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Author

Mayes, Thomas A.

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Tonya Harding's Case: Contractual Due Process, the Amateur Athlete, and the American Ideal of Fair Play

Thomas A. Mayes*

"He was beaten . . . but he was not broken. He saw, once for all, that he stood no chance against a man with a club."¹

I. INTRODUCTION

For tabloid journalism, it was hard to beat the January 1994 assault on figure skater Nancy Kerrigan and the allegations that her rival, Tonya Harding, was a key player in that attack. Tonya's story was "Michael Jackson, Joey Buttafuoco, and the Menendez brothers wrapped into one."² This story "outlasted the [Los Angeles] earthquake, Whitewater, and the State of the Union address."³ *Paris Match* gave the story four pages; even the moderate *Independent* of London ran a Harding-Kerrigan feature story.⁴ In America, Tonya's escapades received four

* J.D. 1996, University of Iowa College of Law. B.A., 1992, Baylor University. Thanks to Professor William Buss for initial guidance. For early editing and advice, thanks to Claire Mattan, Jill Van Wormer, Dawn Barker, and Danielle Shelton.

¹ JACK LONDON, *The Call of the Wild*, in *THE CALL OF THE WILD, WHITE FANG, AND OTHER STORIES* 39, 51 (Andrew Sinclair ed., 1981).

² Bill Glauber, "Skategate" Captures a Nation, *BALTIMORE SUN*, Feb. 13, 1994, at 1C.

³ *Id.*

⁴ Phil Hersh, *Scandal Spurs Interest In Games' Genteel Sport*, *ORLANDO SENTINEL*, Feb. 11, 1994, at 1.

times as much coverage as the health care debate.⁵ In an Associated Press survey of editors, the Harding story was the fifth biggest news story of 1994.⁶ However, by Spring of that year, the story was already old news. The tabloids were hunting bigger game.⁷

The sports industry is big business in the United States; some say it is as big as health care.⁸ The players in the Harding drama performed against the backdrop of the 1994 Winter Olympics, which were seen in 100 nations by a viewing audience estimated in the billions.⁹ The 1994 Winter Games generated \$525 million in revenue for their Norwegian hosts.¹⁰ A thirty-second advertising spot on CBS cost \$315,000, and the network had sold ninety-five percent of its Olympic spots nearly two months before the Games opened.¹¹ In addition to hosts and sponsors, the athletes also profit. For an athlete, the rewards that follow a successful Olympic performance can be staggering. A gold medal in figure skating adds an estimated \$10 million to an athlete's earning potential over four years.¹² Tonya Harding's dreams of Olympic fame and fortune drove this scandal.

⁵ David S. Broder, *War on Cynicism*, WASH. POST, July 6, 1994, at A19.

⁶ Rick Bozich, *Tonya, O.J. Top Long List of Reasons to Bury '94*, DALLAS MORNING NEWS, Dec. 29, 1994, at E1. See also *All-American Girl*, ESQUIRE, Aug. 1994, at 58 (naming Harding one of *Esquire's* Women We Love); *Tonya Harding: A Feisty Champion Skates Into Scandal and Ices Her Dream*, PEOPLE WKLY., Dec. 26, 1994, at 78 (naming Harding one of the 25 Most Intriguing People of 1994).

⁷ Lynn Ludlow, *Tonya, Michael, and O.J.*, S.F. EXAMINER, July 11, 1994, at A12.

⁸ Fred Musante, *Out of Sports, Quotes and Quips*, N.Y. TIMES, Apr. 17, 1994, § 14CN, at 4.

⁹ William Drozdiak, *Hot Athletes and Cold Cash*, WASH. POST, Feb. 21, 1994, at B1.

¹⁰ *Id.*

¹¹ John Powers, *The Crying Games*, BOSTON GLOBE, Jan. 30, 1994, (Magazine), at 8.

¹² Musante, *supra* note 8, at 4.

Tonya Harding's case, although not frequently mentioned in most of today's newspapers, is still important for the questions it raised and left unanswered. This Comment discusses what process is due an amateur athlete under the Amateur Sports Act of 1978, the United States Olympic Committee's [hereinafter USOC] articles of incorporation, and the charter of the United States Figure Skating Association [hereinafter USFSA], which is recognized by the USOC as the governing body for figure skating in the United States. Part II outlines the events, on the ice and in the courtroom, surrounding Tonya's case.¹³ Part III focuses on the Amateur Sports Act, the statute which governs America's Olympic efforts.¹⁴ In Part IV, this Comment discusses due process and the amateur athlete.¹⁵ Part IV focuses on the state of the law regarding discipline of amateur athletes, with particular attention to the Harry "Butch" Reynolds case which, along with the Harding case, exposes weaknesses in the current law.¹⁶ Finally, Part V proposes changes in this area of law, including amendments to the Amateur Sports Act.¹⁷ It is a secondary goal of this Comment to use sports, a "microcosm of society,"¹⁸ to show an ongoing shift in social values from "the values of *the game*

¹³ See *infra* Part II (summarizing Harding's case). For another discussion of Harding's case, this one focusing on the role of Jeff Gillooly's attorney, see Peter R. Jarvis, *Legal Ethics Limitations of Pretrial Publicity and the Case of Ron Hoebet*, 31 WILLAMETTE L. REV. 1 (1995). Jeff Gillooly was Ms. Harding's husband and a participant in the conspiracy to attack Nancy Kerrigan.

¹⁴ See *infra* Part III (discussing the Amateur Sports Act).

¹⁵ See *infra* Part IV (discussing sports and due process). At this point, the author would like to caution the reader. All discussions of due process tend to be frustrating, as due process is nebulous and not readily definable. *Smith v. Iowa Employment Security Comm.*, 212 N.W.2d 471, 472 (Iowa 1973).

¹⁶ See *infra* Part IV.

¹⁷ See *infra* Part V (proposing changes to USOC rules).

¹⁸ JOSEPH C. MIHALICH, *SPORTS AND ATHLETICS: PHILOSOPHY IN ACTION* 27 (1982) (quoting Penn State football coach Joe Paterno).

. . . to the values of *winning*.”¹⁹ In the words of Pete Hamill, Americans “seem incapable of admitting that an obsession with winning often leads to the most squalid of defeats.”²⁰

The mixed public response to the Harding scandal is due in part to the mixed ideas that Western society has about the social worth of sports. Professor Skillen, of the University of Kent at Canterbury, states:

We have more than one model and there is more than one way of sport’s distinctness from the normal run of life. “Only a game” suggests an appropriate lack of serious purpose. “It’s not cricket” assumes cricket as a paradigm of human worth.²¹

When reading the judicial and public reactions to lawsuits filed by athletes discussed below, recall Skillen’s argument. It helps to explain the ambivalent reaction that most courts have to the legal claims of athletes.

¹⁹ NEIL D. ISAACS, *JOCK CULTURE U.S.A.* 23-24 (1978) (emphasis added).

²⁰ Pete Hamill, *Winning Isn’t Everything*, in *AMERICAN VOICES*, 221, 225 (Warren Rosenberg et al. eds., 1988).

²¹ Anthony Skillen, *Sport: An Historical Phenomonology*, 68 *PHILOSOPHY* 343, 343 (1993). For the perspective of the commissioner of the National Basketball Association, see David Stern, *Law and Sports*, N.Y. ST. B.J., May-June 1994, at 44 (“Simply put, sports have become a medium through which many Americans receive the messages of law.”).

II. TONYA HARDING'S CASE

A. *The Attack on Nancy Kerrigan and the Aftermath*

The plot to attack Nancy Kerrigan apparently began to develop in December 1993.²² Tonya Harding was disappointed and worried about a rival skater, Kerrigan, after Harding finished fourth at a December competition in Japan.²³ Harding's estranged husband, Jeff Gillooly, and three acquaintances (Shawn Eckardt, Derrick Smith, and Shane Stant) planned to attack Kerrigan at the 1994 U.S. Championships in Detroit, which were conducted by the USFSA.²⁴ The top two skaters at the Detroit competition would compete in the Olympics in Lillehammer, Norway in February. On January 6, 1994, Shane Stant struck Kerrigan with an iron bar on her right leg as she left practice at Detroit's Cobo Arena.²⁵ Kerrigan sustained severe bruises. As a result of the attack, Kerrigan was unable to perform and withdrew from the Detroit competition.²⁶ On January 8, Tonya Harding won the 1994 U.S. Figure Skating championship;²⁷ thirteen-year-old Michelle Kwan finished second.²⁸ By January 31, when it became apparent that Kerrigan would be healthy enough to compete in the Olympics, the USOC named Kerrigan and Harding to the

²² E.M. Swift, *Anatomy of a Plot*, SPORTS ILLUSTRATED, Feb. 14, 1994, at 28.

²³ *Id.*

²⁴ *Id.* at 28-41. Gillooly had his name legally changed to Jeff Stone. *Prosecutors: Bobek Got Preferential Treatment*, WASH. POST, Feb. 19, 1995, at D2. Nevertheless, this author will continue to use the name "Gillooly" in this Comment.

²⁵ *Chronology: Key Events in the Attack on Nancy Kerrigan*, ORLANDO SENTINAL, Feb. 11, 1994, at 1.

²⁶ Swift, *supra* note 22, at 40-41.

²⁷ *Chronology, supra* note 25, at 1 (providing timeline for attack).

²⁸ Tommy Hine, *Skating Saga*, HARTFORD COURANT, Feb. 11, 1994, at E9. Ironically, Michelle Kwan stated that Tonya Harding has had the most influence on her skating career. *Id.*

team; Kwan was first alternate.²⁹ Harding, after her victory, declared that she hoped that Kerrigan would be able to compete; nevertheless, Harding predicted that she would “whip [Kerrigan’s] butt.”³⁰ When asked what her Olympic berth meant to her, Harding stated that she was thinking of “dollar signs.”³¹

The conspiracy began to come apart on January 7, when police received an anonymous phone call from a woman who suggested that police talk to Gillooly and Eckardt.³² In the days that followed, all four men involved in the attack implicated Harding, who maintained her innocence.³³ On January 18, Harding spent more than ten hours answering questions for Federal Bureau of Investigation agents; she denied any knowledge of the attack.³⁴ On January 27, Harding admitted, in a “carefully crafted” statement,³⁵ that she knew of the conspiracy to attack Kerrigan after she won in Detroit and that she failed to give this information to authorities.³⁶ The same day, the USFSA formed a panel to investigate Harding’s case.³⁷ On February 1, Gillooly pled guilty to one count of racketeering in exchange for testimony against Harding.³⁸

²⁹ *Chronology, supra* note 25, at 1.

³⁰ Andrea Gross, *Wild Justice*, LADIES HOME J., Apr. 1994, at 102.

³¹ E.M. Swift, *On Thin Ice*, SPORTS ILLUSTRATED, Jan. 24, 1994, at 14, 20.

³² *Id.*

³³ *See* Swift, *supra* note 22, at 29 (describing how conspirators rushed to implicate Harding).

³⁴ *Id.*; *see also Chronology, supra* note 25, at 1.

³⁵ Sandra Torry, *USOC Can Boot Harding*, WASH. POST, Feb. 9, 1994, at F1.

³⁶ *See Chronology, supra* note 25, at 1; *see also* Elliot Almond & Randy Harvey, *Harding Strategy On Track*, L.A. TIMES, Feb. 11, 1994, at C1 (describing Harding’s statement); E.M. Swift, *The Gutless Wonders*, SPORTS ILLUSTRATED, Feb. 21, 1994, at 90 (providing more detail about Harding’s statement).

