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The Legality of Testing Student-Athletes For Drugs and the Unique Issue of Consent

In the past three years, the drug issue has exploded onto the national scene. Publications devote significant pages detailing the horrors of drug abuse and the extent of society's addiction to illegal drugs like cocaine and its potent derivative, crack. President Reagan, declaring a "War on Drugs," has issued an executive order requiring that certain federal employees submit to urinalysis to prove that they are drug-free. The testing of private employees in the workplace for the use of drugs has become commonplace. State legislatures are currently grappling with the issues of whether

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3 It is estimated that more than 25% of the largest U.S. corporations screen work applicants for drug use and some require on-the-job testing of employees. Taylor, Uncovering New Truths About the Country's No. 1 Menace, U.S. NEWS & WORLD REPORT, July 28, 1986, at 51; Rust, supra note 2, at 51 ("more than one quarter of all Fortune 500 Companies test employees for drug use, and many smaller companies are expected to follow suit").
state employees should be subjected to mandatory drug testing or whether private employers should be allowed to test for illegal drug use.\(^4\) One can argue that this nation is paranoid over drug abuse.\(^5\) Furthermore, it does not take a seer to predict that this issue has broader ramifications than the more narrow question of testing for illicit drug use; it is likely the same arguments will be made concerning the legality of mandatory testing for acquired immune deficiency syndrome (AIDS).

Unfortunately, athletics has not escaped this national paranoia.\(^6\) Fueled by the deaths of prominent student-athlete Len Bias and professional football player Don Rogers,\(^7\) the issue of drugs and sports has become a national issue. In fact, the testing of amateur athletes, initially developed at the Olympic level to detect the presence of performance-enhancing drugs\(^8\) has grown into a multimillion dollar industry. The purpose of this testing is no longer solely to detect performance-enhancing drugs, but also to detect and police the drug use of our amateur athletes—the alleged role models for youngsters.

At the college level, both public and private schools have either instituted or are planning to institute drug testing programs\(^9\) for


\(^5\) This paranoia may be well-founded given the harm created by illegal drug abuse. Although any statistical data which attempts to assess the damage created by illegal drug use in our society can, at best, be considered an estimate, some of the figures are striking. It is estimated that “20 million [Americans] are regular users of marijuana, 4 to 8 million are cocaine abusers and 500,000 are heroin addicts.” Lang, \textit{supra} note 1, at 48. Moreover, sales of illegal narcotics are estimated at more than 100 billion dollars a year. \textit{Id.} Furthermore, drug abuse costs the economy an estimated 60 billion dollars in 1983. Castro, \textit{supra} note 1, at 53.

\(^6\) In fact, some would argue that drug abuse among student-athletes has changed our perception of recreational drug use and has actually created the current paranoia. “Rising anti-drug sentiment is being fed by fears of a deadly substance called crack and by the recent deaths of sports stars Len Bias and Don Rogers.” Duffy, \textit{supra} note 1, at 16.


\(^8\) Athletes participating in the Olympics have long been the subject of mandatory testing to assure that performance-enhancing drugs (e.g., steroids) have not affected the outcome of the competition. Pursuant to current International Olympic Committee (IOC) Rules, the top four finishers in each Olympic event and other randomly selected competitors are subject to mandatory drug testing. See 2 R. Berry & G. Wong, \textit{Law and Business of the Sports Industries} XIV-XV (1986).

\(^9\) In 1986, the NCAA reported that 76 Division I colleges (public and private) had
student-athletes.\textsuperscript{10} Generally, a student-athlete is required by either National Collegiate Athletic Association (NCAA) rules\textsuperscript{11} or the rules of a particular athletic department to consent to, and participate in, random drug testing (urinalysis). Further, consent to such testing is a necessary precondition to participation in intercollegiate athletics and to eligibility for athletic scholarships.

The NCAA has been the major impetus behind these recent developments. In 1984, the NCAA first passed a resolution empowering itself to adopt permanent drug testing rules.\textsuperscript{12} In 1986, the NCAA adopted legislation that, first, authorizes methods for drug testing of student-athletes who compete in NCAA championship and certified postseason football contests;\textsuperscript{13} and, second, requires all student-athletes to consent to be tested for drugs\textsuperscript{14} prohibited by the NCAA;\textsuperscript{15} and, finally, states that failure to consent to drug testing "shall result in the student-athlete's ineligibility for participation in all intercollegiate competition."\textsuperscript{16} Based on these and other NCAA

drug testing programs, while 34 schools were planning to implement such programs. \textit{National Collegiate Athletic Ass'n Drug Educ. Comm., Summary of Results of Drug Education/Testing Survey} 1-2 (Apr. 22, 1986) [hereinafter NCAA Survey]. Several schools have adopted drug testing programs since the NCAA Survey. For example, as of April 1987, North Carolina State and Wake Forest also had drug testing programs. However, some schools, such as the University of Oregon, have discontinued their drug testing programs.

\textsuperscript{10} This Article focuses on the student-athlete as defined by the NCAA:

A "student-athlete" is a student whose matriculation was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a "student-athlete" only when the student reports for an intercollegiate squad that is under the jurisdiction of the department of intercollegiate athletics. . . . A student is not deemed a "student-athlete" solely because of prior participation in high school athletics.

\textsuperscript{11} See infra notes 13-16 and accompanying text.


\textsuperscript{13} 1986-87 NCAA Manual, supra note 10, Bylaws art. V, § 2(a) & (b), at 106-07.

\textsuperscript{14} The NCAA bans eight categories of drugs: 1) psychomotor stimulants (e.g., amphetamine and cocaine); 2) sympathomimetic amines (e.g., ephedrine); 3) miscellaneous central nervous system stimulants (e.g., caffeine—if concentration in urine exceeds fifteen micrograms/ml.); 4) anabolic steroids (e.g., testosterone—if the ration of the total concentration of testosterone to that of epitestosterone in urine exceeds six); 5) substances banned for specific sports (e.g., alcohol is one of seven banned drugs for participants in riling); 6) diuretics; and 7) street drugs (e.g., cocaine and marijuana). 1986-87 NCAA Manual, supra note 10, Exec. Reg. 1, § 7(b), at 186-88. See Appendix A.

\textsuperscript{15} 1986-87 NCAA Manual, supra note 10, Const. art. III, § 9(i), at 28.

\textsuperscript{16} \textit{Id}.
regulations, several prominent college athletes have been prohibited from playing in intercollegiate competition for failing to pass the required drug tests.\textsuperscript{17} Furthermore, NCAA sponsored drug testing has prompted several lawsuits and the threat of lawsuits, some of which have been successful.\textsuperscript{18}

The fact that drug testing has become such a highly visible and emotionally charged issue has resulted in a plethora of articles addressing the propriety and legality of drug testing.\textsuperscript{19} Several articles focus specifically on the drug testing of student-athletes.\textsuperscript{20} However, many of these articles either fail to address important issues or

\textsuperscript{17} Twenty-one college athletes, including two-time All-Americans Brian Bosworth of Oklahoma and University of Southern California guard, Jeff Bregel, were banned from playing in certified postseason football games because their urine tested positive for anabolic steroids in violation of NCAA Regulation 1, § 7, see 1986-87 NCAA Manual, supra note 10, Bylaws art. V, § 2(a), at 106-07. See Neff, Bosworth Faces the Music, SPORTS ILLUSTRATED, Jan. 5, 1987, at 20-25. The most recent widely publicized casualties of NCAA drug testing are George Mira and John O'Neill of Miami who were prohibited from participating in the 1988 Orange Bowl because they "flunked pregame drug tests for taking Lasix, a prescription diuretic that some experts believe can make the use of anabolic steroids less detectable." Telander, Raising Canes, SPORTS ILLUSTRATED, Jan. 11, 1988, at 18.

\textsuperscript{18} In Levant v. NCAA, No. 619209 (Cal. Sup. Ct. March 13, 1987), Santa Clara County Superior Court Judge Peter Stone issued a temporary restraining order and a preliminary injunction barring the NCAA from enforcing its regulation requiring an athlete to consent to drug testing as a precondition to participating at an NCAA championship match. Although no decision was published, "Stone ruled that drug testing constituted an 'obtrusive, unreasonable and unconstitutional invasion of privacy' and added that there was a 'reasonable probability Levant would win her case if it went to trial.' " Incident or Precedent?, SPORTS ILLUSTRATED, Mar. 23, 1987, at 18. Levant based her arguments "only on the California constitution." Id.

The University of California at Berkeley rescinded its policy of requiring athletes to undergo drug testing as a result of a threatened lawsuit by the American Civil Liberties Union. CHRON. HIGHER EDUC., Dec. 17, 1986, at 31. The University of Colorado's drug testing program has been challenged by a lawsuit filed by the NCAA. See CHRON. HIGHER EDUC., Oct. 29, 1986, at 37, col. 2; see also Scanlon, Playing the Drug-Testing Game: College Athletes, Regulatory Institutions, and the Structures of Constitutional Argument, 62 IND. L.J. 863, 879 n.48 (1987). See infra notes 214-19 and accompanying text.

\textsuperscript{19} See, e.g., Testing for Drug Use in the American Workplace, 11 NOVA L. REV. (1987); see also infra notes 20, 27-30.

inadequately discuss the issues they do raise, particularly the issue of the NCAA as a state actor. Therefore, our basic conclusion, and the reasoning that compels it—that drug testing as currently undertaken by the NCAA and colleges is legal and permissible—has not been the subject of previous articles. In fact, in many of the articles addressing the issues raised by drug testing, the authors come to the wrong conclusion, for perhaps the right reasons.21

Part I briefly discusses the various notes and articles which address the issues surrounding the legality of drug testing. In particular, we note the failure to adequately consider and address the state action issue regarding the testing of student-athletes and, more important, the erroneous conclusion that consent to a drug test conditioned upon receipt of a benefit, such as an athletic scholarship, is illegal. Part I demonstrates that the context within which drug testing takes place is what determines the content of the legal issues raised by consensual drug testing.22 Further, Part I concludes that any drug testing by public universities and colleges, and perhaps the NCAA, raises significant constitutional questions.

Part II addresses the constitutional issues raised by testing student-athletes for drugs. Although it is currently in vogue to allege that current plans to test student-athletes and others is a violation of their constitutional rights of privacy or a violation of their fourth

city of articles written by public law scholars, the drug testing issue has apparently caught the students’ fancy, while it has been ignored by academe.

21 See, e.g., Note, supra note 20, discussed infra notes 135-55 and accompanying text. The author concludes that drug testing of student-athletes is illegal even if they consent to the test, if that consent is “coerced” by threat of loss of an athletic scholarship. As will be seen, this conclusion is without merit. It may represent the author’s attempt to arrive at the “right result”—that drug testing should be impermissible—but for the wrong reason, thereby misconstruing current law.

Along similar lines, the Oregon Attorney General has issued an advisory opinion in which a tentative conclusion is reached that voluntary drug testing of student-athletes is unconstitutional, in part, because (1) consent is not truly voluntary (for a discussion of the issue of voluntary consent, see infra notes 136-42 and accompanying text), and (2) Wyman v. James (see infra notes 143-53 and accompanying text) is not persuasive authority for the proposition that consent to a noncriminal search in exchange for receipt of “public” benefits is valid and constitutional. For a discussion of the unconstitutional condition doctrine and the Wyman opinion, see infra notes 143-55 and accompanying text. Oregon Attorney General Opinion No. 8191 (Nov. 16, 1987) (on file at University of Oregon Law Review).

22 For example, consensual drug testing raises different questions than does mandatory drug testing. See infra notes 129-55 and accompanying text. The key issue is consent, which in effect makes the drug testing voluntary. Unless noted otherwise, “drug testing” refers to consensual drug testing. Furthermore, “consent,” in the context of student-athletes, refers to the consent to drug testing as a precondition to participating in intercollegiate athletics and to receiving an athletic scholarship.
amendment rights, we conclude that drug testing is permissible pursuant to current federal constitutional law. Although the state action doctrine may be used to "constitutionalize" the issues raised by drug testing at public schools, and perhaps any drug testing required by the NCAA, the "voluntary" consent given by student-athletes to drug testing as a precondition to participation in intercollegiate athletics serves as a bar to any constitutional challenge. Utilizing a two-part test which requires a finding of both state action and a constitutionally protected right which is not waived by the signing of a consent form (which is rapidly becoming a universal requirement of all voluntary plans at colleges), we conclude that due to the Supreme Court's narrow and restrictive definition of what constitutes impermissible coercion, the signing of a consent form is regarded as consent "freely given." As such, this consent defeats any argument that drug testing is an unconstitutional condition which violates protected constitutional rights.

Having concluded that the state action doctrine is, as a practical matter, applicable to all student-athletes irrespective of the public or private nature of the school, Part III briefly analyzes two viable methods to attack drug testing which avoid the issues raised by consent and the waiver of federal constitutional rights.

I

ISSUES RAISED BY TESTING STUDENT-ATHLETES FOR DRUGS

Numerous articles address many of the issues raised by testing student-athletes for drugs. What is unique about these articles is the fervor with which they conclude that such testing is illegal, and further, that student-athletes should, for some unexpressed reason, be treated differently than laborers or government employees. In addition, many of these articles fail to analyze the environment within which drug testing of student-athletes takes place. Therefore, by narrowly focusing on the student-athlete, these articles lack both a focus and an understanding of the true issues raised by testing student-athletes for drugs.

23 See Note, supra note 20 (author concludes that drug testing of student-athletes at public colleges and universities is in violation of their fourth amendment rights).
24 See infra notes 112, 115 and accompanying text.
25 See infra notes 200-19.
26 See supra note 20.
A. The Fallacy of Relevant Scholarship

Articles published which discuss the drug testing issue may be placed in three distinct categories: 27 articles addressing the issue of drug testing in the workplace; 28 articles addressing the issue of mandatory drug testing required by a governmental body or agency; 29 and articles addressing the issue of drug testing of athletes


at the college and professional level.\textsuperscript{30} While the issue of testing professional athletes may fall into the first or second category depending on the entity requesting the test (the government or the employer), this Article focuses on issues raised when colleges test student-athletes for drugs.

