

# Playing Fair: Why the United States Anti-Doping Agency's Performance-Enhanced Adjudications Should Be Treated as State Action

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## INTRODUCTION

The continued vitality of the Olympic Games indicates that society finds some intrinsic value in athletic competition.<sup>1</sup> “This intrinsic value often is referred to as ‘the spirit of sport,’”<sup>2</sup> and it combines ethical notions of fairness and a level playing field with excellence in athletic performance.<sup>3</sup> Undeniably, this idealized notion of competition is played out by thousands on the Olympic stage. Equally irrefutable, however, is the long-standing use of artificial substances to enhance natural athletic abilities.<sup>4</sup> The illicit use of performance-enhancing substances—commonly referred to as “doping”—is irreconcilable with the spirit of sport.<sup>5</sup>

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1. Athens, Greece recently hosted the XXVIII Olympiad. See Athens 2004 Olympic Games, <http://www.athens2004.com> (last visited Apr. 7, 2006). Over 11,000 athletes represented 202 countries during the seventeen-day competition. *Id.* An estimated four billion viewers from around the world watched on television or in person. *Id.*

2. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 3 (2003) [hereinafter WORLD ANTI-DOPING CODE], available at [http://www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf).

3. The “spirit of sport” involves, *inter alia*, ethics, health, excellence in performance, teamwork, dedication, and respect for other participants. *Id.*

4. “Ancient Greek athletes are known to have used special diets and stimulating potions to fortify themselves.” World Anti-Doping Agency, *A Brief History of Anti-Doping*, <http://www.wada-ama.org/> (follow “About WADA” hyperlink; then follow “History” hyperlink) (last visited Apr. 7, 2006). “Strychnine, caffeine, cocaine, and alcohol were often used by cyclists and other endurance athletes in the 19th century.” *Id.* “Thomas Hicks ran to victory in the Olympic marathon of 1904 in Saint Louis with the aid of raw egg, injections of strychnine, and doses of brandy administered to him during the race!” *Id.*

5. See WORLD ANTI-DOPING CODE, *supra* note 2, at 3.

Unfortunately, regulators struggle to keep pace with the increasing levels of sophistication at which doping is conducted.<sup>6</sup> Until very recently, the scientific difficulties were compounded by inconsistent anti-doping controls and political struggles among various international and national sports organizations.<sup>7</sup> International criticism has been focused on American athletes and the United States Olympic Committee (USOC),<sup>8</sup> which has been suspected of sanctioning the drug abuse.<sup>9</sup>

In response to such problems, the World Anti-Doping Agency (WADA) was established in 1999,<sup>10</sup> with the goal of creating a doping-free sports culture through research, education, and sanctioning.<sup>11</sup> WADA formally introduced its World Anti-Doping Code (“the Code”) in March 2003.<sup>12</sup> The Code attempts to harmonize

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6. See Lisa Jarvis, Comment, *Should the International Olympic Committee Be Policing Motherhood? Constitutional Implications of Regulating Pregnancy and the Abortion-Doping Scheme Under Domestic Law*, 13 SETON HALL J. SPORT L. 297, 299 (2003).

7. See Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523, 525–31 (2002) (reviewing several “sad examples of the Byzantine and dysfunctional world of anti-doping control before the 2000 Olympic Games”). Two United States cases, *Slaney v. International Amateur Athletic Federation*, 244 F.3d 580 (7th Cir. 2001), and *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994), are illustrative and are discussed *infra* Part I.A.

8. Terry Madden, current CEO of the United States Anti-Doping Agency, stated: “[T]he international perception of America’s athletes was that America’s athletes were the biggest cheaters in the world . . . the international perception was that we were dirty.” Anne Benedetti & Jim Bunting, *There’s a New Sheriff in Town: A Review of the United States Anti-Doping Agency*, INT’L SPORTS L. REV., May 2003, at 19, 20.

