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Drugs, Athletes, and the NCAA: A Proposed Rule for Mandatory Drug Testing in College Athletics, 18 J. Marshall L. Rev. 205 (1984)

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DRUGS, ATHLETES, AND THE NCAA: A PROPOSED RULE FOR MANDATORY DRUG TESTING IN COLLEGE ATHLETICS

Drugs which allegedly enhance athletic performance have become an integral part of the training regimen of a growing number of American college athletes.[1] Although many athletes are motivated to participate in athletics for personal satisfaction, others are motivated by winning and the trappings of success.[2] This emphasis on winning has increased the pressure on the athlete to succeed.[3] Consequently, many athletes use drugs to enhance their athletic performance.[4]

At its 1984 convention, the National Collegiate Athletic Association (NCAA) recognized the harm that could result from an athlete's improper use of drugs.[5] In response, the NCAA empowered its Executive Committee[6] to draft a comprehensive

1. *See Proper and Improper Use of Drugs by Athletes: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 17 (1973) (statement of Dr. Donald Cooper, American Medical Association Committee on Medical Aspects of Sports, and Team Physician, Oklahoma State University) [hereinafter cited as *Hearings*], 146-49 (statement of Phillip Shinnick, Director of Athletics, Livingston College, Rutgers University, and former NCAA All-American), 152-60 (statement of Jack Scott, Ph.D., Athletic Director and Chairman of the Physical Education Department of Oberlin College, and Director of the Institute for the Study of Sport and Sociology), 272-76 (statement of Harold Connolly, former Olympic champion and track coach).

For some examples of recent articles about the use of drugs in athletics, see Looney, *A Test With Nothing But Tough Questions*, SPORTS ILLUS., Aug. 9, 1982, at 24; Neff, *Caracas: A Scandal and a Warning*, SPORTS ILLUS., Sept. 5, 1983, at 18; Todd, *The Steroid Predicament*, SPORTS ILLUS., Aug. 1, 1983, at 62.

2. *See generally* J. MICHENER, SPORTS IN AMERICA 183-333 (1976) (general discussion of sports and upward escalation, the pressures to win in college, university athletic programs, and athletic motivations).

3. *See supra* note 2.

4. *See supra* note 1.

5. *See infra* note 7.

6. The NCAA Executive Committee is a 14 member group which transacts NCAA business between the Association's annual conventions. The Executive Committee, which meets at the direction of the NCAA president, is basically a financial group which controls the Association's purse-strings. NCAA CONST. art. 5, § 2, *reprinted in* 1984-85 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 38 (1984). By empowering the Executive Committee to draft a drug testing rule, the NCAA convention actually did nothing more than empower the Executive Committee to make the necessary expenditures for research and drafting of the rule.

drug-testing rule for presentation at the 1985 NCAA convention.[7] Although a drug-testing rule may be necessary to reduce the athlete's use of potentially harmful performance-enhancing drugs, the rule may be subject to constitutional challenge as an intrusive measure which unnecessarily singles out athletes from their peers.[8] Because the courts have previously scrutinized NCAA rules and sanctions under the due process[9] and equal protection[10] clauses of the fourteenth amendment to the United

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7. National Collegiate Athletic Association, Res. No. 163, entitled *Drug Testing*, states:

> Whereas, the use of controlled substances and allegedly performance-enhancing drugs represents a danger to the health of the students and a threat to the integrity of amateur sports;
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> Now, Therefore, Be It Resolved, that the NCAA Executive Committee be directed to develop an ongoing program of drug testing to identify those students involved in intercollegiate athletics competition who have used either controlled or allegedly performance-enhancing drugs; and
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> Be It Further Resolved, that when fully implemented, the program would include sanctions against those students who were found to have used prohibited drugs; and
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> Be It Further Resolved, that the NCAA Executive Committee shall inform each member of the Association of all details of the proposed testing program, including a list of prohibited substances, before July 1, 1984; and
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> Be It Further Resolved, that the NCAA Executive Committee present the proposed program and legislation necessary to implement it to the 1985 Convention.

National Collegiate Athletic Association, Res. 163 (1984 Convention). In this case, the resolution simply empowers the NCAA to adopt a permanent drug-testing rule.

8. A drug-testing rule which requires that only athletes submit to drug testing, while excluding the rest of the student population from testing, could be construed to create an unreasonable classification in violation of the equal protection clause. U.S. CONST. amend. XIV, § 1. *See infra* notes 9, 10, 59 & 75 and accompanying text.

9. The due process clause of the fourteenth amendment states in pertinent part that no State shall "deprive any person of life, liberty or property, without due process of law...." U.S. CONST. amend. XIV, § 1. For a discussion of the due process clause, see *infra* notes 75-114 and accompanying text.

10. The equal protection clause of the fourteenth amendment states in relevant part that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. For a discussion of the equal protection clause, see *infra* notes 59-74 and accompanying text.

For examples of athletes' challenges of NCAA rules and sanctions, see Jones v. Wichita State Univ., 698 F.2d 1082 (10th Cir. 1983) (dictum) (due process scrutiny of NCAA's minimum grade point rule); Wiley v. NCAA, 612 F.2d 473 (10th Cir. 1979) (dictum) (discussion of Supremacy Clause and equal protection in context of NCAA rule concerning scholarship athlete's right to Basic Equal Opportunity Grant), *cert. denied*, 446 U.S. 943 (1980); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (due process scrutiny of NCAA rule limiting the number of athletic coaches); Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977) (basketball players bring due process challenge to NCAA determination of ineligibility), *cert. dism'd*, 434

States Constitution, the NCAA Executive Committee should draft a drug-testing rule that will withstand such a challenge.

After discussing the need for a drug-testing rule in college athletics, this comment will analyze the importance of the courts' conclusion that the NCAA is a state actor. The comment will then address the past equal protection and due process challenges to NCAA actions as well as privacy considerations. The comment will conclude with suggestions intended to balance the need for a drug-testing rule with the athlete's constitutionally protected rights.

DRUGS AND COLLEGE ATHLETICS

The extent of drug use by athletes is difficult to quantify.[11]

U.S. 978 (1977); Rivas Tenorio v. Liga Athletica Interuniversitaria, 554 F.2d 492 (1st Cir. 1977) (equal protection challenge to rules made by NCAA's Puerto Rican counterpart); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975) (equal protection and due process challenges to NCAA rules and sanctions); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975) (equal protection challenge to NCAA's "Five-Year Rule," and "1.600 Rule" and "Foreign Student Rule"); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974) (equal protection challenge to NCAA "1.600 Rule"); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976) (equal protection and due process challenge to NCAA rules and sanctions), *aff'd*, 570 F.2d 320 (10th Cir. 1976); Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973) (equal protection challenge to NCAA " Foreign Student Rule").

For a discussion of the background of athletes' constitutional rights, *see* BUSS, *Due Process in the Enforcement of Amateur Sports Rules*, in LAW & AMATEUR SPORTS 1 (R. Wakukauski ed. 1982); J. WEISTART & C. LOWELL, THE LAW OF SPORTS, §§ 1.01-10.28 (1978); Carrafiello, *Jocks Are People Too: The Constitution Comes to the Locker Room*, 13 CREIGHTON L. REV. 843 (1980); Gaona, *The National Collegiate Athletic Association; Fundamental Fairness and the Enforcement Program*, 23 ARIZ. L. REV. 1065, 1091-1101 (1981); Martin, *The NCAA and the Fourteenth Amendment*, 11 NEW ENG. 383, 393-403 (1976); Comment, *A Student-Athlete's Interest in Eligibility: Its Context and Constitutional Dimensions*, 10 CONN. L. REV. 318, 333-349 (1978) [hereinafter cited as Comment, *Constitutional Dimensions*]; Comment, *The NCAA, Amateurism, and the Student Athlete's Constitutional Rights Upon Ineligibility*, 15 NEW ENG. 597, 600-625 (1980) (hereinafter cited as Comment, *Amateurism*); Note, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903, 916-929 (1972) (hereinafter cited as Note, *Judicial Review*).

11. *See Hearings*, *supra* note 1, at 10-11 (statement of Dr. Cooper); 134-52 (statement of Phillip Shinnick); 152-68 (statement of Jack Scott); 204 (statement of Dr. Hanley). Although some organizations have attempted to quantify athletes' drug use through questionnaires, the results are not consistent with the opinions of the experts. *Compare Drug Use Survey of Big Ten Athletes* (compiled by the Drug Education Committee of the NCAA) (8% of football player respondents admitted amphetamine or steroid usage) *with Hearings*, *supra* note 1, at 150 (statement of Mr. Shinnick) (68% of University of California football team admitted using amphetamines or steroids). *See generally* Castro, *The Big Caracas Drug Bust*, TIME, Sept. 5, 1983, at 70; Looney, *A Test With Nothing But Tough Questions*, SPORTS ILLUS., Aug. 9, 1982, at 24; Neff, *Caracas: A Scandal and a Warning*, SPORTS ILLUS., Sept. 5, 1983, at 18; Sanoff, *Drug Problem in Athletics; It's Not Only the Pros*, U.S.

In 1973, Congress held hearings on the use of controlled drugs by athletes.[12] Witnesses testified that a growing drug problem existed in college athletics and that the only way to identify the extent of the problem was to test the athletes for drug use.[13]

NEWS & WORLD REP., Oct. 17, 1983, at 64; Underwood, *"I'm Not Worth A Damn...."* SPORTS ILLUS., June 14, 1982, at 66 (discussion of personal experiences with recreational drugs).

Athletes use amphetamines to increase endurance and aggressiveness. *See Hearings*, *supra* note 1, at 7-9 (statement of Dr. Donald Cooper of the American Medical Association Committee on the Medical Aspects of Sports, and team physician, Oklahoma State University). The abuse of amphetamines may cause psychological and physical dependence, weight loss, an increase in REM sleep, apathy, and depression. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 72 (25th ed. 1974).

In addition to amphetamines, some athletes, such as football players and weightlifters, use steroids to improve their strength and to gain weight. "Steroid" is a generic name for a group of drugs that are hormones or synthetic hormone substitutes. Certain types of steroids may increase the amount of male hormones in the body of a male or a female. This increased hormonal level may cause the body to take on masculine characteristics, to assimilate protein more rapidly and to gain weight. *See* H. BECKMAN, PHARMACOLOGY: THE NATURE, ACTION AND USE OF DRUGS 596-638 (2d ed. 1951); Todd, *The Steroid Predicament*, SPORTS ILLUS., Aug. 1, 1983, at 62. The possible side effects of steroid use include arteriosclerosis, hypertension, liver damage, decrease in testicular size and sperm production in men, and general masculinization of women. H. BECKMAN, *supra*, at 596-638; Todd, *supra*, at 62-66. For a scientific discussion of steroids and their affect on muscles and motor skills, see GOLDING, EROGENIC AIDS AND MUSCULAR PERFORMANCES (1972).