³⁷ *Chronology, supra* note 25, at 1. For the USFSA rules in effect at the time, *see* BYLAWS OF THE UNITED STATES FIGURE SKATING ASS’N, art. XXVII, § 3 (1993).

³⁸ *Chronology, supra* note 25, at 1.

Police investigated whether some of the \$50,000 in USFSA contributions that Harding received were used to pay for the attack.³⁹ President Bill Clinton stated that Harding should be given “the benefit of the doubt.”⁴⁰

B. *Tonya Harding's Legal Maneuvers Prior to the Olympics*

On February 5, 1994, the USFSA found “reasonable grounds” to discipline Harding, and notified her that she had 30 days to respond to the charges against her.⁴¹ On February 7, the USOC announced that its Games Administrative Board would conduct a disciplinary hearing in Norway, independent of the USFSA, on February 15.⁴² On February 9, Harding filed a \$25 million lawsuit against the USOC⁴³ and sought to enjoin the USOC from holding the hearing. Harding alleged, among other things, that the USFSA Bylaws required that she receive 30 days notice of a hearing, and that the USOC, as it had approved the USFSA Bylaws, was bound by them; she also alleged that the hearing would deny her due process because she had only one week to prepare a defense⁴⁴ and the location of the hearing would be unfair to her.⁴⁵

The USOC filed a motion to dismiss Harding's action on

³⁹ Swift, *supra* note 31, at 19-20 (describing course of investigation).

⁴⁰ *Kerrigan Skates Tonight in Boston*, WASH. POST, Feb. 4, 1994, at G5. When the U.S. Olympic team visited the White House, Tonya was not invited. Times had changed. *CNN & Company: Tonya Harding Not Welcome At White House*, (CNN television broadcast, Apr. 11, 1994).

⁴¹ Complaint at ¶ 10, *Harding v. United States Olympic Comm.*, (Or. Clackamas Co. Cir. Ct. 1994) (No. 94 2151).

⁴² *Id.*

⁴³ Reynolds Holding, *Harding's Case Has Precedent In Track Star's 1992 Battle*, S.F. CHRON., Feb. 12, 1994, at A3.

⁴⁴ Complaint at ¶ 25, *Harding v. United States Olympic Comm.*, (Or. Clackamas Co. Cir. Ct. 1994) (No. 94 2151).

⁴⁵ *Id.*

February 10, contending that the Amateur Sports Act⁴⁶ gave it “exclusive jurisdiction over all matters” concerning the U.S. Olympic team.⁴⁷ The USOC focused on Harding’s allegedly false statements to the FBI as grounds for a disciplinary hearing.⁴⁸ Harding’s attorneys questioned whether the USOC had jurisdiction over events occurring at a USFSA event.⁴⁹

Commentators were divided on the merits of Harding’s suit. Many noted that the USOC must provide an athlete with notice and an opportunity to respond before assessing discipline.⁵⁰ Some attorneys, such as Shepard Goldfein of New York, considered the suit a shrewd maneuver: if the Oslo hearing were held, Harding would either have to describe how she failed to report her knowledge of the attack on Kerrigan or she would have to “take the Fifth Amendment” because her testimony may be self-incriminating.⁵¹ Robert Berry, of Boston College’s law school, called Harding’s suit “nonsense.”⁵² Jill Pilgrim, a New York attorney, remarked that everything surrounding the Oslo hearings indicated “[a] complete lack of due process.”⁵³

⁴⁶ 36 U.S.C. §§ 371-396 (1988); *see infra* Part III (discussing the Amateur Sports Act).

⁴⁷ Jane M. Adams & Michael Madden, *Oregon Judge Delays Harding Ruling*, BOSTON GLOBE, Feb. 12, 1994, at 1. The IOC stated that Harding’s case was an internal matter which it would leave in the hands of the USOC. *Harding Affair Drags On*, Agence France Presse, Feb. 10, 1994, available in LEXIS, News library, Curnws file.

⁴⁸ Adams, *supra* note 47, at 1.

⁴⁹ Complaint at ¶¶ 19-20, *Harding v. United States Olympic Comm.*, (Or. Clackamas Co. Cir. Ct. 1994) (No. 94 2151). *See also* Adams, *supra* note 47, at 1.

⁵⁰ 36 U.S.C. § 391(b)(6); *see also* Jere Longman, *Grounds May Exist to Remove Harding*, N.Y. TIMES, Jan. 20, 1994, at B9 (commenting on the notice provisions of the Amateur Sports Act).

⁵¹ Sandra Torry, *Experts Say Harding Suit Is a Double-Edged Sword*, WASH. POST, Feb. 11, 1994, at C6.

⁵² Holding, *supra* note 43, at A3.

⁵³ Torry, *supra* note 51, at C6.

The print media occasionally framed Harding's fitness to represent America in the Olympics as dependent on a criminal indictment. If she was found not guilty of criminal conduct, certain writers, such as the *Chicago Tribune's* Joan Beck⁵⁴ and the *Washington Post's* Richard Cohen,⁵⁵ implied that she was not guilty of any unsportsmanlike conduct which would justify removing her from the Olympic team. Other writers noted that a USOC disciplinary hearing would not be a criminal trial and the USOC need not prove "beyond a reasonable doubt" that Harding deserved to be removed from the team.⁵⁶ Others, such as E.M. Swift of *Sports Illustrated*, noted that a criminal charge was not a prerequisite to a disciplinary action.⁵⁷ Phil Hersh of the *Chicago Tribune* noted that an athlete charged with a crime may still compete in the Olympics⁵⁸ or the Olympic trials.⁵⁹ Harding's case was distinguishable, according to Hersh, because a fellow athlete was the target of her alleged misconduct.⁶⁰ Her act directly impacted the integrity of the competition.

Many reporters and editorial writers focused on the various oaths Harding signed after the Nationals in Detroit. According to the USFSA, Harding pledged to "exemplify high standards of fairness, ethical behavior, and genuine good

⁵⁴ Joan Beck, *Innocent Till Proven Guilty Competes With The Olympic Ideals*, CHI. TRIB., Feb. 3, 1994, Perspective, at 21.

⁵⁵ Richard Cohen, *Give Tonya Harding Her Due*, WASH. POST, Feb. 3, 1994, at A27.

⁵⁶ John Jeansonne, *Public Will Judge Tonya*, NEWSDAY, Feb. 2, 1994, at 5; see also Longman, *supra* note 50, at B9 (discussing relationship between criminal law and Olympic eligibility).

⁵⁷ E.M. Swift, *Stars and Scars*, SPORTS ILLUSTRATED, Feb. 7, 1994, at 74, 76.

⁵⁸ Phil Hersh, *Harding May Lose Olympic Berth*, CHI. TRIB., Jan. 16, 1994, at C1 (noting that Jim Doehring, the 1992 silver medalist in the shot put, was convicted in 1991 of a federal drug charge).

⁵⁹ *Id.* (noting that diver Bruce Kimball was awaiting trial for drunk driving and vehicular manslaughter when he tried out for the 1988 team).

⁶⁰ *Id.*

sportsmanship in any of [her] relationships with others.”⁶¹ By accepting a spot on the Olympic team, she bound herself to the promise that all other Olympians make: “I promise that we shall take part in these Olympic Games, respecting and abiding by the rules which govern them, in the true spirit of sportsmanship, for the glory of sport and the honor of our teams.”⁶²

On February 12, Harding and the USOC reached a settlement: Harding dropped her suit and the USOC canceled the Oslo hearing.⁶³ Clackamas County Circuit Judge Patrick D. Gilroy, in announcing the settlement, stated that “Tonya Harding will skate in the 1994 Olympics.”⁶⁴ He continued:

This case involved difficult legal issues and well warranted concerns on both sides. The USOC has the right and obligation to oversee and discipline certain conduct for its Olympic athletes. Tonya Harding has the right to a fair and impartial hearing regarding claimed ethical violations and the right to prepare adequately for same. Time is on the side of neither party. The games, in fact, began this morning.⁶⁵

The USOC took savage criticism for allowing Harding to skate. Bill Dwyre, sports editor of the *Los Angeles Times*, wrote:

Th[e] sound you heard Saturday afternoon, a big

⁶¹ Michael F. Sadowski, *Bar Harding*, CHI. TRIB., Feb. 4, 1994, Perspective, at 22; see also Christine Brennan, *Harding's Fate May Rest On Dotted Line*, WASH. POST, Feb. 7, 1994, at B1 (discussing pledges Harding signed).

⁶² Jeansonne, *supra* note 56, at 5 (providing language of the Olympic oath).

⁶³ Mitch Gelman, *Breaking Ice: Deal Lets Tonya Skate in Olympics*, NEWSDAY, Feb. 13, 1994, at 5.

⁶⁴ *Harding v. United States Olympic Comm.*, BOSTON GLOBE, Feb. 13, 1994, at 51 (Or. Clackamas Co. Cir. Ct. Feb. 12, 1994) [hereinafter *Harding I*].

⁶⁵ *Id.*

whoosh like the noise of a giant balloon deflating, was the sound of the U.S. Olympic Committee caving in. An extensive search of USOC officials in Lillehammer found no evidence of existing spines [The USOC] had a chance to take a stance . . . and it went whimpering off into a corner and hid.⁶⁶

Swift reminded his readers that LeRoy Walker of the USOC stated, less than one month earlier, "We're not going to be intimidated by the threat of a lawsuit."⁶⁷ "Hooray for the USOC," wrote a sarcastic reader of the *Los Angeles Times*.⁶⁸

C. *The Olympics*

The United States team fared well at the Norway Games, winning a record thirteen medals.⁶⁹ Nancy Kerrigan was a silver medalist.⁷⁰ Tonya Harding finished eighth despite having to restart her program due to an untied shoelace.⁷¹ When Harding returned to Portland after the games, a small (but loyal) crowd met her at the airport.⁷² Harding also returned to her legal problems.

⁶⁶ Bill Dwyre, *USOC Wins Gold In Backing Down*, L.A. TIMES, Feb. 13, 1994, at C1.

⁶⁷ Swift, *supra* note 36, at 90.

⁶⁸ Cormac O'Herlihy, L.A. TIMES, Feb. 19, 1994, Letters to the Editor, at C3.

⁶⁹ Christine Brennan, *U.S. Ends Olympics With Record*, WASH. POST, Feb. 28, 1994, at A1; Phil Hersh, *Haunted Winter Olympics Begin*, CHI. TRIB., Feb. 13, 1994, at C1.

⁷⁰ Brennan, *supra* note 69, at A1. Shane Stant, Kerrigan's attacker, stated that he was "happy that Kerrigan was doing really well." *Kerrigan Attacker Glad She Did Well*, ORLANDO SENTINEL, Feb. 24, 1994, at D9.

⁷¹ Diane Pucin, *Kerrigan Dazzles, Harding Unravels*, PHILA. INQUIRER, Feb. 26, 1994, at A1.

⁷² Mitch Gelman, *Circus Greets Tonya*, NEWSDAY, Mar. 2, 1994, at 133.

