, 459 U.S. at 411.

132. *United States Trust*, 431 U.S. at 31-32.

133. *Id.* at 31.

134. The NCAA Committee on Infractions runs the enforcement program by controlling an investigative staff, determining facts relating to any possible rules violations, and penalizing schools that violate the rules. *Miller*, 795 F. Supp. at 1480.

135. *Status*, *supra* note 3, at A40. On December 18, 1990, the NCAA charged UNLV with 29 rules violations, many of them major. *Id.*

136. YAEGER, *supra* note 3, at 232.

137. *Miller*, 795 F. Supp. at 1480. The university released a secretly made videotape of a conditioning class taught by a UNLV basketball coach that allegedly shows the team practicing before the season started officially. *Status*, *supra* note 3, at A40.

138. *Status*, *supra* note 3, at A40. Ed O’Bannon never ended up playing for UNLV. Instead, he accepted a scholarship at UCLA (University of California at Los Angeles) and as of February 1992 plays forward for the UCLA Bruins basketball team. *Id.*

vestigation resulted in an official charge of rules violations against UNLV which was mailed on July 2, 1991.¹³⁹

As a result of the investigations, near the end of July 1991, the Committee notified UNLV of the prehearing conference and official hearing scheduled for September 1991.¹⁴⁰ However, Tarkanian notified the NCAA that any hearing appearance would be conditioned upon the NCAA complying with the Nevada Due Process Statute enacted into law on April 8, 1991.¹⁴¹ Specifically, Tarkanian demanded:

(1) that at least thirty (30) days prior to the prehearing conference the NCAA give each defendant copies of all documents the NCAA intends to rely upon or use in any manner; (2) that each defendant be given the opportunity to confront all witnesses; (3) that the NCAA provide the defendants all exculpatory statements obtained by the NCAA; (4) that the Committee on Infractions is not impartial and that an independent and impartial entity be selected to adjudicate the facts and corrective actions; (5) that all proceedings of the NCAA hearing be open to the public, recorded and transcribed; and (6) that all other provisions of [the Nevada Due Process Statute] be followed.¹⁴²

With their investigation and enforcement methods challenged, and four years of investigation on the line, the NCAA rallied their cause to the courtroom and filed suit for declaratory and injunctive relief.¹⁴³ The NCAA implored the court to (1) declare the Nevada statute void and (2) restrain and enjoin Tarkanian from taking any action to enforce or seek protection under the provisions of the statute.¹⁴⁴

In response, Tarkanian contended that under NCAA rules, an accused faces loss of livelihood, revenue, and reputation, without such basic due process protections as a transcript of his disciplinary hearings, an unbiased hearing officer, a right to confront accusers, or an opportunity for a meaningful appeal.¹⁴⁵ Tarkanian argued that "the Nevada Due Process Statute was enacted for a very serious purpose—to curb the pernicious effects of allowing national collegiate athletic associations, such as the NCAA, unfettered freedom in conducting 'star chamber' proceedings."¹⁴⁶ Tarkanian concluded that without the protection of the Due Process Statute, the

139. *Id.*

140. *Miller*, 795 F. Supp. at 1480.

141. *Id.*

142. *Id.* at 1481.

143. *Id.*

144. *Id.* at 1479, 1488.

145. Supp. Brief, *supra* note 84, at 3. "The large number of affected Nevada citizens include the 11,714 students and approximately 1,000 employees at the University of Nevada at Reno, the 19,504 students and 1,870 employees at the University of Nevada, Las Vegas, as well as untold thousands of alumni from these institutions, and the hundreds of thousands of fans or 'boosters' of Nevada college sports." *Id.*

146. Supp. Brief, *supra* note 84, at 25.

NCAA's unfair practices would result in the tarnishing of "the reputations of all those directly and indirectly connected with a Nevada member institution athletic program, disrupt the participation in and enjoyment of college sports programs, and end the careers of coaches and other university employees as well as rising young student-athletes."¹⁴⁷

Despite Tarkanian's arguments, the Nevada District Court held the Nevada Due Process Statute violated the Commerce Clause and Contract Clause of the United States Constitution,¹⁴⁸ and ruled the Nevada statute invalid and unenforceable against the NCAA.¹⁴⁹ Furthermore, the court restrained and enjoined Tarkanian from taking any action to enforce or seek protection under the Nevada Due Process Statute.¹⁵⁰

B. Discussion: The Miller Court's Constitutional Analysis

1. The Commerce Clause

The district court began its Commerce Clause analysis by asking the threshold question of whether the regulatory activities of the NCAA involved "interstate commerce for purposes of Commerce Clause protection in light of the educational objectives of the NCAA."¹⁵¹ The court noted that while the participating athletes may be amateurs, the management of intercollegiate athletics is business, and "big business at that."¹⁵² Thus, the court concluded that the conduct of the athletic programs between the NCAA and its member institutions significantly involved interstate commerce and triggered implication of the Commerce Clause.¹⁵³

147. *Id.*

148. *Miller*, 795 F. Supp. at 1488. Besides arguing that the Nevada statute violated the Commerce and Contract Clauses of the Constitution, the NCAA also contended that (1) "the statute arbitrarily deprives the NCAA and its members of the right to freely associate with each other to maintain their intercollegiate athletic programs in violation of the First Amendment" and that (2) "the statute contains provisions which are vague and overbroad in violation of the Due Process Clause under the Fourteenth Amendment." *Id.* at 1479. The last two issues were undecided by the court because their resolution would not alter the relief granted to the NCAA. *Id.* at 1488.

149. *Miller*, 795 F. Supp. at 1488.

150. *Id.* Also, the court had stayed consideration of certain counterclaims by Jerry Tarkanian and his wife, Lois Tarkanian, pending a resolution of this case. Thus, the court vacated that stay. *Id.*

151. *Miller*, 795 F. Supp. at 1482.

152. *Id.* (citing *Hennessey v. NCAA*, 564 F.2d 1136, 1150 (5th Cir. 1977)).

153. *Id.* (citing *Hennessey v. NCAA*, 564 F.2d 1136, 1150 (5th Cir. 1977); *see also Banks v. NCAA*, 746 F. Supp. 850, 857 (N.D. Ind. 1990)). The court stated that a close look at the NCAA bears its conclusion out:

The NCAA conducts seventy-six (76) annual NCAA championship events throughout the United States involving member teams and individual student athletes from across the country. The games and tournaments scheduled by the NCAA necessitate the transportation of teams across state lines. In addition, the NCAA controls bids involving hundreds of millions of dollars for interstate television broadcasting of

The court erred, however, by focusing entirely on the NCAA's "economic" activities and not on the "social" nature of the Nevada Due Process Statute.¹⁵⁴ The U.S. Supreme Court gives priority to legislation regarding social issues over economic issues.¹⁵⁵ The Nevada Due Process Statute provides for "the social concern of providing minimum due process rights to Nevada state employees and others accused in an NCAA infractions case."¹⁵⁶ Furthermore, even the NCAA argued successfully in the past that its rules "are not designed to generate profits in a commercial activity but to preserve amateurism by assuring that the recruitment of student athletes does not become a commercial activity."¹⁵⁷ The NCAA argued that its "eligibility rules have purely or primarily non-commercial objectives."¹⁵⁸ Therefore, if the NCAA considered its own enforcement rules "purely non-commercial," then those of the Nevada Due Process Statute are equally so.¹⁵⁹

Nonetheless, finding the Commerce Clause applicable, the court next considered whether the Nevada statute violated the Commerce Clause.¹⁶⁰ The court applied the two-tiered analysis articulated in *Brown-Forman Distillers Corp. v. New York Liquor Authority*.¹⁶¹ First, the court considered whether the Nevada law directly discriminated against interstate commerce or amounted to "economic protectionism" making the statute per se invalid.¹⁶² The court determined that the statute did not facially or directly discriminate against interstate commerce, nor did it sound of economic pro-

intercollegiate sports events. Finally, collegiate recruiting of perspective team members takes place on a national and even international scale and the NCAA strictly regulates this recruiting activity. As the Supreme Court has held . . . the "product" marketed by the NCAA is intercollegiate competition. Accordingly, the court concludes that the national scope of the NCAA's activities are sufficient to establish the requisite interstate involvement under the Commerce Clause.

Miller, 795 F. Supp. at 1482 (citations omitted).

154. A.O.B., *supra* note 5, at 19.

155. *Id.* (citing *Healy v. Beer Inst., Inc.*, 109 S. Ct. 2491, 2501 (1989) (stating that even overt discrimination against interstate trade may be justified in cases of social welfare); *Breard v. Alexandria, La.*, 341 U.S. 622, 640, (1951) ("[w]here there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for [the federal courts] because of the Commerce Clause to deny the exercise locally of the sovereign power of [the state]").

