The Supreme Court's insulation of the NCAA from direct constitutional constraints did not end the debate about the obligations that this organization owes to its constituents. After the NCAA initiated its action against *Tarkanian* in 1977, Congress conducted a lengthy inquiry into NCAA enforcement procedures. The resulting report[1] threatened legislation unless the NCAA voluntarily improved its procedures (and in certain limited respects the Association did so). Following the Supreme Court's *Tarkanian* decision in 1988, a number of states (including Nebraska, Florida, Illinois, and, not surprisingly, Nevada) passed legislation requiring the NCAA to comply with federal and state due process principles as a matter of statutory law.

The Nebraska and Nevada laws provide an interesting comparison in legislative approaches to this issue. Instead of specifying the procedures necessary to afford due process, the Nebraska legislation, passed in 1990, required only that "all proceedings of a collegiate athletic association, college, or university that may result in the imposition of a penalty for violation of such association's rule or legislation shall comply with due process of law as guaranteed by the Constitution of Nebraska and laws of Nebraska." The procedures the NCAA had to follow were to be derived from general Nebraska case law defining due process, which presumably is influenced by federal constitutional precedents such as *Mathews v. Eldridge*. That left open the key question, though, of whether the procedures appropriate for NCAA investigations are those used for administrative determination of welfare entitlements, those used by courts in resolving criminal charges, or some other intermediate standard. The Nebraska statute allowed the parties to sue the NCAA for injunctive relief or damages, and made NCAA decisions and penalties reviewable in state court like the decisions of state agencies.

In contrast, the Nevada legislation, passed in 1991, noted that "substantial monetary loss, serious disruption of athletic programs and significant damage to reputations and careers result from the imposition of sanctions on member institutions, its employees, [and] student-athletes . . . for violations of [NCAA] rules." In an NCAA proceeding which results in the imposition of a sanction for violation of an NCAA rule, "all parties against whom a sanction may be imposed must be afforded an opportunity for a hearing after reasonable notice." The law also provided that 1) the NCAA must give detailed notice of the charge against the party; 2) the party charged with violating an NCAA rule may be represented by counsel and "is entitled to respond to all witnesses and evidence related to the allegations against him and may call witnesses on his own behalf"; 3) "all written statements introduced as evidence at a proceeding must be notarized and signed under oath by the person making the statement"; 4) a record must be kept of all the proceedings; 5) parties may make objections to evidence; 6) the adjudicator must be impartial and avoid ex parte communications with the parties; 7) "the decision and findings of fact must be based on substantial evidence in the record, and must be supported by a preponderance of such evidence"; and 8) NCAA sanctions must be "reasonable in light of the nature and gravity of the violation" and "consistent with penalties and sanctions previously imposed" by the NCAA. Like the Nebraska statute, the Nevada legislation offered injunctive and damage remedies to those harmed by violations of these procedures, as well as affording judicial review of the merits of the NCAA decision.

In 1990, the NCAA received information that suggested that UNLV had again violated NCAA rules—this time by the recruiting of basketball player Lloyd Daniels by Coach Jerry Tarkanian and his assistants. Both NCAA and UNLV staff conducted investigations of these allegations as the prelude to a hearing before the NCAA Committee on Infractions scheduled for late September, 1991. That summer, Tarkanian and his colleagues filed written requests with the NCAA asking for compliance with Nevada law; in particular, seeking advance copies of any documents that the NCAA intended to use and any exculpatory statements obtained during the investigation, with a

[1] *NCAA Enforcement Program*: Hearings Before the Subcomm. on Oversight and Investigation of the Comm. on Interstate and Foreign Commerce, House of Representatives, 95th Cong., 2d Sess. (1978).

right to confront all witnesses in a public hearing in front of an independent and impartial entity. Faced with that request, the NCAA went to federal court, asking for a ruling that the Nevada law was unconstitutional because of its obstruction of national uniformity in the enforcement of NCAA rules. The district court granted the NCAA an injunction against any use of the state law, and the Governor of Nevada appealed to the Ninth Circuit.[2]

## NATIONAL COLLEGIATE ATHLETIC ASS'N v. ROBERT F. MILLER, GOVERNOR, STATE OF NEVADA

United States Court of Appeals, Ninth Circuit, 1993.
10 F.3d 633.

FERNANDEZ, CIRCUIT JUDGE.

* * *

Whenever an alleged rules violation is reported to the NCAA, the matter is handled pursuant to the enforcement program. The enforcement program is administered by the Committee on Infractions, which establishes investigation procedures that must later be approved by the NCAA Council and the full membership of the NCAA. The Manual details the procedures that must be followed in processing an infractions case.