The increased use of steroids by athletes may be the single most pressing concern of the administrators of amateur sports. Even athletes who would not ordinarily take drugs have been taking steroids to stay abreast of their competition. The controversy is summed up by an athlete who stated that:

> It's simply not fair to allow one athlete to use a substance which both research data and empirical observation suggest is effective in producing material strength gains, when a second athlete for medical and/or ethical reasons chooses not to use the substance. The non-user has the right to expect the administrators of a sport to support policies which protect both fairness in competition and the good health of the athletes.

Todd, *supra*, at 68.

Finally, athletes use therapeutic drugs and pain killers to overcome the deleterious effects of minor injuries. These types of drugs are usually prescribed to athletes who have an injury that will not be aggravated through continued participation. Some doctors may, however, inject athletes with pain killers even when it may seriously worsen the athlete's condition. *See Hearings*, *supra* note 1, at 255-57 (statement of Dr. Donald Spencer) (types of injuries which doctors could treat with anesthetics or analgesics).

12. *See supra* notes 1 and 11.

13. *See supra* note 1. *But see Hearings*, *supra* note 1, at 65-80 (statement by Robert Pritchard, Chairman of the NCAA Drug Education Committee) (drug education is a visible means by which to end minor drug problems in athletics). For a discussion of the drug testing controversy in athletics, see Looney, *A Test With Nothing But Tough Questions*, SPORTS ILLUS., Aug. 9, 1982, at 24.

One witness testified that a urinalysis[14] conducted upon 41 volunteers out of 300 track and field competitors revealed that 25 athletes had traces of controlled drugs in their systems.[15]

Besides estimating the broad extent of the use of drugs by athletes, the congressional hearings also adduced testimony that drugs are potentially harmful to the athlete.[16] Although some doctors continue to prescribe allegedly performance-enhancing drugs to athletes, modern medical opinion holds that the unnecessary prescription or use of any drug carries with it the risk of harmful side effects.[17] While performance-enhancing drugs rarely cause the death of an athlete,[18] physicians frequently cite liver damage, liver cancer, arteriosclerosis, habituation, and testicular atrophy as common side effects.[19] NCAA indifference in the face of this potential harm could lead to the continued or accelerated use of harmful drugs by athletes.

As the chief administrative body of American major college athletics,[20] the NCAA has attempted to end the improper use of

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14. The testing of a person's urine is one of the most commonly used procedures to determine the presence of drugs in a person's body. Most sports organizations, which test athletes for drug use, use some form of urinalysis. *See, e.g.*, INTERNATIONAL OLYMPIC COMMITTEE, MEDICAL GUIDE 23-30 (1984) (summary of testing procedure and banned substances). A discussion of the types of drug tests and the logistic and economic problems of drug testing is outside the scope of this paper. For information on drug testing, see D. TENNENHOUSE, ATTORNEY'S MEDICAL DESKBOOK §§ 110-118 (1983); Neff, *Caracas: A Scandal and a Warning*, SPORTS ILLUS., Sept. 5, 1983, at 18.

15. *See Hearings*, *supra* note 1, at 251-52 (statement of Dr. Donald Spencer, coordinator of the Medical Aspects of Sports Committee of the National Association of Intercollegiate Athletics). A number of former athletes have written books which chronicle the use of drugs in both college and professional sports. *See, e.g.*, P. GENT, NORTH DALLAS FORTY (1973); D. MEGGYESEY, OUT OF THEIR LEAGUE (1970); B. PARISH, THEY CALL IT A GAME (1971).

16. *See Hearings*, *supra* note 1, at 10 (statement of Dr. Cooper) (dangers of amphetamines and steroids); 124-26 (statement of Dr. Golding) (dangers of side effects caused by amphetamine and steroid use).

17. *See supra* note 11.

18. The death of one athlete, an Italian bicycle racer, was conclusively linked to drug use during performance. The athlete's death was attributed to a heart attack which was caused by amphetamines and heavy exertion. The death spurred a reexamination of the use of drugs by European bicycle racers culminating with the institution of mandatory drug testing. The tests had a positive effect. Different agencies administering the tests all point to at least a 20% drop in positive test results over a three-year period. *See* INTERNATIONAL OLYMPIC COMMITTEE, DOPING 19-36 (1972) (published for the 1972 Olympic winter games).

19. *See supra* note 11.

20. The NCAA is an unincorporated association which consists of more than 870 schools, conferences, and organizations. The membership consists of both privately endowed and publicly funded schools, but over half of the members are publicly supported. The Association is organized pursuant to the NCAA Constitution. The NCAA monitors the integrity of each member's athletic program, promulgates rules of play governing inter-collegiate sports, and organizes championship athletic events. In addition, it promul-

drugs among college athletes.[21] In 1973 the NCAA adopted a by-law which prohibited the use of dangerous drugs in NCAA championship events and allowed the Executive Committee to authorize methods for testing competitors in those events.[22] In 1975, the NCAA instituted a drug awareness program aimed at

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gates stringent guidelines to achieve its stated objectives and policies. *See* NCAA CONST. art. 2, § 1, *reprinted in* MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 7 (1984) (purposes of the NCAA); Jones v. Wichita State University, 698 F.2d 1082, 1083 (10th Cir. 1983). *See also* Cross, *The College Athlete and the Institution*, 38 LAW & CONTEMP. PROBS., 151 (1974) (general discussion of the role of the NCAA as the administrative body of college athletics). *See generally* J. MICHENER, *supra* note 2, at 219-80; Weistart, *Legal Accountability and the NCAA*, 10 J.C. & U.L. 167, 169-71 (1983) (critical discussion of NCAA's structure and monolithic control over college sports) [hereinafter cited as Weistart, *Legal Accountability*].

The NCAA rules and guidelines are enforced by the Committee on Infractions. *See* OFFICIAL PROCEDURE GOVERNING THE NCAA ENFORCEMENT PROGRAM § 1 (1984), *reprinted in* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1984-85 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 199-214 (1984) [hereinafter cited as NCAA ENFORCEMENT PROGRAM]. The enforcement program is similar to those employed by governmental administrative agencies. *See, e.g.*, 5 U.S.C. §§ 501-576 (1980). The program envisions a two-step enforcement procedure including an investigative phase and an adjudicatory phase. NCAA ENFORCEMENT PROGRAM §§ 1, 2, 12. During the investigative stage, the NCAA investigative staff, either on a member's complaint or on its own motion, will investigate the facts surrounding any allegation of misconduct. *Id.* at § 2. If the Committee on Infractions determines that a "violation of a serious nature" has occurred, then an official inquiry and finding of fact will be initiated by the Committee. *Id.* at § 3. Upon the factual determinations of the official inquiry, the Committee shall determine whether a violation has occurred and it shall issue findings of fact and impose a penalty. *Id.* at § 4. All of the investigations must be conducted according to the articulated policies and guidelines of the Enforcement Program. *Id.* at § 12.

The official inquiry consists of a hearing at which the school is allowed to present evidence relevant to the issues of the inquiry. *Id.* at § 4(a)(1). Penalties which may be imposed upon a finding of a serious violation are listed in section 7 of the Enforcement Program. The penalties may be imposed upon the institution itself or against a student athlete. *Id.* at § 7. The sanctioned institution has the right to appeal the finding of the Committee on Infractions. *Id.* at § 5. Although the institution has the right to contest the NCAA's allegations at the hearing and the right to appeal the finding of the Committee on Infractions, student athletes are given very few procedural rights. The assumption is that the member institution will adequately represent the interests of the athlete. *Id.*

A number of commentators have criticized the NCAA enforcement procedure. The main point of attack has been the NCAA assumption that the member institution will adequately represent the student athlete. *See* Remington, *NCAA Enforcement Procedures Including the Role of the Committee on Infractions*, 10 J.C. & U.L. 181 (1983); Weistart, *Legal Accountability*, *supra* 169-79. The problem with this assumption is that the school will be interested in minimizing the risk of injuring its reputation with the NCAA or the general public. Consequently, the school will not represent the athlete's interest to the fullest. Weistart, *Legal Accountability*, *supra*, at 175-80.

21. *See supra* note 20 and *infra* notes 22-24 and accompanying text.

22. BYLAWS AND INTERPRETATIONS OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, art. 5, § 2 (1984), *reprinted in* 1984-85 MANUAL OF THE NA-

educating athletes, coaches, and athletic trainers about the detrimental effects of drug use in athletics.[23] Those measures, however, have had limited success as a means of controlling drug use among athletes.[24]

Many factors have hindered the NCAA's attempts to alleviate the drug problem. First, although the drug education program deters most athletes, the pressure on the athlete to succeed in some cases may override the athlete's concern for his own health.[25] Second, because the 1973 NCAA bylaw prohibited drug use only at championship events,[26] it did not affect the majority of athletes. The NCAA Executive Committee, moreover, did not implement a comprehensive drug testing plan even for the championship events, thus there were no means to effectively enforce limited proscription against drug use.

TIONAL COLLEGIATE ATHLETIC ASSOCIATION 97 (1984). Section 2, entitled "Drugs" states in pertinent part:

(a) Student-athletes competing in NCAA championships shall not use any drugs which may endanger their health or safety. This does not preclude the use of drugs prescribed by a physician in the course of medical treatment.

(b) The Executive Committee may authorize methods for testing student-athletes who compete in NCAA championships to determine the extent of drug usage therein.

Id.

By its own terms, the rule applies only to NCAA sanctioned championship events. *Id.* The rule discussed in this paper will include drug testing for all NCAA sanctioned events. *See infra* notes 144-45 and accompanying text. For a discussion of the unenforceability of this rule, see *infra* text accompanying notes 27-29.

In addition, many NCAA member conferences have included anti-drug clauses as part of the "Grant-in-Aid Tender Sheet" which is the scholarship agreement signed by the school and the athlete. It sets forth several conditions with which the athlete must comply. The clause in the Big Ten Conference, Tender of Financial Assistance-Men, 1984-85, states that the athletic scholarship "may not be renewed ... for participating in the use, sale of, or distribution of any narcotic or controlled subtance." Big Ten Conference, Tender of Financial Assistance-Men Acceptance cl. f (1984).