Testing for drug use among student-athletes is unique and should be treated separately for two reasons. First, the legal identity and characteristics of the entity (college or university) requesting the test is ambiguous and therefore requires clarification. Is the entity requesting the test a governmental agent for the purposes of state action, thus raising the same sort of issues addressed by articles that examine government requested testing? Second, it is equally important to define the nature of the relationship between the entity requesting the test and the athlete. Is it an employer-employee relationship, or is it something else, some hybrid relationship that is not capable of articulation? Does the student-athlete's subtly coerced consent remove the relationship from either category and place it into a third category that may expand rapidly in the future: consensual drug testing in exchange for other benefits?

A major shortcoming evident in articles written on drug testing of student-athletes is their failure to address and resolve two fundamental questions.\textsuperscript{31} First, what is the legal nature of the relation-


\textsuperscript{31} For example, in Note, supra note 20, the author dodges the tough question of the nature of the relationship between the student-athlete and the college. Rather, the author assumes that the student of a public school, as opposed to a student at a private college, has constitutionally protected rights which are not waiveable merely because that athlete attends a public college. However, this is a debatable assumption. See infra notes 135-55 and accompanying text. Similarly, in Comment, \textit{Collegiate Athletic Participation, supra note 20,} the author assumes that as a result of receiving an athletic scholarship, a student is an employee with a protectable property or liberty interest which is not subject to deprivation without constitutional safeguards. This conclusion is also questionable. See infra notes 182-89 and accompanying text. Further, in the Oregon Attorney General Opinion on Drug Testing, see supra note 21, it is assumed that the athlete's consent to drug testing is not voluntary and, more important, that \textit{Wyman v. James} is not good authority for the proposition that one may be required to consent to
ship between the institution and the student-athlete? Second, how does the student-athlete's consent to drug testing as a condition of either maintaining eligibility to play intercollegiate athletics or receiving an athletic scholarship affect that relationship? Only when these fundamental questions are resolved may larger questions regarding the legality of such testing be addressed.

B. Defining the Applicable Environment

The complexity of the legal and ethical questions raised by drug testing stem, in part, from the different fact situations in which the testing occurs and the different consequences that flow from these situations. Therefore, we must first define the environment in which the issue of drug testing arises. As stated above, the focus of this Article is the student-athlete who, pursuant to either NCAA rules or to the rules of the school's athletic department, is required to consent and submit to random drug testing in order to participate in intercollegiate athletics and to receive an athletic scholarship. Whether constitutional protections can be applied in these two contexts depends on whether the school (public or private) or the NCAA is considered a state actor.

C. The Necessity of Finding State Action

Constitutional prohibitions only limit state or government action. Consequently, constitutional protections do not apply to purely private conduct. Therefore, student-athletes must first al-

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32 For example, mandatory drug testing in public schools raises significantly different issues than the testing of student-athletes that "consent" to the test in order to maintain their scholarships and their eligibility for intercollegiate athletics. For a discussion of the issues raised by mandatory drug testing in public schools, see Comment, supra note 27.


34 J. Nowak, R. Rotunda & J. Young, supra note 33, § 12.1, at 421. However, a private act may constitute state action if it is so imbued with state authority that it requires the application of constitutional limitations. See generally id. §§ 12.1(a), 12.3. Historically, courts have used three tests to determine whether state action exists. A court will find state action and apply constitutional restraints if 1) the private actor performed a public or governmental function (see infra notes 51-57 and accompanying text); 2) the private actor sought the state's aid in enforcing the questioned action (see Shelley v. Kraemer, 334 U.S. 1 (1948); cf. infra notes 70-86); or 3) the state supported or controlled a private entity, thereby acting as a "joint participant" in bringing about the challenged conduct (see infra notes 50 and 59-67 and accompanying text). See Phillips, The Inevitable Incoherence of Modern State Action Doctrine, 28 St. Louis U.L.J.
lege and prove that state action is involved before they can claim deprivation of a constitutionally protected right by either being requested or required to consent to drug tests in order to maintain their eligibility to play intercollegiate athletics or to receive a scholarship. In the absence of a finding of state action, drug testing will be deemed private action and, therefore, not subject to constitutional protection. As a result, student-athletes must resort to private law remedies in order to resolve their legal claims.

A determination of what is "public" and what is "private" is not easily made since ostensibly private acts may be imbued with sufficient state authority to require the application of constitutional protection. The numerous ways in which a private act may be considered public, and hence state action, generate much confusion and controversy. Consequently, it is necessary to analyze separately the three settings in which the student-athlete is "requested" to consent to drug testing: a public college, an NCAA Championship or certified postseason football game, and finally, a private college.

These categories are based on the perceived degree of state involvement in each type of educational institution. However, a court may resolve the state action issue based more on the facts of a particular case rather than pursuant to these three classifications. Nonetheless, these categories provide an excellent framework within which to examine this question.

1. Public or State Colleges

State action is present in public school activities. Public schools, like other subdivisions of the state, sufficiently represent the govern-

683 (1984); Jakosa, Parsing Public From Private: The Failure of Differential State Action Analysis, 19 Harv. C.R.-C.L.L. Rev. 193 (1984). For the argument that state action should apply to purely private conduct, see Chemerinsky, Rethinking State Action, 80 NW. U.L. Rev. 503 (1985). This Article refers to the traditional state action analysis where there must be a state actor or state involvement before state action is found.

35 See supra note 34 and accompanying text.

36 See, e.g., Chemerinsky, supra note 34; Phillips, supra note 34; Jakosu, supra note 34.

37 Recent Supreme Court decisions on what constitutes state action by an ostensibly private actor depend to a large degree on the specific facts of each case. See Rendell-Baker v. Kohn, 457 U.S. 830 (1982), discussed infra notes 80-86 and accompanying text. Hence, any attempt to generalize the applicability of the state action doctrine to generic fact situations must be subject to caveat.

38 See Dunham v. Pulisfer, 312 F. Supp. 411 (D. Vt. 1970). In Dunham, a local school board's promulgation of an athletic grooming code was held to be state action: "This state action is readily found in the acts of duly elected or appointed officials at all
ment so as to constitute state action, thereby invoking constitutional restrictions on the schools' actions.\textsuperscript{39} Thus, in \textit{Hamilton v. Regents of the University of California},\textsuperscript{40} the Supreme Court held that a rule (compulsory military training) promulgated by the regents of a state college constituted state action.\textsuperscript{41} Therefore, where a state college is the only party requiring drug testing, state action is involved. Indeed, parties usually stipulate to the state action issue.\textsuperscript{42} As a result, there are few decisions on this point.

2. \textit{The NCAA}

Although the Supreme Court has never expressly addressed the issue,\textsuperscript{43} a number of lower courts have held that NCAA actions constitute state action for constitutional purposes.\textsuperscript{44} However, recently the Fourth Circuit held, and the First Circuit suggested, that the Supreme Court's recent state action decisions compel a different result. This section will first review the decisions which hold that NCAA actions constitute state action. The Fourth Circuit's opinion in \textit{Arlosoroff v. NCAA}\textsuperscript{45} is closely examined due to its departure levels of governmental hierarchy with the state.” \textit{Id.} at 416. \textit{See also} Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

\textsuperscript{39} J. NOWAK, R. ROTUNDA & J. YOUNG, \textit{supra} note 33, § 12.1(a), at 422.

\textsuperscript{40} 293 U.S. 245 (1934), \textit{reh'g denied}, 293 U.S. 633 (1935).

\textsuperscript{41} The Court stated that state action “include[s] every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law-making power.” \textit{Id.} at 258. For a discussion of the early cases defining the reach of state action within the public sphere see Phillips, \textit{supra} note 34, at 684-89.

\textsuperscript{42} \textit{See}, e.g., Spath v. NCAA, 728 F.2d 25, 28 (1st Cir. 1984) (the court summarily concluded that “a ‘state funded’ university, may be a state actor”); Moreland v. Western Pa. Interscholastic Athletic League, 572 F.2d 121 (3d Cir. 1978) (association of public high schools concede presence of state action).

\textsuperscript{43} In the recent landmark antitrust decision, NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984), the Court found it unnecessary to address the issue of whether the NCAA should be considered a state actor. As a result, there is no mention of the applicability or inapplicability of the state action doctrine to the NCAA in the opinion.


\textsuperscript{45} 746 F.2d 1019 (4th Cir. 1984).
from the previously unanimous view that the NCAA is a state actor.\textsuperscript{46} This Article concludes, contrary to the court's view in Arlosoroff, that the NCAA is a state actor for purposes of applying constitutional constraints.

\textit{a. The Majority View}

In \textit{Associated Students, Inc. of California State University-Sacramento v. NCAA},\textsuperscript{47} the Ninth Circuit held that the NCAA's enforcement of a minimum grade point average requirement for freshman athletes constituted state action. The court's holding was based on three factors. First, the NCAA controls public schools to the extent that athletic programs use NCAA regulations and sanctions to control their athletes; second, public schools use state funds to pay NCAA membership dues; and third, at least half of the schools which the NCAA regulates are public.\textsuperscript{48}

In \textit{Parish v. NCAA},\textsuperscript{49} the Fifth Circuit also held that the NCAA's enforcement of a minimum grade point average requirement constituted state action. The court applied two tests: the \textit{Burton} joint participation test\textsuperscript{50} and the traditional governmental function test of \textit{Evans},\textsuperscript{51} \textit{Terry},\textsuperscript{52} and \textit{Marsh}.\textsuperscript{53} First, the NCAA action met the

\textsuperscript{46} Suits against the NCAA have been barred, however, on grounds other than the state action doctrine. In \textit{Wiley v. NCAA}, 612 F.2d 473 (10th Cir. 1979) (en banc), \textit{cert. denied}, 446 U.S. 943 (1980), the Tenth Circuit barred a suit by a student-athlete against the NCAA through the application of the substantial federal question doctrine. Pursuant to this doctrine, courts will dismiss a claim if it is "(1) wholly insubstantial or obviously frivolous, (2) foreclosed by prior cases which have settled the issue . . . , or (3) so patently without merit as to require no meaningful consideration." \textit{Id.} at 477 (citing \textit{Hagans v. Lavine}, 415 U.S. 528, 536-37 (1974)). This form of analysis is quite dissimilar to state action analysis, and therefore, it is not considered here. Further, because the analysis in \textit{Wiley} appears to have been based on the merits of the student's federal constitutional claims, relevant cases are discussed in Part II.

\textsuperscript{47} 493 F.2d 1251 (9th Cir. 1974).

\textsuperscript{48} \textit{Id.} at 1254 (quoting \textit{Parish v. NCAA}, 361 F. Supp. 1214, 1219 (W.D. La. 1973)).

\textsuperscript{49} 506 F.2d 1028 (5th Cir. 1975).

\textsuperscript{50} State action exists where the state is in a position of interdependence with a private entity acting as a "joint participant" in the private actor's challenged activity. The Supreme Court established the joint participation test in \textit{Burton v. Wilmington Parking Authority}, 365 U.S. 715 (1961). In \textit{Burton}, the Wilmington Parking Authority, using public funds, erected a public parking building. The Parking Authority leased a portion of the parking space to a restaurant that denied service to a black person solely because of his race. The Court found the parking and restaurant facilities to be sufficiently financially interdependent to constitute state participation in a nominally private activity: "The State has so far insinuated itself into a position of interdependence with [the restaurant] that it [was] a joint participant in the challenged activity . . . ." \textit{Id.} at 725. The existence of this relationship was a basis for finding state action.

\textsuperscript{51} \textit{Evans v. Newton}, 382 U.S. 296 (1966), established the governmental function theory. In \textit{Evans}, Senator Augustus O. Bacon devised a park to the city of Macon, Georgia.
Burton test because "state-supported educational institutions and
their members and officers play a substantial, although admittedly
not pervasive, role in the NCAA's program."54 Second, because
states cannot regulate nationwide competition between schools,
"the NCAA by taking upon itself the role of coordinator and over-
seer of college athletics . . . is performing a traditional governmental
function."55 This is particularly true given "[t]he large role played
by the NCAA in regulating the educational effects of athletic par-
ticipation in intercollegiate sports, a traditional state interest.56 Fi-
nally, the court declared it immaterial that no one state controls the
NCAA, for "it would be a strange doctrine indeed to hold that the
states could avoid the restrictions placed upon them by the Consti-

Managed by the city, the park was to be used exclusively by whites. When the segrega-
tion was challenged, the city sought to substitute private trustees for itself, thus raising
the question of whether the park would become "private" in nature. Justice Douglas,
speaking for the Court, held that "the public character of th[e] park requires that it be
treated as a public institution subject to the command of the Fourteenth Amendment,
regardless of who now has title under state law." Id. at 302. Thus, the Court focused on
the public nature of the activity, stating that it was irrelevant whether the state directed
the activity itself or allowed a private party to do so: "Conduct that is formally 'private'
may become so entwined with governmental . . . character as to become subject to the
constitutional limitations placed upon state action." Id. at 299.

52 Terry v. Adams, 345 U.S. 461, reh'g denied, 345 U.S. 1003 (1953), is the case most
cited for the governmental function test. Terry involved a Democratic party primary in
Texas where whites held dispositive straw polls two months before the primary election
in order to exclude blacks from voting. The Court determined that state action was
present. However, it could not agree on a rationale for its holding, providing three
opinions and one dissenting opinion. Although Terry is one of the most famous cases
establishing the public function test, Smith v. Allwright, 321 U.S. 649, reh'g denied, 322
U.S. 769 (1944), is a better case in which to gain an understanding of the doctrinal
underpinnings of the governmental function test. In Smith, the Court stated that "state
delegation to a party of the power to fix the qualifications of primary elections is delega-
tion of a state function that may make the party's action the action of the State." Id. at
660.