The first step in the process is for the enforcement staff to notify the institution in question that the NCAA is making a preliminary inquiry into the institution's athletics policies and practices. If the enforcement staff determines that a possible rule violation has occurred, it sends an official inquiry letter to the chief executive officer of the institution. The official inquiry must include a statement of the NCAA rule alleged to have been violated and the details of each separate allegation. The enforcement staff must also provide the institution and other involved individuals with the names of the principals involved and the names, addresses and telephone numbers of any people contacted during the NCAA investigation. The institution is required to notify past or present staff members or prospective, past, or present student-athletes who may be affected by the charges that they have the opportunity to submit any information they desire to the Committee and that they and their personal legal counsel may appear before the Committee. The institution is also required to investigate the charges and to indicate whether it feels that the allegations are substantially correct. It may also submit written evidence to support its response to the official inquiry.

After the institution has submitted its written response to the official inquiry in a case involving a major violation, the enforcement staff must "prepare a summary statement of the case that indicates the status of each allegation and identifies the individuals upon whom and the information upon which the staff will rely in presenting the case." The summary is presented to the Committee, the institution, and all other affected individuals before the Committee hearing. The institution and affected individuals and their legal counsel are permitted to review any memoranda or documents upon which the enforcement staff will rely in the presentation of its case, but only at the NCAA national office.

Prior to the Committee on Infractions hearing, prehearing conferences are held with the NCAA staff, the institution and all affected individuals and their legal counsel. At those meetings, the NCAA staff is required to provide all of the information upon which it intends to rely at the hearing. All involved parties review the relevant documents. Areas of factual dispute are identified. Unsupported allegations may be withdrawn and the institution and affected

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[2] See Sherry Young, *The NCAA Enforcement Program and Due Process: The Case for Internal Reform*, 43 Syracuse L. Rev. 747 (1992), and Sherry Young, *Is "Due Process" Unconstitutional? The NCAA Wins Round One in Its Fight Against Regulation of its Enforcement Proceedings*, 25 Arizona State L. J. 841 (1993).

individuals can determine whether they need to conduct any further interviews in order to supplement their responses to the official inquiry.

The Committee on Infractions hearing consists of a detailed presentation of the case by the enforcement staff followed by a response from the institution and any affected individuals (or their legal representatives) who desire to respond. After the hearing, the Committee members privately make their determinations of fact, determine appropriate corrective action, if any, and prepare their written report. The institution is entitled to appeal the Committee's findings of fact and any corrective action taken against it to the NCAA Council.

In 1991, the Nevada legislature enacted the Statute. Essentially, the Statute requires any national collegiate athletic association to provide a Nevada institution, employee, student-athlete, or booster who is accused of a rules infraction with certain procedural due process protections during an enforcement proceeding in which sanctions may be imposed. Many of the procedures required by the Statute are not included in the NCAA enforcement program. For example, the NCAA does not provide the accused with the right to confront all witnesses, the right to have all written statements signed under oath and notarized, the right to have an official record kept of all proceedings, or the right to judicial review of a Committee decision.

[After describing the history of this legislation and dispute, the Court then turned to the constitutional issues.]

A. Legal Standards

The Supreme Court has outlined a two-tiered approach to analyzing state economic regulations under the Commerce Clause.

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

*Healy v. Beer Institute*, 491 U.S. 324, 337 n. 14 (1989) (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)). Applying this test, we must first ask whether the Statute: 1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state economic interests over out-of-state interests. If the Statute does any of these things, it violates the Commerce Clause per se, and we must strike it down without further inquiry. If we determine that the Statute has only indirect effects on interstate commerce and that it regulates evenhandedly, then we must apply the balancing test.

B. The Statute Violates the Commerce Clause Per Se

The district court held that the Statute does not violate the Commerce Clause per se because it does not directly discriminate against interstate commerce or favor in-state economic interests over out-of-state interests. That holding was error because discrimination and economic protectionism are not the sole tests. The court should also have considered whether the Statute directly regulates interstate commerce.

It is clear that the Statute is directed at interstate commerce and only interstate commerce. By its terms, it regulates only interstate organizations, i.e., national collegiate athletic associations which have member institutions in 40 or more states. Moreover, courts have consistently held that the NCAA, which seems to be the only organization regulated by the Statute, is engaged in interstate commerce in numerous ways. It markets interstate intercollegiate athletic competition. See *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (finding by implication that NCAA was engaged in interstate commerce and was subject

to antitrust regulation). The NCAA schedules events that call for transportation of teams across state lines and it governs nationwide amateur athlete recruiting and controls bids for lucrative national and regional television broadcasting of college athletics. Thus, the Statute regulates only interstate organizations which are engaged in interstate commerce, and it does so directly. In fact, it applies no such panoply of procedural rights to voluntary organizations which operate wholly within the State of Nevada.