156. A.O.B., *supra* note 5, at 20.

157. B.A.C., *supra* note 83, at 1 (citing *Gaines v. NCAA*, 746 F. Supp. 738, 743 (M.D. Tenn. 1990)).

158. *Id.* at 1 n.3 (citing *McCormack v. NCAA*, 845 F.2d 1338, 1343 (5th Cir. 1988)).

159. A.O.B., *supra* note 5, at 21.

160. *Miller*, 795 F. Supp. at 1483.

161. *Id.*; see *Brown-Forman Distillers Corp. v. New York Liquor Authority*, 476 U.S. 573 (1986).

162. *Id.* If the statute was directly discriminatory, amounting to economic protectionism, then the statute would be considered per se invalid under the Commerce Clause. *Id.* (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *Evergreen Waste Sys. v. Metro. Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987); *Valley Bank of Nev. v. Plus Systems, Inc.*, 914 F.2d 1186, 1194 (9th Cir. 1990)).

tectionism.¹⁶³ This conclusion is correct. In *Miller*, the situation was definitely unlike cases in which the state sought to advantage its own competing commercial enterprises,¹⁶⁴ or close off its borders from interstate commerce.¹⁶⁵

More troublesome, however, is the court's employment of the *Pike*¹⁶⁶ balancing test and its determination that any burden on interstate commerce outweighed the statute's benefit.¹⁶⁷ In holding that the statute's benefits were outweighed by the harm to the uniform enforcement of NCAA regulations throughout the country,¹⁶⁸ the court committed serious errors. First, the court gave inadequate attention to the benefits resulting from the statute. The court should have acknowledged that the Nevada Due Process Statute makes NCAA procedures for determining violations fair to Nevada students, school employees, schools, and the institutions' communities.¹⁶⁹ Also, the Nevada Statute benefits student athletes and school employees by protecting their reputations, means to make a livelihood, and personal and professional aspirations.¹⁷⁰ Furthermore, the statute protects Nevada institutions from crippling financial loss that would severely disrupt their athletics programs

163. *Miller*, 795 F. Supp. at 1483. The court also added that the Nevada statute did not overtly block the flow of interstate commerce at Nevada's borders. The Nevada Due Process Statute only attempted to require the NCAA to comply with minimum due process standards when investigating Nevada schools. *Id.*

164. *See, e.g.,* *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977). In *Hunt*, North Carolina enacted a statute which required that "all closed containers of apples sold, offered for sale, or shipped into the State to bear 'no grade other than the applicable U.S. grade or standard.'" *Id.* at 335. The Washington State Apple Advertising Commission challenged the statute on the ground that it violated the Commerce Clause. *Id.* The Washington "legislature has undertaken to protect and enhance the reputation of Washington apples by establishing a stringent, mandatory inspection program . . . [i]n all cases, the Washington State grades . . . are the equivalent of, or superior to, the comparable grades and standards adopted by the United States Department of Agriculture (USDA)." *Id.* at 336. The court invalidated the North Carolina statute because 1) it raised the cost of doing business for Washington growers and 2) the statute stripped the Washington apple industry of the competitive and economic advantages it had earned by its high grade system. *Id.* at 351-52. "By requiring Washington apples to be sold under the inferior grades . . . the North Carolina statute offers the North Carolina apple industry the very sort of protection against out-of-state competition that the Commerce Clause was designed to prohibit." *Id.* at 334.

165. *See generally* *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding that New Jersey's law that prohibited the importation into the state of solid or liquid wastes, in order to protect the public, health, safety, and welfare violated the Commerce Clause because New Jersey sought to close off its borders from interstate commerce).

166. *See supra* note 116 and accompanying text (describing the holding in *Pike*).

167. *See Miller*, 795 F. Supp. at 1483. The court "must first identify the state's interests in its legislation, ensure that those interests are legitimate, and then determine whether the state law imposes an excessive burden on interstate commerce in relation to those legitimate interests." *Id.* (citing *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1194 (9th Cir. 1990)).

168. *Miller*, 795 F. Supp. at 1485.

169. These arguments are taken from the body of the Illinois Act, *supra* note 89, para. 2902(i). Because the Illinois and the Nevada statute primarily fight for the same things, procedural due process within state borders, the Illinois argument aptly applies to the Nevada case.

170. *See id.*

and directly lessen local taxpayer support to the institutions.¹⁷¹ Although the court did correctly note that “the enactment of the statute is to afford basic due process safeguards to the careers, livelihoods, and reputations of all Nevadans, including students and employees of Nevada NCAA member institutions, the alumni of these institutions, and the fans and boosters of Nevada intercollegiate sports,”¹⁷² it failed to evaluate the importance of these interests. Noting that they were “matters of legitimate local public interest,”¹⁷³ the court quickly concluded that even though a statute may address interests of legitimate concern, these interests may be void if the burden on interstate commerce is clearly “excessive in relation to the local interests served by the statute.”¹⁷⁴ The court reasoned that the statute prevented the evenhanded application of NCAA enforcement procedures because the statute required cross-examination of all witnesses, required an impartial hearing officer, required NCAA compliance before sanctioning Nevada schools, and controlled commerce outside its borders.¹⁷⁵ Had the court truly weighed these interests, it would have found that the burdens did not clearly outweigh the benefits.¹⁷⁶ The Nevada Due Process Statute does remedy a public concern.¹⁷⁷ When the NCAA investigates Nevada institutions and issues unfair sanctions against them, all Nevadan taxpayers directly shoulder the financial burden of lost income from sporting events.¹⁷⁸ Furthermore, distinguished coaching careers may be curtailed because of unfair NCAA sanctions.¹⁷⁹ Indeed, as argued in an amicus brief, the statute does not subject the NCAA “to formidable or burdensome requirements; rather, the provisions of [the Nevada Due Process Statute] . . . merely impose rules guaranteeing the common concepts of notice, an opportunity to be heard, cross-examination, an impartial adjudicator and punishment consistent with that dispensed for like violations.”¹⁸⁰ Admittedly, these local interests do not rise to the level of the prevention of food contamination¹⁸¹ or traffic deaths.¹⁸² However, even if the court’s underplaying of the benefits of the Nevada Due Process Statute was more appropriate, the court committed a significant error by over-valuing the burdens in several ways.

171. *See id.*

172. *Miller*, 795 F. Supp. at 1483. Tarkanian contends that the impetus for the statute is a concern that “coaches will not receive a fair hearing consistent with notions of due process and fundamental fairness” if the existing NCAA rules are used in subsequent investigations. *Id.*

173. *Id.* at 1483.

174. *Id.* at 1484 (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982)).

175. *Id.* at 1484-85.

176. *See B.A.C.*, *supra* note 83, at 4.

177. *See id.* at 7.

178. *Id.*

179. *Id.*

180. *Id.* at 7, n.10.

181. *See, e.g.*, *Mintz v. Baldwin*, 289 U.S. 346 (1933).

182. *See, e.g.*, *South Carolina State Highway Dep’t v. Barnwell Brothers*, 303 U.S. 177 (1938).

The court decided that the Nevada law required procedures both substantially different than the NCAA bylaws and significantly burdensome on the NCAA's goal of maintaining a "level playing field."¹⁸³ First, the court noted that Section 398.155(2) of the statute provides investigatees the right to cross-examine witnesses.¹⁸⁴ The court determined that because the NCAA lacks the power to subpoena witnesses, "an infractions proceeding could not practically be processed in compliance with the provisions of the Nevada statute."¹⁸⁵

The court's subpoena power argument fails for several reasons. The NCAA already has substantial power to compel witnesses to testify. Coaches, athletes and administrators already have a commitment to cooperate with the NCAA, and failure to testify before the NCAA enforcement staff can be a violation of the cooperation clause.¹⁸⁶ For a coach this may mean NCAA banishment, or for an athlete, the loss of eligibility.¹⁸⁷ The NCAA acknowledges this power, but argues that one important group remains unaffected by the cooperation clause, namely the boosters.¹⁸⁸ Nonetheless, the NCAA can remedy the booster problem by requiring each university to sign contracts with everyone, including members of the booster club, requiring complete cooperation during NCAA investigations.¹⁸⁹ If boosters failed to cooperate, the contract could provide for school sanctions and personal disassociation from the university.¹⁹⁰

Additionally, the NCAA can get subpoena power. One alternative for the NCAA to is to go to the state legislatures and just ask for subpoena power.¹⁹¹ Another alternative would be for the NCAA to link its procedures with those of local law enforcement people.¹⁹² "If those potential NCAA witnesses were threatened with time in jail if they didn't answer,

183. *Miller*, 795 F. Supp. at 1484.