23. *See Hearings*, *supra* note 1, at 43-109 (statement of Robert Pritchard, Chairman NCAA Drug Education Committee) (testimony on NCAA drug education program including posters and informative pamphlets and articles discouraging drug use by athletes). The drug awareness program consisted of lectures to teams and other athletic groups as well as a nationwide advertising campaign decrying the use of drugs by athletes. Although the drug awareness program is still in effect, the increasing number of athletes who use drugs is indicative of the program's limited effectiveness. *See Hearings*, *supra* note 1, at 10-14 (statements of Mr. Cooper).

24. *See infra* text accompanying notes 25-29. *See also supra* note 1.

25. *See supra* notes 1-2.

26. *See supra* note 22. Championship events involve only the top caliber athletes and teams who have successfully participated in the regular seasons. *Cf. Bylaws and Interpretations of the National Collegiate Athletic Association* arts. 5-6, *reprinted in* MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 83-110 (1984).

Because of the limited success of the NCAA's present anti-drug programs, the NCAA needs a rule which both prohibits the use of harmful drugs by all NCAA athletes and provides an effective means of enforcement. Without a means by which the NCAA can identify athletes who are using drugs, the only fair way for the NCAA to sanction an athlete's drug use is if the use of the drug is witnessed or documented.[27] Consequently, the rule will be enforceable only in limited situations, and will not deter the use of drugs by athletes. A comprehensive drug testing program, similar to the program used by the International Olympic Committee,[28] would give the NCAA the strong tool necessary to combat the use of controlled drugs by the college athlete.[29]

At its 1984 convention, the NCAA recognized the need for a rule and testing program.[30] The convention delegates directed the NCAA Executive Committee "to develop an ongoing program of drug testing to identify those students involved in intercollegiate athletics who have used either controlled or allegedly performance-enhancing drugs" and to provide sanctions against athletes who use drugs.[31] Although testing athletes for drugs is a strict and authoritarian measure, the NCAA has determined that testing is necessary to help end the use of performance enhancing drugs.[32] While this rule is necessary, it could be subject

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27. An anti-drug rule, without a viable means of enforcement, acts only as a deterrent. To invoke a penalty under such a rule without some concrete means of determining whether or not the athlete is using drugs would be tantamount to considering a person guilty of a crime before a hearing.

28. *See* INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC CHARTER rule 29 (1984). Rule 29 to the IOC Olympic Charter is the "Medical Code" of the Olympic movement. The rule states in pertinent part:

A. Doping is forbidden. The IOC shall prepare a list of prohibited drugs.

B. All Olympic competitors are liable to medical control and examination carried out in conformity with the rules of the IOC Medical Commission.

C. Any Olympic competitor refusing to submit to a medical control or examination or who is found guilty of doping shall be excluded. If the Olympic competitor is a member of a team, the match, competition or event during which the infringement took place shall be forfeited by that team....

D. Female competitors must comply with the prescribed tests for femininity....

Id. The "IOC Medical Controls" brochure is a by-law to Rule 29. The Medical Controls brochure sets up the testing procedures, the list of prohibited drugs, and the reasons certain drugs are prohibited. INTERNATIONAL OLYMPIC COMMITTEE, MEDICAL GUIDE 23-30 (1984).

29. *See supra* notes 11-19.

30. *See supra* notes 5-7.

31. Nat'l Collegiate Athletic Ass'n, Res. 163 (1984 Convention). For the full text of the resolution, see *supra* note 7.

32. *See supra* note 7.

to a constitutional challenge.[33]

PRIOR CONSTITUTIONAL SCRUTINY OF NCAA RULES AND SANCTIONS

The threshold question in a constitutional claim is whether the invaded right is a right protected by the Constitution.[34] Student athletes, who were found ineligible to participate in athletics by the NCAA, have challenged such a finding by relying on the fourteenth amendment.[35] Although no student athlete has challenged an NCAA rule on the ground that it was an unconstitutional invasion of privacy, the intrusiveness of a drug testing rule could open the door for such a challenge.[36] Any NCAA promulgated drug-testing rule, therefore, must be drafted to conform to the strictures of the Constitution.

The State Action Requirement

A cause of action under the fourteenth amendment exists only if the alleged invasion can be considered a state action.[37] Although the fourteenth amendment restrains only state actions which invade individual interests,[38] the United States Supreme Court has expanded the concept of state action to include some situations where a private actor is the primary cause of the deprivation. The Court has identified three distinct theories by which it restricts private activities under the rubric of state action. First, a private organization may be subject to constitutional restraint by performing a traditional government function.[39] Second, the nature and the circumstances of a par-

33. *See supra* notes 8-10.

34. U.S. CONST. amend. XIV, § 1.

35. *See supra* notes 59-105.

36. *See infra* notes 115-26 and accompanying text.

37. For a discussion of state action, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 497-525 (1983) [hereinafter cited as NOWAK].

The express terms of the fourteenth amendment provide that no state shall deprive a person of certain fundamental rights. U.S. CONST. amend. XIV, § 1. Initially, the state action requirement was interpreted strictly to apply to direct actions by the states. *See* The Civil Rights Cases, 109 U.S. 3 (1883). The court, however, expanded the state action concept in a number of racial discrimination cases. *See, e.g.*, Terry v. Adams, 345 U.S. 461, (1953); Marsh v. Alabama, 326 U.S. 501 (1946). Some Commentators have criticized the expansion of state action. *See, e.g.*, Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

38. *See infra* notes 39-58 and accompanying text.

39. This private assumption of a power usually reserved for the government is commonly referred to as the "public function" theory or the "government function" theory. *See* Evans v. Newton, 382 U.S. 296 (1966) (alternate ground for holding that a private park was subject to the fourteenth amendment); Marsh v. Alabama, 326 U.S. 501 (1946) (owners of pri-

ticular private action may reveal a substantial governmental involvement or entanglement in that activity so that it constitutes a state action.[40] Finally, where the state controls the actions of a private actor, those actions are considered the state's responsibility.[41] Although the NCAA is not a governmental body, it has been held to be a state actor under both the "governmental function" theory and the "entanglement" theory.[42]

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vately owned company town are state actors because they serve a public function). For a general discussion of this theory, see NOWAK, *supra* note 37, at 502-08; Note, *supra* note 37, at 691-98.

40. This is referred to as the "entanglement" theory because it depends upon mutual contacts between the state and the private individual. The theory relies on the assumption that substantial contacts between the state and the private actor render the private actions indistinguishable from those of the state. The Court has not developed a special test to determine the measure of involvement necessary to attribute private actions to the state. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (privately owned restaurant leasing space in state parking lot satisfies fourteenth amendment state action requirement). *See also* Norwood v. Harrison, 413 U.S. 455 (1973) (book loan program involved state in private school). *Cf.* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (discussion of tax exemption to church as substantial government involvement). *See generally* NOWAK, *supra* note 37, at 513-23; Note, *supra* note 37, at 663-90.

The types of state involvement necessary for a finding of state action vary. The Court has discussed many different types of involvement in reaching determinations on state action issues. *See* Reitman v. Mulkey, 387 U.S. 369 (1967) (government protection of a preexisting right); Cooper v. Aaron, 358 U.S. 1 (1958) (state aid to schools); Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952) (government regulation of private actor).

41. This theory is usually referred to as the "state control" or "state encouragement" theory. This theory is very similar to the "entanglement" theory. *See supra* note 40. In both theories, the courts look at the factual background of each case to determine whether the involvement in control is substantial enough to attribute the private actions to the state. *See* NOWAK, *supra* note 37, at 508. In fact, NCAA decisions which have relied upon the "entanglement" theory seem to discuss both the "entanglement" and "state control" theories without distinguishing between the two. *See, e.g.*, Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975). For a general discussion of the "state control" or "state encouragement" theory, see NOWAK, *supra* note 37, at 508-13; Note, *supra* note 37, at 508-13, 663-90.

42. *See* Rivas Tenerio v. Liga Athletica Interuniversitaria, 554 F.2d 492, 494-96 (1st Cir. 1977) (entanglement theory used to find state action in Puerto Rican equivalent of the NCAA); Hennessey v. NCAA, 564 F.2d 1136, 1144 (5th Cir. 1977) (entanglement theory); Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 364-65 (8th Cir.) (entanglement theory), *cert. dismissed*, 434 U.S. 978 (1977); Shelton v. NCAA, 539 F.2d 1197 (9th Cir. 1976) (entanglement theory); Howard Univ. v. NCAA, 510 F.2d 213, 216-20 (D.C. Cir. 1975) (entanglement theory); Parish v. NCAA, 506 F.2d 1028, 1031-32 (5th Cir. 1975) (state control theory); Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1254-55 (9th Cir. 1974) (state control theory).

The state action issue in the context of a constitutional challenge or an NCAA rule or sanction poses an interesting problem for the courts. The reviewing courts have held that the actions of a publicly funded college or university are clearly state actions. *See* Dixon v. Board. of Educ., 294 F.2d 150, 158-59 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Dutram v. Pulsifier, 312

In *Parish v. NCAA*,[43] the Court of Appeals for the Fifth Circuit held that the NCAA activities constituted state action because the NCAA performed a traditional governmental function.[44] Noting the traditional governmental interest in all aspects of education and the national scope of college athletics, the court determined that there was a need for an organization

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F. Supp. 411 (D. Utah. 1970). Private colleges or universities, however, are usually not considered state actors. Historically, when both public and private institutions are members of an athletic association, courts have not found state action. *See* Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); California State-Hayward v. NCAA, 47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (1978). In the past, courts viewed the NCAA as a private association consisting of a voluntary membership. Accordingly, the courts applied the "doctrine of private associations" to the NCAA and similar athletic associations. *See* California State-Hayward v. NCAA, 47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (1978); Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555 (Iowa 1972). Under the doctrine of private association, members who voluntarily join an association subject themselves to the rules of the association. The courts have traditionally not intervened into the inner workings of private associations unless the rules made by the association are illegal or violative of public policy. *See* Parsons College v. North Cent. Ass'n. of Colleges, 271 F. Supp. 65 (N.D. Ill. 1965). Thus, the courts applied a low level of scrutiny to the private associations' rules looking only to see whether the rules were consonant with law and public policy, and whether the associations applied the rules without fraud. *See* Goldstein, *The Scope and School Board Authority to Regulate Student Conduct on Status: A Nonconstitutional Analysis*, 177 U. PA. L. REV. 373 (1969).

Changes in private associations have led to the imposition of a stricter standard of scrutiny for private association determination. The courts impose a stricter standard when membership in a particular association is tantamount to a condition for participation in a particular field or concern. *See* Falcone v. Medical Soc'y, 34 N.J. 582, 590, 170 A.2d 791, 799 (1961); Note, *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963) (judicial acknowledgement of the non-voluntariness of membership). *See also* J. WEISTART & C. LOWELL, *supra* note 10, at 911-13. The stricter scrutiny simply means that a court will review private association rules to see if they are reasonable and applied fairly.