53 Marsh v. Alabama, 326 U.S. 501 (1946), introduced another line of governmental
function cases. In Marsh, the Gulf Shipbuilding Corporation owned and ran the town
of Chickasaw, Alabama. The state prosecuted Marsh for distributing religious litera-
ture in the company town in violation of company rules. The state justified its action as
enforcing the company's private property rights. Id. at 505. The Court held that the
limitations of the first and fourteenth amendments applied: "Ownership does not always
mean absolute dominion. The more an owner, for his advantage, opens up his property
for use by the public in general, the more do his rights become circumscribed by the
statutory and constitutional rights of those who use it." Id. at 506. The Court further
stated that privately owned facilities are subject to state regulation if the "facilities are
built and operated primarily to benefit the public and . . . their operation is essentially a
public function . . . ." Id.

54 Parish, 506 F.2d at 1032.
55 Id. at 1032-33.
56 Id. at 1032 & n.11.
tution by banding together to form or to support a 'private' organization to which they have relinquished some portion of their governmental power." 57 Thus, the court found state action based on two of the three traditional state action doctrines. 58

In *Howard University v. NCAA*, 59 the D.C. Circuit held that the NCAA's enforcement of its eligibility rules constituted state action. Similar to the analysis applied in *Evans* and *Burton*, the court found that the NCAA and its public institution members were so intertwined and "joined in a mutually beneficial relationship . . . [which] may be fairly said to form the type of symbiotic relationship . . . that triggers constitutional scrutiny." 61 The important factors underlying the court's holding included the following: "Approximately half of the NCAA's 665 institutional members are state- or federally-supported" schools, which "provide the vast majority of the NCAA's capital"; 62 state schools "traditionally provide[] the majority of the members of the governing Council and the various committees"; 63 "no NCAA action could be taken by the Convention, Council, or any committee without the substantial support of the public instrumentalities"; 64 "all NCAA actions appear 'impregnated with a governmental character' "; 65 and finally, the NCAA provides "an immeasurably valuable service for its member institutions," including arranging television contracts which primarily benefit public universities. 66 In addition, the court quoted with approval the Fifth Circuit's statement in *Parish* regarding the impermissibility of states delegating power to a private organization to

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57 Id. at 1033.
58 For a discussion of the three state action doctrines, see *supra* notes 34-42, 51-53 and accompanying text.
59 510 F.2d 213 (D.C. Cir. 1975).
60 The contested regulations were (1) the "five-year rule," which states that an athlete "must complete his seasons for participation within five calendar years . . . ." NCAA Const. art. III, § 9(a), cited in *Howard Univ. v. NCAA*, 510 F.2d 213, 215 n.2 (D.C. Cir. 1975); (2) the "1.600 rule" which requires member schools to adopt a 1.6 minimum grade point average eligibility requirement for athletes, NCAA Bylaw 4, § 6(b)(1), cited in *Howard Univ.*, 519 F.2d at 216 n.3; and (3) the "foreign-student rule" which counts each year played by an individual over 19 years old in a foreign country as one year of varsity competition, NCAA Bylaw 4, § 1(f)(2), cited in *Howard Univ.*, 519 F.2d at 215 n.1.
61 *Howard Univ.*, 510 F.2d at 220.
62 Id. at 219.
63 Id.
64 Id. at 219 n.11.
65 Id. at 220 (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).
66 Id.
avoid constitutional strictures. This thoughtful and thorough analysis could provide the basis for a finding of NCAA state action even today.

The First and the Eighth Circuits have also adopted the D.C. Circuit's *Howard University* analysis. Thus, until recently, every circuit that has addressed the issue has held that NCAA action is state action.

b. The Minority Position

The Supreme Court has greatly limited the expansive scope of the state action doctrine. Starting with *Moose Lodge No. 107 v. Irvis* and concluding with *Rendell-Baker v. Kohn*, these decisions must be taken into account when deciding whether the NCAA should be considered a state actor for the purposes of the state action doctrine.

In *Jackson v. Metropolitan Edison Co.*, the Court stressed that mere ties between a state and private entity are not sufficient to find state action. Rather, there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."  

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67 *Id.*

68 In *Rivas Tenorio v. Liga Atletica Interuniversitaria*, 554 F.2d 492 (1st Cir. 1977), the court held that the enforcement of an eligibility rule by a Puerto Rican athletic association (LAI) constituted commonwealth action for purposes of the Civil Rights Act of 1871, 42 U.S.C.A. § 1983. Applying the *Howard Univ.* analysis, the court found the LAI to be substantially similar to the NCAA even though there was less state involvement in the LAI than in the NCAA. *Id.* at 495-96. Thus, although this decision is not directly on point regarding the NCAA, its tone and analysis suggest that the First Circuit agrees with the D.C. Circuit's treatment of the issue of whether the NCAA is a state actor.

69 In *Regents of the Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977), the court rather summarily noted its adoption of the D.C. Circuit's analysis of the NCAA state action issue. In so doing, it held that the NCAA's placing the University of Minnesota's athletic teams on indefinite probation (for failing to enforce eligibility rules) constituted state action: "We, like the First Circuit ..., agree with the analysis and conclusion of Judge Tamm for the District of Columbia Circuit. ..." *Id.* at 364-65. Apparently, the Eighth Circuit regarded the NCAA state action question as settled law.

70 407 U.S. 163 (1972) (The Court refused to extend the *Burton* public function rationale to private social clubs, but declared invalid a Pennsylvania Liquor Control Board regulation requiring private clubs to follow state bylaws when their bylaws are discriminatory.).


73 *Id.* at 351.
More important, in *Flagg Brothers, Inc. v. Brooks*, the Court determined that only those functions which are exclusively reserved to the states, like elections and the operation of a town, qualify as state action. In addition to this "exclusivity test," the Court also narrowed state action to those private acts which the state compels, rather than encourages or acquiesces in.

Finally, in *Lugar v. Edmondson Oil Co.*, the Court limited the applicability of *Flagg Brothers* by holding that the latter's restrictive exclusivity test applies only where a state official is not involved in the challenged action. Thus, this case renewed debate over when a state officer's involvement in the challenged conduct is sufficient to be called "state action." However, this loosening of *Flagg Brothers* must be viewed in conjunction with the Court's earlier restrictive pronouncements in the state action area. Most commentators believe that the Court still views with skepticism earlier opinions which easily conclude that, if a public actor participates in some way in the challenged action, it qualifies as state action.

The argument for a continuing restrictive interpretation of state action finds support in the Court's decision in *Rendell-Baker v. Kohn*. *Rendell-Baker* is the last of five decisions by the Burger Court which demonstrate an effort to distinguish actions of state governments from those of private parties who have had some interaction with the state. These five cases support a credible argument that the Court has moved to promote a finding of no state action. *Rendell-Baker* is the archetypical case to sum up the Court's approach to the state action doctrine. Moreover, this case is the Court's first word on state action in the educational context. Finally, since so much of *Arlosoroff* rests upon the rationale set forth in *Rendell-Baker*, an indepth analysis of *Rendell-Baker* is warranted.

In *Rendell-Baker*, the Court held that the dismissal of a teacher by a private school did not involve state action. The Court reviewed the relevance of a number of factors including public funding, the extent of state regulation of the school, the school's

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75 Id. at 158.
76 Id. at 164-65.
78 Id. at 936-39.
79 See supra notes 70-76 and accompanying text.
81 Id. at 840-43.
performance of a public function, and the presence of a symbiotic relationship between the state and the school in the school’s operation. As to public funding, the Court held that it is immaterial that the private school derived over ninety percent of its revenues from the state. Second, although the school was extensively regulated, the nexus between state involvement and the challenged act was insufficient. Third, the public function performed by the school must “traditionally [be] the exclusive prerogative of the State.” Finally, the Court rejected an analogy to Burton’s symbiotic relationship test because the state would not profit from the school’s decision to take the challenged action, as the state allegedly did in Burton.

The first application of these new restrictive cases, and the first indication that the NCAA might escape state actor status, occurred in the First Circuit’s opinion in Spath v. NCAA. The court cryptically stated that “recent trends have limited” the view that NCAA action is state action. “Recent trends” apparently refers to the Supreme Court’s Rendell-Baker decision. Nonetheless, the court in Spath suggested that the university was a state actor.

The Fourth Circuit formally parted company with the other circuits in Arlosoroff v. NCAA by finding no state action in the NCAA’s eligibility rules. The court specifically rejected earlier precedents, arguing that the Supreme Court’s recent decision in Rendell-Baker “require[d] a different conclusion.” Arlosoroff’s rather cursory treatment of the issue is inconsistent in light of its abrupt departure from precedent. Using the exclusivity test of Flagg

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82 Id.
83 Id. at 840-41.
84 Id. at 841-42. The decision to fire employees is “not compelled or even influenced” by the state. Id. at 841.
85 Id. at 842 (emphasis in the original) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974) (emphasis added)). Because the state had only recently begun trying to provide special education for “maladjusted” students like those educated at the school in question, this education was not an exclusive function of the state. Id. at 842-43.
86 Id. at 842-43.
87 728 F.2d 25 (1st Cir. 1984).
88 Id. at 28 (citations omitted).
89 Id.
90 746 F.2d 1019 (4th Cir. 1984).
92 See supra notes 54-69 and accompanying text.
93 746 F.2d at 1021.
Brothers, Arlosoroff dismissed the public function argument by citing Rendell-Baker and holding that "[t]he regulation of intercollegiate athletics . . . is not a function 'traditionally exclusively reserved to the state.'"\textsuperscript{94} Arlosoroff based this bold statement on Rendell-Baker's conclusion that "'the operation of a school is [not] traditionally an exclusive prerogative of the state.'"\textsuperscript{95} The fact that the NCAA provides a public service was apparently immaterial to the court.

The Arlosoroff court also determined that Lugar\textsuperscript{96} did not compel a different result because there was no suggestion that "public institutions, in contrast to the private institutional members, caused or procured the adoption of the Bylaw."\textsuperscript{97} Thus, Rendell-Baker, and not Lugar, controlled. Accordingly, the court in Arlosoroff held that "'[t]he adoption of the Bylaw was private conduct, not state action' because it was "not as a result of governmental compulsion, but . . . [was adopted in] the common interests of the members.'"\textsuperscript{98}

The obvious problem with Arlosoroff is the court's erroneous rejection of the limiting language of Lugar. That language was designed to curb an unduly restrictive interpretation of state action, and thus allow state action to be found in certain instances where state and private actors bring about the challenged conduct. In Lugar, the Supreme Court determined that the involvement of any state official may constitute state action.\textsuperscript{99} The Court did not count votes to determine whether more state actors than private actors were involved in eliciting or bringing forth the challenged decision, nor even the ratio of state versus private actors involved. Rather, state action was present because some public officials together with other private parties acted to deprive the plaintiff of his property in an attachment action. Indeed, the Arlosoroff court's rationale merely illustrates an additional manner by which the NCAA's actions may be considered state action above and beyond those normally applicable to private entities: if the state representatives voting for a measure outnumber the private representatives, then the state's "coercive" votes may have controlled the actions of the NCAA, imbuing it with the imprimatur of state action.

\textsuperscript{94} Id. (citation omitted).
\textsuperscript{95} Id. (citation omitted).
\textsuperscript{96} See supra note 77 and accompanying text.
\textsuperscript{97} 746 F.2d at 1021.
\textsuperscript{98} Id. at 1022.
Similarly, the court's decision in *Arlosorff* eschews the issue of allowing state institutions to delegate power to the NCAA so that it may achieve objectives state actors themselves are constitutionally foreclosed from pursuing. Pursuant to *Arlosorff*, as long as the “common interests” of state and private NCAA members are congruent, there is no way to challenge any action taken by the NCAA, even if adopted solely on the votes of its state or public members. *Arlosorff* compels the anomalous conclusion that public actors, by binding together with private actors, can take actions the states cannot unilaterally undertake. Although rejection of this principle may depend on the actual vote count on a given NCAA rule, the court's broad language in *Arlosorff* precludes consideration of this point. The result may be the same even when state officials have clearly drummed up support for the “common interests” they may share with private institutions in order to take actions otherwise barred by the Constitution.100

Finally, the *Arlosorff* court failed to consider the D.C. Circuit's compelling “symbiotic relationship” analysis under *Burton*. The court in *Howard University* found that the NCAA and state universities are dependent upon one another for profits or financial support: states pay dues to the NCAA, and the NCAA arranges lucrative television contracts for the state colleges.101 More important, if the state schools do not join the NCAA, they will have no

100 Indeed, some of the reasons for which the NCAA was formed, including the exclusion of all-but-amateur athletes, would be unenforceable were it not for the binding character of the NCAA's action; otherwise, each school would have an incentive to “hire” professional athletes to have a winning program. Only by concerted action can both public and private schools achieve their goal of amateurism in collegiate athletics. However, attempting to reach this goal may involve states in unconstitutional discrimination. Thus, it is precisely the *Arlosorff* court's “common interests” that may create problems!

The *Arlosorff* court did not consider the argument that a state may not contract to do an unconstitutional act. Although state colleges' agreements to abide by NCAA rules may be regarded as permissible when those rules require the state to act in an unconstitutional manner, the state cannot follow the rules, for a “superior constitutional duty [would prevent] the [state] from honoring its contractual obligation . . . .” Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 371 (8th Cir.), cert. dismissed, 434 U.S. 978 (1977). This language is dictum, however, because the court found no constitutional problem. Regardless, as noted in the text, the argument is a good one insofar as a decision to the contrary would appear to allow states to freely contract out of their constitutional obligations whenever they desired. This argument is based on the same rationale that led the Court in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), to enjoin operation of a facially neutral state regulation (mandating private clubs' compliance with their bylaws) when enforcement of the regulation would lead to state involvement with private discrimination. See supra note 70.