184. *Id.* "A party to a proceeding . . . is entitled to confront and respond to all witnesses and evidence related to the allegation against him. . . ." NEV. REV. STAT. § 398.155(2) (1991).

185. *Id.*

186. NCAA MANUAL, *supra* note 23, at 32.3.11 at 428.

187. YAEGER, *supra* note 3, at 261.

188. *Id.*

189. *Id.* at 262.

190. *Id.* The contract "could even extend to alums, that to be a member of the booster club, to be involved in athletics in any way, you must sign a contract that says you will cooperate with the NCAA and the NCAA has the authority to go into court to force you to cooperate if you don't. And if you fail to cooperate the university could be sanctioned, and you still be automatically disassociated from the program. It's like a contempt citation." *Id.*

191. *Id.* Duke University sports law professor John Weisert feels that the NCAA's complaint that it does not have subpoena power "bothers him for at least one reason: They've never asked for it. 'If they wanted to be truly effective . . . the easiest thing to do would be to go to Congress . . . and ask for subpoena power. . . . The fact that they've never requested subpoena power, in my mind, means they shouldn't be using the lack of subpoena power as an excuse for bad enforcement.'" *Id.* at 241, 243-44.

192. *Id.* at 262.

then . . . you'd get a much more thorough, a much more complete investigation."¹⁹³ However, the NCAA has avoided seeking official subpoena power because the NCAA fears legislatures might require them to abide by due process requirements in exchange.¹⁹⁴

Second, similarly questionable is the court's discussion of Section 398.195 of the Nevada statute, which required that hearings be conducted by an impartial hearing officer.¹⁹⁵ The court stated that the NCAA cannot comply with this provision because only membership at conventions may change the hearing officer from the Committee on Infractions to an impartial observer.¹⁹⁶ In other words, the court says that because the Nevada Statute conflicts with the NCAA's rules, the statute is invalid. However, the court used circular reasoning to reach this conclusion. Obviously, state law overrules a private association's regulations. If the court declared the statute valid, the statute would certainly "preempt" a private association's by-laws, here, the NCAA's. Therefore, just because the NCAA has its own rules does not make them presumptively immune to state statutory law.

Third, the court erred by finding that Section 398.235(2) burdens interstate commerce. The section abdicates the NCAA's right to expel Nevada institutions unless the NCAA abides by the terms of the statute. The court noted the NCAA "would likely be reluctant to use its resources to enforce rules evenhandedly in the several venues in this country," because this provision would "strip the NCAA of the authority to freely adopt its own procedural regulations."¹⁹⁷ But once again, the District court seems to ignore the fact that state laws almost always affect, and sometimes limit, private power. In and of itself, this is not a sufficient basis for a dormant commerce clause challenge. For example, in *Exxon Corp.*,¹⁹⁸ the court found that a state statute affected private power and business decisions, but held that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift

193. *Id.*

194. *Id.*

Or try this. When a school goes under investigation, the NCAA could require the institution the booster club or whatever to post a substantial bond that would be forfeited if someone does not cooperate. The idea is used on other places—that's what states are doing now with athletic agents, making them post bond, and if they violate rules they lose money under the bond. That's a powerful incentive to cooperate, if the university is going to lose big money.

Id.

195. *Miller*, 795 F. Supp. at 1484.

196. *Id.*

197. *Id.*

198. 437 U.S. 117 (1978).

from one interstate supplier to another.”¹⁹⁹ In other words, just because a state statute affects private power does not make the statute unconstitutional under the Dormant Commerce Clause. The *Miller* court did not explain how prohibiting the NCAA from imposing sanctions on schools, unless the NCAA complies with the Nevada Due Process Statute, creates a substantial burden on interstate commerce.

Finally, the court closely examined the state law in light of its effects on interstate commerce outside its borders.²⁰⁰ The court concluded that the extraterritorial effect of the statute was substantial because it “severely restricts the NCAA from establishing uniform rules to govern and enforce interstate collegiate practices associated with intercollegiate athletics.”²⁰¹ The fact that other states might have adopted different legislation meant that the NCAA would be precluded from having a uniform rule and procedural basis for conducting its investigations.²⁰²

Nonetheless, the court’s uniformity argument is irrelevant to Commerce Clause analysis because the NCAA seeks to merely protect its own method of operation, rather than an interstate market.²⁰³ The facts of the *Miller* case parallel those in *Exxon Corp.*²⁰⁴ In *Exxon Corp.*, Exxon challenged a state statute prohibiting them from owning and operating gas stations in

199. *Id.* at 127-28. In *Exxon Corp.*, the appellants argued ineffectively that because the Maryland statute would cause at least three refiners to stop selling in Maryland which would “deprive the consumer of certain special services.” *Id.* The court concluded that “[e]ven if we assume the truth of both assertions, neither warrants a finding that the statute impermissibly burdens interstate commerce.” *Id.* The court continued:

Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by other interstate refiners. The source of the consumers’ supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another. . . . It may be true that the consuming public will be injured by the loss of the high-volume, low-priced stations operated by the independent refiners, but that argument relates to the wisdom of the statute, not to its burden commerce.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28 (1978).

200. *Miller*, 795 F. Supp. at 1484 (citing *Edgar v. Mite Corp.*, 457 U.S. 624 (1982); *Brown-Forman Distillers Corp. v. New York Liquor Authority*, 476 U.S. 573 (1986); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989)).

201. *Miller*, 795 F. Supp. at 1484. The state law would force the NCAA to adopt the procedures of the statute thus allowing the Nevada Legislature to dictate enforcement proceedings outside Nevada. *Id.* at 1484-85. Further:

the practical effect of the statute must be evaluated by considering the consequences of the statute itself, but also in considering how the challenged statute may interact with the legitimate regulatory schemes of other states and what effect would arise of not one, but many or every, state adopted similar legislation.

Id. (citing *Healy*, 491 U.S. at 336).

202. *Miller*, 795 F. Supp. at 1485.

203. See A.O.B., *supra* note 5, at 21.

204. 437 U.S. 117 (1978).

Maryland.²⁰⁵ Exxon argued that other state legislatures had enacted or were planning to enact similar legislation and that the cumulative effect would damage the national uniformity of Exxon's marketing operations.²⁰⁶ Thus, Exxon argued that "because the economic market for petroleum products is nationwide, no state has the power to regulate the retail marketing of gas."²⁰⁷

However, in upholding the statute, the Court held that the Commerce Clause "protects the interstate *market*, not particular interstate *firms*, from prohibitive or burdensome regulations."²⁰⁸ More significantly, the Court upheld the statute even though "many legislatures [had] either enacted or considered proposals similar to Maryland's."²⁰⁹ The *Exxon* Court noted that Exxon was not afraid that other states would enact differing legislation, but rather that different states would enact legislation similar to the Maryland statute prohibiting them from owning and operating gas stations within state boundaries.²¹⁰ Similarly, in *Miller*, "the evil that the NCAA perceives is not that other states will enact differing legislation, but rather that the states will all conclude that the NCAA's existing enforcement rules fail to provide minimum due process procedures for those accused of NCAA rule violations."²¹¹

2. The Contract Clause

The *Miller* court used a three step approach in its analysis of the Contract Clause claim.²¹² First, the court asked if a contract existed between the parties.²¹³ Second, finding a contract did exist, the court then asked if the Nevada Due Process Statute substantially impaired the contractual relationship between the NCAA and Nevada schools.²¹⁴ Third, after concluding the statute substantially impaired the contractual relationship, the court analyzed whether the impairment was both reasonable and necessary to attain a valid state interest.²¹⁵ The court held the Nevada Statute unnecessary to achieve a valid state interest, thus invalidating the statute under a

205. A.O.B., *supra* note 5, at 22 (citing *Exxon Corp.*, 437 U.S. at 128).

206. *Id.*

207. *Exxon*, 437 U.S. at 128.

208. *Id.* at 127-28 (emphasis added).

209. *Exxon*, 437 U.S. at 128. The court noted that while "California, Delaware, the District of Columbia, and Florida [had] adopted laws restricting refiners' operation of service stations," legislatures in thirty-two other jurisdictions had considered similar proposals. *Id.* at 128 n.18.

210. A.O.B., *supra* note 5, at 23.

211. *Id.* at 25.

212. *Miller*, 795 F. Supp. at 1485-88.

213. *Id.* at 1485.

214. *Id.* at 1486.

215. *Id.* at 1487.