The NCAA's pervasive control of college athletics will subject it to the stricter private association scrutiny. Participation in the NCAA is a virtual prerequisite for a university which wishes to compete in college athletics. Moreover, the athletes themselves do not voluntarily subject themselves to the rules of the NCAA. They simply go to a college that is a member, thus binding themselves to the rules. The proposed rule will be drafted to pass the stricter constitutional test. Thus, the rule will also survive judicial review under the strictest private association scrutiny.

43. 506 F.2d 1028 (5th Cir. 1975). In *Parish*, basketball players at Centenary University sought injunctive relief to prohibit the NCAA from declaring them ineligible to compete in NCAA tournaments or in NCAA sanctioned television games. *Id.* at 1031. The NCAA had declared the players ineligible for not maintaining a 1.6 grade point average during their freshman year. Accordingly, the NCAA directed the small private school to terminate the athletes' scholarships. Upon Centenary's refusal to comply with the NCAA rule, it was declared ineligible for tournament or television competition. *Id.* at 1030-31.

44. *Id.* at 1031-33.

to control and direct college athletics.[45] Because this control was beyond the means of any single state, the court concluded that the NCAA, by filling the void, performed a governmental function.[46] The *Parish* court stated that "it would be a strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a 'private' organization to which they have relinquished some portion of their governmental power."[47] The United States Supreme Court, in *Flagg Brothers v. Brooks*,[48] narrowed the applicability of the "governmental function" theory by requiring that the private actor completely displace the governmental body for the state action to exist.[49] The reasoning in *Parish* appears to retain its validity, however, because the NCAA, which is the sole body controlling college athletics, does completely displace the government.[50]

The courts have also held, however, that NCAA activities constitute a state action under the "entanglement" theory.[51] In *Howard University v. NCAA*,[52] the court weighed the involvement of state institutions in the NCAA's activities.[53] Although state or federally supported institutions comprise one-half of the NCAA's membership, these schools contribute most of the NCAA's capital and exercise substantial control over both NCAA policy and action.[54] In addition, the NCAA provides many valuable services to both state supported and privately endowed member institutions.[55] The *Howard* court decided that the entanglement between the NCAA and its public institution members formed "the type of symbiotic relationship be-

45. *Id.*

46. *Id.* at 1033. The court reasoned that the government would fill the void if the NCAA could no longer function as the coordinator of major college athletes in America. *Id.*

47. *Id.*

48. 436 U.S. 149 (1978).

49. *Id.* at 155. *See also* Hudgens v. NLRB, 424 U.S. 507, *on remand*, 531 F.2d 1342 (5th Cir. 1976).

50. *See* J. MICHENER, *supra* note 2, at 251.

51. *See supra* note 40.

52. 510 F.2d 213 (D.C. Cir. 1975). In *Howard*, a private university and an athlete challenged three NCAA rules on the grounds that the rules and the NCAA's enforcement violated the athlete's fourteenth amendment rights. *Id.* at 214-16.

53. *Id.*

54. *Id.* at 219. The *Howard* court determined that "public instrumentalities" provided the majority of the NCAA governing Council which runs the body throughout the year. The court also noted that large public institutions provided the most financial support for the NCAA because membership dues were levied according to the size of the member institutions. *Id.* at 219-20.

55. *Id.* at 220.

tween public and private entities which triggers constitutional scrutiny."[56]

Under either the "entanglement" theory or the "governmental function" theory, courts facing the issue of whether an NCAA action is a state actor can rely upon a substantial body of precedent to find a state action.[57] Therefore, in the context of a constitutional challenge to a drug-testing rule, the courts should find that the NCAA is a state actor. As a state actor, the NCAA is tantamount to a governmental administrative agency. It is thus bound by the same equal protection and due process requirements that bind administrative agencies.[58]

Equal Protection

Student-athletes challenging the constitutionality of a drug testing rule may claim that the rule denies them equal protection under the law.[59] Courts faced with a student-athlete equal protection challenge of NCAA rules have consistently applied two standards of review: "strict scrutiny"[60] and "traditional

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56. The court reached this conclusion by noting that public institutions both controlled the NCAA and benefited from NCAA activities. *Id.*

57. *See supra* note 42.

58. *See generally* Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimism Forum*, 75 COLUM. L. REV. 721 (1975); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1977).

59. The equal protection clause of the fourteenth amendment states that "no State shall ... deny to any person within its jurisdictions the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Courts determine whether a governmental classification impermissibly differentiates without a sufficient purpose between classes of persons. *See* Reed v. Reed, 404 U.S. 71 (1971); NOWAK, *supra* note 37, at 586-600. A law may create an impermissible classification either "on its face," *see* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), or "in its application," *see* Yick Wo v. Hopkins, 118 U.S. 356 (1886). In addition, the legislative classification may violate the equal protection clause if it is overinclusive or underinclusive. An overinclusive legislative classification includes persons in addition to those who are similarly situated with respect to the law, while an underinclusive classification excludes persons or groups who are similar to the included persons respect to the law. *See* Williamson v. Lee Optical, 348 U.S. 483, 488-90 (1955); *Developments, supra*, 1083-87.

60. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). This strict standard applies when the challenged rule affects either a "suspect classification," (*see* Washington v. Davis, 426 U.S. 229 (1974) (race a suspect class); *In re* Griffiths, 413 U.S. 717 (1973) (suspect class based on alienage); Douglas v. California, 372 U.S. 353 (1963) (wealth as a suspect classification); Korematsu v. United States, 323 U.S. 214 (1944)), or a "fundamental interest," (*see, e.g.*, Storer v. Brown, 415 U.S. 724 (1974) (a right to be a candidate); Dunn v. Blumstein, 405 U.S. 320 (1972) (right to vote and right to travel); James v. Valtierra, 402 U.S. 137 (1971) (no fundamental right to governmental subsidized housing); Kent v. Dulles, 357 U.S. 116 (1958) (right to travel abroad); Griffin v. Illinois, 351 U.S. 12 (1954) (procedural rights for accused criminals); Skinner v. Oklahoma, 316 U.S. 535, 541

equal protection."[61] Courts have found the NCAA rules constitutional under both standards.[62]

Courts have found the strict scrutiny standard inapplicable, however, to disputes between athletes and the NCAA.[63] Neither

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(1942) (right to procreate)). *But see, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (no fundamental right to subsistence or welfare payments). *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980).

The strict scrutiny standard, sometimes called the new equal protection, is actually forty years old. The phrase was first used in Korematsu v. United States, 323 U.S. 214, 216 (1944). The new equal protection standard is stricter because the Court decided that the political process could not adequately protect certain interests. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976). Consequently, the Court began to assert more power over legislative classifications in certain situations. *See Developments*, *supra* note 59, at 1065-80. The Court increasingly decides equal protection by applying a middle-tier test. Under this test, a challenged classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). This middle-tier allows the Court to review certain classifications more strictly without creating new fundamental interests or suspect classes. The Court has applied this middle level of scrutiny to gender discrimination cases. *See* Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980); Caban v. Mohammed, 441 U.S. 380 (1979); Parham v. Hughes, 441 U.S. 347 (1979); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). For a discussion of the middle-tier standard of scrutiny, see Gunther, *In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classification*, 62 GEO. L.J. 1071 (1974).

61. Regulations which do not affect a fundamental interest or a suspect class are subject to the more lenient "traditional equal protection standards." Under this standard of scrutiny, the challenged regulation must simply bear a rational relationship to legitimate state interests to survive the equal protection challenge. *See, e.g.*, Vance v. Bradley, 440 U.S. 93 (1979) (mandatory retirement rule upheld under the rational relationship test); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (mandatory retirement rule rationally related to state's objective). The Court traditionally scrutinizes economic and social welfare legislation under this lower level of scrutiny if the challenged classification does not involve a fundamental right or a suspect class. This lower standard is satisfied if any conceivable set of facts can establish a rational relationship between the classification and an arguably legitimate end of the government. *See* Schweiker v. Wilson, 450 U.S. 221 (1980) (welfare benefits); Hodel v. Indiana, 452 U.S. 314 (1981) (property use); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (business activity); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (personal activity). *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980); NOWAK, *supra* note 37, at 593-600; Gunther, *supra* note 60; Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

62. *See infra* notes 63-73.

63. *See* Jones v. Wichita State Univ., 698 F.2d 1082, 1086 (10th Cir. 1983) (dictum) (claimant conceded that strict scrutiny standard was not applicable); Wiley v. NCAA, 612 F.2d 473, 480 (10th Cir. 1979) (Logan, J., dissenting) (rational relationship test should be applied), *cert. denied*, 446 U.S. 943 (1980); Hennessey v. NCAA, 564 F.2d 1136, 1144-45 (5th Cir. 1977) (minimum rationality standard should apply); Parish v. NCAA, 506 F.2d 1028, 1033 (5th

an athlete's right to an education nor the prospect of a professional athletic career have been deemed a "fundamental interest."[64] Similarly, the courts have determined that the challenged NCAA rules did not discriminate against a suspect class.[65] Typical claims against a rule, such as the minimum grade point rule,[66] have not been found to create a suspect classification even though the rule may weigh more heavily upon underprivileged athletes who did not benefit from a good high school education.[67] In the only successful suit brought by an athlete against the NCAA, however, the court determined that an NCAA rule, which limited the eligibility of Canadian hockey players, created a suspect classification because it affected certain Canadian student athletes unfairly.[68]

In the majority of equal protection claims brought against the NCAA, the courts have also upheld the challenged rules by finding that they were rationally related to legitimate state inter-

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Cir. 1975) (challenged rule not subject to strict scrutiny); Associated Students v. NCAA, 493 F.2d 1251 (9th Cir. 1974). *See generally* Martin, *supra* note 10, at 369-99; Comment, *Constitutional Dimension*, *supra* note 10, at 333-36; Note, *Judicial Review*, *supra* note 10, at 424-28.

64. *See, e.g.*, Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) (classification by sex is subject to scrutiny under 14th amendment); Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970) (rule that any person who repeats a grade after the 6th grade shall lose his 4th year of eligibility was not an encroachment of a fundamental right); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976) (student hockey player's interest in participating in school athletics did not rise to level of constitutionally protected property or liberty interest), *aff'd*, 570 F.2d 320 (10th Cir. 1978).

65. *But see, e.g.*, Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973) (only case which found that NCAA discriminated against suspect class).