101 Although following the Supreme Court's decision in *NCAA v. Board of Regents*,
opponents. As many schools' athletic programs are self-supporting, based primarily on gate receipts and television revenues, the states could not continue to offer athletics as part of their educational program were it not for the efforts of the NCAA. While this "mutual profit" requirement has tripped up many litigants seeking to rely on Burton, it is directly applicable between the NCAA and state schools.

Thus, contrary to the Arlorsorff court's rather cursory statement that recent state action decisions compel a refusal to find state action in the acts of the NCAA, the more persuasive arguments, also consistent with recent opinions, support a finding of state action in NCAA action. The majority of circuits addressing the issue concur, and the Arlorsorff court does not provide good reasons to reverse this longstanding position. For purposes of constitutional adjudication, the NCAA should be considered a state actor subject to the Constitution's controls and prohibitions. Of course, if the NCAA is determined to be a state actor, then no school will be allowed to follow a NCAA rule that is unconstitutional. Uniformity will thus be achieved by a finding that NCAA action equals state action.

On the other hand, even assuming Arlorsorff is correctly decided, the NCAA's drug testing policy may not be unconstitutional. As a practical matter, however, a determination of the NCAA's state actor status may be irrelevant. In other words, if the NCAA is not a state actor, any unconstitutional rules it passes presumably cannot be followed by public colleges because it would compel unconstitutional behavior.\textsuperscript{102} Thus, an unconstitutional rule could only be followed by private colleges. The existence of rules which apply to some, as opposed to all, of its members would undermine the NCAA's primary goal of uniformity. Consequently, it would be in

\textsuperscript{468 U.S. 85 (1984), see supra note 43, the NCAA no longer exclusively arranges football telecasts for NCAA members.}

\textsuperscript{102 Cf. supra note 100 and the Arlorsorff court's failure to deal with the issue of whether the state may contract to undertake an unconstitutional act. As an aside, it makes little difference if you quibble with the assertion that the NCAA should be regarded as a state actor and the early opinions which held that NCAA action constitutes state action. As long as a significant number of NCAA member schools are public state actors, the NCAA must insure that its edicts can legally be followed by these state actors. Since the application of uniform rules is one of the primary requisites to maintain competition, the NCAA must protect its public members. Perhaps the fallacy of earlier opinions holding that NCAA action is state action is the failure to forthrightly address the issue of whether a state actor can contract or be coerced to undertake an unconstitutional act by a "private party" like the NCAA.}
the NCAA's best interest to drop the rule or change it so that all schools may constitutionally follow it. Hence, even a Supreme Court decision that the NCAA is not a state actor is not dispositive of the question of whether drug testing of student-athletes will actually take place. As long as a significant portion of the NCAA's membership is comprised of public colleges, the NCAA's action may be practically circumscribed by constitutional limitations.

3. Private Colleges

Rendell-Baker effectively dismissed the argument that education is a public function and found that the "private" school involved was not a state actor based on any of the other arguments put forward. Therefore, it is virtually certain that private colleges will not be regarded as state actors for state action purposes. Nonetheless, for practical reasons, this should be of little concern in most situations.

The NCAA's primary purpose is to ensure uniformity among member schools with respect to the rules and regulations which govern intercollegiate athletics.\textsuperscript{103} This uniformity rationale suggests that private colleges are bound by the same constitutional limits as state colleges, irrespective of the NCAA's or private colleges' state action status. It is exceedingly difficult to envision an athletic conference existing on a regional or national basis in which private colleges follow one set of rules and public colleges another, based on their state actor status. This would be the result if state actors are subject to constitutional prohibitions while nonstate actors are not.

Thus, the state action status of private schools need only be addressed when they act on their own, outside of the NCAA's authorization or approval. The same uniformity rationale also suggests, however, that private colleges will not take action that public colleges cannot legally take. Private colleges operate in a free market for fans, coaches, students, and, most important, players. Therefore, it is unlikely that private colleges will take actions that are unpopular with student-athletes, if public colleges are not acting similarly. Mandatory drug testing of student-athletes is one good way of ensuring that student-athletes will look even harder at the public colleges that either cannot mandate drug tests or that test in a less intrusive manner.

\textsuperscript{103} See 1986-87 NCAA Manual, \textit{supra} note 10, Const. art. II, § 1, at 9-16. In NCAA v. Board of Regents, the Court recognized that the NCAA does have an interest in maintaining a competitive balance among athletic teams. 468 U.S. at 118.
If private colleges wish to expose themselves to the hazards of a free market in this manner, only then will student-athletes freely choose to submit to a drug testing program. However, one need not be concerned about this situation because given a free choice, the student-athlete has presumably decided to accept testing by attending a private college that requires drug testing. Moreover, it is this freedom of choice, or current lack of freedom of choice, which goes to the heart of the argument that any "consent" by a student-athlete to drug testing obtained in exchange for the student-athlete's scholarship or his right to participate in intercollegiate athletics, is and should be constitutionally objectionable. No one can reasonably object to drug testing when the individual tested freely consents.

Thus, the decision in Rendell-Baker v. Kohn, which effectively places private colleges outside constitutional limits, should be of little concern to student-athletes faced with mandatory drug tests. Because public colleges are state actors, and the NCAA is most likely a state actor, private colleges will only be able to "force" drug tests on student athletes who willingly attend the school knowing that the tests are a part of the price of attendance there, but not elsewhere. The market should work to protect student-athletes from coerced actions as long as there is a choice. The key question then is: Are mandatory drug tests of student-athletes in the public sphere unconstitutional?

II

FEDERAL CONSTITUTIONAL LIMITS ON TESTING STUDENT-ATHLETES FOR DRUGS

It is currently popular to advocate drug testing for student-athletes. In fact, the University of Virginia, a public school which should qualify as a state actor, recently implemented a program that mandates drug testing for its student-athletes. Consequently, University of Virginia student-athletes, and similarly affected student-athletes at other schools where like proposals have been implemented, are offered the "choice" of either submitting

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104 See infra notes 106-15 and accompanying text.
106 See Comment, supra note 28, at 207.
107 See supra notes 38-41 and accompanying text.
108 See infra notes 115-28 and accompanying text.
109 The 110 Division I colleges that have drug education programs (a euphemism for drug testing) or are actively planning them are listed in Appendix B.
their blood or urine samples for drug testing by officials, or not participating in intercollegiate sports.\textsuperscript{110} Of course, in the real world, many student-athletes realize that this "choice" is no choice. For some, athletic endeavors will supply the bulk of their income in life.\textsuperscript{111} Others face the loss of athletic scholarships, often their only avenue to a college education.\textsuperscript{112} Still other student-athletes face losing a portion of their education, that which occurs on the playing field.\textsuperscript{113} Due to the fact that there is no legal limitation on the use of drug-testing results, including but not limited to evidence in a criminal trial, one can argue that student-athletes may be forced, in order to obtain an education, to expose themselves to expeditions for "improper" or illegal drug use.\textsuperscript{114}

Assuming the state action hurdle is overcome, student-athletes may have valid constitutional claims. Of course, the exact claims in any case will depend on the facts involved. Therefore, this section of the Article examines the constitutional questions raised by the University of Virginia's recently implemented drug testing program, since it is representative of many other college programs.\textsuperscript{115} The

\textsuperscript{110} Although blood samples have traditionally been used to test for, among other things, driving while intoxicated, see Schmerber v. California, 384 U.S. 757 (1966) (upholding the constitutionality of a forced blood test to be used as evidence of driving while intoxicated), the University of Virginia proposes to test its student-athletes for drugs by means of urinalysis.

\textsuperscript{111} These players are a distinct minority of the student-athletes due to the limited number of professional jobs available. See Comment, supra note 12, at 224-25 & 225 n.100.

\textsuperscript{112} See the University of Virginia's policy on this matter, discussed infra at notes 130-32 and accompanying text.

\textsuperscript{113} See, Comment, supra note 12, at 223 n.93.

\textsuperscript{114} "Improper," of course, may be defined to include the use of any number of legal drugs. For instance, smoking tobacco (nicotine), drinking coffee or sodas (caffeine), or drinking alcohol may be forbidden during the athlete's season. Testing for the use of this kind of drug raises concerns different from those associated with testing for the use of illegal drugs because the latter involves gathering evidence of the commission of a crime. For instance, testing for the former may implicate privacy issues, but it does not implicate fifth amendment self-incrimination issues. Therefore, the distinction between "improper" and "illegal" drugs must be kept in mind. Moreover, it is interesting to note that none of the programs test for alcohol use, with the exception of the NCAA's testing of rifle shooters, although not because it is a drug subject to abuse, but because it may act as a performance-enhancing sedative that steadies the nerves. See supra note 14. Alcohol abuse may be just as deleterious as improper drug abuse. Indeed, an argument can be made that testing only for drugs serves as a channeling and signalling function which informs the student-athlete that it is okay to abuse drugs as long as the drug of preference is alcohol.

\textsuperscript{115} Of the colleges that have drug testing programs, 85% require the athlete to sign a waiver or consent form, 79% of the programs are mandatory, 82% give the athlete a specific written drug testing policy, 79% do not test the coaching staff, and 94% of the
details of Virginia's program are initially delineated. On these facts, four constitutional arguments appear relevant: the fourth amendment's search and seizure provisions, the fifth amendment's self-incrimination prohibition, and the fourteenth amendment's due process and equal protection clauses. The Article explores each of these concerns in turn.

The University of Virginia Department of Athletics (the Department) adopted its "Drug Education Program" (DEP) "to aid and assist the student athlete at the University." 116 "At the beginning of the academic year," 117 student-athletes attend a DEP orientation presentation. 118 At this meeting, student-athletes are given a copy

colleges test for marijuana and cocaine. All of these features are represented in the University of Virginia's Drug Education Program. See NCAA Survey, supra note 9.

The University of Oregon's "Volunteer Drug Testing" Program represents a substantial departure from the typical program of which the University of Virginia's is representative. Pursuant to the Oregon Volunteer Drug Testing Program, the only athletes tested are those that "volunteer" with "no jeopardy or sanction to those who do not volunteer." Drug testing may still occur, however, for "individualized reasonable suspicion." See Appendix E (University of Oregon Athletic Department Volunteer "Drug Testing Consent Form"). We can only presume that the "voluntary" nature of participation in the Oregon program is due to the erroneous conclusion presented in the Attorney General's opinion that a drug testing program similar to the one at the University of Virginia will not pass constitutional muster. See supra note 21.

116 University of Virginia, Department of Athletics, University of Virginia Intercollegiate Athletics Drug Education Program, 6 n.d. (rule 15.4(c)). See Appendix C. The program lists seven goals:

1) to educate University of Virginia athletes concerning the associated problems of drug use and abuse, 2) to discourage any drug use or abuse by University of Virginia athletes, 3) to identify any athlete who may be using drugs and to identify the drugs, 4) to educate any athlete so identified, regarding such usage as it may affect the athlete and his or her team and teammates, 5) to see that any chronic dependency is treated and addressed properly, 6) to provide reasonable safeguards that every athlete is medically competent to participate in athletic competition, and 7) to encourage discussion about any questions the athlete may have, either specifically or generally, about use of drugs.

Id. at 2.

117 Id. It is unclear whether first year student-athletes are told of the program's existence before they sign a National Letter of Intent binding them to the University.

118 It is noteworthy that the program and testing pursuant to it runs throughout the school year, whether or not the student-athlete is participating in athletic competition at that time. Id. at 3. The pamphlet contains the following language: "Drug use will be deemed a violation of team rules if it is concluded that the use occurred during the season." Id. at 5. Thus, it is unclear whether punishment will follow a positive test result obtained during the student-athlete's off-season. One indication that the same penalties are incurred whether or not a student-athlete is playing a sport at the time is the statement, "Those who at any time experience a positive test can expect further screening to be done on a more regular basis." Id. at 3.
of the athletic department’s pamphlet and a form to sign.\textsuperscript{119} By signing the form, the student-athlete “acknowledge[s] receipt and understanding of the [pamphlet] and provide[s] consent to the administration of the urinalysis testing required by the program and permit[s] release of testing information to a limited group.”\textsuperscript{120} The DEP is structured so that student-athletes “consent” to the program at the beginning of each school year.\textsuperscript{121} The first test is performed during each student-athlete’s annual physical examination administered at the beginning of the academic year.\textsuperscript{122} After the physical exam, “all athletes will be randomly and regularly tested a minimum of three additional times during the academic year.”\textsuperscript{123} Student-athletes whose tests reveal evidence of drug use “at any time” will be tested on a “more regular basis” than others. Moreover, they must “pass” a test before they will be allowed to practice or play in a game.\textsuperscript{124}

Relatively specific actions follow a positive test result, although there is room for discretion by program officials. On the first positive result, a student health physician discusses the finding with the student-athlete and “urges” her to tell her parents. After the second positive result, the student-athlete again talks with the student health physician, who notifies the athletic director and the team coach. Punitive action at this time is completely discretionary: “The restrictions placed on the student at this time are dependent upon the drug identified as well as the assessment of the individual by a counselor.”\textsuperscript{125}

On the third “offense,” the physician, coach and athletic director are again notified.\textsuperscript{126} The student-athlete has “the opportunity to discuss the matter with the Athletic Director and present evidence

\textsuperscript{119} \textit{Id.} at 2.

\textsuperscript{120} \textit{Id.} at 2. The pamphlet does not specify who is included in this group.

\textsuperscript{121} Since the adoption of DEP, the NCAA has also required the student-athlete to sign a consent form to allow NCAA drug testing. \textit{See supra} note 13 and accompanying text and Appendix A. The consent form which University of Virginia student-athletes must sign is attached in Appendix D.