Contract Clause analysis.²¹⁶

First, the court asked whether a contract existed between NCAA and UNLV.²¹⁷ In determining a contract existed, the court reasoned when UNLV became an NCAA member in 1958 it received the benefits and privileges flowing from membership.²¹⁸ In exchange, the UNLV agreed to follow the NCAA's conditions of membership, including all enforcement procedures laid out in the NCAA Constitution and Bylaws.²¹⁹ Therefore, the court concluded a contractual relationship existed sufficient to trigger the Contract Clause.²²⁰

Assuming a contract between UNLV and the NCAA existed, although some arguments exist to the contrary,²²¹ it may not have fallen within the scope of the Contract Clause because of its subject matter.²²² The Contract Clause was intended to prevent legislative schemes that would defeat or adjust debtor-creditor relationships and contractual obligations.²²³ The "obligations" that the Contract Clause typically protects relate to "insolvency, property rights, eminent domain, taxation or other economic interests."²²⁴ However, any contract that exists between the NCAA and UNLV falls outside these categories and governs noneconomic activity.²²⁵ The NCAA rules are not designed to *generate* profits in a commercial activity,²²⁶ indeed, the eligibility rules have a purely non-commercial objec-

216. *Id.* at 1488.

217. *Id.* at 1486.

218. *Id.*

219. *Id.* (citing NCAA MANUAL, *supra* note 23, Const. art. 1.3.2.).

220. *Id.*

221. One commentator said that as a prerequisite for membership in the NCAA, all members "contractually" agree to conduct their athletic program in conformity with NCAA rules and regulations. Kevin M. McKenna, *The Tarkanian Decision: The State of College Athletics is Everything but State Action*, 40 DEPAUL L. REV. 459, 473 (1991). However, while there exists some evidence that a contract existed between the NCAA and UNLV, the court may have erred in finding one. See A.O.B., *supra* note 5, at 34. UNLV does not have any recognizable legal existence under Nevada law enabling it to contract with the NCAA because "UNLV is merely a branch of the University of Nevada System without any independent legal or corporate existence." *Id.* at 34-35. Section 396.020 of the Nevada Revised Statutes says that "[t]he system of universities, colleges, research and public service units administered under the direction of the board of regents shall collectively be known as the University of Nevada System." *Id.* at 34 (citing NEV. REV. STAT. § 396.020). Within this statute, university employees do not enter into contracts for UNLV, but the "University of Nevada System." Therefore, because UNLV is merely a branch of the University of Nevada System and has no legal significance, it does not have the power to enter into a contract with the NCAA. *Id.*

222. B.A.C., *supra* note 83, at 22.

223. See *id.* (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934)).

224. B.A.C., *supra* note 83, at 23 (citing *Annotation, State's Exercise of Police Power as Constituting Impairment of Obligation of Private Contract in Violation of Contract Clause of Federal Constitution—Supreme Court Cases*, 57 L. Ed. 2d 1279 (1977)).

225. See B.A.C., *supra* note 83, at 23.

226. See B.A.C., *supra* note 83, at 1 (citing *Gaines v. NCAA*, 746 F. Supp. 738, 743 (M.D. Tenn. 1990)).

tive.²²⁷ On this basis, because the contract between the NCAA and UNLV involves non-commercial or non-economic activity, the Contract Clause probably should not be applied.

Next, the court found that the statute substantially impaired the contractual relationship between the NCAA and Nevada member institutions.²²⁸ The court reasoned the NCAA would face pecuniary sanctions if it did not follow the Nevada Due Process Statute.²²⁹ The court believed the threat of monetary sanctions restricted NCAA enforcement proceedings and gave UNLV an unfair competitive advantage over out-of-state schools.²³⁰ In the court's view, this allowed UNLV to circumvent the contractual requirements with the NCAA.²³¹ Therefore, the court held that the statute substantially impaired the contractual relationship between UNLV and the NCAA.²³²

Nonetheless, the court erred by concluding that the statute substantially impaired any contract between UNLV and the NCAA.²³³ The Nevada Due Process Statute only affects the enforcement mechanism of the contract,²³⁴ and not the contractual *obligations*, and therefore only modifies the NCAA's remedy.²³⁵ The obligation is based upon a myriad of substantive behavior, including, the rules by which the games are played, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes and rules governing the size of athletic squads and coaching staffs.²³⁶ The Court decided in *In re Penniman*²³⁷ that two issues must be addressed when considering the constitutionality of a procedural modification of a contractual remedy: 1) does the action deny a remedy and, 2) does the action seriously impair the value of the contractual remedy to the point no substantial remedy remains.²³⁸ First, in *Miller*, the Nevada Due Process Statute does not deny a remedy because "the power to enforce the substantive regulations and the power to discipline violations remain in full force."²³⁹ Second, when the court examines whether a substantial remedy

227. *Id.* at 1 n.3 (citing *McCormack v. NCAA*, 845 F.2d 1338, 1343 (5th Cir. 1988)).

228. *Miller*, 795 F. Supp. at 1487.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. B.A.C., *supra* note 83, at 23.

234. *Id.* at 24.

235. *Id.* at 23.

236. *See id.* (citing *NCAA v. Board of Regents*, 468 U.S. at 85, 88 (1984)).

237. 103 U.S. 714 (1880). *In re Penniman* was quoted in *Thorpe v. Housing Authority*, 393 U.S. 268 (1969) and acknowledged *In re LaFortune*, 652 F.2d 842, 846 (9th Cir. 1981). B.A.C., *supra* note 83, at 24 n.27.

238. B.A.C., *supra* note 83, at 28.

239. *Id.*

remains, it decides each case on its own circumstances²⁴⁰ and “[i]n all such cases the question becomes one of reasonableness, and of that the *legislature* is primarily the judge.”²⁴¹ Regarding the Nevada Due Process Statute, the Nevada Legislature determined that it was reasonable to require national collegiate athletic associations to be fair when enforcing their rules.²⁴² Therefore, because the statute does not deny the NCAA remedy, or seriously impair the value of the contractual remedy to the point no substantial remedy remains, the Nevada Statute is arguably valid under the Contract Clause.

Lastly, the court determined the contractual impairment was not *necessary* to achieve an important public purpose.²⁴³ While the court conceded the statute represented a legitimate exercise of the state’s police power,²⁴⁴ it determined the statute did not rise to the level *necessary* to protect the health and safety of the Nevada people.²⁴⁵ The court reasoned the statute fell short of the *necessary* requirement for two reasons. First, the statute was not designed to solve a broad societal problem.²⁴⁶ The court explained that the statute specifically targeted the NCAA to give Nevada institutions unequal treatment, thus contradicting the initial contract promoting a fair and level playing field.²⁴⁷ This fact is somewhat irrelevant. The court erred by looking to the pointed *mechanism*, rather than the broad concerns solved as a result of the statute.²⁴⁸ Furthermore, the court reasons that because the Nevada statute affects only its state and those laws in it the Nevada schools get unequal treatment.²⁴⁹ But the court fails to acknowledge that all Nevada laws affect only Nevada and those entities operating in Nevada. Therefore, by the court’s own analysis, a state statute could never survive Contracts Clause requirements because state statutes serve to protect the interests of those within the borders of the state.

Additionally, the *Miller* court found the Nevada Due Process statute not necessary because: 1) Tarkanian, in conjunction with the NCAA and other member schools, could modify the procedural rules of NCAA enforcement proceedings by amending the NCAA Constitution and Bylaws, and 2)

240. *Id.* (citing *United States ex rel. Von Hoffman v. City of Quincy*, 71 U.S. 535, 554 (1876)).

241. *Id.* (citing *Antoni v. Greenhow*, 107 U.S. 769, 775 (1883) (emphasis added)).

242. *Id.* (citing Legislative findings at 1991 NEV. STAT. ch. 55 § 1, at 10).

243. *Miller*, 795 F. Supp. at 1488.

244. *Id.* at 1487. The court defined the statute’s purpose as affording “basic due process safeguards to the careers, livelihoods, and reputations of all Nevadans which include students, alumni, and employees of UNR and UNLV, and the fans and boosters of Nevada intercollegiate sports.” *Id.*

245. *Id.* at 1487.

246. *Id.* at 1488.

247. *Id.*

248. *See supra* notes 169-182 and accompanying text (discussing broad interests affected by NCAA procedures).

249. *Miller*, 795 F. Supp. at 1488.

Congress could enact due process legislation limiting the NCAA.²⁵⁰ However, the Nevada law makers had no other choice but to pass the Nevada Due Process Statute precisely because UNLV alone could not act with the NCAA to change its procedures. While investigating the shortcomings of the NCAA enforcement proceedings, Congress discovered the problem.