66. *See Bylaws and Interpretations of the National Collegiate Athletic Association*, art. 5, § 1, *reprinted in* 1984-85 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 83-97. The minimum grade point rule is actually a series of rules covering almost every aspect of the academic related eligibility of the NCAA athlete. *Id.*

67. *See* Parish v. NCAA, 506 F.2d 1028, 1033-34 (5th Cir. 1975) (rule limited eligibility for scholarship and participation in athletics to those who maintain a 1.600 grade point average during their first year in college); Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1255-56 (9th Cir. 1974) (1.600 Rule). Although generalized rules may produce irrational results at times, under the traditional equal protection scrutiny those rules are consonant with equal protection. Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (subjecting opticians to regulation while exempting sellers of ready-to-wear eyeglasses from some regulation did not violate equal protection).

68. Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973). *See also* Rivas Tenero v. Liga Athletica Interuniversatoria, 554 F.2d 492 (1st Cir. 1977) (regulation should have been subject to strict scrutiny because of its facial discrimination against aliens); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975) (association's "foreign-student" rule created an unconstitutional alienage classification).

ests.[69] In *Jones v. Wichita State University*,[70] a student-athlete contested the NCAA's 2.000 minimum grade point rule which prohibited NCAA institutions from awarding scholarships to incoming athletes who had accumulated less than a 2.000 grade point average in high school.[71] The athlete contended that the variance in high school grade computation resulted "in a disparate and unequal application of the 2.000 rule, thereby causing prospective student-athletes to be treated in a discriminatory manner."[72] In applying the rational relationship test, the court determined that the rule was rationally related to a legitimate state interest, and thus was constitutional.[73]

The rational relationship test establishes a very low burden of proof for the NCAA rule makers. In fact, only one court has found an NCAA rule unconstitutional on the ground that it denied athletes equal protection under the law.[74] In addition to the athletes' equal protection arguments, a drug-testing rule may affect other constitutional rights, such as the right to privacy or the right to due process.

Procedural Due Process

The Student Athlete's Protectible Interests

A student athlete may also challenge a drug-testing rule under the due process clause of the fourteenth amendment.[75]

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69. *See* Jones v. Wichita State Univ., 698 F.2d 1082, 1086-88 (10th Cir. 1983) (dictum) (claimant conceded that strict scrutiny standard not applicable and court found legitimate state interest in preventing exploitation of the student-athlete); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (distinction between coaches who had academic tenure and those who did not was rationally related to legitimate economic interests of college athletic program); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976) (rule rendering as ineligible hockey players who had played for pay rationally related to interest of protecting athletes from exploitation even though it bore more heavily on some nationalities), *aff'd*, 570 F.2d 320 (10th Cir. 1978). *But see* Wiley v. NCAA, 612 F.2d 473, 478 (10th Cir. 1979) (Logan, C.J., dissenting) (rule preventing student-athlete from receiving Basic Equal Opportunity Grant totally arbitrary with respect to state interest of preventing exploitation of athlete because university has no control over awarding of the BEOG's), *cert. denied*, 446 U.S. 943 (1980). *See generally* J. WEISTART & C. JOWELL, *supra* note 10, at 49-50; Carrafiello, *supra* note 10; Gaona, *supra* note 10, at 1091-95; Martin, *supra* note 10, at 393-400; Comment, *Amateurism*, *supra* note 10, at 600-12; Comment, *Constitutional Dimensions*, *supra* note 10, at 334-40; Note, *Judicial Review*, *supra* note 10, at 916-20.

70. 698 F.2d 1082 (10th Cir. 1983).

71. *Id.* at 1083-84.

72. *Id.* at 1086.

73. *Id.* at 1087.

74. *See supra* note 68.

75. *See* Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 368 (8th Cir.) (student-athletes not entitled to considerations of mitigating circumstances in connection with violations of NCAA constitution and bylaws

This clause requires that due process of law be accorded to an individual whenever state actions deprive that individual "of life, liberty or property."[76] Under a due process theory, the student athlete would attempt to have the NCAA sanction, as opposed to the rule, declared unconstitutional.[77] Under this theory, the athlete would contest the NCAA determination on the ground that it deprived him of a constitutionally protected right without affording him rudimentary procedural safeguards.[78]

The NCAA affords sanctioned athletes few procedural rights.[79] The courts, however, have not been receptive to the athlete's due process claims.[80] Athletes have been unable to prove that the NCAA sanctions deprive them of an interest to which due process rights attach.[81] The threshold question in any due process claim is whether the state has deprived the claimant of a right which falls under the United States Supreme Court's interpretation of "life, liberty or property."[82] The Court has broadly interpreted the protected rights to include many

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prior to declaration of their ineligibility), *cert. dismissed*, 434 U.S. 978 (1977); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975) (private college and student disqualified under rules of NCAA from participating in Association's sporting events were not denied due process of law because they were given notice of charges against them); Colorado Seminary v. NCAA, 417 F. Supp. 885, 893-95 (D. Colo. 1976) (court precluded from addressing due process issue), *aff'd*, 570 F.2d 320 (10th Cir. 1980). *See also* Hennessey v. NCAA, 564 F.2d 1136, 1145-47 (5th Cir. 1977) (procedure for passage of NCAA bylaw adequately protected coaches who lost job because of rule); Williams v. Hamilton, 497 F. Supp. 641, 644-46 (D.N.H. 1980) (student did not have a property interest in participation); Stanley v. Big Eight Conference, 463 F. Supp. 920, 929-34 (W.D. Mo. 1978) (procedure by which conference could "black ball" a coach for a violation of NCAA rules was enjoined until the conference outlined a procedure comporting with due process). *See generally* J. WEISTART & C. LOWELL, *supra* note 10, at § 1.15; Carrafiello, *supra* note 10; Gaona, *supra* note 10, at 1096-1101; Martin, *supra* note 10, at 393-400; Comment, *Amateurism*, *supra* note 10, at 612-22; Note, *Judicial Review*, *supra* note 10, at 921-24.

76. *See* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (court must look not at the weight of the interest at stake but at the nature of the interest at stake); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring) (whether any procedural protections are due depends on the extent to which an individual will suffer grevious loss). *See generally* NOWAK, *supra* note 37, at ch. 15; Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146 (1983).

77. *See* NOWAK, *supra* note 37, at ch. 15.

78. *See supra* note 75.

79. *See supra* note 20.

80. *See infra* notes 86-105 and accompanying text. *See also supra* note 75.

81. *See infra* notes 86-105 and accompanying text. *See also supra* note 72.

82. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); NOWAK, *supra* note 37, at 527. The fourteenth amendment, by its own terms, limits the due process requirement to state deprivations of life, lib-

substantial rights and interests.[83] Student athletes alleging that they were deprived of a protected right without due process have claimed to have a property interest in their continued participation. In *Board of Regents v. Roth*,[84] the Court held that a property interest exists in a benefit only if the claimant demonstrates a legitimate claim of entitlement and not just an abstract or unilateral desire for the benefit.[85]

Student athletes have advanced three arguments to prove that an NCAA sanction deprived them of a protectible property interest under *Roth* and its progeny. First, their participation is protectible as an integral facet of their education.[86] Second, their athletic scholarship creates a protectible contract interest.[87] Third, the NCAA sanction would foreclose the economic opportunities of professional athletics.[88] Judicial receptiveness to each of these arguments has varied.

Athletes contending that the right to participate in athletics is protectible as a facet of education have argued for a broad interpretation of the Supreme Court's decision in *Goss v. Lopez*.[89]

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erty or property: "[N]or shall any State deprive any person of life, liberty or property without due process of law ...." U.S. CONST. amend. XIV.

83. While the "life" interest is self-explanatory, the Court interpreted the interests of "liberty" and "property" to include a wide range of factual situations. Although the Court in Paul v. Davis, 424 U.S. 693, 701, (1976), concluded that a claimant must show a "tangible" interest in liberty before due process rights are invoked, the Court has decided that some of these tangible liberty interests include: discharging plaintiff from governmental employment, Arnatt v. Kennedy, 416 U.S. 134, (1974); barring the plaintiff from future governmental employment, Joint Anti-Fascit Refugee Comm. v. McGrath, 341 U.S. 123, (1951); suspension of a student from a public school, Goss v. Lopez, 419 U.S. 565 (1975). The Court also stated that the liberty interest includes

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

84. 408 U.S. 564 (1972).

85. *Id.* at 577.

86. *See, e.g.*, Regents of Univ. of Minn. v. NCAA, 422 F. Supp. 1158, 1161 (D. Minn. 1976), *rev'd on other grounds*, 560 F.2d 32 (8th Cir.), *cert. denied*, 434 U.S. 978 (1977). For a discussion of judicial receptiveness to this argument, see *infra* notes 89-93 and accompanying text.

87. *See* Parish v. NCAA, 506 F.2d 1028, 1034 n.17 (5th Cir. 1975); Colorado Seminary v. NCAA, 417 F. Supp. 885, 895 (D. Colo.), *aff'd*, 570 F.2d 320 (10th Cir. 1976). For a discussion of this argument, see *infra* notes 94-99 and accompanying text.

88. *See, e.g.*, Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972). *But see* Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975). *See infra* notes 100-05 and accompanying text.

89. 419 U.S. 565 (1975).

In *Goss*, the Court held that a student's right to a public education may not be abridged without due process of law.[90] In *Regents of the University of Minnesota v. NCAA*,[91] moreover, the Court of Appeals for the Eighth Circuit relied on *Goss* and held that the character-building function of competitive athletics was integral to the athlete's educational experience and thus protectible under the due process clause.[92] Although other courts have adopted a narrower interpretation of *Goss*, the reasoning of *Regents of the University of Minnesota* provides a strong precedent for the application of due process principles to NCAA determinations of an athlete's eligibility.[93]

An athlete contesting an NCAA sanction may also contend that he has a constitutionally protected property right in the contractual relationship created by the athletic scholarship.[94] For instance, in *Perry v. Sinderman*,[95] the United States Supreme Court held that a non-tenured college professor may

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90. In *Goss*, students who were suspended from school contended that they should be granted at least rudimentary procedural safeguards. The Court found that the students must be given due process protection because a student has a "legitimate entitlement to public education." *Id.* at 574.

91. 422 F. Supp. 1158 (D. Minn. 1976), *rev'd on other grounds*, 560 F.2d 32 (8th Cir.), *cert. denied*, 434 U.S. 978 (1977).

92. The University of Minnesota brought this action seeking injunctive relief from an NCAA sanction. *Id.* The University incurred the sanction as a result of its failure to comply with the NCAA's order to declare three basketball players ineligible for selling complimentary tickets. *Id.* For cases adopting a more narrow view of *Goss*, see Parish v. NCAA, 506 F.2d 1028, 1034 n.17 (5th Cir. 1975); Colorado Seminary v. NCAA, 417 F. Supp. 885, 895 (D. Colo.), *aff'd*, 570 F.2d 320 (10th Cir. 1976); NCAA v. Gillard, 352 So.2d 1072, 1082 (Miss. 1977).