\textsuperscript{122} \textit{Supra} note 116, at 3.

\textsuperscript{123} \textit{Id.} The Department asserts that “precautions will be taken to ensure that all subsequent testing is random (except those tests that follow a positive result), including making selections for testing by computer.” \textit{Id.} at 4. What other forms these “precautions” might take are not specified. Further, note that no maximum number of tests is set in advance for all student-athletes or for student-athletes tested positive. This means that a student-athlete can never be sure when the random tests will cease.

\textsuperscript{124} \textit{Id.} at 3.

\textsuperscript{125} \textit{Id.} at 6.

\textsuperscript{126} \textit{Id.}
of any mitigating circumstances which the student feels is important.\footnote{Id.}{127} While it appears the director has some discretion, the pamphlet's language indicates otherwise: "The third offense will dictate an indefinite suspension of the student from practice and athletic competition and the individual will be asked to return for frequent testing."\footnote{Id.}{128}

\textit{A. Fourth Amendment: Search and Seizure}

The fourth amendment prohibits "unreasonable searches and seizures."\footnote{Id.}{129} A student-athlete may waive this right, however, by consenting to a search or seizure. The University of Virginia's DEP is based on the student-athlete's consent. The voluntariness of that consent is a very real issue. Virginia's DEP program, like that of the NCAA\footnote{See supra note 15.}{130} and other colleges,\footnote{See supra note 115.}{131} conditions the student-athlete's receipt of her athletic scholarship and her eligibility to participate in intercollegiate athletics upon her agreement to consent to drug testing by the institution. If the student-athlete refuses to consent, she runs the risk of losing both her eligibility to compete and her athletic scholarship. The scholarship might be her only financial ticket to the academic world. Thus, the key fourth amendment issue is whether the student-athlete's consent to drug testing, pursuant to a program like DEP, vitiates her right to object to the test. Another possible consideration is whether the "coerced" character of that consent negates the fundamental requirement of consent, its voluntariness. This is the key issue with respect to student-athlete drug testing, and it places the student-athlete in a different legal situation when compared to either employees or professional athletes.\footnote{Although no federal court to date has addressed the legality of college drug testing programs, there is a line of cases developing which delimit when mandatory drug}{132}

\footnote{Id.}{127} One wonders whether the quality of performance rendered on the field is a factor to be considered!
\footnote{Id.}{128} The pamphlet continues: "Whether he or she will be allowed to reenter the athletic program will depend on recommendations of the student health physician and counselor." \textit{Id.} It is clear that this statement leaves some leeway for the officials to decide on an individual basis.
\footnote{Id.}{129} The full amendment reads:

\textit{The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.}

\textit{U.S. Const. amend. IV.}
If a court holds that a student-athlete has waived her fourth amendment right to object to the search by giving her consent in the situation described above, the consenting student-athlete has no legitimate fourth amendment claim. More important, with one notable exception,\(^\text{133}\) it is the recognition and resolution of this issue that pertinent articles consistently ignore.\(^\text{134}\) However, the legality of drug testing of student-athletes cannot be resolved without resolution of this critical issue. Indeed, a determination of the merits of the student-athlete's consent is dispositive of the fourth amendment issues raised in this area.

Unfortunately, the Court has approved "coerced consent" under circumstances closely analogous to the drug testing procedures adopted by the University of Virginia and by the NCAA. No viable theory would allow a student-athlete to circumvent the Court's current policy, which states that the state may mandate such conditions as it chooses when it confers a benefit on a citizen.\(^\text{135}\) Short of testing is presumed legal. See McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985), aff'd, 809 F.2d 1302 (8th Cir. 1987). See also Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985). These three cases upheld urine testing where some particularized cause existed. The following cases also hold that drug testing does not violate the fourth amendment. See Everett v. Napper, 632 F. Supp. 1481 (N.D. Ga. 1986); Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985), 795 F.2d 1136 (3rd Cir.), cert. denied, 107 S. Ct. 577 (1986); Micciotta v. McMickens, 118 A.D.2d 489, 499 N.Y.S.2d 960 (1986); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985). See Edwards, supra note 28.

There is another line of cases developing in the lower courts, however, which holds that drug testing of employees, even if they are involved in hazardous employment, is unconstitutional. See City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985); see also Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986), aff'd, 70 N.Y.2d 57, 517 N.Y.S.2d 456 (1987). However, because athletes are not traditionally viewed as employees or individuals involved in hazardous employment, or generally suspected of particularized involvement with illegal drugs, it would be exceedingly difficult to uphold a mandatory drug testing program based on the authority discussed above.

In all of the above cases (even those finding drug testing permissible), two important factors exist that are lacking in cases involving student-athletes. First, student-athletes are amateurs and the traditional view is that the employer-employee relationship does not exist. But see infra notes 200-06 and accompanying text for a discussion of whether student-athletes should be considered employees. Second, and more important, none of these cases address the issue of the validity of consent to the drug testing by the individual actor and how that impacts the constitutional issues raised by "voluntary" drug testing.

\(^\text{133}\) See Note, supra note 20 and infra note 142.

\(^\text{134}\) See supra note 32.

\(^\text{135}\) Cf. Note, supra note 20, at 849-50. The author concludes that drug testing at public colleges is impermissible as an unconstitutional condition. "An unconstitutional condition exists when a person must forego the exercise of a constitutional right in order
the Court overruling itself on the consent issue, no other fourth amendment issues need be raised.

1. Consent

Resolution of the first issue, consent to test, is imperative, for if it is found that the complaining student-athlete has consented to a search or seizure, the inquiry is over. In effect, the consent requirement shifts the issue from a determination of the merits of drug testing to the narrow issue of the validity of consent. Thus, the nature and efficacy of consent in this unique environment between the student-athlete and the college is of critical importance.

Unfortunately for the student-athlete, the Supreme Court has unequivocably stated that, "a search authorized by consent is wholly valid." 136 In Schneckloth v. Bustamonte, 137 the Supreme Court described the applicable standard for consent:

We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. 138

Because this is necessarily a fact-based inquiry, it is difficult to treat the subject in the abstract. Thus, it is necessary to examine the various ways in which the DEP can be challenged in order to determine how the consent issue will be resolved.

Of course, a student-athlete can obtain an athletic scholarship, and thereafter refuse to sign the consent form in the fall, and thus take the chance that the athletic department will not prevent him from participating in sports. 139 The Department's pamphlet does not address the actions that will be taken if a student-athlete refuses to obtain a government benefit." Id. at 826-27 (citing Nicholson, Political Campaign Expenditure Limitations and the Unconstitutional Condition Doctrine, 10 Hastings Const. L.Q. 601, 602 (1983)). The Note concludes that, "It might be argued that requiring drug testing as a condition for receiving a scholarship is an unconstitutional condition." Id. at 827. Cf. infra notes 136-55 and accompanying text.

137 Id. at 218.
138 Id. at 248-49.
139 It is assumed that because of possible NCAA penalties, the Department will re-
to consent to the testing. This is a perfectly sensible “position” for the Department to adopt, for it would unduly clarify the issue of “voluntary” consent. If student-athletes are told that their refusal to consent will result in a denial of participation, the state’s voluntariness argument is much weaker. On the other hand, if student-athletes are told that they may refuse to consent with impunity, it is hard to imagine a student-athlete who would consent to the testing.\textsuperscript{140} Therefore, the Department does not mention the consent issue. However, one can assume that the Department will not let the student-athlete who withholds her consent participate in intercollegiate athletics.\textsuperscript{141} The Department’s stand can be summarized as follows: without a test the athlete cannot play, and if she cannot play, she will not get a scholarship.\textsuperscript{142} Moreover, it appears the Department is totally within its rights in requesting the consent of the student-athlete as a precondition or continuing condition of both the receipt of an athletic scholarship and to maintain eligibility to participate in intercollegiate (or even intramural) athletics.

In \textit{Wyman v. James},\textsuperscript{143} the Court challenged a New York Aid to Families with Dependent Children (AFDC) requirement that denied benefits to any program beneficiary who refused a caseworker “visitation” into her home. The AFDC told the mother, James, that she would lose her benefits if she refused to consent.\textsuperscript{144} James

\textsuperscript{140} More important, if the student-athlete can refuse to consent without sanction, the student-athlete’s freedom of choice would negate the “coercive” nature of consent. In this freedom of choice environment, the student-athlete’s consent would, in all cases, be deemed voluntary. \textit{See supra} notes 103-05 and accompanying text. Virginia’s program would, in reality, be very similar to Oregon’s Volunteer Drug Testing Program discussed at \textit{supra} note 115.

\textsuperscript{141} Indeed, the student-athlete consent form states:

\begin{quote}
It is my understanding that signing this consent form is a prerequisite to participation in intercollegiate athletics at the University of Virginia. I further understand that I may refuse to sign this consent form, but as a consequence, I must forego participation in intercollegiate sports at the University.
\end{quote}

\textit{See} Appendix D-1.

\textsuperscript{142} Another possible method for challenging DEP is for a student-athlete to consent “under protest.” Under this alternative, the student-athlete could challenge the program and continue to participate in sports, arguing that her consent was not voluntarily given. This is probably the best method for attacking the DEP, for in all likelihood, the litigation will take well over the student-athlete’s four years of college to complete.

\textsuperscript{143} 400 U.S. 309 (1971).

\textsuperscript{144} \textit{Id.} at 314.
brought a suit for declaratory and injunctive relief, alleging that the visitation consent requirement violated her fourth amendment rights.\(^{145}\) Justice Blackmun held that the "consent" requirement did not violate the fourth amendment "for the seemingly obvious and simple reason that we are not concerned here with any search . . . in the Fourth Amendment meaning of that term."\(^{146}\) Though Justice Blackmun claims the reasons are obvious, his opinion in *Wyman* includes additional reasons why there was no fourth amendment problem. Foremost among them was the absence of compulsion. His language is worth quoting in full:

> We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

...What Mrs. James appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms, and to avoid questions of any kind.\(^{147}\)

The parallels between the facts in *Wyman* and those involved in a student-athlete's challenge to DEP cannot be ignored. Not only the search, but the receipt of benefits conditioned upon certain actions by the beneficiary, makes these two situations analogous.

One crucial factor, however, distinguishes the *Wyman* case: the Court repeatedly differentiated the home visitation from a search for criminal evidence; rather, the visitation is an informational interview necessary for the administration of welfare laws benefiting the child.\(^{148}\) Any evidence of criminal activity would be secondary to the primary motive for the interview. The DEP's search, on the other hand, could be aimed directly at collecting evidence of criminal behavior.\(^{149}\) The Department may claim, however, that it merely seeks to "help" the student who has a drug problem.\(^{150}\) Despite the true nature and material of the drug testing program, giv-

\(^{145}\) *Id.* at 315.
\(^{146}\) *Id.* at 317.
\(^{147}\) *Id.* at 318-19, 321-23.
\(^{148}\) *Id.* at 323.
\(^{149}\) Urinalysis is considered a search for purposes of the fourth amendment. *Cf.* Schmerber v. California, 384 U.S. 757 (1966) (blood test for alcohol content is a search).
\(^{150}\) See supra note 116 and accompanying text.
ing credence to this claim would allow the states and the police to engage in any search on the pretense of rehabilitating the victim. Hence, one must view the stated objectives of the DEP cynically, keeping in mind the ultimate result.

However, given the sweeping language in the Wyman opinion, this distinguishing feature of collecting criminal evidence offers scant consolation to student-athletes:

The home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding. If the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect. And if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow, then . . . that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct.151

The chance discovery of criminal evidence in a DEP search would similarly be a “routine and expected fact of life.”152

One other point may serve to distinguish Wyman: the Court emphasized the significance of the fact that “Mrs. James received written notice several days in advance of the intended home visit.”153 Presumably, the notice was important because it gave her sufficient opportunity to remove evidence of crime from her home. The DEP gives no such specific notice. Besides the general knowledge that she is subject to a search at any time during the school year, the student does not know the specific date when the search will take place. The Court will likely hold, however, that the general notice affords sufficient warning to students to refrain from illegal activity during the time for which they have “voluntarily” given consent to search.154

151 Wyman v. James, 400 U.S. 309, 323 (1971) (citation omitted). The Court refused to rule, however, on whether the evidence so found could be used in the trial. Id.
152 Id.
153 Id. at 320.
154 In most instances, the state can neither force an individual to choose between the exercise of two constitutional rights nor can it use a classification that restricts the exercise of a constitutional right. Thus, if the student-athlete has a right to an education, a component of which is her participation in sports, the state could not force the student-athlete to trade off this right to avoid an unreasonable search. However, in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court held that education is neither a constitutional right nor a fundamental interest. Id. at 37. Thus, the state, in compelling consent, does not deny access to a fundamental right in violation of another. See infra note 155.
In short, the *Wyman* Court's disregard for the usual meaning of the term "consent" appears to have foreclosed a challenge to the Department's right to require "consent" to a warrantless search for drugs. If the student-athlete wishes to engage in sports, she must consent to the searches. Once she consents, the search is "wholly valid." Since the state may place any condition upon the receipt of any benefits, including athletic scholarships, a student-athlete may not object to the "consent" requirement.\(^{155}\) The result may be that drug tests will "coerce" student-athletes to consent to searches they would never accept but for the exchange of an athletic scholarship and the eligibility to play intercollegiate athletics.

B. Fifth Amendment: Self-Incrimination

The fifth amendment states in pertinent part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."\(^{156}\) A student-athlete invoking this constitutional limit would argue that the state's requirement that a student submit to urine tests to determine the presence or absence of drugs is, in reality, compelling her to be a witness against herself. It is immaterial that the Department official taking the sample is not motivated by criminal prosecution. The damage is done once the sample is taken because the results of the test are admissible against her in a subsequent criminal trial.