D. *Harding's Case After the Olympics*

The USFSA announced that it would hold a disciplinary hearing, on March 10, 1994, concerning Harding's involvement in the attack on Kerrigan.⁷³ If the hearing had gone forward, it would have threatened Harding's opportunity to skate in March's World Championships in Japan.⁷⁴ Harding brought suit in Oregon state court, and the USFSA quickly removed the suit to federal court.⁷⁵ Harding's attorneys argued that they would not have enough time to prepare a defense;⁷⁶ the district court judge agreed. He granted a temporary restraining order on March 9, preventing the USFSA from holding the scheduled hearing.⁷⁷

On March 16, Harding pled guilty to one count of hindering prosecution, was placed on three years probation, and fined \$110,000.⁷⁸ No other charges against Harding would be filed in relation to the Kerrigan conspiracy; in return, Harding agreed to resign from the USFSA.⁷⁹ "I'm really sorry I interfered," stated Harding.⁸⁰ Five days later, the grand jury investigating the Kerrigan conspiracy concluded that Harding was "in on the plot."⁸¹ The foreman stated that "[t]here was

⁷³ Phil Hersh, *World (Meet) Likely Will Turn Without Nancy-Tonya Soap Opera*, CHI. TRIB., Mar. 6, 1994, at C7.

⁷⁴ Steve Rushin, *Legal Aid Society*, SPORTS ILLUSTRATED, Mar. 21, 1994, at 110.

⁷⁵ Randy Harvey, *Harding's Lawyers Back In Court*, L.A. TIMES, Mar. 8, 1994, at C2.

⁷⁶ Rachel Shuster, *An Overdose of Tears, Tantrums*, USA TODAY, Mar. 10, 1994, at 5C.

⁷⁷ Rushin, *supra* note 74, at 110.

⁷⁸ Sonja Steptoe & E.M. Swift, *A Done Deal: Tonya Harding Confessed to a Crime But Avoided Jail*, SPORTS ILLUSTRATED, Mar. 28, 1994, at 32.

⁷⁹ *Id.*

⁸⁰ *Tonya Harding's Plea Bargain Hearing* (CNN television broadcast, Mar. 16, 1994).

⁸¹ *Jury: Harding Was in on Plot*, PHOENIX GAZETTE, Mar. 22, 1994, at A2.

a great deal of evidence pointing to the fact that she was involved from the beginning or very close to the beginning.”⁸²

On May 2, Federal District Judge Owen Panner dismissed Harding's suit against the USFSA.⁸³ Panner agreed that the date set for the hearing was unfair; elaborating, he stated that the USFSA's dealings with Harding were “arbitrary,” “lacking in good faith,” and in violation of the Association's by-laws and articles.⁸⁴ The Association's dispute resolution apparatus, he warned, “works only so long as [the USFSA] follows it.”⁸⁵ He dismissed the case as moot, since Harding had resigned from the USFSA, and the World Championships had been over for a month.⁸⁶

On June 30, a five-member panel of the USFSA stripped Harding of her 1994 National title.⁸⁷ In addition, the Association banned Harding for life.⁸⁸ The Association stated that Harding had demonstrated a “clear disrespect for fairness, good sportsmanship, and ethical behavior.”⁸⁹ Harding's amateur career on ice was over.

⁸² *Id.*

⁸³ *Harding v. United States Figure Skating Ass'n*, 851 F. Supp. 1476, 1476 (D. Or. 1994) [hereinafter *Harding II*], *later proceeding*, 879 F. Supp. 1053 (D. Or. 1995).

⁸⁴ *Harding II*, 851 F. Supp. at 1478.

⁸⁵ *Id.* at 1480.

⁸⁶ *Id.* Judge Panner's opinion was cited with approval in *Lindemann v. American Horse Shows Ass'n, Inc.*, 624 N.Y.S.2d 723 (Sup. Ct. 1994).

⁸⁷ *Harding Stripped of Title, Banned*, FACTS ON FILE, July 7, 1994, at 483 E1.

⁸⁸ *Id.*

⁸⁹ *Id.*

III. THE AMATEUR SPORTS ACT

A. *The Act's Background*

Congress, concerned by problems at the 1972 Munich Olympics, passed the Amateur Sports Act in 1978.⁹⁰ At the Munich Games, some aspects of the American team's performance were embarrassing; for example, two sprinters were disqualified because their coach inadvertently gave them the wrong time for their race.⁹¹ Furthermore, Congress was concerned that conflicts among governing bodies were hindering America's Olympic effort and damaging America's athletes. Representative Ralph Metcalfe, a former Olympic athlete, described the pre-Act amateur athletics as "punctuated by rival jurisdictional quibbling and squabbling."⁹² Congress also sought to encourage greater participation of women, racial and ethnic minorities, and the handicapped in amateur athletics.⁹³ President Jimmy Carter signed the Amateur Sports Act on November 8, 1978.⁹⁴

⁹⁰ Amateur Sports Act, 92 Stat. 3045 (1978) (codified at 36 U.S.C. §§ 371-396 (1988)).

⁹¹ James A.R. Nafziger, *The Amateur Sports Act of 1978*, 1983 B.Y.U. L. REV. 47 (analyzing the Act).

⁹² *Amateur Sports Act: Hearings Before the Subcomm. on Admin. and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 2 (1977) (testimony of Rep. Ralph Metcalfe) [hereinafter Metcalfe].

⁹³ H.R. REP. NO. 1627, 95th Cong., 2d Sess. 14 (1978), reprinted in 1978 U.S.C.C.A.N. 7478, 7487.

⁹⁴ Statement on Signing S. 2727 into Law, 1978 PUB. PAPERS 1976 (Nov. 8, 1978).

B. *Provisions of the Act*

1. Powers and Purposes of the United States Olympic Committee

The Act gave the United States Olympic Committee, a federally-authorized corporation,⁹⁵ “exclusive jurisdiction” over America’s participation in the Olympics and Pan-American Games.⁹⁶ The USOC is to promote public participation in amateur sports and physical fitness activities, especially women, minorities, and the handicapped.⁹⁷ The Committee has “exclusive power” over the Olympic name and symbols.⁹⁸ The Amateur Sports Act requires the Committee to maintain “orderly and effective administrative procedures” for the “swift resolution of conflicts” among persons and bodies under its jurisdiction.⁹⁹

The Act authorizes the USOC to recognize one national governing body [NGB] for each Olympic sport.¹⁰⁰ Each NGB has power to conduct competitions, to sponsor training programs, and to recommend Olympic and Pan-Am team members to the USOC.¹⁰¹ Each NGB must meet and maintain certain eligibility standards; if an NGB is deficient, the USOC

⁹⁵ 36 U.S.C. § 371 (1988).

⁹⁶ *Id.* § 374(3).

⁹⁷ *Id.* §§ 374(12)-(14).

⁹⁸ *Id.* § 380; *see also* James Cox, *Wendy's Unofficial Olympic Ads Irk Organizers*, USA TODAY, July 11, 1994, at 1B (noting the frustration that many corporate sponsors felt with hamburger chain's unofficial Olympic ads); Jonathan Ringel & Heidi Dawley, *A Brawl That's Hardly in the Olympic Spirit*, BUS. WK., Oct. 10, 1994, at 114 (describing USOC's attempt to frustrate the use of “Paralympics” by disabled athletes).

⁹⁹ 36 U.S.C. §§ 374(c), 391(b)(3), 391(b)(6), 391(b)(11), 395 (1988).

¹⁰⁰ *Id.* § 391 (requiring one NGB for each Olympic sport).

¹⁰¹ *Id.* § 392 (concerning powers of NGBs).

may withdraw that organization's certification as an NGB.¹⁰² To earn and maintain its status, each NGB must have a dispute resolution mechanism which meets the minimum requirements of the Act.¹⁰³

2. The Act's Conflict Resolution Requirements

As stated above, the Act's drafters were concerned about the retarding and inhibiting effects that unresolved disputes have on America's Olympic efforts.¹⁰⁴ Consequently, each NGB, such as the USFSA, is required to "provide procedures for the prompt and equitable resolution of grievances of its members."¹⁰⁵ The Act further mandates that all members, including athletes, receive "fair notice and an opportunity for a hearing . . . before declaring such individual ineligible"¹⁰⁶ For disputes which remain unresolved, the Act provides for commercial arbitration.¹⁰⁷

Before an athlete appeals a decision, either to the USOC or the courts, he must exhaust all remedies provided.¹⁰⁸ If the athlete exhausts all remedies in the NGB or demonstrates that pursuing those remedies would result in "unnecessary delay,"¹⁰⁹ then he can appeal to the USOC. After this, either party may seek arbitration if dissatisfied; the Amateur Sports Act provides that the decision of the arbitrators is final.¹¹⁰ Courts are very reluctant to interfere with an arbitrator's

¹⁰² *Id.* § 391 (concerning eligibility requirements for NGBs).

¹⁰³ *Id.* § 391(b) (concerning dispute resolution policy).

¹⁰⁴ Metcalfe, *supra* note 92, at 2 (discussing intent of the Amateur Sports Act's framers).

¹⁰⁵ 36 U.S.C. § 391(b)(11) (1988).

¹⁰⁶ *Id.* § 391(b)(6).

¹⁰⁷ *Id.* §§ 391(b)(3), 395(c).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* § 395(a)(1).

¹¹⁰ 36 U.S.C. § 395.

decision.¹¹¹

When an athlete fails to exhaust his remedies with his NGB or the Committee, courts uniformly will not grant relief. In *Devereaux v. Amateur Softball Ass'n of America*,¹¹² the plaintiffs challenged their suspensions by the Amateur Softball Association, softball's NGB. The court found that the plaintiffs failed to resort to any ASA internal remedy available to them.¹¹³ Consequently, the court dismissed the suit as "premature."¹¹⁴

Courts have held that the Amateur Sports Act does not create a private cause of action. In *DeFrantz v. United States Olympic Committee*, the plaintiffs sought to enjoin the USOC from boycotting the 1980 Moscow Games.¹¹⁵ The trial court denied the injunction, stating that Congress had no intention of creating a private cause of action under the Act.¹¹⁶ The court stated that "the legislative history of the Act reveals unequivocally that Congress never intended to give plaintiffs a right to compete in the Olympics if the USOC determines not to enter a team."¹¹⁷

DeFrantz, however, should not be interpreted as immunizing the USOC from lawsuits. First, the Act provides

¹¹¹ See, e.g., *In re Gault*, 578 N.Y.S.2d 683, 685 (App. Div. 1992) (ruling that court has no authority to upset arbitrator's decision about Olympic bobsled trials when arbitrator did not exceed his power).

¹¹² 768 F. Supp. 618 (S.D. Ohio 1991).

¹¹³ *Id.* at 624.

¹¹⁴ *Id.*; see also *Barnes v. Int'l Amateur Athletic Fed'n*, 862 F. Supp. 1537, 1541 (S.D. W. Va. 1994) (denying relief because world record holder in the shot put failed to exhaust NGB-provided remedies).

¹¹⁵ *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181 (D.D.C.), *aff'd*, 701 F.2d 221 (D.C. Cir. 1980).

¹¹⁶ *Id.* at 1192; accord *Oldfield v. The Athletics Congress*, 779 F.2d 505, 508 (9th Cir. 1985) (finding no private cause of action); *Michels v. United States Olympic Comm.*, 741 F.2d 155, 157 (7th Cir. 1984) (same).

¹¹⁷ *DeFrantz*, 492 F. Supp. at 1192.

that the Committee can “sue or be sued.”¹¹⁸ Second, the Act does not displace common law causes of action. In *Harding v. USFSA*, Judge Panner noted that Harding’s claim was for breach of contract; thus, she achieved federal subject matter jurisdiction by diversity of parties, not by relying on a cause of action implied in the Amateur Sports Act.¹¹⁹ The *DeFrantz* line of cases was inapplicable.