93. Athletics may be one of the single most compelling reasons for an athlete to attend a higher educational institution. Richard Rohberg, a noted sports sociologist, has stated that:

> Contrary to the belief that athletics is detrimental to scholastic performance and educational expectations, the evidence we have reviewed appears to support the belief that interscholastic athletics is conducive not only to higher scholastic performance but to higher educational expectations as well. (That is, sports encourage high school students to continue their education.)

J. MICHENER, *supra* note 2, at 301 (1976).

94. *See, e.g.*, Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978). *See generally* Gaona, *supra* note 10, at 1094-95; Comment, *Amateurism*, *supra* note 10, at 615-18; Comment, *Constitutional Dimension*, *supra* note 10, at 336-40.

95. 408 U.S. 593 (1972). The professor, in *Perry*, was employed at a small private college which did not have a tenure plan. Odessa College, the employer, instead had a policy giving the professors "permanent tenure." According to the official policy of the college, tenure could be revoked only if the teacher became uncooperative, performed unsatisfactorily, or was unhappy in the position. *Id.* at 600. *Contra* Board of Regents v. Roth, 408 U.S. 564 (1972) (professor hired for fixed term of one year does not have property interest in continued employment).

have a property interest in reemployment if the circumstances and conduct of the parties created a "mutually explicit understanding" of reemployment.[96] While an NCAA sanctioned athletic scholarship technically must be renewed on a yearly basis,[97] an athlete could argue that the scholarship relationship creates the "mutually explicit understanding" envisaged in *Perry*.[98] The athlete would argue that the factors surrounding the school's offer and the athlete's acceptance of the scholarship created a "mutually explicit understanding" that the scholarship was intended to last for four years.[99] The large amount of time and money spent in the modern recruitment process bolsters the athletes argument that the scholarship is viewed as a four-year investment.

Student athletes have also argued that they have an economic interest in participation in college athletics which cannot be taken away without due process.[100] The athletes contend

96. *Perry*, 408 U.S. at 603.

97. NCAA CONST. art. 3, § 4(g), *reprinted in* MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 19 (1984).

98. 408 U.S. at 603. Courts, however, have looked more skeptically upon this argument. *See, e.g.*, Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978). The *Colorado Seminary* court rejected the argument that an athlete had a property interest in a continued athletic scholarship and place on the athletic team. *Id.* at 894-95. The court took a narrow view of *Roth* and held that the athlete's interest in the scholarship was too speculative to deserve due process protection. *Id.* at 895 n.5 (*citing* Board of Regents v. Roth, 408 U.S. 564 (1972)). The court reasoned that a scholarship athlete had no more reason to expect a place on the team than any other student at the university. *Id.*

99. The NCAA has placed limits on the number of scholarships that a school may award each year. College athletic programs spend a great deal of time and money to recruit the best athletes for scholarships. Considering the substantial investment made by the schools, it is fair to assume that the schools intend that the athlete will serve them for four years. The athlete, on the other hand, usually sifts through a number of scholarship offers using various factors to choose the correct school. When the athletes make the choice to the exclusion of other schools, they make it on the assumption that they will spend their college careers at the particular school. Because both the school and the athlete view the scholarship as a four year investment, there is a mutually explicit understanding that the scholarship will continue for four years. Perry v. Sinderman, 408 U.S. 593 (1972). For a general discussion of the athlete and the athletic recruitment process, see J. MICHENER, *supra* note 2, at 52-60, 247-52; Cross, *The College Athlete and the Institution*, 38 LAW & CONTEMP. PROBS. 151, 153-57 (1973).

100. *See* Hall v. University of Minn., 530 F. Supp. 104 (D. Minn. 1982) (student granted preliminary injunction because there was substantial probability of success on his due process claim); Regent of the Univ. of Minn. v. NCAA, 422 F. Supp. 1158 (D. Minn. 1976), *rev'd on other grounds*, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977) (opportunity to participate in intercollegiate basketball a property right entitled to due process guarantees); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978) (student's interest in participating in intercollegiate athletics did not rise to level of constitutionally protected property interest); Behagen v. Intercollegiate Conference of Faculty Repre-

that a determination of ineligibility would foreclose their opportunity for lucrative professional sports contracts or other long-term benefits of the college athletic experience.[101] In *Behagen v. Intercollegiate Conference of Faculty Representatives*,[102] the court held that a college athlete could not be suspended from intercollegiate competition without the minimum standards of due process.[103] The court determined that "to many [athletes] the chance to display their athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education."[104] The *Behagen* holding, however, does not represent the majority view and has not been followed by other courts.[105]

The Process That Should Be Due

Notwithstanding the limited judicial acknowledgement of the athlete's economic interest in a future professional career, athletes do have a valid argument for due process rights in the NCAA enforcement process. Because a student athlete may possess a protectible interest in continued athletic eligibility,[106]

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sentatives, 346 F. Supp. 602 (D. Minn. 1976) (conference decision reached without a hearing deprived the athletes of their constitutional right to due process). *But cf.* Parish v. NCAA, 506 F.2d 1028, 1034 n.17 (5th Cir. 1975) ("appellants wisely abandoned ... their attempt to create a property interest out of ... their hoped for careers in professional basketball"). Athletes wishing to play professional athletics are fighting great odds. In J. MICHENER, *supra* note 2, the author discussed the odds against a high school basketball player making a professional team:

> In a physical year there will be 200,000 school boy seniors eager to win basketball scholarships at some college, but since there are only 1,243 colleges playing the game, the scholarships available cannot exceed 12,000. Four years later the colleges will be graduating about 5,700 seniors, most of them hoping for a professional contract. But there are only 25 professional teams, and they draft somewhere around 200 players each year, but they actually offer contracts to only a portion of that number. About 55 college seniors will land salaried berths with the pros, but of them only about six of them will earn starting positions.

Id. at 193.

101. *But see supra* note 100 (athletes have limited professional opportunity).

102. 346 F. Supp. 602 (D. Minn. 1972).

103. *Id.* at 605.

104. *Id.* at 604.

105. Many courts have viewed the athlete's interest in a professional sports career as too speculative to invoke procedural safeguards. *E.g.*, Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976) (following a strict interpretation of Board of Regents v. Roth, 408 U.S. 564 (1972), *aff'd*, 570 F.2d 320 (10th Cir. 1978). Some commentators have suggested that the athlete's interest in a professional career may deserve due process protection. Carrafiello, *supra* note 10, at 860-62; Comment, *Amateurism*, *supra* note 10, at 620-22.

106. For a discussion of the athlete's valid interest, *see supra* notes 75-105 and accompanying text.

he is entitled to the minimal procedural standards the constitution requires before the athlete can be denied athletic eligibility.[107]

In *Matthews v. Eldridge*,[108] the United States Supreme Court developed a balancing test to decide the procedures that must be followed before the government can act to deprive a person of a protected interest.[109] The Court identified three factors in making the determination:

> First, the private interest that will 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 function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.[110]

Applying these factors, the NCAA must provide certain procedural safeguards to protect the student athletes from the erroneous deprivation of their interest in continued participation in college athletics.[111] Because the athlete's interest is relatively insubstantial when compared to a welfare recipient's interest in continued subsistence payments, only minimal safeguards are necessary. The additional burden that a mass drug-testing rule will cause the NCAA is relatively small.[112] While the athletic scholarship is technically not a four-year commitment on the

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107. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[o]nce it is determined that due process applies, the question remains what process is due"); NOWAK, *supra* note 37, at 554-62.

108. 424 U.S. 319 (1976).

109. *Id.* at 335.

110. *Id.*

111. *Id.*

112. *See supra* note 1. *See* NOWAK, *supra* note 37, at 560-62. Two cases are of particular importance in the context of a due process-based challenge of an NCAA sanction. *See* Stanley v. Big Eight Conference, 463 F. Supp. 920 (W.D. Mo. 1978); Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972). The *Stanley* court held that the sanctioned parties were entitled to challenge the NCAA action in hearings and to be informed in writing of the charges against them, the grounds for the sanction, and a list of witnesses at least two days before the hearings. 463 F. Supp. at 932-33. The *Behagen* court reached a similar result. 346 F. Supp. at 607-08. At the hearing, the parties were entitled to present their position, to hear all of the evidence, and to receive a tape recording of the proceedings. *Stanley*, 463 F. Supp. at 932-33; *Behagen*, 346 F. Supp. at 608. In addition, the *Stanley* court held that the sanctioned party had the right to cross-examine adverse witnesses. 463 F. Supp. at 932-33. For a list of other procedural rights which have been granted to athletes facing athletic association sanctions, see Martin, *supra* note 10, at 401 n.85.

The NCAA has recently come under judicial fire because of its pervasive control of college athletics. In NCAA v. Board of Regents of the Univ. of Oklahoma, 52 U.S.L.W. 4928 (June 27, 1984), the Supreme Court held that the NCAA's pervasive control over television rights to college football violated the Sherman Act. Justice Stevens, writing for the majority, noted

part of the NCAA member school, current logistical and practical factors indicate that athletes have an interest in the continuance of their scholarship and participation for four years.[113] In addition, the obvious differences between a drug-testing rule and typical NCAA rules[114] also militate in favor of according minimal due process rights. Any drug-testing rule promulgated by the NCAA should include minimal procedural safeguards in order to survive a constitutional challenge.

Right To Privacy

In addition to equal protection and due process challenges, student athletes challenging a drug-testing rule may also contend that the drug test invades their constitutional right of privacy.[115] This right of privacy, however, has been applied only in limited factual situations.[116] There is a dearth of case law on the

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that, in some ways, "the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the nation's life...."

113. *See supra* notes 75-105 and accompanying text (discussion of athlete's due process arguments).

114. *See supra* note 20 (NCAA role and rules).

115. Although the Constitution does not explicitly mention a right to privacy, the Supreme Court has recognized the right. *See* NOWAK, *supra* note 37, at 624-35, 787-89, 843; Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965). In *Griswold*, Justice Douglas wrote that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees" which provide individuals the right to engage in private acts free from governmental decisions. *Id.* at 484. *See also* Zablocki v. Redhail, 434 U.S. 374 (1978) (Court invalidated a law which restricted right of poor people to marry under the equal protection clause of the fourteenth amendment); Roe v. Wade, 410 U.S. 113 (1973) (Court invalidated anti-abortion law on the ground that it violated the due process clause of fourteenth amendment as an unjust deprivation of liberty in that it unnecessarily infringed on a women's right to privacy); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parents have the right to send their children to parochial schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (private schools have right to be free from excessive restrictions).