The Statute would have a profound effect on the way the NCAA enforces its rules and regulates the integrity of its product. The district court found that in order for the NCAA to accomplish its goals, the "enforcement procedures must be applied even-handedly and uniformly on a national basis." That finding is not only correct, but is also consistent with the Supreme Court's statement that the integrity of the NCAA's product cannot be preserved "except by mutual agreement; if an institution adopted [its own athlete eligibility regulations] unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed." *Board of Regents of Univ. of Okla.*, 468 U.S. at 102.

In order to avoid liability under the Statute, the NCAA would be forced to adopt Nevada's procedural rules for Nevada schools. Therefore, if the NCAA wished to have the uniform enforcement procedures that it needs to accomplish its fundamental goals and to simultaneously avoid liability under the Statute, it would have to apply Nevada's procedures to enforcement proceedings throughout the country.

The practical requirement that the NCAA would have to use the Statute in enforcement proceedings in every state in the union runs afoul of the Commerce Clause in two ways. First, "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336.

The Statute would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules. Thus, if a university in state X ("U of X") engaged in illicit practices while recruiting a high school quarterback from state Y, the NCAA would have to conduct its enforcement proceeding according to Nevada law in order to maintain uniformity in its rules. Nevada procedures do not allow the Committee on Infractions to consider some types of evidence, like hearsay and unsworn affidavits, that it can consider under the NCAA Bylaws. As a result, if its case against the U of X were based on unsworn affidavits from unavailable witnesses, the NCAA might not have enough admissible evidence to prove that there was a violation of the recruiting rules. The NCAA could be forced to allow the U of X to use an illegally recruited quarterback from state Y because it could not prove a rules violation under the strictures of Nevada law. In this way, the Statute could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders. That sort of extraterritorial effect is forbidden by the Commerce Clause.

The Statute's extraterritorial reach also violates the Commerce Clause because of its potential interaction or conflict with similar statutes in other jurisdictions. "Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336–37.

Nevada is not the only state that has enacted or could enact legislation that establishes procedural rules for NCAA enforcement proceedings. Florida, Illinois, and Nebraska [Nebraska's was described in the text before this decision] have also adopted due process statutes and similar legislation has been introduced in five other states. Those statutes could easily subject the NCAA to conflicting requirements. For example, suppose that state X required proof of an infraction beyond a reasonable doubt, while state Y only required clear and convincing evidence, and state

Z required infractions to be proven by a preponderance of the evidence. Given that the NCAA must have uniform enforcement procedures in order to accomplish its fundamental goals, its operation would be disrupted because it could not possibly comply with all three statutes. Nor would it do to say that it need only comply with the most stringent burden of persuasion (beyond a reasonable doubt), for a state with a less stringent standard might well consider its standard a maximum as well as a minimum. The serious risk of inconsistent obligations wrought by the extraterritorial effect of the Statute demonstrates why it constitutes a per se violation of the Commerce Clause.

Under *Brown-Forman*, 476 U.S. at 579, when a state law directly regulates interstate commerce, it can generally be struck down without further inquiry. The Statute directly regulates interstate commerce and runs afoul of the Commerce Clause both because it regulates a product in interstate commerce beyond Nevada's state boundaries, and because it puts the NCAA, and whatever other national collegiate athletic associations may exist, in jeopardy of being subjected to inconsistent legislation arising from the injection of Nevada's regulatory scheme into the jurisdiction of other states. Because the Statute violates the Commerce Clause per se, we need not balance the burden on interstate commerce against the local benefit derived from the Statute.[8]

CONCLUSION

We appreciate Nevada's interest in assuring that its citizens and institutions will be treated fairly. However, the authority it seeks here goes to the heart of the NCAA and threatens to tear that heart out. Consistency among members must exist if an organization of this type is to thrive, or even exist. Procedural changes at the border of every state would as surely disrupt the NCAA as changes in train length at each state's border would disrupt a railroad. See *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). It takes no extended lucubration to discover that. If the procedures of the NCAA are "to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable. . . ." Id. at 771. In short, when weighed against the Constitution, the Statute must be found wanting. It violates the Commerce Clause.

Affirmed.