C. *The Unclear Relationship Between the USOC and NGBs*

An American athlete competing in the Olympics is subject to the jurisdiction of four separate bodies: the USOC, the athlete’s NGB, the International Olympic Committee [IOC], and the international governing body [IGB] for the athlete’s sport.¹²⁰ This scheme can generate no small amount of confusion.¹²¹ In the *Harding* case, it was unclear what effect the concurrent investigations had on each other.¹²² Could either the USOC’s or the USFSA’s investigation take priority over the other? Second, questions existed about whether the USOC could punish Harding for an assault which took place before she was officially named to the U.S. team.¹²³ The

¹¹⁸ 36 U.S.C. § 375(a)(6) (1988).

¹¹⁹ *Harding v. United States Figure Skating Ass’n* [hereinafter *Harding II*], 851 F. Supp. 1476, 1480 (D. Or. 1994).

¹²⁰ *Michels*, 741 F.2d at 156.

¹²¹ This problem is discussed in Jonathan S. Fishbein, Note, *When Sovereigns Collide: Why America’s Figure Skating Competitors Are The Ultimate Losers Under the Amateur Sports Act of 1978*, 9 CARDOZO ARTS & ENT. L.J. 231 (1990); the relationship between American athletes and the *international* bodies is beyond the scope of this Comment. See also *Michels*, 741 F.2d at 156 (describing confusion resulting from four organizations exercising simultaneous control over the athlete).

¹²² See generally Complaint, *Harding v. United States Olympic Comm.* (Or. Clackamas Co. Cir. Ct. 1994) (No. 94 2151); see also Christine Brennan, *Let the XVIIth Winter Games Begin*, WASH. POST, Feb. 13, 1994, at A1.

¹²³ Michael Janofsky, *USOC to Let Harding Skate in the Olympics*, N.Y. TIMES, Feb. 13, 1994, at 1.

settlement of *Harding I* left these questions unanswered.¹²⁴

IV. DUE PROCESS AND THE AMATEUR ATHLETE

To claim protection under the Due Process provision of the Fifth¹²⁵ or the Fourteenth Amendments¹²⁶ when faced with disciplinary action, the athlete must meet two requirements. First, the athlete must show that the actor is a "state actor."¹²⁷ Second, the athlete must show that the offending disciplinary action or rule infringes on a constitutionally protected interest.¹²⁸ If an athlete clears both of these hurdles, then the disciplinary procedure is measured against the *Mathews v. Eldridge* balancing test:

[Procedural due process analysis] requires consideration of three distinct factors: First, the private interest that would be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the . . . burdens that the additional or substitute procedural requirement would

¹²⁴ *Harding I*, *supra* note 64, at 51.

¹²⁵ "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

¹²⁶ "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

¹²⁷ See *infra* Part IV.A (discussing state action and amateur athletic associations).

¹²⁸ See *infra* Parts IV.B to IV.D (describing due process and the amateur athlete).

entail.¹²⁹

Because an athlete seeking to avoid discipline so rarely shows both state action and a constitutionally protected interest, the *Mathews* test is rarely invoked. In that situation, any procedural protection must be grounded in an agreement between the parties.

In *Goss v. Lopez*,¹³⁰ the plaintiffs were suspended from school for ten days without a hearing. They appealed their suspensions and the district court found the schools' actions to be violative of due process.¹³¹ The Supreme Court affirmed, holding that schools must provide some hearing and some amount of notice, even if the procedure is rather informal.¹³² The *Goss* Court used an approach similar to *Mathews*, reasoning that an informal hearing sufficiently protects both students and schools.¹³³ When considering the cases below, the athletes' interests and the governing bodies' procedures should be compared to the "rudimentary"¹³⁴ procedures approved in *Goss*.

In contrast, if the athlete challenges the validity of the rule itself, then this challenge is measured according to substantive due process standards. Again, the athlete must show a constitutionally protected interest.¹³⁵ If the rule does not infringe on a fundamental interest, such as privacy,¹³⁶ the

¹²⁹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹³⁰ 419 U.S. 565 (1975).

¹³¹ *Id.*

¹³² *Id.* at 575-76, 581.

¹³³ *Id.*; see also William G. Buss, *Due Process in the Enforcement of Amateur Sports Rules*, in *LAW & AMATEUR SPORTS* 1, 23 (Ronald J. Waicukauski ed., 1982).

¹³⁴ *Goss*, 419 U.S. at 581; see Buss, *supra* note 133, at 23.

¹³⁵ *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 558 (Tex. 1985) (involving a challenge to Texas' "no pass, no play" rule for interscholastic athletics), *appeal dismissed*, 475 U.S. 1001 (1986).

¹³⁶ *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

challenger must prove that the rule is not rationally related to a permissible state interest.¹³⁷

In *Brands v. Sheldon Community School*,¹³⁸ Tom Brands, a state champion high school wrestler, challenged his suspension from the wrestling team for the remainder of his senior season for engaging in, along with three of his teammates, sexual activities with a sixteen-year-old female classmate.¹³⁹ He argued, *inter alia*, that the school board's ruling violated substantive due process.¹⁴⁰ In the maintenance of discipline and an optimal educational environment, the court found a rational basis for the Board's action.¹⁴¹ Brands, desiring a "strict scrutiny" review of the Board's actions, sought to implicate the fundamental interest of privacy by arguing, in effect, that the Board administered punishment based on unwarranted interferences with his sex life.¹⁴² Citing *Bowers v. Hardwick*,¹⁴³ the court rejected Brand's fundamental interests claim, reasoning that privacy "does not keep the state from regulating private sexual conduct."¹⁴⁴

¹³⁷ See *Stone v. Kan. State High Sch. Activities Ass'n*, 761 P.2d 1255, 1259 (Kan. Ct. App. 1988).

¹³⁸ 671 F. Supp. 627 (N.D. Iowa 1987).

¹³⁹ *Id.* at 629. The letter announcing the suspension accused Brands of engaging in "bullying behavior," and characterized the sexual contact as "injurious and offensive" to the female classmate. *Id.* The trial court expressly stated that it made no finding regarding the truth of the charges. *Id.*

¹⁴⁰ *Id.* at 630. He also alleged procedural due process violations. *Id.* at 630-33. The trial court rejected his claim, noting in part that the School afforded Brands a nearly six-hour-long evidentiary hearing. *Id.* at 632-33.

¹⁴¹ *Id.* at 633.

¹⁴² *Id.* at 634.

¹⁴³ 478 U.S. 186 (1986) (holding that Georgia's anti-sodomy law does not violate the Constitution, at least when applied to those who engage in homosexual conduct).

¹⁴⁴ *Brands*, 671 F. Supp. at 634. Tom Brands later went on to win 3 NCAA wrestling titles, a 1993 world championship, and a gold medal at the 1995 Pan-Am Games. Matt Winklejohn, *Wrestling: Their Own Brands of Rough and Tumble*, ATLANTA J. & CONST., Apr. 7, 1995, at 5D.

A. *State Action and Athletic Organizations*

To invoke the Constitution's Due Process protections, the aggrieved party must demonstrate governmental action under either the Fifth Amendment¹⁴⁵ or the Fourteenth Amendment.¹⁴⁶ The most obvious way of finding state action is if the actor is the state.¹⁴⁷ But life is never so easy for plaintiffs who allege constitutional violations. In the absence of overt state action, the plaintiff must satisfy one of the tests used by the Supreme Court to ascribe state action to a seemingly private entity;¹⁴⁸ such as the presence of a "close nexus" between the state and the challenged action of a private body;¹⁴⁹ a delegation of authority by the state to the private actor;¹⁵⁰ the state deriving benefits from the private entity's actions;¹⁵¹ or the performance by the private body of a "traditional government function."¹⁵² This section will explore constitutional due process decisions involving the USOC and NGBs, college associations and conferences, and high school athletic organizations.

In *San Francisco Arts & Athletics v. United States Olympic Committee*, the Supreme Court held that the USOC is

¹⁴⁵ See *Public Utils. Comm'n v. Pollack*, 343 U.S. 451, 463 (1952); see also, *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that the Fifth Amendment's Takings Clause applies only to the federal government).

¹⁴⁶ See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

¹⁴⁷ *Id.* at 11.

¹⁴⁸ See, e.g., HENRY J. ABRAHAM, *FREEDOM AND THE COURT* 473-500 (5th ed. 1988) (describing "state action").

¹⁴⁹ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

¹⁵⁰ *West v. Atkins*, 487 U.S. 42, 49 (1988).

¹⁵¹ See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

¹⁵² *S.F. Arts & Athletics Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) [hereinafter *Arts & Athletics*]. This decision is discussed and criticized in Mitchell L. Beckloff, Comment, *State Action in San Francisco Arts & Athletics, Inc. v. United States Olympic Committee: Let The Games Begin*, 22 LOY. L.A. L. REV. 635 (1989).

not a state actor for due process purposes.¹⁵³ In *Arts & Athletics*, the USOC brought suit against the organizers of the "Gay Olympic Games," seeking to enjoin them from using the word "Olympic."¹⁵⁴ The trial court and Ninth Circuit ruled for the USOC, relying on the USOC's exclusive control of Olympic words and symbols.¹⁵⁵ *Arts and Athletics* appealed, claiming that denial of permission to use the word "Olympic" was unconstitutional discrimination under the Fifth Amendment.¹⁵⁶ The Supreme Court, affirming the lower courts,¹⁵⁷ found the Fifth Amendment inapplicable because the USOC was not a state actor.¹⁵⁸ The incorporation of the USOC under Federal law did not make the USOC a state actor.¹⁵⁹ The Court found this alone to be insufficient. To hold otherwise would seemingly render *all* corporations state actors, because all corporations owe their existence to grants from a State or the Federal government.¹⁶⁰ The Court found that the USOC was not a state actor under all other tests.¹⁶¹

The case law is split regarding whether athletic organizations, aside from the USOC and NGBs are state actors.¹⁶² In *National Collegiate Athletic Ass'n v.*

¹⁵³ *Arts and Athletics*, 483 U.S. at 525, 527; see also *Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524, 530-31 (10th Cir. 1989) (holding that the defendant NGB was not a state actor), *cert. denied*, 471 U.S. 1010 (1990); *Reynolds v. The Athletics Congress*, No. C-2-91-0003, 1991 WL 179760, at *11 (S.D. Ohio Mar. 19, 1991) (same); *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C.) (same), *aff'd*, 701 F.2d 221 (D.C. Cir. 1980).

¹⁵⁴ *Arts and Athletics*, 483 U.S. at 522.

¹⁵⁵ 36 U.S.C. § 380 (1988).

¹⁵⁶ *Arts and Athletics*, 483 U.S. at 542.

¹⁵⁷ *Id.* at 527.

¹⁵⁸ *Id.* at 544-45.

¹⁵⁹ *Id.* at 543.

¹⁶⁰ See *id.* at 544.

¹⁶¹ *Arts and Athletics*, 483 U.S. at 544-45.

¹⁶² See GLENN M. WONG, *ESSENTIALS OF AMATEUR SPORTS LAW* 204-05 (2d ed. 1994) (discussing cases).