116. The Court has applied the right of privacy to areas concerning the family. Zablocki v. Redhail, 434 U.S. 374 (1978) (striking a law which interfered with the right to marry); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (allowing a non-pharmacist to sell non-medical contraceptive devices); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (invalidating a law which required a spouse's consent to an abortion during the first trimester of pregnancy); Roe v. Wade, 410 U.S. 113 (1973) (upholding a woman's right to have an abortion); Eisenstadt v. Baird, 495 U.S. 438 (1972) (invalidating a law which prohibited unmarried persons from obtaining contraceptives); Boddie v. Connecticut, 401 U.S. 371 (1971) (upholding the freedom of choice regarding the dissolution of marriage based solely on the individual's inability to pay court costs and fees); Griswold v. Connecticut, 381 U.S. 479 (1965) (allowing person to use contraceptives). While the Court extended the right to privacy in these cases, it has refused to extend it to a number of other situations. *See, e.g.*, Enslin v. Bean, 436 U.S. 912 (1978) (memorandum order) (refusing review of sodomy conviction of consenting homosexual adult); Gay Liberation v. University of Mo. C., 558 F.2d 848 (8th

issue of whether a person has a right to be free from drug testing.[117] Although the courts have authorized blood and urine tests to determine whether drivers are under the influence of drugs or alcohol,[118] those tests have been justified on the ground that they are necessary to protect the safety of the general public.[119] The NCAA, however, would promulgate a drug rule to protect the health of the users themselves.

One court has reviewed, on privacy grounds, the constitutionality of a drug-use questionnaire administered by school officials to eighth graders to isolate potential abusers.[120] In *Merriken v. Cressman*,[121] the court held that, by requiring students to take a personality test to reveal potential drug abusers,

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Cir. 1977), *cert. denied sub. nom.*, Ratchford v. Gay Liberation, 434 U.S. 1080 (1978) (denying gay person's rights on campus).

117. An intrusive testing measure like a drug test may, however, be analogized to the fourth amendment dog sniffing cases. *See, e.g.*, Jones v. Laxeto Indep. School Dist., 499 F. Supp. 223, 236 (E.D. Tex. 1980); Gardner, *Sniffing for Drugs in the Classroom, Perspective on Fourth Amendment Scope*, 74 NW. U.L. REV. 803 (1980). Both searches involve an intrusive method to search for drugs. Both methods of searching for drugs can be employed in the school setting. Most of the drug sniff searches to date, however, have been performed in grammar schools or high schools. They are distinguishable because the lower schools operate *in loco parentis* to the students. Gardner, *supra*, at 811-31.

A mass drug screening through urinalysis would most likely be a fourth amendment search. *Cf.* Schmerber v. California, 384 U.S. 757 (1966) (blood test is a search under fourth amendment). Two factors, however, render a complete fourth amendment discussion unnecessary. First, the regularity and certainty of a mandatory drug test should establish a predictable and guided regulatory presence which "provides a constitutionally adequate substitute for a warrant." Donovan v. Dewey, 452 U.S. 594, 603 (1981). Thus, a rule which provides for regular testing at specific times would satisfy the fourth amendment's proscription against warrantless searches. Secondly, the athlete may waive the right to be free from a drug test. An authorized and voluntary consent will validate a search which would otherwise be illegal. *See* State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970). The NCAA should not attempt a mass drug-testing program without first seeking an informed consent from the athletes. This is especially true in light of the Court's reluctance to accept the waiver of constitutional rights. *See* Ohio Bell Tel. Co. v. The Public Util. Comm'n, 301 U.S. 292, 304 (1937) (no compromise because of expediency); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) (courts give every reasonable presumption against waiver).

118. Schmerber v. California, 384 U.S. 757 (1966).

119. *Id.* at 764.

120. Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973).

121. *Id.* In *Merriken*, a junior high school attempted to introduce a drug abuse program to be administered to eighth graders at a local school. The program consisted of a drug-use questionnaire which was aimed at identifying potential drug abusers and preparing the programs by which drug abuse control could be prevented. While most of the questions were vague, many of the questions sought to elicit answers relating to the home life of the subject. After compiling all of the answers, the program administrators planned to develop a data bank for the dissemination of the information to persons associated with the school. *Id.* at 914-17.

the school administrators had violated the students' right to privacy.[122] The *Merriken* court upheld the students' privacy rights because many of the test questions intruded into their private family relationships.[123]

Because the Supreme Court has only upheld privacy rights in limited factual situations, generally dealing with familial relations,[124] it is unlikely that a student athlete would succeed in a privacy-based challenge to a drug-testing rule.[125] In addition, the right of privacy, like other constitutional rights, may be voluntarily waived.[126] Therefore, an athlete may waive the right by voluntarily and knowingly subjecting himself to the test.

A Proposed Drug Testing Rule

The NCAA can draft a drug-testing rule that will withstand constitutional scrutiny in the courts. Initially, the rule must set forth the purposes and objectives which it seeks to serve. The primary purpose of a drug-testing rule is to protect the health of the student athlete.[127] The state has a legitimate concern for the health of its citizens.[128] The regulations of the Food and Drug

122. *Id.* at 922. The questionaire included questions of a highly personal nature which went "directly to an individual's family relationship and his rearing." *Id.* at 918. The *Merriken* court concluded that it could "look upon any invasion of that relationship as a direct violation of one's Constitutional right of privacy." *Id.* In concluding that the test violated the student's right to privacy, the *Merriken* court also addressed the consent issue. *Id.* at 919. The court concluded that there was no valid consent because the waiver form was a mere "selling tool" for the test and did not include the relevant circumstances and likely consequences of the program. *Id.*

123. *Id.* at 922.

124. *Id.*

125. *See supra* note 116 and accompanying text (discussion of the right to privacy and the United States Supreme Court).

126. A person may voluntarily waive his constitutional rights with a knowing consent. Brady v. United States, 397 U.S. 742 (1970). In *Brady*, the Court stated that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences." *Id.* at 748.

127. *See supra* notes 1, 11, 15 and accompanying text (discussion of harmful side effects of drug use and also of NCAA's purpose for past drug plans).

128. The Supreme Court's decision in many commerce clause cases turned on the issue of whether the state exercised a local police power, such as regulating the health of its citizens. *See, e.g.*, Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) (state asserted that it had the power to regulate milk for legitimate health and safety reasons); Bradley v. Public Util. Comm'n, 289 U.S. 92 (1933) (state could refuse new truck traffic as a legitimate means of protecting local health). Under the equal protection clause, various courts have upheld a wide variety of state interests. *See, e.g.*, American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. 618, 517 P.2d 691 (1973) (preventing litter and waste); Black Hills Packing Co. v. South Dakota Stockgrowers Ass'n, 397 F. Supp. 622 (D.S.D. 1975) (protecting health through meat regulations).

Administration[129] and the criminal laws[130] against drugs manifest the state's interest in the public health, especially where drugs are concerned.

The NCAA promulgates many rules for the express purpose of protecting student athletes from physical harm during their athlete participation.[131] Most of these rules prohibit athletes from certain movements or actions which have been proved to be dangerous.[132] A drug-testing rule is a logical extension of these rules. The drug-testing rule, like the other rules, is aimed at protecting athletic participants from other harms engendered by the sport. Any drug-testing rule should contain a statement of policy and objectives which clearly and explicitly states that it was promulgated to protect the health of college athletes.

The policy statement for any NCAA promulgated drug-testing rule should also state that the rule is designed to prevent the exploitation of athletes. The courts have found legitimate state interests in other NCAA rules which were designed to prevent the exploitation of the student athlete by overzealous schools, administrators, or coaches.[133] A drug-testing rule would also protect the athlete from such exploitation.

College athletics, especially at the higher levels, is very competitive.[134] If athletes feel compelled to take drugs, because of their own perceived inadequacies, the pressure to win, or at a coach's urging, these pressures are at least partly responsible for the athlete's use of harmful drugs. In the first section of a NCAA drug-testing rule, the NCAA should recognize these problems and state that the rule was promulgated to end the potential for exploitation.[135]

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129. *See, e.g.*, 21 C.F.R. §§ 200-299 (1983) (drug regulations).

130. *See also* 21 U.S.C. §§ 301 *et seq.* (1982) (empowering statute to prevent and control drug abuse).

131. Rules prohibiting "clipping" (blocking a player from behind in football), "spearing," (football player striking another with top of football helmet) and blocking below the waist in football are all examples of rules aimed at protecting the health of the players.

132. *See supra* note 131. The obvious reasons behind these rules is to protect players.

133. *See, e.g.*, Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975) (minimum grade point rule serves legitimate interest by preventing exploitation of athletes). For a more complete list of cases where a rational relationship was found to exist, see *supra* note 69.

134. *See supra* note 100.

135. A possible "Statement of Purposes and Objectives" for a NCAA drug-testing rule could read as follows:

A. STATEMENT OF PURPOSES AND OBJECTIVES

The use of controlled substances and allegedly performance-enhancing drugs represents a danger to the health of students and a threat to the integrity of amateur sport. In highly competitive athletics, the presence of drugs which allegedly enhance performance

An additional objective of a drug-testing rule would be to foster fairness in competition and to protect the integrity of the game. The NCAA has promulgated rules to protect fairness in competition and to protect the integrity of the game.[136] Rules in the areas of academic eligibility, amateurism, recruiting and gambling serve these purposes.[137] A drug-testing rule would also foster fairness in competition and protect the integrity of the game. If drug use were eliminated no NCAA athlete would have a "chemical advantage." Similarly, cleansing the NCAA of drugs will improve the association's public image.

In drafting a drug-testing rule which would survive a fourteenth amendment review, the NCAA must adopt a rule which is "rationally related" to legitimate state objectives.[138] Primarily, this means that the rule must only provide sanctions for those athletes who are found to be using specific drugs to improve their athletic performance.[139] In addition, the NCAA should only test for the specific allegedly performance-enhancing drugs which can harm the athletes.[140] By testing for specific allegedly performance-enhancing drugs, such as amphetamines and steroids, the NCAA will punish only those athletes who will be harmed most by the drug use. In addition, the athletes should not be tested for drugs such as marijuana or alcohol. While these drugs may also be dangerous to the health of the athlete, they are not the type of drug which an athlete would use for enhancing performance.[141] Testing for alcohol, marijuana and

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may potentially lead to the exploitation of athletes who feel compelled to take injurious drugs. Drug testing is the only way to identify those students involved in intercollegiate athletics competition who have used either controlled substance or allegedly performance-enhancing drugs and to eradicate the problem. By ending the drug problem in college athletics, drug testing will protect the health of the student and the integrity of amateur athletics and it will lessen the potential for exploitation of the athletes.