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### *QUESTIONS FOR DISCUSSION*

1. Suppose that Nevada were to amend its legislation to make its requirements applicable to all athletic associations (including intrastate high school sports federations), and to remove the ban on NCAA expulsion of Nevada colleges if the NCAA preferred not to comply with these procedural restrictions. Would those revisions materially reduce the impact of this brand of state regulation? Alternatively, suppose the Nebraska statute required the NCAA to satisfy the "due process" requirements of the federal, not the state, constitution in its disciplinary actions against Nebraska college players and personnel. Would (should) any of these changes alter the judicial verdict under the dormant Commerce Clause?

2. A major Commerce Clause decision is *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987), which involved an Indiana law that regulated tender offers made for Indiana-chartered corporations, whether or not the offer came from in-state or out-of-state bidders. The Supreme Court upheld the Indiana law against the constitutional argument that the state had unduly interfered with the national securities market. Are there differences between the sports industry and the securities

[8] If balancing were necessary or appropriate, the balance struck by the learned trial judge was exactly right. If the NCAA is suffering from a procedural disease, Nevada's attempted cure is as likely to destroy the patient as it is to banish the disease. It is not an example of permissible praxis.

industry that might explain why the court in *Miller* did not even cite *CTS Corp.*, let alone reach the same result?

3. Suppose that Nevada (following the lead of Montana) enacted a statute that forbade wrongful dismissal or suspension of employees working in the state, and specified in the law what kind of due process must be extended to employees before such disciplinary action could be taken. Can such a law be applied to national corporations that have employees working in the state? Would the answer differ if the employer—perhaps a securities firm—belonged to a national association that required alternative dispute resolution procedures for employees suspected of specific offenses, such as fraud? Again, is there a difference between employment in sports and employment in other industries that is relevant to the issues of constitutional federalism? For a discussion of a similar question as applied to professional sports, see *Williams v. NFL,* 582 F.3d 863 (8th Cir. 2009), excerpted in Chapter Four.

4. Recall from Chapter Two the decision in *Hill v. NCAA & Stanford Univ.*, 26 Cal.Rptr.2d 834, 7 Cal.4th 1, 865 P.2d 633 (1994), in which the Supreme Court of California ruled that the NCAA's program of random drug testing of college athletes did not violate their privacy rights under the California state constitution. The *Hill* decision did, however, expressly affirm that this privacy clause (and perhaps other constitutional constraints) barred private as well as public entities from unduly infringing on the rights of California citizens. Thus, to the extent that privacy, due process, equal protection, and other claims under the California (or other state) constitution extend to private action, are the NCAA's rules and procedures subject to challenge, or would the dormant commerce clause doctrine relied on in *Miller* insulate the NCAA from any such state constitutional limits? In particular, suppose California were either to amend its constitution (e.g., by popular referendum) or pass legislation that precluded random drug-testing of either high school or college students, with no exceptions for athletes. Is such a state initiative barred by *Miller*? Does your verdict differ if the targets of NCAA tests are performance-enhancing drugs such as anabolic steroids, or mind-altering drugs such as marijuana?

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If *Miller* governs, state efforts to regulate NCAA enforcement *procedures* are likely not to be constitutionally permissible. However, in the early 1990s, former Rep. Tom McMillen introduced legislation in Congress that would have required the NCAA to provide "due process" in all enforcement proceedings. While such national legislation would not be subject to dormant Commerce Clause attack, it raised both practical and policy questions about what role the law and courts should play in securing fair and effective "law" enforcement by a private body. In any event, in response to the popular and political pressures reflected in the McMillan proposal, the NCAA appointed a blue-ribbon committee to review its procedures. The Special Committee, which was headed by Rex Lee (former U.S. Solicitor-General and the NCAA's counsel in the *Tarkanian* appeal before the Supreme Court) and included former Chief Justice Warren Burger, announced its recommendations in late 1991. As we will see, some (but far from all) of the proposals were implemented.

More recently, the Supreme Court weighed in on the constitutional question it avoided in *Tarkanian* as to the requirements imposed on athletic associations by the Due Process Clause. In *Tennessee Secondary Sch. Ath. Ass'n v. Brentwood Academy,* 551 U.S. 291 (2007), the Court reversed the court of appeals' holding that the TSSAA (which the court had previously held was a state actor) violated due process by holding closed door consultations with staff prior to rendering judgment on an infractions violation. The Court's precise holding was that Brentwood failed to show any prejudice, but in *dicta* referred to the lower court's finding that such a procedure was unconstitutional as "questionable."

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