I do not think one school can take the initiative, or will take the initiative within the framework of the NCAA to try to get revision of procedures and fairness in these enforcement procedures. The reason is that simply from my observation one school is afraid to. When the NCAA is one-on-one with an institution, it is a bad situation. The only way that effective external pressure can be brought to bring about needed provisions in the procedures, I think, is by some outside source or by generating sufficient concern and interest to stir up enough people within the NCAA to take action collectively.²⁵¹

Furthermore, the NCAA has worked on the 'due process' problem within its own organization for a long time, with no results.²⁵² Moreover, the impact of state due process legislation has caused the NCAA to form a special committee,²⁵³ but "nothing imminent is expected from the NCAA committee."²⁵⁴ Therefore, because UNLV alone can't work within the framework of the NCAA to try to get revision of the NCAA's enforcement procedures, coupled with the fact that neither Congress nor the NCAA has made changes, the only available alternative to prompt action is state due process statutes. "It is a shame that we may have to do it this way, but it looks like it will require 50 different legislatures to pass 50 state laws protecting the people of their states from the NCAA. I believe many states will do so because to avoid the issue is to invite trouble."²⁵⁵

First the *Miller* court's analysis is dubious at best for several reasons. The *Miller* facts probably fulfill the requirements of the test espoused in *Allied Structural Steel Co. v. Spannaus*,²⁵⁶ this test considers whether a statute is necessary and reasonable to serve an important public purpose. The *Miller* court erred by saying "[t]he Nevada law simply does not possess the attributes of those state laws that have survived challenge under the Contract Clause."²⁵⁷ In *Spannaus*, the Court listed three "attributes of

250. *Id.*

251. A.O.B., *supra* note 5, at 44 (citing Trial Record 108, Reference 11 at 55 (the testimony of Irwin Ward)).

252. Beckett, *supra* note 45, at 16.

253. "Distinguished jurists, including former Supreme Court Chief Justice Warren Berger and former federal District Judge Philip Tone, are joined by other similarly distinguished individuals. Their announced task is to review NCAA procedures in light of the 'due process' controversy." *Id.*

254. *Id.*

255. YAEGER, *supra* note 3, at 241.

256. 438 U.S. 234 (1978).

257. *Miller*, 795 F. Supp. at 1488 (citing *Spannaus*, 438 U.S. at 244).

these state laws that in the past have survived challenge": 1) the statute concerned a broad generalized economic or social problem, 2) it operated in an area already subject to state regulation at the time the contractual obligations were entered into, and 3) it effected simply a temporary alteration of the contractual relationship.²⁵⁸ The Nevada statute satisfies the first two attributes and thus survives challenge.

First, the Nevada Due Process Statute concerned a broad generalized economic or social problem.²⁵⁹ On appeal, Tarkanian argues the Nevada Legislature enacted the statute "to protect the reputations and careers of Nevada state employees, students and others subject to the NCAA's enforcement machine."²⁶⁰ He maintains the statute guards against unfair proceedings which may "wrongfully disrupt the participation in and enjoyment of college sports programs, and unfairly end the careers of coaches and other university employees as well as rising young student-athletes."²⁶¹ Furthermore, school alumni, sports fans and Nevada residents with an interest in the State's reputation are protected by the Nevada Due Process Statute.²⁶² Additionally, the statute protects Nevada schools from sanctions without receiving minimum due process, which guards the schools' interests in obtaining valuable television contracts. These television contracts help fund Nevada institutions on the whole. Simply stated, this statute provides some Nevada citizens in a wide array of categories with procedural due process, and protects the participation in and enjoyment of college sports coupled with the protection of the careers and livelihoods of coaches, university employees and student athletes, thereby dealing with a broad social problem.²⁶³

Second, the Nevada Due Process Statute operated in an area already subject to state regulation at the time the contractual obligations were entered into.²⁶⁴ The Nevada Administrative Procedure Act and the general rules of civil procedure governed all Nevada administrative proceedings at the time the NCAA and UNLV entered into any contract.²⁶⁵ Therefore, because the state regulated the contractual obligations at the time of the contract, and the statute operated in this area, the Nevada Due Process Statute satisfies the second prong of the *Spannaus* test.

However, unlike the third characteristic in *Spannaus*, the Statute does not temporarily alter the contractual relationship. It is clear from a reading of the Nevada Due Process Statute, looking at the language and construction,

258. *Id.* at 250.

259. A.O.B., *supra* note 5, at 42.

260. *Id.* at 44.

261. *Id.* at 42.

262. Moreover, if Nevada's reputation is tarnished because of unfair NCAA sanctions, this may impact Nevada's tourism and gambling market.

263. A.O.B., *supra* note 5, at 42.

264. *Id.*

265. *Id.*

that it is not temporary in nature.²⁶⁶ The statute carefully outlines minimum procedural due process requirements to protect concerned individuals in Nevada. Therefore, the Statute permanently affected the contractual relationship between the NCAA and UNLV. When a statute works "a severe, permanent, and immediate change in [contractual] relations irrevocably and retroactively, the statute probably will not withstand Contract Clause analysis."²⁶⁷ However, because the Nevada Statute falls within the first two *Spannaus* categories, the statute should sufficiently possess the attributes of those state laws that have survived Contract Clause challenges. Therefore, the Nevada statute should withstand Contract Clause analysis.

IV. DUE PROCESS STATUTES: THEIR FUTURE?

Congressional subcommittee hearings and investigations have compelled the NCAA to scrutinize its enforcement program and acknowledge due process inadequacies.²⁶⁸ However, based on the 1988 *Tarkanian* decision and Congress' failure to enact due process legislation limiting the NCAA, "the torch has been passed to the state legislatures to protect the due process rights of those alleged to have violated the NCAA rules."²⁶⁹ In addition to Nevada, Nebraska, Illinois, and Florida have responded by enacting legislation requiring national collegiate athletic associations to provide minimum standards of procedural due process to schools under investigation for rules violations.²⁷⁰

A. *The Nebraska Collegiate Athletics Association Act*

In 1990, the Nebraska Collegiate Athletics Association Procedures Act

266. *See id.*

267. *Spannaus*, 438 U.S. at 250 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

268. McKenna, *supra* note 45, at 101.

269. *Id.*

270. Timothy J. Lilley, *Lobbying Groups Continue Efforts Against the NCAA*, NCAA NEWS, July 31, 1991, at 10. NCAA Executive Director Richard D. Schultz feels that NCAA member schools are not 100% behind these unnecessary statutes:

Legislation has been passed that has not been supported by NCAA member institutions. . . Some bills, in fact, have been approved in spite of testimony in opposition by representatives of member institutions. . . . One message I believe this sends is that the members must be very active in their own states—at the grass-roots level—in making their elected officials aware of the problems these kinds of bills create for the NCAA and of the fact that these measures simply are not necessary. . . the NCAA's investigative process currently is designed to be a joint effort—one where member institutions cooperate with the Committee on Infractions and the NCAA enforcement staff. If do not appear that any of these state bills would do anything to enhance that spirit of cooperation. . . State laws like these are not necessary, and the membership has not shown interest in having them.

Id.

was signed into law.²⁷¹ The Nebraska Act calls the NCAA “a private monopolist that controls intercollegiate athletics throughout the United States.”²⁷² By virtue of the NCAA’s monopolistic control and its power to prevent non-conforming institutions from competing in intercollegiate athletic events, the NCAA exercises great power over member institutions.²⁷³ The NCAA, by imposing penalties on colleges or universities for rules violations, may cause “substantial monetary loss, serious disruption of athletic programs, and significant damage to reputation.”²⁷⁴ Therefore, “because of such potentially serious and far reaching consequences,” the Act provides that all NCAA penalty proceedings shall comply with due process of law as guaranteed by the Nebraska Constitution.²⁷⁵ However, because the Nebraska Act only generally suggests the NCAA comply with due process, without a specific description of the requirements for a fair trial, the Act may fail constitutional analysis for vagueness reasons.²⁷⁶ Improving upon the Nebraska bill, Illinois lawmakers built a more extensive and specific Due Process Statute.²⁷⁷

271. NEB. REV. STAT. §§ 85-1201 to 85-1210. The Nebraska legislators passed the Act because of recent NCAA sanctions against the University of Oklahoma and Oklahoma State University which could cost the Nebraska Cornhuskers as much as \$500,000 a year in television contracts and bowl game appearances. McKenna, *supra* note 45, at 103 (citing *Neb. Bill Would Require Due Process in NCAA Cases*, PHILA. INQUIRER, Jan. 13, 1989, at 3D).

272. § 85-1202(1).

273. § 85-1202(5).

274. § 85-1202(6).