The state could argue that a positive test will rarely result in criminal prosecution. The converse is true, however, because a few, highly publicized convictions would deter illegal conduct, thus furthering one of the purposes for testing student-athletes.\(^{157}\) Further, the athletic staff, no longer having an interest in the athlete after she is barred from playing, will likely turn over the test results to other state officials responsible for criminal prosecutions. In any event,

\(^{155}\) One commentator suggests that requiring a drug test as a precondition to participation in collegiate athletic programs is an unconstitutional condition: the individual's privacy interest outweighs the college's interest in discipline. Note, *supra* note 20, at 849. The author of the Note relies heavily upon New Jersey v. T.L.O., 469 U.S. 325 (1985), where the Court upheld the drug search of a junior high school girl's purse in order to maintain order and discipline in the public school. He argues that the need for order and discipline in high school may not apply in the college sphere, "since nearly all college students are adults and thus are presumed to be able to conduct themselves in a mature manner on campus." Note, *supra* note 20, at 848. Apart from the speciousness of that argument, the author of the Note fails to discuss and analyze the relevant fact that the student in *T.L.O.* gave no consent.

\(^{156}\) U.S. CONST. amend. V.

\(^{157}\) See *supra* note 116 and accompanying text.
upon what legal basis could school officials deny the state’s valid request for the results of the drug test?

Reliance on the fifth amendment as a weapon to be used against student-athlete drug testing is doomed to fail on several counts, despite its apparent logic. First, as discussed previously, the Supreme Court will not find compulsion in a drug testing program where the student-athlete is offered the “choice” of either participating in sports and undergoing testing or not participating at all. To the Court, compulsion connotes lack of any choice whatsoever. Second, the fifth amendment privilege only applies to “testamentary” and not to “physical” evidence. These two shortcomings are discussed separately.

1. Testamentary or Physical Evidence

The fifth amendment protects a person from being compelled to be “a witness against himself.” In which situations does a person act as a witness so as to trigger fifth amendment protection? Over time, a testamentary/physical evidence distinction arose to define this category.

In Schmerber v. California, the Court held the results of a blood alcohol test admissible under the fifth amendment. The Court distinguished testimony and physical evidence. “The privilege is a bar against compelling ‘communications’ or ‘testimony,’ but . . . compulsion which makes a suspect or accused the source of ‘real or physical evidence’ does not violate [the fifth amendment].” To hold otherwise, the Court argued, would be to prohibit police lineups or fingerprinting, or to “forbid a jury to look at a prisoner and compare his features with a photograph in proof.”

The Court is correct in allowing police lineups, for to deny the prosecution any means of linking the identity of a suspect to the identity of the criminal perpetrator would render proof of guilt impracticable. However, while this argument has superficial ap-

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159 U.S. CONST. amend. V.


161 Id. at 764.

162 Id. at 763 (quoting Holt v. United States, 218 U.S. 245, 253 (1910) (Holmes, J.)).

163 Of course, eyewitnesses could testify that the two are the same person, but the drama of the courtroom identification would be lost and probable cause leading to arrest harder to prove.
peal, it ignores the relative degree to which an accused's personal interests are at stake. It is one thing to appear in a lineup or in court where everyone can see a person's features: there is no intrusive or invasive nature to the "search." It is another matter entirely, however, to require that a person submit to a sampling of their blood or urine for testing purposes. Nonetheless, the Court held that a blood test to determine alcohol content produces physical evidence which is not privileged from compulsion for use in a criminal case. The question then arises: what constitutes compulsion?

2. Compulsion

Courts often interpret a word to mean something other than its ordinary meaning. Such is the case with the word "compel." The dictionary definitions of "compel" are "to drive or urge forcefully or irresistibly (poverty compelled him to work)" or "to cause to do or occur by overwhelming pressure (exhaustion compelled their surrender)." If the standard selected by the Supreme Court reflected either of these meanings, there is little doubt that denying participation in intercollegiate athletics to those who refuse to submit to testing is compulsion negating the concept of consent. Unfortunately, this is not the Court's standard.

In Schmerber, Justice Brennan found compulsion where a police officer directed a doctor, in spite of Schmerber's objections, to take blood from him after he was arrested for drunk driving. This is perhaps the clearest example of compulsion—the forcible removal of blood from the body over the target's objections. Nonetheless, the Court, basing its conclusion on the testimentary/physical distinction, found no fifth amendment violation.

In South Dakota v. Neville, the Court reaffirmed Schmerber and extended its "compulsion" rationale. Pursuant to South Da-

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164 Surprisingly, the Court did advert to the inviolability of the person. See Schmerber, 384 U.S. at 762. Why it did not enforce that inviolability remains unclear.
165 Id. at 764.
166 WEBSTER'S NEW COLLEGIATE DICTIONARY 229 (5th ed. 1974).
167 Participation in intercollegiate athletics is often a prerequisite for a professional sports career and often the only way one can afford to attend college. Given the high cost of post-secondary education, an athletic scholarship can make a significant difference in the student-athlete's ability to attend school. As other forms of student aid are limited, the athletic scholarship becomes increasingly important.
169 Id. at 761.
kota's "implied consent" law,\textsuperscript{171} drivers in that state are "deemed to have consented to a chemical test" for blood alcohol levels if arrested while driving.\textsuperscript{172} The state grants the driver the right to refuse the test, but with two conditions: the state may suspend her license for one year and may admit her refusal to take the test into evidence in a drunk driving prosecution.\textsuperscript{173} The Court concluded that, because there was no compulsion, the lower court had properly admitted into evidence her refusal to take the test. Thus, under \textit{Schmerber}'s testamentary/physical distinction, the state can order a driver to undergo a blood test. Moreover, offering the option of refusing with the attendant penalties does not make the action less legitimate.

The significance of the \textit{Neville} decision becomes clear if we view the \textit{Schmerber} fifth amendment inquiry as a two-part test. First, was compulsion used? Second, was the evidence testamentary or physical? In essence, \textit{Neville} collapsed the \textit{Schmerber} two-part inquiry into a one-part analysis: Was the evidence taken testamentary or physical? If the evidence is physical, then the state may legally take it. If the state can legally take evidence, then it may offer the "choice" of either submitting to the test or refusing it with certain conditions. Those conditions often require the relinquishment of her constitutional right not to have testamentary evidence taken from her. Therefore, \textit{Neville} effectively eliminates the compulsion aspect of the test.

Another decision, \textit{Selective Service System v. Minnesota Public Interest Research Group},\textsuperscript{174} exhibits this same type of rationale in a case directly affecting students. Congress required federal student financial aid applicants to indicate, on the financial aid application, compliance with the draft registration rules. If the student was required to sign up for the draft, but had failed to do so, he could be denied financial aid and also be held criminally liable for his failure to register.\textsuperscript{175} Among other claims, students challenged this rule as compelling self-incrimination in violation of the fifth amendment. Chief Justice Burger found no impermissible compulsion in the statutory scheme.\textsuperscript{176} The state did not require the student to apply for financial aid. To receive financial aid, the student need only register

\textsuperscript{171} S.D. CODIFIED LAWS ANN. § 32-23-10 (Supp. 1982).
\textsuperscript{172} \textit{Neville}, 459 U.S. at 559.
\textsuperscript{173} \textit{Id.} at 560.
\textsuperscript{174} 468 U.S. 841 (1984).
\textsuperscript{175} \textit{Id.} at 856.
\textsuperscript{176} \textit{Id.}
and apply.\textsuperscript{177} Thus, only a student's continuing failure to register and truthfully apply for financial aid would constitute a disclosure of illegal conduct. This meant that there was no compelled self-incrimination.

Selective Service applied to student financial aid the same rationale that underlies Wyman. The Court consistently holds that the state may attach conditions to a grant of a benefit such as a scholarship.\textsuperscript{178} Under this variant of the implied consent theory, a statutory beneficiary may waive virtually any constitutional right in exchange for the privilege of driving an automobile for a year,\textsuperscript{179} for obtaining college education funds,\textsuperscript{180} or even for obtaining funds for food and shelter.\textsuperscript{181}

Although it may strain credulity to argue that these situations involve no compulsion, the Court has so held. The decisions discussed above indicate that the Court could easily dispense with the "compulsion" issue and the fifth amendment in the drug testing scenario. Thus, as long as the Court conditions participation on submitting to testing and finds that such a test involves physical and not testamentary evidence, fifth amendment self-incrimination claims will also fail.

C. Fourteenth Amendment: Due Process

The fourteenth amendment's procedural due process guarantee\textsuperscript{182} may provide a legal basis for a student-athlete challenge to DEP. To apply the guarantee, the student must first be deprived of an interest within the amendment's "liberty" or "property" protections. Thus, these issues will arise at the enforcement stages of DEP: the initial denial of participation upon refusal of consent,\textsuperscript{183} any (discretionary) restrictions placed on the student-athlete after the second positive test result, and the indefinite suspension from practice and competition after the third positive test.\textsuperscript{184} If a fourteenth amendment interest has been denied, the inquiry shifts to what process is constitutionally due.

\textsuperscript{177} Id.
\textsuperscript{178} See supra notes 143-56 and accompanying text.
\textsuperscript{180} See Selective Service Sys., 468 U.S. 841.
\textsuperscript{181} See Wyman v. James, 400 U.S. 309 (1971).
\textsuperscript{182} U.S. CONST. amend. XIV.
\textsuperscript{183} See supra notes 139-42 for a discussion of the possible sanctions which flow from the student-athlete's refusal to consent to the test.
\textsuperscript{184} See supra notes 126-28 and accompanying text.
The fourteenth amendment due process claim, however, is not likely to reach the second inquiry. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that education is not a fundamental interest or right within the meaning of the fourteenth amendment. A claim that a student, dependent on her athletic scholarship, is denied an education upon revocation of her scholarship will therefore fail under the due process clause.

The only liberty interest the student-athlete could successfully assert would be based on any damaging publicity suffered upon suspension from play. If a charge made by the state upon suspension might “seriously damage the student’s standing with fellow pupils . . . as well as interfere with later opportunities for higher education and employment,” then she has a due process right to a hearing to refute the charges. As long as the Department maintains confidentiality throughout the process, however, no liberty interest is implicated.

D. Fourteenth Amendment: Equal Protection

An individual may challenge a regulatory or statutory scheme under the equal protection clause of the fourteenth amendment in two ways: on its face or in its application. This section focuses on potential equal protection challenges to DEP’s facial validity.

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186 See *supra* notes 154-55 and accompanying text.
187 *But cf.* Goss v. Lopez, 419 U.S. 565 (1975) (finding a state constitutional right to education and applying a due process analysis to the resulting liberty and property rights). *See also* Parish v. NCAA, 506 F.2d 1028, 1034 n.17 (5th Cir. 1975) (appellants “wisely abandoned” their due process claim); Williams v. Hamilton, 497 F. Supp. 641, 645 (D. N.H. 1980) (dictum that New Hampshire courts have not determined that participation in intercollegiate sports is a property right); *cf.* Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972) (dictum that “big time” college athletics often lead to multimillion dollar contracts); Regents of the Univ. of Minn. v. NCAA, 422 F. Supp. 1158, 1161 (D. Minn. 1976), rev’d on other grounds, 560 F.2d 352 (8th Cir. 1977) (citing dictum in *Behagen* that athletic participation is a property right); Hall v. University of Minn., 530 F. Supp 104 (D. Minn. 1982) (court issued an injunction compelling plaintiff basketball player’s admission to college program based, in part, on the court’s belief that his right to play professional basketball would be impaired if he were denied an opportunity to play college ball. Only if he were admitted to a degree granting program could he play college basketball). *See also* Comment, *supra* note 20, at 1229 (concludes that college athletes have no liberty or property interest in light of current case law).
188 Goss, 419 U.S. at 575.
189 *Id.* at 579.
191 *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).
Traditionally, there are two levels of equal protection scrutiny. Where a challenged classification separates out a suspect class or a fundamental interest for less favorable treatment, the court engages in strict scrutiny. Where neither a suspect class nor a fundamental interest is at issue, the court uses a minimum rationality test. Strict scrutiny most often results in a plaintiff victory, while the state usually wins under the mere rationality standard. Thus, the court actually decides the outcome once it chooses the category of review.

Two recent Supreme Court cases involving education, however, may indicate a trend towards middle level scrutiny for claims involving impairment of an educational interest. San Antonio School District v. Rodriguez contains the genesis of the new middle-tier scrutiny. The Court suggests a higher level of scrutiny if the challenged scheme "occasioned an absolute denial of educational opportunities to any of its children," but not where, as in that case, "only relative differences in spending levels are involved." The Court applied the rational relation test and upheld the school funding scheme at issue.

In Plyler v. Doe, the Court struck down a Texas statute that denied public education funding for children of illegal aliens. After reviewing the two-tiered system, Justice Brennan stated:

Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Thus, although neither a suspect class nor a fundamental right was at issue, the combination of classifications falling just short of constitutionally protected status led the Court to adopt a higher standard for governmental purposes. Previously, the law had to be rationally related to a "legitimate" governmental goal. Plyler v. Doe now requires a rational relationship to a "substantial" governmental goal. The Court declared the law unconstitutional as not ration-

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195 Id. at 37.
197 Id. at 221 (citation omitted).
ally related to a substantial state goal.\footnote{Id. at 224.}

This middle level of scrutiny is a student-athlete's best bet for winning an equal protection challenge, as neither a suspect class (athletes are not disadvantaged by the system nor are they traditionally discriminated against) or a fundamental interest (education is not fundamental) is at stake. It is still too soon to tell, however, what combination of factors will lead the Court to apply its new \textit{Plyler} middle-tier analysis in education cases. Middle-tier equal protection cases to date are limited to education at the elementary and secondary school levels. The Court emphasized the importance of learning to read and communicate in making one's way in society.\footnote{Id. at 222.} These underlying rationales are less persuasive at the college level. Nonetheless, the emergence of a new tier of equal protection scrutiny brings some hope to student-athletes who refuse to consent to drug testing and who, as a result, are suspended from athletics or lose their scholarships.

