A. JUDICIAL SCRUTINY OF INSTITUTIONAL DECISIONS

We now turn to the question of whether and to what extent courts should engage in serious independent scrutiny of the judgments made about issues of athletic eligibility and academic integrity within the college athletic establishment. This is an issue similar to the one we encountered in Chapter 1 regarding legal challenges to commissioner judgments about the best interests of their professional sports.

In our adversarial system, student-athletes who are ruled ineligible for athletics participation can seek judicial review of eligibility decisions, but as there is no general provision for judicial review, challengers must set forth a persuasive theory of why an athletic association, conference, or individual school has violated some legal right vested in the adversely-affected athlete. This part surveys some of the major theories that litigants have used. These include:

- *The Fourteenth Amendment:* have athletes ruled ineligible or otherwise adversely affected by an institutional decision been deprived of a property right without due process of law?
- *The law of private associations*: under what circumstances can those delegated with enforcing rules of private associations be held liable in court when they violate their association's own rules?
- *Contract law*: can associations alleged to be violating their own rules be liable to student-athletes for breach of contract?
- *The First Amendment*: are associations limited in their ability to restrict communications made by coaches and others employed by member schools?

Academic transfer rules figure in a number of lawsuits. *Albach v. Odle,* 531 F.2d 983 (10th Cir. 1976), was a challenge to a New Mexico high school association rule requiring a player to sit out one year of athletic competition after transferring to and from a boarding school. The court rejected the suit. It acknowledged and distinguished cases raising Equal Protection Clause challenges to differential treatment of student-athletes based on gender, race, or marital status, and concluded that "[p]articipation in interscholastic athletics is not a constitutionally protected civil right. The supervision and regulation of high school athletic programs remain within the discretion of appropriate state boards, and are not within federal cognizance under 42 U.S.C. § 1983 unless the regulations deny an athlete a constitutionally protected right or classify him or her on a suspect basis." There are some decisions to the contrary. In *Hall v. University of Minnesota,* 530 F.Supp. 104 (D. Minn. 1982), the court articulated the property right as follows:

> The private interest at stake here, although ostensibly academic, is the plaintiff's ability to obtain a "no cut" contract with the National Basketball Association. The bachelor of arts, while a mark of achievement and distinction, does not in and of itself assure the applicant a means of earning a living. This applicant seems to recognize this and has opted to use his college career as a means of entry into professional sports as do many college athletes. His basketball career will be little affected by the absence or presence of a bachelor of arts degree. This plaintiff has put all of his "eggs" into the "basket" of professional basketball. The plaintiff would suffer a substantial loss if his career objectives were impaired.

Most reported decisions, however, reject a property right in participation in athletics.[1] *See generally* Am. Jur. 2d, Schools § 244.

GULF SOUTH CONFERENCE v. BOYD

Supreme Court of Alabama, 1979.
369 So.2d 553.

This is an appeal from an order of the Circuit Court of Pike County declaring that the plaintiff, Julian R. Boyd, is eligible to participate in varsity football at Troy State University. We affirm.

* * *

The essential facts are undisputed. Boyd entered Livingston University in the Fall of 1975 on a full grant-in-aid football scholarship and played on the Livingston University football team during the Fall of 1975. The full grant-in-aid football scholarship awarded to and accepted by Boyd was only for a one-year period (covering only the 1975–76 football season), and was renewable at Livingston University's discretion, subject to Boyd's acceptance. During the 1975–1976 football season both Boyd and Livingston University performed all of their commitments to each other as required by the terms of that one-year scholarship.

At the end of the 1975–1976 school year Livingston University Coach Jack Crowe forwarded Boyd a written offer to renew his football scholarship at Livingston University for the 1976–1977 school year. Boyd did not accept the offer. By telephone Coach Crowe urged Boyd to return and play on the Livingston football team. During that telephone conversation, Boyd informed Coach Crowe that he could not play football as a running back because of an asthmatic condition he had developed. Boyd also informed Coach Crowe that he did not want to return to Livingston University because he wanted to live in Enterprise, Alabama, and work part-time with his father while attending Enterprise State Junior College. Coach Crowe then told Boyd that he could be a specialist player as a punter on the team if Boyd's asthmatic condition would not permit him to be a running back. However, Boyd still declined the offer of Livingston University to renew his grant-in-aid and finally told Coach Crowe that for personal reasons he chose not to go back to Livingston University.

Boyd later enrolled at Enterprise State Junior College for the 1976–1977 school year and was graduated in the Summer of 1977. Boyd then discussed with Dr. Stewart at Troy State University the possibility of transferring to Troy and playing on Troy's varsity football team as a punter. He was informed that he had been ruled ineligible by the Commissioner of the GSC. Troy State, thereafter, appealed the Commissioner's ruling to the Faculty Appeals Committee of the GSC. That committee affirmed the Commissioner's ruling that Boyd was ineligible to play football at Troy State.