275. § 85-1203(7). Nebraska Senator Ernest Chambers, the main drafter of the Nebraska Collegiate Athletic Association Procedures Act, described the statute:

The bill simply requires that, in every single stage or facet of action by the NCAA that might result in a penalty against a school for violation or alleged violation of NCAA rules, due process must be applied. . . . And due process, to make it as simple as I can, is a procedure which is fair. You have a right to know what you’re charged with, to face your accuser, an opportunity to test the evidence to be used against you through cross-examination, and the things that most people would think of in order to have a fair accusation and a fair opportunity to meet those accusations.

YAEGER, *supra* note 3, at 237-38.

Furthermore, when NCAA legal counsel said the Nebraska statute wouldn’t really affect the NCAA because it already had procedural due process safeguards and believed in fair enforcement, Senator Chambers laughed. *Id.* at 238. Chambers replied, “[t]he NCAA is an arrogant organization, almost uncontrollable and accountable to nobody. . . . [a]nd since they’re in a position to do so much damage to a university or a coach or even a player, they have to be accountable.” *Id.*

276. McKenna, *supra* note 45, at 103 (citing *Sports in Brief*, PHILA. INQUIRER, June 16, 1990, at E-4).

277. *Id.*

*B. The Illinois Collegiate Athletic
Association Compliance Procedures Act*

On September 12, 1991, Illinois legislators enacted the Athletic Association Compliance Procedure Act.²⁷⁸ Similar to its Nebraska counterpart, the Illinois Act provides due process protection during collegiate investigations by the NCAA.²⁷⁹ Nonetheless, the Illinois Act improved upon the Nebraska Act by outlining the requirements for a fair trial.

The Illinois Act also begins by noting the monopolistic nature of the NCAA with paramount importance placed on fair enforcement procedures.²⁸⁰ It claims a deep public interest by "ensuring that the procedures for determining whether violations of association rules have actually occurred are fair to its students, university or college employees, institutions of higher learning, and the communities in which the institutions operate."²⁸¹ In support of its contention that due process safeguards serve a deep public interest, the Illinois Act points to three separate arguments.²⁸² First, the Act claims that individual student athletes or employees, such as coaches or athletic directors, risk serious damage to their reputations, "the means to make a livelihood, and personal and professional aspirations."²⁸³ Second, the Act argues that a school may suffer monetary loss and disruption of its athletic programs, which would directly lessen taxpayer support to that institution.²⁸⁴ Lastly, "the State has a right to feel pride in the accomplishments and reputations of its institutions of higher learning and seek to protect its institutions' reputations from harm inflicted by unfair means."²⁸⁵ Therefore, because "the present procedures of collegiate athletic associations do not reflect the principle that one is innocent until proven guilty,"²⁸⁶ the Illinois Act outlines specific requirements for NCAA hearings, penalties, and liability.²⁸⁷

278. ILL. ANN. STAT. ch. 144, para. 2901-2903 (Smith-Hurd 1991). Illinois Representative Tim Johnson, who filed the bill with the Illinois legislature said, "If we pass bills in three or four states, you could see a stampede. . . . As it is right now the NCAA is a modern-day counterpart to the Third Reich. We [in Illinois] have a long history of what people would call arbitrary and capricious treatment by the NCAA. We need to establish a set of rules to prevent this sort of thing from happening again." YAEGER, *supra* note 3, at 241.

279. Para. 2902(l).

280. *See generally* para. 2902.

281. Para. 2902(i).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. Para. 2902(l).

287. *See generally* ch. 144, para. 2901-2903.

1. Hearings

The NCAA may not impose any penalties on any colleges or universities, unless it first complies with the rules of the Illinois Act.²⁸⁸ The Illinois Act requires: findings in writing supported by clear and convincing evidence, two month notification of charges prior to hearing, the right to have counsel present, to interrogate and cross-examine witnesses, and to present a complete defense.²⁸⁹ Furthermore, the rules of evidence at Illinois civil trials shall apply at hearings, charged individuals shall be entitled to full disclosure of all facts and matters as a defendant in a criminal proceeding, and any hearing shall be open to the public. Additionally, no hearing will be allowed more than 6 months from the date on which the school first receives notice from the NCAA of potential rules violations, the NCAA must provide the school with a transcript of all hearings at the NCAA's expense, and findings from the hearing are subject to review by the circuit court.²⁹⁰

2. Penalties

All penalties imposed by the NCAA on the school, or mandated by the NCAA to be administered against a student or employee must "bear a reasonable relationship to the violation committed."²⁹¹ In addition, penalties must be of the same degree and magnitude in similar situations for similar violations,²⁹² and are subject to review by the circuit court.²⁹³ The goal of the penalty provisions is to ensure the even distribution of punishment by the NCAA Infractions Committee against guilty member institutions.

3. Liability

Significantly, "[l]iability strikes right at the heart of the Act . . . [w]ithout a doubt the chief concern of the drafters of this Act is money."²⁹⁴ The Act notes that "[p]articipation in sports on a national level . . . creates a greater sense of pride and loyalty among students, faculty, alumni, and other citizens who may contribute more to the school of their choice because of its sports successes . . . [which] brings in revenue to the university that helps

288. Para. 2904(a).

289. Para. 2904(b)-(d).

290. *Id.*

291. Para. 2905(a).

292. Para. 2905(b).

293. Para. 2905(c).

294. McKenna, *supra* note 45, at 107.

to fund its various programs."²⁹⁵ Furthermore, as discussed earlier, the Act adds the school may suffer monetary loss and disruption of its athletic programs, which would directly lessen taxpayer support to that institution.²⁹⁶ The Act aims to protect the revenue generated by hosting major sporting events which will directly benefit surrounding college and university areas.²⁹⁷ The NCAA is liable for findings contrary to the Illinois Act which requires the NCAA to pay damages, costs, litigation expenses, attorney's fees, and equitable relief.²⁹⁸ This, in turn, will motivate a long overdue restructuring of the NCAA enforcement procedures.²⁹⁹

C. *The Florida Collegiate Athletic Association Compliance Enforcement Procedures Act*

The Florida Collegiate Athletic Association Compliance Enforcement Procedures Act went into effect on June 1, 1992.³⁰⁰ For all practical purposes, the Florida and Illinois Acts are the same. Both statutes call for due process in the NCAA's enforcement process. In fact, the Florida act is mainly comprised of parts taken from the Illinois Act.

However, there are two distinct differences between the Florida and Illinois Acts. First, the Florida Act does not address the economic significance of collegiate athletics, nor does it discuss Florida's deep public interest in fairness to students, school employees, universities and their communities. Second, in Florida, once the NCAA notifies the school of investigations, the NCAA must hold a hearing within 12 months.³⁰¹ In contrast, the NCAA only has 6 months to hold a hearing in Illinois after the NCAA notifies the school of investigations.³⁰² Also, if a Florida school identifies its own violation, the NCAA has 18 months from the time of notification to hold a hearing.³⁰³ In Illinois, the NCAA only has nine months.³⁰⁴ Thus, the

295. Para. 2902(c).

296. Para. 2902(i).

297. Para. 2902(k).

298. Para. 2909(a).

299. McKenna, *supra* note 45, at 121.

300. FLA. ANN. STAT. §§ 240.5339-.5349 (West 1992).

NCAA enforcement staff member David Berst, in an attempt to scare Florida lawmakers, described the Florida Act "as an inappropriate intrusion into our operation. I don't know how I can say it any more clearly. The few politicians that are seizing the opportunity to obtain a little bit of local support because of the use of the term 'due process' are really doing a disservice to the NCAA and, I think, to the people of the state involved." YAEGER, *supra* note 3, at 240. Furthermore, NCAA's John Kitchin implied that if Illinois passed the due process bill they may "jeopardize the NCAA membership of schools in Illinois." *Id.* at 239. Kitchin padded his statement insisting, "This isn't a threat. We're not saying anybody's going to get kicked out. But as a voluntary member, you have to comply with the same rules that bind the other members." *Id.* at 240.

301. § 240.531(9).

302. *See generally* ILL. ANN. STAT. ch. 144, para. 2904(i) (Smith-Hurd 1991).

303. FLA. ANN. STAT. § 240.531(9).

Florida lawmakers give the NCAA more time to act than their Illinois counterparts.

D. *The Nevada Due Process Statute*

The Nevada governor signed the Nevada Due Process Statute³⁰⁵ into law on April 8, 1991.³⁰⁶ As noted above, the Nevada Due Process Statute was passed primarily because of the long-running battle between the NCAA and coach Jerry Tarkanian.³⁰⁷ The Nevada Statute, like its predecessors in Illinois and Florida, aimed to force the NCAA to comport with minimum standards of procedural due process.³⁰⁸ However, while the Nevada statute is substantially similar to both the Illinois and Florida Acts, it is also noticeably different. Before examination of the differences between the due process statutes, a brief look at the Nevada Statute's proceedings, procedural rules, and relief provisions will lay a foundation to understand the Nevada law.