Part II examined many of the concerns implicated by mandatory drug tests of student-athletes. State colleges, such as the University of Virginia, represent state actors who must act within the bounds set by the Constitution. However, because the Court has taken an extremely narrow view of coercion as applied to consensual waivers of fourth and fifth amendment rights, the allegedly coercive effect of the DEP will not likely receive judicial recognition under either amendment. Fifth amendment claims suffer the further limitation that urinalysis tests produce physical, not testamentary evidence. A student may perhaps invoke the fourteenth amendment's procedural due process right in certain narrow circumstances, but the efficacy of the remedy remains doubtful. Finally, an emerging trend towards a middle-tier analysis of equal protection claims related to substantial deprivations of education has not as yet been applied at the college level.

\section*{III}
\textbf{Nonconstitutional Issues Raised By Testing Student-Athletes For Drugs}

Although drug testing may be legal pursuant to current federal constitutional law, students may also challenge it for reasons apart from the federal Constitution. While many commentators and
scholars attack drug testing based on constitutional law, they fail to explore alternative avenues which may protect the student-athletes' "rights."

Student-athletes have the same rights which are available to other members of society, such as laborers and government employees. Hence, student-athletes must broaden their attack on drug testing by raising issues that encompass all similarly situated individuals. This may prove advantageous to student-athletes because similarly situated individuals are not meekly acquiescing to drug testing. This section analyzes and applies the two most promising challenges to drug testing: attacks under labor law and state constitutional rights.

A. Labor Law

Although the Supreme Court has not directly addressed the issue, a valid argument can be made that student-athletes are employees and therefore should be treated as such. In other words, the scholarship or the grant-in-aid that the student-athlete receives is actually compensation for his services. The student-athlete receives an annually renewable scholarship that may be revoked if the student-athlete becomes ineligible to compete or refuses to compete for personal reasons. The Court accepted this contract theory when it found that the student-athlete is an "employee" of the college for the purpose of determining whether she is entitled to workman's

200 Indeed, many of the articles analyzing this issue represent attempts to somehow come to the "right" result that drug testing is illegal. See, e.g., Note, supra note 20; Comment, Violating the Athlete's Rights, supra note 20; Lock & Jennings, supra note 20; Scanlan, Playing the Drug-Testing Game: College Athletes, Regulatory Institutions, and the Structures of Constitutional Argument, 62 IND. L.J. 863 (1987).

201 Alternatively, if student-athletes have some unique status which somehow immunizes them from drug testing, those facts should be articulated. We can think of no reason to treat student-athletes differently from similarly situated individuals.

202 The relationship between the student-athlete and institution has been analyzed by the courts in some cases on a contract theory. The institution can require the student-athlete to meet certain requirements. For example, the student-athlete must maintain academic eligibility, attend practices, compete in games, and follow the rules and regulations of the institution, the allied conference (if applicable), and the NCAA. Therefore, both parties to the 'contract' are required to perform certain duties creating 'consideration.' When any integral part of the agreement is not fulfilled, or if one or both parties are unable to comply with the agreed-upon terms, the courts have allowed the institution to rescind or revoke the scholarship.

R. BERRY & G. WONG, supra note 8, § 2.15-1(a).

compensation benefits. Finding that a contract exists between the student-athlete and the college may be counterproductive, however, because such a decision destroys the student-athlete's amateur status.

If an employer-employee relationship is established between the student-athlete and her college, all of the issues and arguments used against an employer's drug testing of her employees are also applicable. In addition, if the employer is a public university or college, the issues raised and addressed are broader still.

Any employee, as defined by the National Labor Relations Act, which includes athletes, may organize for the purposes of collective bargaining. Although the issue arises concerning which group of athletes comprise an appropriate bargaining unit, organizers may set up a nation-wide group or unit similar to the structure utilized by professional athletes. The idea of student-athletes organizing a union to represent their interests is not as far-fetched as might first appear. Both student-athletes and administrators of college athletic programs take seriously the possible unionization of student-athletes.

If student-athletes establish a union and a collective bargaining process, they can legally insulate themselves from any employer's requirement of employee drug testing. Drug testing would most likely be subject to mandatory collective bargaining, and thus nego-

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204 See Van Horn v. Industrial Accident Comm'n, 219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1963); University of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953); cf. J. Weisstart & C. Lowell, supra note 158, § 1.09 (scholarships should be viewed as a conditional gift or an educational grant to avoid characterizing the relationship as an employer-employee relationship).

205 See supra note 28.

206 See supra note 29.


208 Section 7 of the National Labor Relations Act grants to employees the right to form labor organizations, to bargain collectively through these organizations (unions) regarding the terms and conditions of employment, and to engage in concerted activities in support of these rights. 29 U.S.C. § 157 (1982); W. Gould, A Primer on American Labor Law 37 (2d ed. 1986).

209 See W. Gould, supra note 208, at 40-41; Matter of Chrysler Corp., 76 N.L.R.B. 55, 58 (1948) ("[E]mployees with similar interests shall be placed in the same bargaining unit.").

210 This raises an interesting question: Should there be a union for each sport, one union for all athletes in revenue producing sports, e.g., football and basketball, or one for all student-athletes that receive scholarship (pay) in exchange for their services?

211 See Whitford, NCAA Union: No Pay, No Play?, Sport Magazine, Jan. 1987, at 14 (Dick DeVenzo, a former academic all-American guard at Duke is trying to organize a college players union.).
tiated among the affected parties. As such, student-athletes presumably have the same rights as professional athletes and other employees to negotiate with the employer (presumably the NCAA would act as the bargaining agent for the colleges which comprise the multi-unit employer) over the need for (or type of) drug testing program. Thus, constitutional protection and constitutional questions would be largely irrelevant. The student-athletes would use labor law, not constitutional law, to protect their rights against allegedly invasive drug testing.

B. State Law

In *Levant v. NCAA*, a California court, basing its decision on the California Constitution, held that the NCAA’s plan to test a female swimmer for drugs violated her right to privacy. This landmark decision established the principle that NCAA rules are subject to review pursuant to each state’s constitution. *PruneYard Shopping Center v. Robins* established that a state may, on the basis of state law, grant individuals more rights than those provided by the Constitution. In other words, the Constitution establishes the minimum amount of individual rights enforceable under federal law. However, it does not prohibit state constitutions and laws from granting individuals additional rights.

One cannot overestimate the importance of this doctrine. Although current federal constitutional law might fail to shield the student-athlete from drug testing, each state may decide the issue

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212 R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 496 (1976) (Collective bargaining is a mutual obligation to “confer good faith with respect to wages, hours, and other terms and conditions of employment.”). 29 U.S.C. § 158(d) (1982). The issue would be whether drug testing is a term or condition of employment.

213 See *supra* notes 28-29 and accompanying text.


216 The court issued a preliminary injunction preventing the NCAA from enforcing drug testing against Levant; see Reporter’s Transcript of Proceedings; *Levant v. NCAA*, No. 619209 (Cal. Super. Ct. Mar. 13, 1987).

217 The NCAA did not appeal, apparently for fear of setting a negative precedent. *See supra* note 19.

218 447 U.S. 74 (1980).

based on an interpretation of its own laws and constitution. If the highest courts of enough states (perhaps one will suffice) find that drug testing violates state constitutional law, the lack of uniformity in rules among competing colleges may force the NCAA, private, and public colleges to eliminate such tests. If an appellate court in an important state like California enforces the *Levant* opinion and follows the uniformity rationale, then courts may halt voluntary drug testing of the student-athlete.  

Thus, perhaps drug testing opponents are using the wrong court or venue. Given the Supreme Court's opinions in this area, state court may be the appropriate place to attack the legality of drug testing.

**Conclusion**

This Article presents a realistic picture of the present and future rights of student-athletes. Due to an artificial view of what constitutes consent, federal courts will continue to allow drug testing of student-athletes, conditioning receipt of an athletic scholarship and the athlete's eligibility to compete in intercollegiate athletics upon consent to the test. This consent vitiates a student's otherwise powerful constitutional objections, including, but not limited to, the fourth amendment's prohibition on warrantless searches, the fifth amendment's prohibition on compelling self-incriminating testimony, and the fourteenth amendment's guarantee of equal protection pursuant to the law.  

Until the right to an education, and the related right to participate at an educational institution, is treated as either a fundamental or protected right, the student-athlete may have to choose between urinating in a bottle or participating in intercollegiate athletics. In the absence of a constitutionally protected right to take part in sports, the student-athlete may be required to submit to drug testing. The fact that participation in intercollegiate sports may be the only means of receiving a higher education or of earning a lucrative

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220 See supra notes 115-28 and accompanying text.
221 We chose not to address certain constitutional claims raised by student-athletes regarding the penumbral right of privacy protected by the ninth and other amendments, although we believe consent would likewise vitiate any constitutional privacy claims. In addition, we did not address idiopathic legal reasons which may prevent a state from enforcing a drug testing program. For example, the Oregon Attorney General raises the interesting, but novel question that any drug-testing program implemented by the University of Oregon may be invalid because it may not be expressly authorized by appropriate legislation. Oregon Attorney General Opinion, supra note 21.
living playing professional sports is irrelevant to the determination of whether the student-athlete has a protected constitutional interest. In this situation, form does triumph over substance. Unless you can fit your “right” into a previously designated box, no matter how compelling your interest, the Constitution will not provide protection.

All is not lost for the student-athlete, however. Although the federal Constitution provides no relief, students may use state constitutional guarantees to protect privacy and other rights of student-athletes and similarly situated individuals. If enough states protect the rights of student-athletes by resorting to an interpretation of the relevant state constitution, the need for uniformity may dictate that all institutions comply. In this situation, one state’s rules protecting student-athletes may have the unintended effect of protecting the rights of all.

Finally, if public law fails to protect student-athletes’ rights, a student may resort to private law. If student-athletes band together and form a union, labor law may provide a powerful vehicle for protecting their rights. In this era of privatization, perhaps this is the ultimate resolution: a consensual agreement between management (the universities and colleges) and labor (the student-athletes) that drug testing will either be completely prohibited or permitted pursuant to conditions agreed upon by the parties. Ironically, the development of constitutional law may push amateur student-athletes to form a union, forcing the resolution of an issue that has vexed scholars and courts for many years: Are student-athletes employees? The answer may be “yes,” with all of its attendant ramifications.\textsuperscript{222} However, that is the subject of another article.

\textsuperscript{222} The effect that the formation of a union for athletes would have on other issues is beyond the scope of this Article. However, there would clearly be tax, labor, and workman’s compensation issues that would transcend the issue of drug testing of student-athletes.
Appendix A

UNIVERSITY OF OREGON ATHLETIC DEPARTMENT
VOLUNTEER DRUG TESTING
CONSENT FORM

I hereby consent to volunteer drug testing. In doing so, I accept the protocol and the sanction system in the University of Oregon Drug Testing Policy.

There will be no jeopardy or sanction to those who do not volunteer. Drug testing may still occur, however, for individualized reasonable suspicion.

I volunteer and agree to be drug tested for all of the substances as stated in the NCAA Drug Testing Banned List.

Once I have volunteered, I understand that I can withdraw from volunteer testing only prior to any positive test. Once tested positive, I cannot withdraw my consent for retesting, without suffering the consequences described in the policy, which may eventually include dismissal from the squad and loss of scholarship.

_____________________________  ______________________________
Name (printed)                    Name (signature)

______________________________
Birthdate

______________________________
Sport
III. Student-Athlete Consent Form

Each year, student-athletes will sign a consent form demonstrating their understanding of the NCAA drug-testing program and their willingness to participate. This consent statement is part of a total Student-Athlete Statement required of all student-athletes prior to participation in intercollegiate competition during the year in question. Failure to complete and sign the statement annually shall result in the student-athlete's ineligibility for participation in all intercollegiate competition.

The text of the Student-Athlete Statement follows:

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
STUDENT-ATHLETE STATEMENT
1986-87 Academic Year

Name of Institution

1. ______________________, certify the following:
2. I have administered this statement after providing the student-athlete: (1) a copy of the NCAA Rules and Regulations Information Sheet; (2) an opportunity to ask any questions and receive answers thereto with regard to NCAA regulations and the official interpretations thereof in the NCAA Manual; and (3) an opportunity to review the actual regulations and the official interpretations thereof in the NCAA Manual; finally, I am not aware of any additional information concerning the student-athlete that would result in ineligibility under NCAA regulations on the part of the student or this institution.

Signature of Director of Athletics  Date

Signature of Head Coach  Date

NOTE: The institution should retain this completed form in its files until one calendar year after the date on which the consent is signed.

APPENDIX A-1
student athlete’s eligibility for intercollegiate athletics under NCAA legislation is exhausted.

Drug-Testing Consent

In the event I participate in any NCAA championship event or in any NCAA-certified postseason football contest in behalf of an NCAA member institution during the current academic year, I hereby consent to be tested in accordance with procedures adopted by the NCAA to determine if I have utilized, in preparation for or participation in such event or contest, a substance on the list of banned drugs set forth in Executive Regulation 1-7(b). I have reviewed the rules and procedures for NCAA drug testing and I understand that if I test “positive” I shall be ineligible for postseason competition for a minimum period of 90 days and may be charged thereafter upon further testing with the loss of postseason eligibility in all sports for the current and succeeding academic year. I further understand that this consent and my test results will become a part of my educational records subject to disclosure only in accordance with my written Buckley Amendment consent and the Family Education Rights and Privacy Act of 1974.