* * *

The GSC eligibility rules at issue here are contained in Article VI, Section 7; Article V, Section 3(B) and (C); and Article VIII, Section 3, of the GSC Bylaws. GSC Bylaws, Article VI, Section 7, provides as follows:

> A student-athlete who transfers from one GSC school to another will not be eligible to participate in any sport at the second school unless (1) the first one drops that sport

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[1] For an argument that student-athletes should have heightened legal protection of opportunities to participate in college athletics, see Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities,* 8 Va. Sports & Ent. L.J. 71 (2008).

and all other GSC rules are complied with, or (2) if the student qualifies under Bylaws Article V, Section 3, B or C, or (3) Article VIII, Section 3.

GSC Bylaws, Article V, Section 3 (B) and (C) provides:

> Section 3. Migrants or Transfers are students who enter a college after having been registered in another college. (Attendance at Summer School excepted.)
>
> B. Any student who has attended a GSC school but has not been recruited in any way; has not signed a pre-enrollment application, has received no financial aid, and has not participated would be a Transfer upon attending any other GSC school.
>
> C. When a GSC member does not renew the grant-in-aid of an eligible athlete according to NCAA Constitution 3–4(d), the athlete becomes a free agent and may be signed by any other GSC school as a Transfer.

GSC Bylaws, Article VIII, Section 3, provides as follows:

> A student-athlete who signs a PRE-ENROLLMENT APPLICATION with one GSC school (and same is duly processed with the GSC Commissioner) cannot participate with any other GSC school, except: A prospective student-athlete who does not accept the grant-in-aid at that school nor participate becomes a free agent at the end of two (2) years and can be signed by any GSC school.

The GSC contends that the lower court's order was erroneous for two reasons; the first being that the lower court was without jurisdiction to intervene in the internal affairs of the GSC.

GSC contends that this Court's decision in *Scott v. Kilpatrick, 286 Ala. 129, 237 So.2d 652 (1970),* is conclusive on the issue of the lower court's jurisdiction. The *Scott* case involved a transfer rule of a high school athletic association and not a college athletic association. In *Scott* the complainant contended that the transfer rule of the Alabama High School Athletic Association was unconstitutional since his right to compete for an opportunity to play high school football involved a property right. The right to play high school football was alleged to be a property right on the ground that a good high school football player had an opportunity for a scholarship in many colleges of this state, and that to declare such a player ineligible to play football denied him an opportunity to compete for such a scholarship. This Court held that participation in high school athletics was a privilege and not a property right. This Court further found that "if officials of a school desire to associate with other schools and prescribe conditions of eligibility for students who are to become members of the school's athletic teams, and the member schools vest final enforcement of the association's rules in boards of control, then a court should not interfere in such internal operation of the affairs of the association." *Scott, supra, at 132. Scott*, however, is distinguishable from the instant case

Scott involved a high school athletic association while the present case involves a college athletic association. There is a vast difference between high school football and college football. A high school athlete receives no present economic benefit from playing high school football, his only economic benefit being the possibility of his receiving an offer of a college scholarship. The *Scott* case held that such a possibility was too speculative to recognize as a property right. In contrast, the college athlete receives a scholarship of substantial pecuniary value to engage in college sports. Such scholarships often cover the complete cost of attending a college or university; therefore, the right to be eligible to participate in college athletics cannot be viewed as a mere speculative interest, but is a property right of present economic value. *Cf. Byars v. Baptist Medical Centers, Inc., 361 So.2d 350 (Ala. 1978)*, and *Carter v. Knapp Motor Co., 243 Ala. 600, 11 So.2d 383 (1943). See* also Note, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 Stan. L. Rev. 903 (1972) (hereinafter referred to as *Review of NCAA Disputes*); and Martin, *The NCAA and the Fourteenth Amendment*, 11 New Eng. L. Rev. 383 (1976). For these reasons *Scott v. Kilpatrick, supra* is not controlling.

The contention by the GSC that the lower court did not have jurisdiction basically stems from a body of common law involving private associations. *See Review of NCAA Disputes, supra*; and Chaffee, *The Internal Affairs of Associations Not For Profit*, 43 Harv. L. Rev. 993 (1930). The general rule is that courts should not interfere with the internal management of such associations. *Mackey v. Moss, 278 Ala. 55, 175 So.2d 749 (1965)*; and *Local Union No. 57, et al. v. Boyd, 245 Ala. 227, 16 So.2d 705 (1944)*. The theory behind this non-interference doctrine is that the individual members of such associations have the freedom to choose their associates and the conditions of their association; further, it is argued, judicial review of the affairs of such associations would violate this basic principle of the freedom to associate. Still another justification asserted for the existence of the non-interference doctrine is that the rules and regulations upon which these associations operate are often unclear, and the courts would have no available standard upon which to determine the reasonableness of their rules. *Chaffee, supra*, at 1022. Even though we recognize the existence of this non-interference principle, nevertheless this Court has sanctioned judicial review when the actions of an association are the result of fraud, lack of jurisdiction, collusion, arbitrariness, or are in violation of or contravene any principle of public policy. *Scott v. Kilpatrick, supra; Mackey v. Moss, supra; Local Union No. 57, et al. v. Boyd, supra; Medical Society of Mobile County v. Walker, 245 Ala. 135, 16 So.2d 321 (1944)*; and *Weatherly v. Medical and Surgical Society of Montgomery County, 76 Ala. 567 (1884)*.