Tarkanian,¹⁶³ the Court held that the NCAA was not a state actor subject to Fourteenth Amendment restrictions. *Tarkanian*, the basketball coach at the University of Nevada-Las Vegas, filed suit in Nevada state court, alleging that the NCAA's disciplinary actions deprived him of due process.¹⁶⁴ The United States Supreme Court, in reversing the state court judgment for *Tarkanian*,¹⁶⁵ found that the NCAA was not a state actor: "Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated [rules governing intercollegiate athletics]." ¹⁶⁶ Accordingly, the Court reversed the Nevada Supreme Court's judgment.¹⁶⁷

Earlier cases involving the NCAA are in conflict on this point.¹⁶⁸ Courts finding athletic conferences to be state actors typically reason that the participation of state supported schools in otherwise private associations was sufficient to characterize the associations' conduct as state-like action.¹⁶⁹ Other courts have declined to subject the NCAA and college conferences to Fourteenth Amendment requirements by refusing to find state

¹⁶³ 488 U.S. 179 (1988).

¹⁶⁴ *Id.* at 181.

¹⁶⁵ *Id.* at 181; *Tarkanian v. Nat'l Collegiate Athletic Ass'n*, 741 P.2d 1345 (Nev. 1987) (per curiam).

¹⁶⁶ *Tarkanian*, 488 U.S. at 195.

¹⁶⁷ *Id.* at 199.

¹⁶⁸ *Buss*, *supra* note 133, at 5-6; *see also* WONG, *supra* note 162, at 203-05 (discussing split of authority). Several states have considered or are considering statutes which would subject athletic associations to the due process standards applied to state actors. For a discussion, *see* Aiden Middlemess McCormack, Comment, *Seeking Procedural Due Process In NCAA Infractions Procedures: States Take Action*, 2 MARQ. SPORTS L.J. 261 (1992).

¹⁶⁹ *Fluitt v. University of Neb.*, 489 F. Supp. 1194, 1199 (D. Neb. 1980) (finding that the Big Eight conference was a state actor); *Howard Univ. v. National Collegiate Athletic Ass'n*, 367 F. Supp. 926, 929 (D.D.C. 1973) (ruling that NCAA was a state actor), *aff'd*, 510 F.2d 213 (D.C. Cir. 1975).

action.¹⁷⁰

In cases involving high school athletic organizations, a majority of cases hold that these organizations are state actors because they are public agencies¹⁷¹ or organizations which perform a "public" function.¹⁷² Thus, as a general rule, the closer the relationship between an athletic organization and a state body, and the more the athletic organization assumes the posture of a state body, the more likely the courts will find state action.¹⁷³ At the high school level, athletic associations are either arms of the state or work very closely with a state body in the execution of a traditional government function.¹⁷⁴ Furthermore, the business of a high school athletic association is likely to involve a large number of students as a percentage of a school district's enrollment, and the objectives of the high school association are likely to coincide with the objectives of the school district's health or physical education program. On the other hand, college athletic associations often lack a close relationship to the educational objectives of their member

¹⁷⁰ La. State Bd. of Educ. v. National Collegiate Athletic Ass'n, 273 So. 2d 912, 916 (La. Ct. App. 1973) (characterizing the NCAA as a "private athletic association").

¹⁷¹ Taylor v. Ala. High Sch. Athletic Ass'n, 336 F. Supp. 54, 56 (M.D. Ala. 1972); Fla. High Sch. Activities Ass'n v. Thomas, 409 So. 2d 245, 247 (Fla. Dist. Ct. App. 1982), *rev'd on other grounds*, 434 So. 2d 306 (Fla. 1983); *see also* Palmer v. Merluzzi, 868 F.2d 90, 93 (3rd Cir. 1989) (finding that the school was a state actor by enforcing its own rules).

¹⁷² Mitchell v. La. High Sch. Athletic Ass'n, 430 F.2d 1155, 1157 (5th Cir. 1970) (finding state action); *see also* Kelley v. Metro. County Bd. of Educ., 293 F. Supp. 485, 491 (M.D. Tenn. 1968) (involving suspension of all-black high school from competition). *But see* Giannattasio v. Stamford Youth Hockey Ass'n, 621 F. Supp. 825, 828 (D. Conn. 1985) (holding that municipally supported youth ice hockey league was not a state actor).

¹⁷³ Buss, *supra* note 133, at 5-6.

¹⁷⁴ *See supra* notes 169-73 (discussing the connection between athletic associations and educational institutions).

universities.¹⁷⁵ At the level of the USOC and NGBs, there is almost no relation to education or any other governmental function or agency.¹⁷⁶

B. *Athletes and Their Constitutionally Protected Interests*

Once the state action hurdle has been cleared, the athlete must show an interest protected by the Due Process clauses. As a general rule, an athlete does not have a constitutionally protected liberty or property interest¹⁷⁷ in participating in athletic competitions. Some courts hold that, even if the athlete had a protected interest, the specific procedures used were more than sufficient to satisfy due process.¹⁷⁸ Other courts deny altogether any protected interest in athletic participation.¹⁷⁹

¹⁷⁵ Buss, *supra* note 133, at 13 (discussing the differences between high school and college athletic associations).

¹⁷⁶ *Arts & Athletics*, 483 U.S. at 544. *But see* Justice Brennan's suggestion, in dissent, that the USOC acts in a way that can be characterized as the conduct of foreign affairs when it selects a team for international competitions. *Id.* at 550.

¹⁷⁷ Buss, *supra* note 133, at 10-19. The Due Process Clause does not protect every liberty or property interest—those without sufficient gravity are not constitutionally protected in substantive due process cases. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 10-8 (1988).

¹⁷⁸ *Palmer v. Merluzzi*, 868 F.2d 90, 95 (3rd Cir. 1989) (holding that semi-formal hearing for athlete suspended, for drug use on school grounds, from football team for 60 days was sufficient); *Fluitt v. University of Neb.*, 489 F. Supp. 1194, 1203 (D. Neb. 1980) (finding sufficient procedures); *Stone v. Kan. State High Sch. Activities Ass'n*, 761 P.2d 1255, 1259 (Kan. Ct. App. 1988) (condemning "arbitrary and capricious" rules). A six-hour evidentiary hearing was considered sufficient in *Brands v. Sheldon Community School*, 671 F. Supp. 627, 632 (N.D. Iowa 1987).

¹⁷⁹ *Mitchell v. La. High Sch. Athletic Ass'n*, 430 F.2d 1155, 1158 (5th Cir. 1970) (declaring that playing high school football is not protected under the Fourteenth Amendment); *Giannattasio v. Stamford Youth Hockey Ass'n*, 621 F. Supp. 825, 829 (D. Conn. 1985) (citing *Mitchell*, 430 F.2d at 1158); *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C.) (finding no Fifth Amendment right to in compete in Moscow Olympics), *aff'd*, 701 F.2d 221 (D.C. Cir. 1980); *Taylor v. Ala. High Sch. Athletic Ass'n*, 336 F. Supp. 54, 57 (M.D. Ala. 1972) (finding no protected right); *Southern Methodist Univ. v. Smith*, 515 S.W.2d

Most courts have not accepted assertions that the opportunity for athletic scholarships deserves constitutional protection.¹⁸⁰ Nevertheless, courts are more likely to find a protected interest when the athlete has achieved a level of skill which demonstrates that competition is the athlete's livelihood and not a mere expectation or wish for future greatness, though there is no guarantee that they will do so.¹⁸¹ Most courts have found that an athlete's interests in a college scholarship or professional career are too speculative.¹⁸²

In sum, where athletic success is nearly realized, the courts are less likely to dismiss the athletes' interests as insubstantial. To illustrate, consider the analogy to a eminent domain condemnation proceeding.¹⁸³ If X owns land on which the Government wants to put a toxic substances landfill, the Government is likely to ignore X when he says "Pay me \$1 million dollars because I want the money." Certainly the Government will pay more attention, but not much more, if X stated "Pay me \$1 million because there may be oil under my land." The Government would necessarily pay a great deal of attention if X said "Pay me \$1 million dollars because there's a 90 percent chance that there's a major amount of oil under my land, according to the geologists I've hired and the test wells

63, 64 (Tex. Civ. App. 1974) (finding no right to hearing); *La. State Bd. of Educ. v. Nat'l Collegiate Athletic Ass'n*, 273 So. 2d 912, 916 (La. Ct. App. 1973) (following *Mitchell*, 430 F.2d at 1158).

¹⁸⁰ *Taylor*, 336 F. Supp. at 57 (holding that possibility of athletic scholarship was not a constitutionally protected interest); *accord*, *Giannattasio*, 621 F. Supp. at 829.

¹⁸¹ *Buss*, *supra* note 133, at 13. *But see* *Colorado Seminary (Univ. of Denver) v. National Collegiate Athletic Ass'n*, 417 F. Supp. 885, 895 (D. Colo. 1976) (holding that a suspended athlete's interests in a professional hockey career is "too speculative"), *aff'd*, 570 F.2d 320 (10th Cir. 1978).

¹⁸² *Buss*, *supra* note 133, at 14.

¹⁸³ *See, e.g.*, RALPH BOYER ET AL., *THE LAW OF PROPERTY, AN INTRODUCTORY SURVEY* 430-83 (1991) (discussing the law of takings and eminent domain).

I've dug." As the likelihood of oil being under X's property increases, the more attention (and hopefully the more money) the Government will pay to X. Similarly, the more probable the athlete's success is, the more care a court is likely to exercise to ensure that it does not deprive an athlete of something extraordinary, like a chosen livelihood or a chance at a world record.¹⁸⁴

C. *Contractual Due Process and Amateur Athletic Associations*

In the absence of state action, an athlete may challenge disciplinary action by bringing suit for breach of contractual due process. Contractual due process is a creature of contract law; if the parties did not agree to it,¹⁸⁵ it is not available.¹⁸⁶ When a plaintiff alleges breach of contractual due process, courts ask two questions: first, was the process specified in the contract followed, and second, was the process fair.¹⁸⁷ In *Harding v. USFSA*, as discussed above in Part II, the fairness issue was never reached as Harding alleged that the guaranteed

¹⁸⁴ See, e.g., *Reynolds v. Int'l Amateur Athletic Fed'n*, 505 U.S. 1301 (Stevens, Circuit Justice 1992) (noting the "incomparable importance" of competing in the Olympics).

¹⁸⁵ Parties can also make sportsmanlike conduct a contractual duty. *Tollefson v. Green Bay Packers*, 41 N.W.2d 201, 202 (Wis. 1950) (reciting a provision in the plaintiff's contract in which he "pledges to the American public to conform to high standards of fair play and good sportsmanship"); see also *Bell v. Associated Press*, 584 F. Supp. 128, 131 (D.D.C. 1984) (quoting contractual language similar to provision in *Tollefson*).

¹⁸⁶ *Phila. v. Fraternal Order of Police, Lodge No. 5*, 634 A.2d 800, 804 (Pa. 1993) (holding an arbitrator's reinstatement of a plaintiff police officer was invalid because the collective bargaining agreement did not create a "right" of contractual due process).

¹⁸⁷ *Bodensteiner v. St. Michael's Hosp.*, No. 89-0096, 1989 WL 165170, at *3 (Wis. Ct. App. Nov. 16, 1989) (stating that contractual due process was violated only if hospital's actions were arbitrary and capricious).

procedures were not followed.