1. Proceedings

The proceedings requirements of the Nevada Due Process Statute consist of several categories.³⁰⁹ The general requirements guarantee the accused the right to a hearing, after reasonable notice of the time, place, and nature of the proceeding, the rules governing the proceeding, and the factual basis for each violation.³¹⁰ Furthermore, the Statute provides the accused the right to be represented by counsel, the right to confront and respond to all witnesses and evidence and the right to call his own witnesses.³¹¹ Also, the accused has the right to the exchange of all evidence 30 days before any proceeding and the right to have all statements signed under oath and notarized.³¹² Finally, the parties may informally dispose of the proceeding by stipulation, settlement or default and may waive the requirements of findings of fact and decision.³¹³

Additionally, the accused has the right to an official record of all the proceedings³¹⁴ and, upon request, the transcriptions of all oral statements

304. *See generally* ILL. ANN. STAT. ch. 144, para. 2904(i).

305. NEV. REV. STAT. §§ 398.155-.255 (1991).

306. J. Lilley, *Lobbying Groups Continue Efforts Against the NCAA*, NCAA NEWS, July 31, 1991 at 10.

307. Lederman, *supra* note 1, at A35.

308. A.O.B., *supra* note 5, at 9-10.

309. NEV. REV. STAT. § 398.155 (1991).

310. § 398.155(1).

311. § 398.155(2).

312. § 398.155(3)-(4).

313. § 398.155(5).

314. § 398.165.

made at the proceedings.³¹⁵ Only evidence relied upon by reasonable and prudent men may be admitted, while irrelevant, unduly repetitious, or immaterial evidence must be excluded from a proceeding.³¹⁶ Furthermore, the accused has the right to have an impartial person presiding over the proceeding.³¹⁷ The decision must be rendered within a reasonable time, with findings of fact based upon substantial evidence in the record and supported by a preponderance of such evidence.³¹⁸ Finally, any accused falling under the Nevada Due Process Statute has the right to judicial review under Nevada law.³¹⁹

2. Procedural Rules, Standard for Findings, and Nature of Penalties

The Nevada Due Process Statute requires the NCAA to comply with the procedural standards, set out above, before the association may "impose a sanction on any institution located in this state, its employees, student athletes, students or boosters, for a violation of the rules of the association."³²⁰ Furthermore, after a hearing in conformance with the Statute, the NCAA must base its finding a violation upon a preponderance of the evidence "commonly relied upon by reasonable and prudent men in the conduct of their affairs."³²¹ Any penalties the NCAA imposes must be reasonable in light of both the nature and gravity of the violation and commensurate with violations imposed on other schools for violations of similar nature and gravity.³²²

3. The Big Stick: Injunctions and Other Relief

The Nevada Due Process Statute enables a district court to enjoin any NCAA proceeding in violation of the Statute's guidelines.³²³ Moreover, in combination with any injunctive relief, the court must award a successful claimant costs, reasonable attorney's fees, and 100 percent of the monetary loss the school suffered as a result of the penalty imposed in violation of the

315. § 398.175.

316. § 398.185. Additionally, § 398.185 provides that in a proceeding Nevada privilege laws must be observed, objections to evidentiary matters may be made and noted in the record, and "[e]vidence may be received in written form if it will result in an expedited proceeding and will not substantially prejudice a party."

317. § 398.195.

318. § 398.205.

319. § 398.215.

320. § 398.225(1).

321. § 398.225(2).

322. § 398.225(3).

323. § 398.245(1).

Nevada Due Process Statute.³²⁴ These remedies are cumulative and added to other remedies provided by Nevada law.³²⁵

4. How the Nevada, Florida, and Illinois Statutes Differ

The most obvious difference between the Nevada Statute and its Illinois and Florida counterparts is in the basis of the findings. In Florida and Illinois, any finding of a violation must be supported by clear and convincing evidence.³²⁶ In Nevada, the decision and the findings must be supported by a preponderance of the evidence.³²⁷ Therefore, the Nevada Statute requires the NCAA to adhere to a lesser standard of proof than the Statutes in Illinois and Florida.

Additionally, the Nevada Due Process Statute differs from the Florida and Illinois Acts in the pre-hearing discovery procedures and who presides over the hearings. First, the Florida and Illinois statutes provide that all individuals and institutions charged with misconduct by the NCAA "shall be entitled to full disclosure of all relevant facts and matters to the same degree as a defendant in a criminal case and shall have the same right to discovery as applies in criminal and civil cases."³²⁸ However, in contrast, the Nevada Due Process Statute merely says that "[a]t least 30 days before any proceeding, all parties to a proceeding shall provide to all other parties all affidavits or other evidence to be introduced at the proceeding."³²⁹ Second, the Nevada Due Process Statute specifically states that a "person presiding over a proceeding must be impartial and shall not communicate with a party to the proceeding concerning any issue of fact or law except upon notice and opportunity to participate by all parties."³³⁰ In sharp contrast, neither the Illinois nor the Florida Acts provide for an "impartial" presiding officer. Thus, the NCAA will get to choose its own presiding officer in Illinois and Florida.

Lastly, the Nevada Statute goes further than the Illinois or Florida Acts in prohibiting the NCAA from activities in contravention of the due process

324. § 398.245(2). "To calculate monetary loss for the purposes of this subsection, '100 percent of the monetary loss per year' shall be deemed to be equal to the gross amount realized by the affected athletic program during the immediately preceding calendar year." *Id.*

325. § 398.255.

326. *See* ILL. ANN. STAT. ch. 144, para. 2904(b) (Smith-Hurd 1991) and FLA. ANN. STAT. § 240.531(2) (West 1992).

327. NEV. REV. STAT. §§ 398.205, 398.225(2). "Any finding of a violation by a national collegiate athletic association must be based upon and supported by a preponderance of evidence which is of the type commonly relied upon by reasonable and prudent men in the conduct of their affairs and which has been submitted and received in a hearing held and conducted in conformance with the provisions of NRS 398.155 to 398.255, inclusive." *Id.* § 398.225(2) (1991).

328. *See* ILL. ANN. STAT. ch. 144, para. 2904(f) (Smith-Hurd 1991) and FLA. ANN. STAT. § 240.531(6) (West 1992).

329. § 398.155(3).

330. § 398.195.

statute and liability. First, the Nevada Statute, like its Florida and Illinois predecessors, prohibits the NCAA from imposing penalties on institutions in violation of the NCAA's rules unless in accordance with the due process statute.³³¹ However, the Nevada Statute goes further than its counterparts by prohibiting the NCAA from even "threatening" an institution with sanctions if it seeks redress under the Due Process Statute.³³² Second, the Nevada Statute offers an institution more relief than the statutes in Illinois or Florida. In Florida and Illinois, if the NCAA violates the due process statutes it is liable to the institution or individual for damages, costs, litigation expenses, attorney's fees and appropriate equitable relief.³³³ While the Nevada Statute includes the same liability provisions,³³⁴ it goes further by providing that a "district court may enjoin a national collegiate athletic association or institution from violating the provisions [of the statute]."³³⁵

CONCLUSION

Tarkanian has appealed the *Miller* decision.³³⁶ Because the Due Process Statutes in Nebraska, Illinois, Florida and Nevada are similar, the ultimate decision of the *Miller* case will be persuasive material with which either states and schools or the NCAA will use in future courtroom confrontations. If *Miller* is upheld on appeal, other states will have difficulty enforcing their own statutes,³³⁷ and any hope of due process in NCAA enforcement procedures will be all but lost. The surest remaining alternative to require the NCAA to provide member schools with due process is to reverse *Miller* and allow the Nevada Due Process Statute's proper and much needed existence. The United States Supreme Court's decision holding that the NCAA is not a state actor and Congress' reluctance to require the NCAA to abide by due process standards bears this out. A reversal of *Miller* would not only protect Nevada schools and schools in other states, but would also make clear the message that universities, coaches and athletes must be treated with fairness at NCAA enforcement sessions.

Moreover, if *Miller* stands on appeal, the only remaining alternative to spur NCAA change would be a Congressional mandate ordering the NCAA to comport with minimum standards of due process. Although Congress has

331. NEV. REV. STAT. § 398.235, ILL. ANN. STAT. ch. 144, para. 2908 (Smith-Hurd 1991), and FLA. ANN. STAT. § 240.5345.

332. NEV. REV. STAT. § 398.235(2) (1991).

333. ILL. ANN. STAT. ch. 144, para. 2909 and FLA. ANN. STAT. § 240.5346.

334. NEV. REV. STAT. § 398.245.

335. § 398.245(1).