We hold that the general non-interference doctrine concerning voluntary associations does not apply to cases involving disputes between college athletes themselves and college athletic associations. There is a cogent reasons for this position. In such cases the athlete himself is not even a member of the athletic association; therefore, the basic "freedom of association" principle behind the non-interference rule is not present. The athlete himself has no voice or bargaining power concerning the rules and regulations adopted by the athletic associations because he is not a member, yet he stands to be substantially affected, and even damaged, by an association ruling declaring him to be ineligible to participate in intercollegiate athletics. Thus he may be deprived of the property right eligibility to participate in intercollegiate athletics. While there is a split of authority on the question, *cf., e.g., NCAA v. Gillard, 352 So.2d 1072 (Miss. 1977)*, we agree with the following statement of the Oklahoma Supreme Court:

> It is asserted by the NCAA that judicial scrutiny of the bylaw is inappropriate. Courts are normally reluctant to interfere with the internal affairs of voluntary membership associations, however, in particular situations, where the considerations of policy and justice are sufficiently compelling judicial scrutiny and relief are available. . . . The necessity of court action is apparent where the position of a voluntary association is so dominant in its field that the membership in a practical sense is not voluntary but economically necessary. It was proper for the trial court to examine the validity of the bylaw. [*Board of Regents of the University of Oklahoma v. NCAA, 561 P.2d 499, 504 (Okl. 1977)]*

* * *

It should be noted that the relationship between a college athlete who accepts an athletic scholarship and the college which awards such an athletic scholarship is contractual in nature. The college athlete agrees to participate in a sport at the college, and the college in return agrees to give assistance to the athlete. The athlete also agrees to be bound by the rules and regulations adopted by the college concerning the financial assistance. Most of these rules and regulations are promulgated by athletic associations whose membership is composed of the individual colleges. The individual athlete has no voice or participation in the formulation or interpretation of these rules and regulations governing his scholarship, even though these materially control his conduct on and off the field. Thus in some circumstances the college athlete may be placed in an unequal bargaining position. The GSC's interpretation of the bylaws in question was that a student football athlete who transfers from one GSC school to another will not be eligible to

participate in football at the second school unless the first school drops football or unless the first school *does not* (merely) *offer to renew* the grant-in-aid scholarship of the student-athlete. The lower court rejected this interpretation and, as we have shown, that decision was correct. Accordingly, let the judgment be affirmed.

TORBERT, C. J., JONES and SHORES, JJ., concur.

MADDOX, J., concurs in result.

A similar judicial sentiment was expressed in *California State University, Hayward (CSUH) v. NCAA*, 47 Cal.App.3d 533, 121 Cal.Rptr. 85 (1975). The NCAA had suspended CSUH from play in any post-season college championships, because the school had adopted a different interpretation than the Association's of the "1.6 Predictor Rule" for academic eligibility (the rule that we saw at issue in the *Robert Parish* case). An appellate court in California stated that, even though CSUH was itself a member of the NCAA (by contrast with Boyd's "outsider" position in the GSC), it had the same right to assert in court that the Association had "failed to abide by its own rules or the laws of the land" as did the member of a trade union or medical association.

> As to the claim that CSUH's interest is not sufficiently substantial to justify judicial intervention due to a mere expectancy of participation in championship events, it has already been discussed that a violation by an association of its own bylaws and constitution or of the laws of the land justifies judicial intervention. Further, that CSUH had, and has, more than a mere expectancy that some of its athletes would earn the opportunity to participate in NCAA championship events but for the suspension is evidenced by the fact that at the time of both the hearing on the temporary restraining order and the hearing on the preliminary injunction, there were upcoming NCAA championship events in which CSUH students, without the imposed suspension, were eligible to compete. Additionally, the decision of the NCAA necessarily affects more than just the possibility of being precluded from championship events. The sanction of indefinite probation affects the reputation of CSUH and its entire athletic program, and thereby also affects CSUH's ability to recruit athletes. Judicial notice may be taken that state schools such as CSUH are deeply involved in fielding and promoting athletic teams with concurrent expenditures of time, energy and resources. The school provides and pays for the coaches, supplies and equipment. It finances, equips, trains and fields the teams. And, its funds pay the NCAA membership dues. The contention that CSUH has no substantial interest to justify judicial intervention lacks merit.

121 Cal.Rptr. at 89–90.