Because an individual's contractual due process claims owe their existence to an agreement between private parties rather than to constitutional commands, a court will examine the agreement deferentially.¹⁸⁸ However, the agreement must withstand *some* modest level of scrutiny; a patently unfair agreement will likely be modified or voided.¹⁸⁹ In this respect, contractual due process is akin to constitutional due process; the ancestors of the *Mathews* test for due process claims typically focused on the "fairness" of the procedural machinery.¹⁹⁰ This inquiry is similar to the test for contractual due process.¹⁹¹

Assume Y is a world-class gymnast who, after winning a medal at the Pan-American Games for the pommel horse, is randomly selected for a drug test. Y's test comes back positive and Y is declared ineligible to compete for two years. The only appeal Y may make is to the organizer of the competition. Essentially, this appeal consists of the organizer holding the specimen bottle up to the light and concluding, "Looks doped to me." Under the *Mathews* test (assuming state action), this procedure would be inadequate. The gymnast's potential loss is great enough to demand something more accurate than the "hold-it-up-to-the-light test." In addition, this procedure is likely

¹⁸⁸ See, e.g. *La. State Bd. of Educ. v. Nat'l Collegiate Athletic Ass'n*, 273 So. 2d 912, 916 (La. Ct. App. 1973) (noting reluctance of courts to disturb the "disciplinary proceedings of private athletic associations"). *But see* Buss, *supra* note 133, at 5 (noting that a few courts have found "Fourteenth Amendment due process standards to be an implied term of the contract" between the athletic organization or educational institution and the athlete) (emphasis added).

¹⁸⁹ The procedure may be voided on grounds of unconscionability, for example. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 398-409 (3d ed. 1987) (discussing unconscionability).

¹⁹⁰ *TRIBE*, *supra* note 177, § 10-8, at 678 (citations omitted) (discussing the antecedents of present due process standards).

¹⁹¹ *Bodensteiner*, 1989 WL 165170, at *3.

invalid because it is inadequate to protect Y's rights, however substantial they may be.

When seeking to enjoin disciplinary action by their NGB, both Tonya Harding¹⁹² and Harry "Butch" Reynolds relied on breach of contract. Harding's allegations are discussed above in Part II. In Reynolds' case, the International Amateur Athletic Federation [IAAF] declared Reynolds, the world record holder for the 400 meter dash, ineligible for two years after he allegedly tested positive for a banned substance in 1990.¹⁹³ Reynolds sought to challenge his suspension on procedural grounds and sought injunctive relief in Federal Court in 1991. He alleged that the IAAF and The Athletics Congress [TAC], the national governing body for track and field, violated his Fifth Amendment right to due process, breach of contractual due process, defamation, and tortious interference with business relationships.¹⁹⁴ The trial court dismissed Reynolds's constitutional claim for lack of state action.¹⁹⁵ Because the plaintiff had not exhausted remedies provided by the NGB, the Sixth Circuit dismissed the remaining claims.¹⁹⁶

One year later, after exhausting his administrative remedies without success, Reynolds returned to court, seeking to enjoin TAC and the IAAF from interfering with his

¹⁹² *Harding II*, 851 F. Supp. at 1479.

¹⁹³ *Reynolds v. Int'l Amateur Athletic Fed'n*, 841 F. Supp. 1444, 1447 (S.D. Ohio 1992). For an excellent source of information on the early phases of Reynolds' case, see Hilary Joy Hatch, Note, *On Your Mark, Get Set, Stop! Drug-Testing Appeals in the International Amateur Athletic Federation*, 16 LOY. L.A. INT'L & COMP. L.J. 537 (1994).

¹⁹⁴ *Reynolds v. Athletics Congress*, No. C-2-91-0003, 1991 WL 179760, at *1 (S.D. Ohio Mar. 19, 1991).

¹⁹⁵ *Id.* at *11.

¹⁹⁶ *Reynolds v. Athletics Congress*, No. 91-3285, 1991 WL 100600, at *1 (6th Cir. June 11, 1991).

opportunity to try out for the 1992 U.S. Olympic team.¹⁹⁷ He claimed irreparable harm if he were not allowed to try out for the Olympic team and a likelihood of success on the merits of his claim. The IAAF appeared specially, claiming the court lacked personal jurisdiction over the case.¹⁹⁸ The trial court granted injunctive relief.¹⁹⁹ The Sixth Circuit granted TAC a stay of the injunction.²⁰⁰ Justice Stevens, as Circuit Justice, granted Reynolds a stay of the Sixth Circuit's stay of the injunction.²⁰¹ In granting the stay, Stevens stated that "a decent respect for the incomparable importance of winning a gold medal in the Olympic Games convinces me that a pecuniary award is not an adequate substitute for the intangible values for which the world's greatest athletes compete."²⁰² Stevens noted that the injunction would be made moot if Reynolds failed to qualify for the Olympics.²⁰³ The Supreme Court denied TAC's motion to vacate Justice Stevens' decision.²⁰⁴ Reynolds finished fifth, and was thereby eliminated, in the semifinal race at the Olympic qualifying meet in New Orleans.²⁰⁵ In December 1992, the trial court entered a \$27 million default judgment for Reynolds.²⁰⁶ On appeal,

¹⁹⁷ Reynolds v. Int'l Amateur Athletic Fed'n, 841 F. Supp. 1444, 1448 (S.D. Ohio 1992) (listing claims for breach of contract, defamation, and tortious interference with a business relationship).

¹⁹⁸ *Id.* at 1448 n.3.

¹⁹⁹ *Id.* at 1456.

²⁰⁰ Reynolds v. Int'l Amateur Athletic Fed'n, No. 92-3596, 1992 WL 157545, at *1 (6th Cir. June 19, 1992).

²⁰¹ Reynolds v. Int'l Amateur Athletic Fed'n, 505 U.S. 1301 (Stevens, Circuit Justice 1992).

²⁰² *Id.* at 1301.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Joe Concannon, *Still Savoring the Sweep*, BOSTON GLOBE, June 28, 1992, at 57.

²⁰⁶ Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110, 1114 (6th Cir.), *cert. denied*, 115 S. Ct. 423 (1994).

the Sixth Circuit reversed, holding that Ohio courts lacked personal jurisdiction over the IAAF.²⁰⁷

D. *Due Process and the Amateur Athlete: The Uncertain, Unsatisfactory State of Affairs*

The *Harding* and *Reynolds* cases, in spite of their high profile, are very weak precedents because of their procedural postures: a pre-trial settlement, a dismissal for mootness, a default judgment, and a dismissal for lack of jurisdiction over a defendant.²⁰⁸ The most that the *Harding* and *Reynolds* litigation stand for is that some process is due and that procedures in place must be followed.²⁰⁹ What remains unsettled is whether the USOC's procedures are fair and afford athletes sufficient protection.²¹⁰ This uncertainty is a potential source of unease and confusion for both competitors and governing bodies. The athlete remains unsure that her rights are adequately safeguarded by her NGB's procedures. The NGB may doubt whether its disciplinary procedures will, if challenged, withstand judicial scrutiny. The next part of this Comment covers various calls for change to the structure of the USOC and its constituent governing bodies. Those who propose these changes hope to provide to all involved some measure of certainty and security regarding discipline of athletes.

²⁰⁷

Id.

²⁰⁸ *Id.*; *Harding II*, 851 F. Supp. at 1478 (D. Or. 1994); *Harding I*, *supra* note 64, at 51.

²⁰⁹ See *supra* Parts II.D (discussing *Harding's* case) and IV.C (giving an overview of contractual due process).

²¹⁰ Dick Patrick, *Supreme Court Refuses to Hear Reynolds Case*, USA TODAY, Nov. 1, 1994, at 11C.

V. POSSIBLE CHANGES TO THE USOC'S DISCIPLINARY PROCEDURE

When considering changes to any disciplinary regime, the rule-maker has several factors to consider. He must consider the interests of the governed.²¹¹ He must also weigh the interests of those that govern,²¹² and must consider whether any changes to the present regime are necessary.²¹³ Finally, he must consider whether any proposed rule change adequately protects the interests of all involved.²¹⁴

A. *The Interests of the Athlete*

At least at the world-class level, athletes have two types of interests in being allowed to compete: a monetary interest and an interest in the intangible benefits which flow from competing against the world's other great athletes. The monetary interest may consist of prize money, endorsements, or earnings as a coach. In *Washington v. American Community Stores Corp.*,²¹⁵ the plaintiff, a wrestler at the University of Nebraska who was a "prime candidate" for the 1972 Olympic team,²¹⁶ was injured in an auto accident. He introduced evidence that the injury caused by the defendant impaired his earning capacity; the jury awarded Washington \$76,000.²¹⁷ Affirming the award on appeal, the Nebraska Supreme Court found that the jury had sufficient evidence to conclude that

²¹¹ See *infra* Part V.A (summarizing the athlete's interest).

²¹² See *infra* Part V.B (discussing due process and society's interests in sportsmanship).

²¹³ See *infra* Part V.C (questioning the necessity of changes to the USOC's rules).

²¹⁴ See *infra* Part V.D (offering suggested reforms to the USOC's rules).

²¹⁵ 244 N.W.2d 286 (Neb. 1976).

²¹⁶ *Id.* at 288.

²¹⁷ *Id.* at 287.

Washington “suffered a permanent impairment of his earning capacity in a professional or coaching career in the wrestling sport.”²¹⁸

The endorsements that often come with a successful athletic career are well-known; in fact, Tonya Harding received contracts with Texaco, NutraSweet, and the U.S. Post Office after she won the 1991 National Championships.²¹⁹

In *Reynolds*, Justice Stevens recognized the “incomparable importance” of competing in the Olympics.²²⁰ Tom Shales of the *Washington Post* attempted to describe the thrill of Olympic competition: “a striving, a determination, a sense of being ignited by the challenge at hand, the electric tension of finding oneself in the brightest of all possible spotlights.”²²¹ A rule-maker should seek to assure the athletic

²¹⁸ *Id.* at 289; see also *Miranti v. Orms*, 833 P.2d 164 (Mont. 1992) (involving similar facts; reversed on procedural grounds).

²¹⁹ *For Gall and Audacity, Harding Deserves a 6.0*, PALM BEACH POST, Feb. 22, 1994, at 16A. Almost all of Harding’s income was derived from skating. Aside from skating, she has worked as a salesperson in the hardware department of a Sears store and as an assistant manager of a restaurant. *Plea Bargain Hearing*, *supra* note 80. Since her resignation from the USFSA, Tonya was named manager of a professional wrestler, *Weekend Edition: Tonya Harding Named Celebrity Manager for a Wrestler* (National Public Radio broadcast, June 25, 1994); appeared in *Breakaway*, a low-budget adventure film, Bill Higgins, *Tonya’s Gofer*, PREMIERE, Nov. 1994, at 84; launched a singing career and wrote a song in memory of the victims of the Oklahoma City terrorist bombing, Mary Ann Welch, *Names & Faces*, WASH. POST, Apr. 29, 1995, at D03; and received an invitation to join the White Trash Debutantes, a punk band featuring “a 78 year-old grandmother and three male cross-dressers,” *Morning Edition* (National Public Radio broadcast, May 5, 1994). She was also troubled by the release of TONYA HARDING’S WEDDING NIGHT (Leisure Time Video 1994), a pornographic video, and the use of still shots in *Penthouse* magazine; in contrast, Nancy Kerrigan now represents 17 companies and earns several million dollars a year. Angus Phillips, *Lillehammer’s Lasting Legacy*, WASH. POST, Feb. 11, 1995, at B1.

²²⁰ 505 U.S. 1301, 1302 (Stevens, Circuit Justice 1992).

²²¹ Tom Shales, *Goodbye to the Thrilling Games of Summer*, WASH. POST, Aug. 10, 1992, at B1; see also, 1 *Corinthians* 9:24-27 (comparing Christian life to boxing, long distance running).

community that any change in the disciplinary structure, whether it be the USOC or an NGB, will adequately protect these interests and values.