Signature of Student Athlete  Date

Signature of Parent or Guardian (required only if student athlete is a minor)  Date

IV. NCAA Banned Drugs List 1986 (With Examples)

A. Psychomotor stimulants:
- amphetamine
- benzphetamine
- chlorphentermine
- cocaine
- diethylpropion
- dexamphetamine
- ephedrine
- fenfluramine
- methamphetamine
- methylphenidate

B. Sympathomimetic amines:
- atropine
- ephedrine
- pseudoephedrine
- isoproterenol

C. Miscellaneous central nervous system stimulants:
- amphetamine
- benzedrine
- caffeine
- dextroamphetamine
- ephedrine
- methamphetamine

D. Anabolic Steroids:
- danabol
- dianhydroergotamine
- equine nandrolone
- oxymetholone
- stanozolol
- testosterone
- nandrolone

E. Substances banned for specific sports:
- Rif: alcohol
- alcohol
- amphetamine
- atropine
- metamphetamine
- nortriptyline
- and related compounds
- F. Diuretics:
- bendroflumethiazide
- bumetanide
- cyclophosphamide
- chloroform
- cyclobenzaprine
- ethanolic acid
- flumethiazide
- furosemide
- hydrochlorothiazide

Definition of positive depends on the following:
- for caffeine—if the concentration in urine exceeds 1.5 micrograms/ml
- for testosterone—if the ratio of the total concentration of testosterone to that of epiandrosterone in the urine exceeds 1
- for marijuana and THC—based on a repeat testing.

APPENDIX A-2
APPENDIX B

_Institutions That Have Drug-Testing Programs Or Are Actively Planning Them_†

Alabama, University of, Birmingham Alabama, University of, Tuscaloosa Arizona, University of Arizona State University Arkansas, University of, Fayetteville *Arkansas, University of, Little Rock Auburn University Boise State University *Boston College *Boston University Brigham Young University *California, University of, Berkeley *California, University of, Irvine *California, University of, Los Angeles Cincinnati, University of, Clemson Colorado, University of, Colorado State University De Paul University *East Carolina University East Tennessee State University Eastern Kentucky University Florida, University of Florida State University Georgia, University of Georgia Institute of Technology *Hawaii, University of *Houston, University of *Idaho State University Illinois, University of, Champaign Indiana University *Iowa, University of Iowa State University *James Madison University Kansas, University of Kansas State University *Kent State University Kentucky, University of Louisiana Tech University #Louisville, University of McNeese University Maryland, University of, College Park *Maryland, University of, Eastern Shore Memphis State University Miami, University of Minnesota, University of Mississippi, University of Mississippi State University Missouri, University of, Columbia *Montana State University Nebraska, University of, Lincoln Nevada, University of, Reno New Mexico, University of *New Mexico State University New Orleans, University of, Nicholls State University North Carolina, University of, Chapel Hill *North Texas State University Northeast Louisiana University *Northeastern University *Northern Illinois University Northwestern State University Notre Dame, University of Ohio University Ohio State University Oklahoma, University of Oklahoma State University Oregon, University of Oregon State University Purdue University *Rhode Island, University of *Rider College Rutgers University, New Brunswick St. John's University *St. Louis University San Diego State University *San Jose State University South Alabama, University of South Carolina, University of Southeastern Louisiana University *Southern Illinois University Southern Methodist University *Southern
Mississippi, University of Southern University, Baton Rouge Southwestern Louisiana, University of #Stetson University *Syracuse University Temple University Tennessee, University of, Chattanooga Tennessee, University of, Knoxville *Texas, University of, Arlington *Texas, University of, Austin Texas, University of, El Paso Texas A&M University Texas Christian University Texas Tech University Tulane University Tulsa, University of Utah, University of Vanderbilt University Virginia, University of *Virginia Commonwealth University *Virginia Military Institute Wake Forest University *Washington State University WEBER STATE COLLEGE WEST VIRGINIA UNIVERSITY *WILLIAM AND MARY, COLLEGE OF *WISCONSIN, UNIVERSITY OF, MADISON

Abilene Christian University
*Alaska, University of, Fairbanks *California State University, Los Angeles *Ferris State College Hampton University Humboldt State University Indiana University of Pennsylvania *Maryland, University of, Baltimore County Merrimack College *Michigan Technological University

Division III

*Delaware Valley College U.S. Coast Guard Academy *Western New England College *Wisconsin, University of, Stout

* No program at present, but actively planning one
# Program for basketball only
APPENDIX C

University of Virginia Intercollegiate Athletics
Drug Education Program

The Department of Athletics at the University of Virginia, its coaching personnel, physicians, athletic trainers, and administrators, strongly believe that the use or abuse of drugs (excluding those drugs prescribed by a physician to treat a specific medical condition) can be detrimental to the physical and mental well being of its student athletes, no matter when such use should occur during the year. Additionally, use or abuse of drugs can seriously interfere with the performance of individuals as students and as athletes and can be extremely dangerous to student-athletes and their teammates, particularly when participating in athletic competition or practice.

In light of this, the Athletic Department at the University, beginning with the 1985-86 academic year, and for subsequent years thereafter, will implement a mandatory program of drug education, testing, and counseling/rehabilitation efforts to assist and benefit the men and women athletes at the University of Virginia.

Various forms of drugs have worked their way into practically every segment of modern society, and athletics apparently are not immune to this phenomenon. Drug-related events seem to prove newsworthy and often, partly because of the nature of our athletics, an athlete is the center of attention. Numerous studies have indicated that the problem is not limited to any particular group, but rather touches all segments of our society.

Purpose of the Program

The purpose of the University of Virginia Intercollegiate Athletics Drug Education Program is to aid and assist the student athlete at the University. This program is based on the Athletic Department's policy that drug use or abuse is detrimental to the student and a violation of team rules. Specific goals of this program are 1) to educate University of Virginia athletes concerning the associated problems of drug use and abuse, 2) to discourage any drug use or abuse by University of Virginia athletes, 3) to identify any athlete who may be using drugs and to identify the drugs, 4) to educate any athlete so identified regarding such usage as it may affect the athlete and his or her team and teammates, 5) to see that any chronic dependency is treated and addressed properly, 6) to provide reason-
able safeguards that every athlete is medically competent to participate in athletic competition, and 7) to encourage discussion about any questions the athlete may have, either specifically or generally, about use of drugs.

Implementation of the Program

At the beginning of the academic year a presentation will be made to all intercollegiate athletes at the University of Virginia to outline and to review the intercollegiate athletics drug education program, its purposes and implementation. A copy of this program will be given to each student athlete. A copy of this program will also be mailed to the parent(s) or legal guardian(s) of the athlete. Each athlete will be asked to sign a form acknowledging receipt and understanding of the program and provide consent to the administration of the urinalysis testing required by the program and permit release of testing information to a limited group.

It is hoped that no University of Virginia athlete has a problem with drug abuse; however, drugs have touched practically all occupations and age groups, with some exceptionally respected persons found to be abusers. Screening, if for no other reason, should enhance the feeling of trust among athletes and their teammates.

The Drug Screening Program

As part of the annual physical examination, at the beginning of the academic year, athletes will be subject to a drug screening test for substances which may include, but are not necessarily limited to, the following:

- Amphetamines
- Barbiturates
- Cocaine
- Methaqualone
- Opiates
- Morphine
- Codeine
- PCP (Angel Dust) and analogues
- Tetrahydrocannabinol (THC or Marijuana)
- Steroids

After the initial drug screen all athletes will be randomly and regularly tested a minimum of three additional times during the academic year. Those who at any time experience a positive test can expect further screening to be done on a more regular basis. For the
athlete's and teammates' safety every athlete whose test is positive must be retested to obtain medical clearance before participation in a practice session or competition.

The drug screening shall consist of a collection of a urine specimen from the athlete under the supervision of the team physician, student health staff, or the athletic training staff. Each urine sample shall be analyzed for the presence of drugs by an agency employed by the University to provide this service. Each athlete's sample will be identified by code rather than by name, and the code and all records relating to testing will be kept in a safe place. The outside agency analyzing the samples shall report all test results to a student health physician (within 24 to 48 hours) who in turn shall note which, if any, of the test results are positive. For purposes of this program, a positive result is one which indicates, in the opinion of the outside agency performing the testing, the presence of one or more of the above listed drugs in the athlete's urine.

Steps will be taken to maintain the accuracy and confidentiality of the test results, including maintaining a documented chain of specimen custody to establish the identity of the sample throughout the collection and the testing process. Additionally, precautions will be taken to ensure that all subsequent testing is random (except those tests that follow a positive result), including making selections for testing by computer.

The provisions of this program are subject to change, but only through formal action by the Athletic Director. Such changes will not be applied retroactively.

Effect of Positive Test Results

Each athlete will be immediately and confidentially notified if the test result is positive. Every athlete with a positive result must be retested prior to a participation in practice or an event to ensure that he or she is medically fit to participate. The athlete has the right to challenge the test result, and may request a conference to present his or her side of the story. If the student continues to dispute the result, the student may submit a statement setting forth the reasons for disagreement. Thereafter, any time the results are disclosed to the parties specified herein, the athlete's statement must be disclosed as well.

Drug use will be deemed a violation of team rules if it is concluded that the use occurred during the season. A positive test result will have the following consequences:
a) **First Positive:** The first positive test will be discussed with the student by a student health physician. The athlete will be required to attend a mandatory drug counseling session at the Student Health Center. The drug counselor shall determine the length and manner of counseling to best suit the athlete. The athlete will also be urged and advised to initiate immediate contact with his or her parent(s) or legal guardian(s) or spouse to advise them of the positive result. The student's parents will be informed of the positive results if the student is a minor. Every athlete with a positive result will be suspended from practice and competition, and must be retested and be negative on retesting prior to participation in practice or a game.

b) **Second Positive:** If the second test is positive the student will again talk with a student health physician and this physician will notify the Director of Athletics, the team coach and additionally, if the athlete is a minor, he or she will participate in a conference telephone call between the athlete, the athlete's parent(s) or legal guardian(s), and the Athletic Director wherein the parent(s) or legal guardian(s) will be advised of the second positive test result. The restrictions placed on the student at this time are dependent upon the drug identified as well as the assessment of the individual by a counselor and retesting will be required, with a negative result prior to participation in practice or a game.

c) **Third Positive:** If a student's third test is positive it must be assumed that the athlete has a very significant problem or has made some conscious value judgments as to his or her behavior and this must be treated extremely seriously. This information will be shared with the student health physician, the student's coach and the Director of Athletics, as well as the student's family, if appropriate. The third offense will dictate an indefinite suspension of the student from practice and athletic competition and the individual will be asked to return for frequent testing. Whether he or she will be allowed to reenter the athletic program will depend on recommendations of the student health physicians and counselor. Prior to suspension the athlete will have the opportunity to discuss the matter with the Athletic Director and present evidence of any mitigating circumstances which the student feels important.

**Conclusion**

It is believed and hoped that implementation of this University of Virginia Intercollegiate Drug Education Program will serve to ben-
efit all connected with intercollegiate athletics at the University. Further, we believe that participation in this program will make the men and women who participate in athletics at the University, and who represent the University in various areas of athletic competition, better students, better athletes, and better able to make individual, informed, and intelligent decisions with reference to drug usage, both now and in the future.
APPENDIX D

Consent to Testing of Urine Sample and Authorization For Release of Information

To: Dr. Richard P. Keeling, Director
Department of Student Health
University of Virginia Medical Center
Box 378
Charlottesville, Virginia 22908

I hereby acknowledge receipt of a copy of the University of Virginia Intercollegiate Athletics Drug Education Program. I further acknowledge that I have read this Program and fully understand its provisions.

I am aware that I am expected to abide by team rules, that such rules are subject to change, and that I may be dismissed from the team and/or deprived of my grant in aid or scholarship for failure to abide by such rules. I acknowledge my understanding that the use or abuse of drugs not prescribed by a physician for a specific medical condition is a violation of team rules.

It is my understanding that signing this consent form is a prerequisite to participation in intercollegiate athletics at the University of Virginia. I further understand that I may refuse to sign this consent form but as a consequence, I must forego participation in intercollegiate sports at the University.

I hereby consent to have samples of my urine collected and tested for the presence of certain drugs or substances in accordance with the provisions of the University of Virginia Intercollegiate Athletics Drug Education Program.

I further authorize you to make confidential release to the Head Athletic Trainer at the University of Virginia, the head coach of any intercollegiate sports in which I am a team member, the Athletic Director at the University of Virginia, physicians at student health and my parent(s) or legal guardian(s), if a minor, all information and records, including test results, you may have relating to the screening or testing of my urine sample(s) in accordance with the provisions of the University of Virginia Intercollegiate Athletics Drug Education Program which is applicable to all intercollegiate athletes at the University of Virginia. To the extent set forth in this document, I waive any privilege I may have in connection with such information. I further agree that, in the event the results of my drug screening test are positive, I will follow the procedures enu-
merated in the section of the Program entitled "Effective of Positive Test Results."

The University of Virginia, its Board of Visitors, its officers, employees and agents are hereby released from legal responsibility or liability for the release of such information and records as authorized by this form.

____________________________________
Signature

____________________________________
Print Name

____________________________________
Date

If a student athlete has not reached 18th birthday, parents must sign also.

____________________________________
Parents Name

____________________________________
Signature

____________________________________
Relationship

____________________________________
Date
APPENDIX E

*University of Oregon Athletic Department Volunteer Drug Testing Consent Form*

I hereby consent to volunteer drug testing. In doing so, I accept the protocol and the sanction system in the University of Oregon Drug Testing Policy.

There will be no jeopardy or sanction to those who do not volunteer. Drug testing may still occur, however, for individualized reasonable suspicion.

I volunteer and agree to be drug tested for all of the substances as stated in the NCAA Drug Testing Banned List.

Once I have volunteered, I understand that I can withdraw from volunteer testing only *prior* to any positive test. Once tested positive, I cannot withdraw my consent for retesting, without suffering the consequences described in the policy, which may eventually include dismissal from the squad and loss of scholarship.

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