336. The Appellant's Opening Brief was filed with the U.S. Court of Appeals for the Ninth Circuit on November 9, 1992. A.O.B., *supra* note 5.

337. NCAA officials said they were pleased with the *Miller* trial court's decision and hoped it would weaken the basis for the due process statutes in Nebraska, Florida, and Illinois. The NCAA felt the decision would discourage other states from instituting such laws. Lederman, *supra* note 1, at A35.

historically been reluctant to pass NCAA limiting legislation in this area,³³⁸ the ushering-in of the Clinton administration may lend hope. The new president may have a greater inclination to bring government action in areas where Reagan and Bush wanted to deregulate. Nonetheless, regardless of the *Miller* appeal's result, both avenues must be pursued vigorously to bring about a much needed change. The time has come for the NCAA to swallow some of its own medicine . . . and learn to play fairly.

POSTSCRIPT: THE END OF A
CAREER AND UNLV'S FUTURE

In June of 1991, Jerry Tarkanian announced that the 1991-92 season would be his last as head basketball coach for the Runnin' Rebels.³³⁹ Tarkanian finished his UNLV career with a flurry of wins, steam rolling to a 95-8 record his last three seasons and winning the NCAA national championship in 1990.³⁴⁰ After continual flack from the NCAA and UNLV's President, Robert Maxson, Tarkanian threw in the proverbial college basketball sucking towel and joined ranks with the National Basketball Association's San Antonio Spurs in 1992.³⁴¹ However, Tarkanian's pro career was short lived. Only 20 games into the season, because of disagreements with management and a difficult transition period, Tarkanian was replaced by John Lucas.³⁴² Ironically, "[t]he one consolation for Tarkanian was probably the promise shown by Daniels, his one-time UNLV protégé whose college recruitment had added to Tarkanian's troubles with the National Collegiate Athletic Association."³⁴³ Tarkanian, convinced Lloyd Daniels had a promising future in the National Basketball Association, had recruited him for the Spurs.³⁴⁴ "Lloyd," Tarkanian predicted, "will be at

338. A.O.B., *supra* note 5, at 13.

339. Danny Robbins, *Tarkanian and the Spurs Reach Point of No Return; Pro Basketball: Former UNLV Coach is Replaced by Lucas Less than Two Months into the Season*, L.A. TIMES, Dec. 19, 1992, at C1. "That announcement was made shortly after the publication of photographs showing three of Tarkanian's former players socializing with convicted sport fixer Richard Perry. At the same time, UNLV was responding to an NCAA letter of official inquiry outlining charges of rules violations by UNLV coaches and representatives. *Id.*

340. Thomas Bonk, *The Shark Isn't Hooked; First-Year NBA Coach Jerry Tarkanian is Frustrated Enough by Spurs that He Might Consider Quitting at the End of the Season*, L.A. TIMES, Dec. 13, 1992, at C3.

341. *Id.* Jerry Tarkanian succinctly described his reasons for coaching in the NBA by saying, "Why did I take this job? I wasn't ready to retire. . . . If I had a hobby, I wouldn't be here today. . . . Fishing, tennis, golf . . . God, I hate golf." *Id.*

342. Robert McG. Thomas Jr., *Pro Basketball; 20 and Out: Tarkanian is Fired by Spurs*, N.Y. TIMES, Dec. 19, 1992, at 31. Coach Tarkanian was formally "dismissed on December 18, 1992, as head coach of the San Antonio Spurs hours before the team's 21st game of the season, against Dallas at home." *Id.* "I'll never coach again," Tarkanian said. "I'm all done. I probably shouldn't have gotten into it this time. I'm 62 years old. I probably ought to be out watering the flowers." *Id.*

343. *Id.*

344. *Id.*

this a lot longer than me."³⁴⁵

Into the vacuum created by Tarkanian's absence stepped one-time Villanova great Rollie Massimino as the new head coach for the UNLV Runnin' Rebels.³⁴⁶ However, because Tarkanian is still popular and now back in town, "no headliner on the Strip has ever had a tougher act to follow than the 58-year-old Massimino."³⁴⁷ Adding fuel to the fire, "Tarkanian loyalists have accused Massimino and the UNLV administration of fudging basketball attendance records, padding the schedule with weak opponents and

345. *Id.* Coach Jerry Tarkanian's Career Record was impressive.
COLLEGE

Year	School	W	L	Pct.
1969	CS Long Beach	23	3	.885
1970	CS Long Beach	24	5	.828
1971	CS Long Beach*	22	4	.846
1972	CS Long Beach*	23	3	.885
1973	CS Long Beach*	24	2	.923
1974	UNLV	20	6	.769
1975	UNLV	24	5	.828
1976	UNLV	29	2	.935
1977	UNLV	29	3	.906
1978	UNLV	20	8	.714
1979	UNLV	21	8	.724
1980	UNLV	23	9	.719
1981	UNLV	16	12	.571
1982	UNLV	20	10	.667
1983	UNLV	28	3	.903
1984	UNLV	29	6	.829
1985	UNLV	28	4	.875
1986	UNLV	33	5	.868
1987	UNLV	37	2	.949
1988	UNLV	28	6	.824
1989	UNLV	29	8	.784
1990	UNLV	35	5	.875
1991	UNLV	34	1	.971
1992	UNLV	26	2	.929
Totals		625	122	.837

*NCAA Tournament record of 6-3 voided for recruiting violations. NCAA Tournament Record: 34-16.

NBA Year	Team	W	L	Pct.
1992	San Antonio	9	11	.450

Robbins, *supra* note 339, at C1.

346. David Leon Moore, *Rebel with a New Cause: Massimino Brings Own Style to UNLV*, USA TODAY, Jan. 7, 1993, at 1C. "Short squat Rollie Massimino has always resembled a pinball, especially as he careens from one end of the bench to the other, exhorting players, excoriating refs." *Id.* UNLV, which used to play the Jaws theme in "Tark the Sharks" honor, now greets Massimino with the theme from *The Godfather* before home games. William F. Reed, *Inside College Basketball: Desert Storm*, SPORTS ILLUSTRATED, Jan. 11, 1993, at 54.

347. William F. Reed, *Inside College Basketball: Desert Storm*, SPORTS ILLUSTRATED, Jan. 11, 1993, at 54. Tarkanian has shown support of Massimino but still blasts UNLV's President, Maxson, every chance he gets. "'I'd like to be able to go to practice and then go and have a beer with Rollie,' said Tarkanian soon after returning to Vegas. 'But we can't, because if he said anything in support of Maxson, I'd vomit.'" *Id.*

pulling strings so that star player J.R. Rider³⁴⁸ could remain academically eligible this season after failing to complete more than a dozen credits last spring—just so Massimino would look good in his first year [at UNLV].”³⁴⁹ Ironically, it seems that the NCAA and UNLV are letting Massimino get away with the same fudging of the NCAA rules for which they crucified Tarkanian. However, as Massimino becomes more accepted by the fans at the Thomas & Mack Center,³⁵⁰ the bitter memories of NCAA sanctions will fade. And UNLV will begin a new era of basketball Rollie style.

*Kenneth E. James**

348. J.R. Rider was suspended from UNLV's basketball team on March 16, 1993, because he turned in an English paper written by a school tutor. Danny Robbins, *Rider Suspended in Paper Chase; College Basketball: UNLV Punished No. 2 Scorer After Tutor Acknowledges Writing Part of his English Paper*, L.A. TIMES, Mar. 17, 1993, at C1. The teacher said she was pressed by two UNLV officials to pass Rider. *Id.* Some of Rider's papers contained handwriting not his own and "Rider's first name, Isaiah, was incorrectly spelled on at least three papers he turned in." *Id.* Rider said on his behalf, "I feel that I've been made a public scapegoat by the university . . . there has been nothing but lies, fraud and deceit by school officials, while my family, teammates, and myself have been embarrassed in public." Lonnie White, *Rider Says He is a Scapegoat*, L.A. TIMES, Mar. 19, 1993, at C7.

349. Moore, *supra* note 332, at 1C.

350. In late January 1993, the Georgetown Hoyas came to Las Vegas where "the No. 15 Runnin' Rebels administered Georgetown's worst defeat of the season, 96-80, and also extended the nation's longest home winning streak to 57." Alison Muscatine, *Rider, Rebels Run Georgetown Ragged*, THE WASH. POST, Jan. 24, 1993, at D1.

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