B. *The Interests of Society and of the USOC*

An important objective of the USOC is to ensure that only the most worthy athletes represent the United States in international competitions.²²² First, many people view athletes as role models for American youth and are concerned about the negative impacts that bad role models have on children and adolescents.²²³ In *Molinas v. Podoloff*,²²⁴ the plaintiff sought to overturn his suspension from the National Basketball Association for gambling. In upholding the punishment, the trial court stated: "When the breath of scandal hits one sport, it casts suspicion on all other sports. It does irreparable injury to the great majority of the players, destroys the confidence of the public in athletic competition, and lets down the morale of our youth."²²⁵

Second, because society has a general interest in limiting violence, it has a particular interest in limiting violence in sports.²²⁶ Nancy Kerrigan may not have been the only figure

²²² Janet C. Harris & Roberta J. Park, *Introduction to the Sociological Study of Play, Games, and Sports*, in *PLAY, GAMES, AND SPORTS IN CULTURAL CONTEXTS* 1, 23 (Janet C. Harris & Roberta J. Park, eds. 1983).

²²³ Karl Malone, *One Role Model to Another*, *SPORTS ILLUSTRATED*, June 14, 1993, at 84 (criticizing Charles Barkley's "I am not a role model" ad campaign); David Remnick, *The Situationist*, *THE NEW YORKER*, Sept. 5, 1994, at 87-88, 98 (noting the mixed messages of Marion Barry [political success versus crack user/adulterer] as role model). *But see* Keith Baker, *Free For All: Something Rotten About High School Sports*, *WASH. POST*, July 18, 1992, at A19 (describing popular role models as "[o]verpaid, egotistical, drug-using, spoiled elites playing children's games for the amusement of the sedentary masses").

²²⁴ 133 N.Y.S.2d 743, 744 (Sup. Ct. 1954).

²²⁵ *Id.* at 746.

²²⁶ MIHALICH, *supra* note 18, at 8, 27.

skater targeted for personal injury by a rival. Dorothy Hamill, 1976 Olympic gold medalist, claims that a rival's coach (who she refused to name) tried to hit her with his car as she walked through the Olympic village.²²⁷ According to conventional wisdom, if little tolerance is shown for one incident of sports violence, future sports-related violence becomes less likely.²²⁸

A rough correlation exists between violence in sports and violence and lawlessness in society. Consider the case of *McLaughlin v. Machias School Committee*.²²⁹ A high school physical education teacher was playing basketball with some of his students after school when he threw an elbow and injured one of his students.²³⁰ Upholding the plaintiff's firing by the defendant school district, the court stated:

[t]he value of teaching physical education, fair play, and good sportsmanship may be impaired when the teacher's [actions conflict] with the message his teaching should impart. In addition, a single act of violence in the setting of a competitive sport *may cause serious injury or provoke a violent response*.²³¹

Two more examples which are strikingly similar to the *Harding*

²²⁷ Steve Wulf, *Cinderella Story*, SPORTS ILLUSTRATED, Mar. 7, 1994, at 48, 57. Likewise, Tonya Harding was not the only figure skater who has had a brush with the law. A home invasion charge against Nicole Bobek was dismissed by a Michigan judge. *Preferential Treatment*, *supra* note 24, at D2.

²²⁸ Note the swiftness with which penalties were handed out (usually the next day) for rough play and bad sportsmanship at the 1994 World Cup. John Jeansonne, *Footnotes*, NEWSDAY, July 3, 1994, at 12.

²²⁹ 385 A.2d 53 (Me. 1978).

²³⁰ *Id.* at 54-55.

²³¹ *Id.* at 56 (emphasis added); see also Katie Davis, *Morning Edition: Children Speak Up About Their Heroes and Fallen Heroes* (National Public Radio broadcast, June 24, 1994).

case support the statement that "there has been acceptance of the doctrine that where a cause is considered just, any action--legal or illegal--is justified to promote that cause."²³² Consider Watergate, where the closest advisors of the President of the United States used "dirty tricks" to undermine potential opposition candidates.²³³ Also consider the case of Wanda Holloway, who wanted her daughter on the cheerleading squad so badly that she sought (unsuccessfully) to have the mother of her daughter's closest competitor killed.²³⁴

Americans value sportsmanship in other contexts besides athletic competition.²³⁵ Americans, for example, expect fair play in courthouses. Rules of civil and criminal procedure are often justified as fair or sportsmanlike.²³⁶ Thus, rules designed to protect sportsmanship in athletic competitions serve to protect a value that is deeply imbedded in American

²³² David M. Elderkin, *Judicial System Can't Instill Virtue, Only Freedom*, IOWA L. REV., Sept. 1994, at 6, 8.

²³³ CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* 293 (1974). Many of the dirty tricks were relatively tame, such as arranging phony telegrams in support of Nixon's Vietnam policy. *Id.* at 293-94. At the other extreme, it was suggested that the Brookings Institution be firebombed. *Id.* at 355-56; *see also* CHARLES W. COLSON, *LOVING GOD* 63-77 (1987) (giving Colson's inside account of the Watergate conspiracy).

²³⁴ Lois Romano, *The Reliable Source*, WASH. POST, Oct. 14, 1994, at F3. Holloway's conviction was overturned by a Texas appellate court because an empanelled juror was ineligible for jury service because of a felony conviction. *State v. Holloway*, 886 S.W.2d 482 (Tex. Ct. App. 1994).

²³⁵ *See, e.g.*, Donald McCloskey, *Bourgeois Virtue*, 63 AM. SCHOLAR 177, 179 (1993) (equating justice, fairness, and responsibility).

²³⁶ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring "minimum contacts" before allowing personal jurisdiction because of ideas about "fair play and substantial justice"); *Desmond v. Kramer*, 232 A.2d 470, 476 (N.J. Union Co. Ct. 1967) (stating mutuality requirement for *res judicata* is good sportsmanship); *State v. Fowler*, 53 S.E.2d 853, 855 (N.C. 1949) (stating that rule excluding evidence of defendant's prior and unrelated criminal conduct is "good sportsmanship").

culture.²³⁷

Finally, society has an interest in upholding the Olympic ideal. Anita DeFrantz, a bronze medalist at the 1976 Montreal Olympics, stated that “[t]he founders’ dreams of using the modern Olympic movement to help achieve peace through sports is alive and well today.”²³⁸ One may be cynical about the Olympics or sports in general.²³⁹ One may feel that the sports issues are not worthy of judicial attention.²⁴⁰ However, one cannot ignore the good the Olympics have produced, such as efforts at the 1994 Games to help the besieged city of Sarajevo, host of the 1984 Winter Games.²⁴¹ Any rules adopted by the USOC ought to be firm enough to protect the essence of the Olympics. According to E.M. Swift, “If the athletes do not believe in what the Olympics stand for, then the Games are only games. They are not worthy of the importance we attach to them.”²⁴²

One may consider the interests of the USOC and its member NGBs to be separate from those of the public. After all, any increase in due process protection for amateur athletes is a cost directly borne by them alone, not by the public at large. This distinction, however, may not be helpful. Tonya Harding, in her complaint against the USOC, stated that the

²³⁷ See *supra* notes 222-36 (discussing sportsmanship and American society). But see DAVID MAMET, *The Poet and The Rent*, in THREE CHILDREN’S PLAYS 43 (1986) (in this work, one character gives another character a “terrific headache” by “following Official Procedure”).

²³⁸ Anita DeFrantz, Testimony before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, Aug. 11, 1994, *available in* LEXIS, Legis Library, Cngtst File.

²³⁹ Baker, *supra* note 223, at A19; ISAACS, *supra* note 19, at 16 (alleging that the U.S.-U.S.S.R. Olympic medal competition served to “ritualize the cold war”).

²⁴⁰ Buss, *supra* note 133, at 29 (criticizing this sentiment).

²⁴¹ *Lillehammer Has the War in Sarajevo on Its Mind*, N.Y. TIMES, Feb. 8, 1994, at B15.

²⁴² Swift, *supra* note 36, at 90.

relationship between athletes, the USOC, and NGBs is “for the *ultimate benefit of the United States* in developing the most competent athletes to represent the United States in the Olympic Games.”²⁴³ The statement of purpose contained in the Amateur Sports Act supports Harding’s assertion.²⁴⁴ The USOC is, in part, to “establish national goals”²⁴⁵ for amateur athletics, to promote physical fitness among the American public through participation in amateur sports,²⁴⁶ to assist in providing facilities for amateur athletics,²⁴⁷ to promote research in “sports medicine and safety,”²⁴⁸ and to encourage the amateur athletic endeavors of women,²⁴⁹ persons with disabilities,²⁵⁰ and “racial and ethnic minorities.”²⁵¹ For the purposes of this Comment, it is more helpful to treat the interests of the public and the USOC as nearly identical.

C. *Are Changes to the USOC’s Rules Necessary?*

On May 31, 1994, Senator Ted Stevens called for hearings on the Amateur Sports Act.²⁵² On August 11, 1994, a subcommittee of the Senate’s Committee on Commerce, Science, and Transportation heard testimony about possible changes to the Amateur Sports Act, especially changes to

²⁴³ Complaint at ¶ 13, *Harding v. United States Olympic Comm.*, (Or. Clackamas Co. Cir. Ct. 1994) (No. 94 2151) (emphasis added).

²⁴⁴ 36 U.S.C. § 374 (1988). For the purpose which most nearly parallels Harding’s assertion cited at note 243, see § 374(4).

²⁴⁵ *Id.* § 374(1).

²⁴⁶ *Id.* § 374(6).

²⁴⁷ *Id.* § 374(9).

²⁴⁸ *Id.* § 374(11).

²⁴⁹ 36 U.S.C. § 374(12).

²⁵⁰ *Id.* § 374(13).

²⁵¹ *Id.* § 374(14).

²⁵² Steve Woodward, *USOC: Talks Should Precede Any Hearings*, USA TODAY, June 2, 1994, at 9C.

further increase participation by women and minorities.²⁵³ At the hearing, LeRoy Walker, President of the USOC, stated that “only fine tuning of the USOC [procedure]” is needed to avoid another incident like Harding’s case.²⁵⁴ Senator Stevens remarked that there is no urgency to amend the Amateur Sports Act.²⁵⁵ Earlier, DeFrantz had remarked that “[the] system works.”²⁵⁶ USOC general counsel Ronald Rowan also doubted the need for reform, calling the *Harding* case “an aberration.”²⁵⁷ On the other hand, if any reform were desirable, the *Harding* case created the “perfect occasion” for moving reform forward.²⁵⁸

The USOC, however, has mandated one change as a result of the *Reynolds* case. In September 1994, the USOC ordered Track and Field USA²⁵⁹ to reform its disciplinary procedures.²⁶⁰ Previously, TFUSA issued suspensions for positive drug tests before affording the competitor an opportunity for a hearing.²⁶¹ The USOC, declaring that TFUSA’s procedures conflict with the Amateur Sports Act,

²⁵³ 140 CONG. REC. D980-02, 983 (daily ed. Aug. 11, 1994); Janice Lloyd, *Amateur Sports Act Gets Review*, USA TODAY, Aug. 12, 1994, at 14C.

²⁵⁴ LeRoy T. Walker, Testimony before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, Aug. 11, 1994, available in LEXIS, Legis Library, Cngtst File.

²⁵⁵ Lloyd, *supra* note 244, at 14C.

²⁵⁶ Christine Brennan, *In Wake of Harding, USOC to Take a Look at the Law*, WASH. POST, Apr. 13, 1994, at B1.

²⁵⁷ *Id.*

²⁵⁸ *Morning Edition*, (National Public Radio broadcast, Mar. 1, 1994) (comments of Duke University law professor John Weistart) (discussing reform to USOC rules).