136. *See, e.g.*, NCAA CONST. art. 3, *reprinted in* MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 9-24 (1984).

137. *Id.*

138. *See supra* notes 63-74 and accompanying text (discussion of constitutional requirements).

139. For a suggested list of drugs which should be prohibited, see INTERNATIONAL OLYMPIC COMMITTEE, MEDICAL GUIDE 23-30 (1984).

140. *See supra* notes 1, 11, & 15.

141. A rule which includes the drugs which are not used by athletes to improve performance would single out athletes, possibly creating a suspect class in its application. *See supra* note 59. The rule would test college athletes for street drugs while not testing their non-athlete peers. In addition, the wide scope of a rule which tested athletes for all drugs would not be directed at the harm. The courts have overturned athletic association rules for being overbroad in relation to the rule's purpose. *See, e.g.*, Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975). *Cf.* Bunger v. Iowa High School Athletic Ass'n, 97 N.W.2d 555 (Iowa 1972) (rule providing sanctions against high school athletes for being caught with alcohol was unreasonably broad).

similar drugs would result in an over-inclusive classification because it is not aimed at the evils which the rule seeks to prohibit.[142]

A standardized testing procedure is the second necessary attribute of a rule which would pass fourteenth amendment scrutiny.[143] The rule should use a standard scientific procedure, and it should be administered to all competitors after every NCAA sanctioned event.[144] If the rule were applied at random, athletes could contend that the administrator's arbitrary control resulted in the lack of uniformity in the application of the rule. The rule would not then be susceptible to an attack on the ground that the test is applied arbitrarily. The testing procedure should be standardized so that it raises an expectation that testing will occur after each event. The strong deterrence effect of this expectation will result in a drug-testing rule which will withstand equal protection scrutiny.[145]

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142. If the rule were applied arbitrarily, athletes would contend that the lack of uniformity would create a suspect group. A group of athletes singled out by the test administrators could maintain that the randomly applied rule violated the equal protection clause of the fourteenth amendment. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886). In *Yick Wo*, San Francisco passed a law which outlawed hand laundries in wooden buildings. Although most of the outlawed laundries were run by Chinese persons, the Court invalidated the ordinance on equal protection grounds because the administrative authorities exempted the non-Oriental laundrymen from compliance with the rule while the officials did not exempt the Oriental laundrymen. The court decided that an administrative selection process deserves less deference than a legislative classification. *Id.* at 371. *See also supra* note 59.

143. For a discussion of the Olympic Committee testing program, see *supra* note 28.

144. *See supra* note 142 (uneven application of a rule can cause equal protection violation).

145. A suggested rule which would succeed in creating this expectation could resemble the following:

B. MANDATORY DRUG TESTING

All athletes who participate in NCAA sanctioned events must submit to an NCAA administered urinalysis immediately after each sanctioned event. Athletes who are found to have a prohibited substance (see Section D-3 of this Rule) in their blood stream at the time of the test, will be subject to sanction unless they prevail at a hearing provided by Section D of this rule.

C. TESTING PROCEDURE

1. After each event, every competitor shall present a sample of his or her urine to the NCAA officials. At the time of presentation, both the competitor and the official shall sign the label of the urine container.
2. Every sample shall be frozen and shipped to (name of the accepted testing company) where it will undergo (method of testing).
3. The athlete shall be subject to sanctions if his or her urine contains at or above the prescribed level of one or more of the prohibited substances listed below: (prohibited drugs listed with the amounts necessary to invoke a sanction).

In addition to equal protection challenges, a proposed drug-testing rule must provide at least minimal procedural safeguards before sanctions are imposed.[146] Present procedural protections accorded to an NCAA athlete fall far below those recognized as providing a minimal assurance of fairness.[147] The present NCAA enforcement procedure also does not lend itself to a drug-testing rule.[148]

In a drug-testing rule, the NCAA should make provisions which would cure the inadequacies of its present enforcement program. The drug-testing rule, however, raises some unique problems in its application. In the fact-finding phase, two problems deserve attention. First, while the present methods of drug testing are accurate,[149] large scale testing may result in inaccurate results in isolated circumstances.[150] Athletes should be allowed to challenge the validity of the test results. Second, the athletes or their doctors might not know which drugs the NCAA prohibits. They should be allowed to produce evidence explaining why they were using certain drugs. Although most of the allegedly performance-enhancing drugs have few legitimate uses, certain drugs used by the athlete may be necessary for valid medical reasons and thus the use should not be sanctioned.[151] Finally, the rule should provide a standardized procedure for athletes to challenge NCAA sanctions upon a finding that the athlete was using drugs.[152]

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4. The list of prohibited substances may be amended prospectively by the Subcommittee on Drugs and Drug Testing. The amendments must be passed by a simple majority of the NCAA annual convention. Substances added to this list must be proven to be harmful to athletes.

146. For a discussion of the court's analysis of NCAA procedural guidelines, see *supra* note 112.

147. For a discussion of NCAA enforcement procedures, see *supra* notes 20 and 112.

148. *See supra* note 20. The drug test would replace the investigative first stage of the NCAA Enforcement Program. The athlete who fails the test would therefore already be adjudged guilty before the school had a chance to represent the athletes. Assuming that the school were to provide representation during an appeal, the school's representative argues only the facts of a particular situation. In addition, the representatives are not allowed to present mitigating evidence for sentencing nor are there any sentencing guidelines. Moreover, the assumption that the school will represent the accused drug user's interests adequately is even more tenuous than the general assumption. Schools will probably not want to side with an athlete who has failed a drug test.

149. *See supra* note 14.

150. *See supra* note 14.

151. *See Hearings*, *supra* note 1, at 51 (statement of Dr. Cooper) (there are valid reasons for using drugs and those athletes who must use drugs should be allowed to do so).

152. The hearing procedure should be streamlined and simple. An example of a "Hearing Procedure" section of a drug test rule could state:

The sanctioning procedure should also provide the athlete with procedural protections. Although procedural rights are rarely accorded to persons contesting sanctioning procedures,[153] the drafters of a drug testing rule should recognize certain procedural safeguards not presently accorded to the athletes in the NCAA enforcement procedure. The procedural rights recommended above give the athlete an opportunity to present facts which may result in mitigation of the penalty. In addition to the protection provided by those safeguards, the NCAA's discretion as to penalties imposed should also be reduced in a drug-testing rule. Because the rule is aimed primarily at protecting the health of the athlete, sanctioning guidelines consistent with this aim should be included in the rule. The rule should require that first time offenders undergo drug treatment as opposed to a more harsh penalty. By concentrating on rehabilitation as opposed to punishment, this sanctioning approach attempts to help the athlete. Subsequent violations, of course, should be dealt with more harshly.[154] This graduated sanctioning ap-

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D. HEARING PROCEDURE

1. Athletes found to have a prohibited substance at an unacceptable level in their bloodstream shall have the right to a timely pre-sanction hearing, on the record, before an officer of the subcommittee on Drugs and Drug Testing. The hearing process will be initiated by the NCAA by the filing of a notice of hearing with the athlete and the athlete's school.
2. The hearing shall consist of the opportunity for the athlete or legal representative to present evidence concerning either the test or the sanction. The athlete or the legal representative shall be allowed to cross examine representatives of the (testing company) and the testing officials. The athlete or the legal representative shall also be allowed to produce oral or written testimony subject to the discretion of the hearing officers.
3. The hearing officer shall issue a written finding of fact within a reasonable time after the close of the evidence. The athlete is entitled to notice of the grounds of the hearing officer's findings.
4. Appeals shall be handled by the NCAA Committee on Infractions upon filing of written notice of appeal by the athlete within 30 days after the athlete receives notice.

153. Although a person may not be deprived of an interest without an opportunity to be heard, the adjudication on the merits usually satisfies the due process rights. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 412 (1958). *See, e.g.*, Goldberg v. Kelley, 397 U.S. 254 (1970).

154. The "Sanctions" section of the rule should graduate the sanction in accordance with the purposes of the rule. Basically, the NCAA should look to help the athlete before invoking more stringent sanctions. In addition to being fair, the graduated sanctions would be rationally related to the objectives of the rule. The "Sanction" section of the rule could state:

E. SANCTIONS

1. Athletes who have been found by the hearing officer to be using prohibited substances without justification shall be subject to sanction by the hearing officer.
2. Sanctions for violation of this rule are as follows:

proach would be sensible as well as constitutionally sound.

Finally, a constitutionally sound drug-testing rule should not infringe upon an athlete's right to privacy. Notwithstanding the limited protections accorded to an athlete's privacy, however, the NCAA should require that each athlete sign a waiver when the athlete renews his or her scholarship.[155] The waiver form should fully apprise the athlete of the prohibited drugs, the method of testing, and the possible sanctions for violation of the anti-drug rule. The waiver serves a two-fold purpose. First, it protects the NCAA from possible liability. Second, it protects the athletes by fully informing them of the program in detail. The waiver is but another facet of a drug-testing rule which is a strict measure aimed at protecting athletes in a fair and impartial way.

CONCLUSION

The NCAA must initiate a mandatory drug-testing rule to help reduce the harm caused by the drug crisis in the locker-room and on the playing fields of its member institutions. While no concrete data reveals the extent of this drug problem, athletic administrators, coaches, and educators have long warned of widespread use of drugs in athletics. The occasional use of drugs without a prescription is dangerous. The use of allegedly performance-enhancing drugs by athletes presents an even greater potential for irreparable harm. The NCAA has recognized this potential harm by directing the preparation of a mandatory drug testing rule which will be voted upon at its 1985 convention.[156]

A drug-testing rule, however, enacted by the NCAA could pose certain constitutional problems. Courts have found that the NCAA is a state actor for purposes of the fourteenth amendment. Accordingly, an increasing number of courts have scrutinized NCAA rules and sanctions under the due process and equal protection clauses of the Constitution. While the athletes

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a) first time offender shall undergo drug treatment at the university's medical center; or,
b) second time offender shall be suspended from competition in NCAA events for a period not to exceed one (1) year; or,
c) third time offender shall be ineligible for any NCAA competition in any sport.

3. Neither the NCAA nor a representative of the NCAA will publicly disclose the reason for sanctioning an athlete under this rule.

155. For a discussion of the athlete's privacy rights and the waiver of those rights, see *supra* note 126.

156. *See supra* note 7 and accompanying text.

have had only limited success with challenges to NCAA rules and sanctions, the special problems which could be raised by a drug-testing rule necessitate the consideration of special factors. The drafters of the rule should be aware of these problems. They should draft a rule which reflects a policy of fairness towards the athletes and which is consonant with the mandates of the Constitution.

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