²⁵⁹ Track and Field USA [TFUSA] was formerly known as The Athletic Congress [TAC]. *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110, 1112 n.1 (6th Cir. 1994), cert. denied, 115 S.Ct. 423 (1994).

²⁶⁰ Joe Drape, *Track Body’s Drug Policy Under Fire*, ATLANTA J. & CONST., Sept. 4, 1994, at E10.

²⁶¹ *Id.*

threatened to revoke TFUSA's status as an NGB.²⁶²

More recently, the USFSA overhauled the disciplinary regime contained in its Bylaws. In its statement of purpose, it now provides for fair notice and an opportunity for a hearing to any eligible athlete, coach, trainer, manager, administrator, or official before declaring such individual ineligible to participate.²⁶³ The amendments created two new standing committees: the Ethics Committee, which is responsible for the maintenance and administration of the USFSA's ethics rules,²⁶⁴ and the Grievance Committee, which oversees the Association's grievance procedure.²⁶⁵ The Bylaws now provide for two similar methods of sanction: "grievance proceedings," which are actions brought by another member,²⁶⁶ and "disciplinary proceedings," which are brought by the USFSA President or Vice President.²⁶⁷ In each, the accused must respond to the charges within 30 days, by a signed statement made under oath together with any supporting documents that he wishes to attach, or the charges are deemed admitted.²⁶⁸ Any party may be represented by an attorney.²⁶⁹ In grievance proceedings the grievant (and in disciplinary proceeding, the USFSA) must prove her charges by a preponderance of the evidence.²⁷⁰ The accused, should he lose, retains a right to appeal.²⁷¹

The Bylaws, in a major change, now provide that the president of the USFSA has the discretionary power to suspend

²⁶² *Id.*

²⁶³ *Bylaws of the United States Figure Skating Ass'n*, art II, § 10 (as amended to May 20, 1995) [hereinafter *1996 Bylaws*].

²⁶⁴ *Id.* arts. XVII § 1, XIX.

²⁶⁵ *Id.*

²⁶⁶ *Id.* art. XXVII § 3(a).

²⁶⁷ *Id.* § 3(b).

²⁶⁸ *1996 Bylaws*, art. XXVII § 3(a)(v), (b)(iii).

²⁶⁹ *Id.* § 3(a)(vi)(B), (b)(iv)(B).

²⁷⁰ *Id.*

²⁷¹ *Id.* § 3(c).

a member pending the resolution of the dispute, “if such action is not otherwise prohibited by applicable law, including the Amateur Sports Act of 1978.”²⁷² These provisions would have been helpful for the USFSA at the time of Harding’s case. How helpful? It is unclear. As stated above, in Part IV.D, the law in this area is very uncertain. The USFSA, acting in reliance on this provision, may be subject to legal action should a court later find that the suspension at issue is “otherwise prohibited by law.”

The USFSA now provides, in a radical change, for expedited disciplinary hearings. The subsections on emergency procedures provide:

Notwithstanding [any USFSA Bylaw or rule] to the contrary, when compliance with regular [disciplinary procedures] would not be likely to produce a sufficiently early decision to do justice to the affected parties with respect to [any] USFSA qualifying competition or any competition protected by the USOC Constitution, the matter may be summarily heard and decided on an expedited basis [in accordance with USFSA rules]. The [accused] Member must be given such notice and opportunity for a hearing as time and circumstances may reasonably dictate within the discretion of the USFSA. The hearing may be conducted at the site of the competition or by telephone conference if necessary.²⁷³

This procedure eliminates problems which may arise from linking the disciplinary procedure to the calendar. It allows for

²⁷² *Id.* § 3(a)(iv)(B), (b)(ii)

²⁷³ 1996 *Bylaws*, art. XXVII, § 3(a)(vii), (b)(v).

swift sanctions following an infraction, and it also is convenient for the parties because it provides for hearing by conference call. However, it is conceivable that this new mechanism may be used to oppress. The USFSA is given broad latitude in the timing of notice and hearing. One can imagine a case where an NGB, equipped with a similar provision, would use this emergency mechanism to remove from the Olympic team an athlete who has fallen out of favor yet has committed no infraction. Perhaps a sliding-scale burden of proof, which rises as the competition approaches, would prevent this emergency mechanism from being abused.²⁷⁴

D. *Discipline of Olympic Athletes: Suggested Changes*

To protect the interests of Olympic-caliber athletes, the USOC should adopt, or Congress should mandate,²⁷⁵ that rules of evidence, such as the Federal Rules of Evidence, govern disciplinary hearings. Currently, no rules govern admissibility of evidence under the Amateur Sports Act.²⁷⁶ In *Harding II*,

²⁷⁴ See *infra* notes 284-86 and accompanying text.

²⁷⁵ Either the USOC, by amending its articles of incorporation, or Congress, by amending the Amateur Sports Act, can implement the changes this Comment has suggested. All of the changes can be tailored to specific situations, such as when an athlete would be excluded from the Olympics or banned from competition for life. See *supra* Part III (discussing the Amateur Sports Act). The International Olympic Committee is planning to ask all Olympians to waive their rights to sue any of the governing bodies. Mark McDonald, *IOC Will Ask Athletes to Give Up Civil Rights with Waiver Form*, DALLAS MORNING NEWS, Jan. 8, 1995, at 3B. If the USOC or Congress does nothing, then the IOC would seemingly have a stronger argument for making these changes.

²⁷⁶ 36 U.S.C. § 395(c)(3) (1988). There is a parallel provision in many other Federal laws, such as the one in the Social Security Act. 42 U.S.C.S. § 405(b)(1) (Law. Co-op. 1994). The difference between Social Security recipients and amateur athletes is that there are many times more of the former than the latter. The interest of administrative efficiency is much less strong in the case of the amateur athlete. Cf. Shu Fan Lee, Note, *Administrative Delays Involving Social Security Disability Claims: Heckler v. Day Revisited*, 2 ADMIN. L.J. 191 (1988). See also *supra* notes

Judge Panner expressed dissatisfaction with the evidence that the USOC had against Harding, noting that little of it would be admissible in a court of law.²⁷⁷ By adopting some standard for the admissibility of evidence, the USOC can protect the athlete from deprivation of a livelihood based on hearsay, gossip, and innuendo.²⁷⁸ Often, the burden is silently shifted to the athlete to prove her innocence.²⁷⁹ Requiring evidence to be admissible in a Federal court, for example, would decrease the likelihood that she would be saddled with the occasionally impossible task of disproving a charge which, to begin with, was groundless.²⁸⁰

Second, Congress may amend the Amateur Sports Act so that, for the purpose of disciplinary hearings,²⁸¹ the USOC is treated as if it were a state actor, thus making Fifth Amendment standards part of the "contract" between athlete, USOC, and NGB. By treating the USOC as if it were a state actor, and by

125-134 (discussing procedural due process "balancing" tests).

²⁷⁷ *Harding II*, 851 F. Supp. at 1478.

²⁷⁸ CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE, 244-54 (John William Strong, gen. ed., 4th ed. 1992) (explaining the hearsay rule); cf. MARION L. STARKEY, THE DEVIL IN MASSACHUSETTS 49-51 (1949) (noting "peculiar" standard of evidence at the Salem witch trials, such as the admission of "spectral evidence").

²⁷⁹ Michael Janofsky, *Harding's Lawyers Prepare Strategy*, N.Y. TIMES, Feb. 9, 1994, at B12 (describing burden-shifting in Harding's case). The author approves of the provisions in the USFSA Bylaws which state that the Association (or Member bringing a complaint) has the burden of proving the charges made. See *supra* note 270 and accompanying text.

²⁸⁰ See, e.g., STARKEY, *supra* note 257, at 51 (noting how difficult it is to disprove rumor-based charges).

²⁸¹ Since the USOC is not a state actor, Congress has the luxury of deciding under what circumstances the USOC will be treated as a state actor, perhaps by an amendment to the Amateur Sports Act which might read: "The Courts of the United States and the several states, in cases challenging the procedures for discipline of athletes, shall deem the United States Olympic Committee and the national governing bodies which the Committee recognizes to be subject to the Due Process Clauses of the United States Constitution." For an explanation of the "state action" concept, see *supra* Part IV.A (discussing state action).

reviewing disciplinary procedures according to the *Mathews v. Eldridge* test, Congress would impress upon athletes that the USOC respects their interests enough to subject their disciplinary procedures to a higher level of scrutiny, albeit still a deferential one, than the one used in contractual due process.²⁸²

In Harding's case, the USFSA was caught within a difficult time frame.²⁸³ The assault on Nancy Kerrigan occurred approximately six weeks before the start of the Olympic figure skating competition, which meant that the USFSA had very little time to go through the entire procedural process.²⁸⁴ Perhaps this may be alleviated by allowing discipline to be administered up until the start of competition, but requiring a higher level of proof as the event draws closer.²⁸⁵ For example, before ten weeks, the NGB has to prove the athlete guilty by a preponderance of the evidence. From ten weeks to four weeks, the standard would be "clear and convincing." Finally, from four weeks to the day of the competition, the NGB must prove its case beyond a reasonable doubt. This sliding scale burden of proof would allow the NGB to remove an athlete who is demonstrably guilty of rules violations, but the increasing burden would keep this extended

²⁸² It may seem odd that the USOC would subject itself to constitutional standards by charter amendment, but if it feels that its disciplinary procedures are fair, and if it seeks to show that it protects the interests of its athletes, then the USOC might wish to consider taking this step. *See supra* Part IV.D (discussing contractual due process).

²⁸³ *See supra* Part II.A (setting out facts of Harding's case).

²⁸⁴ *See supra* Parts II.A and II.B (discussing facts and procedure of Harding's case).

²⁸⁵ This is similar to rules of procedure which require parties to file certain motions, etc., a specified time before the start of the trial. *See, e.g.*, FED. R. CIV. P. 13 (concerning filing of compulsory counterclaims). Compare this to the USFSA procedure described above at note 273, in which the burden of proof seemingly remains at the preponderance level until the start of competition.

time frame from being used as a harassment device. By adopting any, or all, of these proposals, the USOC would show that it values both sportsmanship and the interests of athletes.

VI. CONCLUSION

Harding's case was not as easy as it appeared to some, such as Swift²⁸⁶ and Dwyre.²⁸⁷ Harding's case was difficult and caused Americans to "tie ourselves into ethical pretzels"²⁸⁸ because the two ideals which seemed to conflict--due process and sportsmanship²⁸⁹--are manifestations of the same core value: fair play.²⁹⁰ It may be awkward or imprecise to "balance" due process and sportsmanship,²⁹¹ but striking that balance is necessary, for neither due process nor sportsmanship may be lightly disregarded without casting the other into doubt. The proposals listed above are preliminary attempts to strike that balance.

²⁸⁶ Swift, *supra* note 36, at 90.

²⁸⁷ Dwyre, *supra* note 66, at C1.

²⁸⁸ Thomas Boswell, *Spinning Her Wheels Into the Ground*, WASH. POST, Jan. 29, 1994, at D1.

²⁸⁹ Beck, *supra* note 54, (Perspective), at 21.

²⁹⁰ See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); see *supra* notes 222-42 and accompanying text (observing the role of fair play, due process, and sportsmanship in American culture).

²⁹¹ William J. Novak, *Common Regulations: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1066 n.17 (1994) (noting the awkwardness of judicial "balancing" formulae and citing Harding's case as an example of such awkwardness).