9. This suspicion appears justified. A doctor formerly associated with the USOC doping control program “released documents showing that between 1988 and 2000, over 100 US Olympic athletes tested positive for prohibited substances, but were subsequently cleared by internal US appeals process without” public comment. *Id.* at 20. Moreover, “at least 18 US athletes tested positive . . . at the US Olympic trials and went on to compete in the Olympic Games after being exonerated by the US internal appeal process.” *Id.*

10. The International Olympic Committee (IOC) convened the World Conference on Doping in Sport in February 1999. See World Anti-Doping Agency, WADA History, <http://www.wada-ama.org/> (follow “About WADA” hyperlink; then follow “History” hyperlink) (last visited Apr. 7, 2006). WADA was established in November 1999 as an independent organization “under the initiative of the IOC with the support and participation of intergovernmental organizations, governments, public authorities, and other public and private bodies fighting against doping in sport.” *Id.*

11. World Anti-Doping Agency, Mission, <http://www.wada-ama.org/> (follow “About WADA” hyperlink; then follow “Mission” hyperlink) (last visited Apr. 8, 2006).

12. See World Anti-Doping Agency, Q&A on the Code, <http://www.wada-ama.org/> (follow “World Anti-Doping Code” hyperlink; then follow “What is the Code” hyperlink; then

anti-doping regulations across all sports and countries.<sup>13</sup> Many governments and sports organizations formally accepted the Code at an international conference on doping in 2003;<sup>14</sup> these signatories include the United States of America, the USOC, and the United States Anti-Doping Agency (USADA).<sup>15</sup> Signatories were required to bring their anti-doping policies into compliance with the mandatory articles of the Code prior to the Summer Olympic Games in Athens, Greece.<sup>16</sup> Accordingly, the USOC and the USADA revised their anti-doping policies and adopted verbatim the Code's mandatory articles.<sup>17</sup>

One of these articles specified the standard of proof to be used in doping adjudications.<sup>18</sup> Under this article, the anti-doping agency must establish a violation of a doping rule "to the comfortable satisfaction of the hearing body."<sup>19</sup> Prior to the Code's enactment a number of anti-doping organizations, including the USADA, applied the standard of proof used in United States criminal courts—beyond a reasonable doubt.<sup>20</sup>

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follow "Q&A on the Code" hyperlink) (last visited Apr. 8, 2006) [hereinafter WADA, Q&A on the Code].

13. *Id.* The Code's two purposes are "[t]o protect the *Athlete's* fundamental right to participate in doping-free sport and thus promote health, fairness and equality . . . and [t]o ensure harmonized, coordinated and effective anti-doping programs at the international and national level . . ." WORLD ANTI-DOPING CODE, *supra* note 2, at 1.

14. See WADA, Q&A on the Code, *supra* note 12.

15. An updated list of signatories is available at Code Acceptance, <http://www.wada-ama.org/> (follow "World Anti-Doping Code" hyperlink; then follow "Code Acceptance" hyperlink) (last visited Apr. 8, 2006).

16. See WADA, Q&A on the Code, *supra* note 12.

17. See U.S. OLYMPIC COMM., NATIONAL ANTI-DOPING POLICIES (2004), [http://www.usoc.org/National\\_Anti-Doping\\_Policies\\_August\\_13\\_04.pdf](http://www.usoc.org/National_Anti-Doping_Policies_August_13_04.pdf).

18. See WORLD ANTI-DOPING CODE, *supra* note 2, at 12.

19. *Id.* Article 3.1 of the Code, entitled *Burdens and Standards of Proof*, states:

The *Anti-Doping Organization* shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the *Anti-Doping Organization* has established an anti-doping rule violation *to the comfortable satisfaction of the hearing body* bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

*Id.* (third emphasis added).

20. See Rob Gloster, *USADA Changes Burden of Proof in Athletes' Cases*, ASSOCIATED PRESS, June 13, 2004, available at [http://www.usatoday.com/sports/olympics/athens/track/2004-06-13-jones-usada-burden\\_x.htm](http://www.usatoday.com/sports/olympics/athens/track/2004-06-13-jones-usada-burden_x.htm). The change is documented in two widely publicized

The change was not well received within the athletic community, particularly amongst those competing in track and field events.<sup>21</sup> Sprinter Marion Jones, under investigation by the USADA, called the agency a “secret kangaroo court,”<sup>22</sup> and threatened to sue should she be barred from competition “because of a hunch.”<sup>23</sup> While Jones has not found it necessary to make good on her promise (yet), others in the field of sports law predict that the lower burden of proof will be challenged by athletes in the courts.<sup>24</sup>

The dissatisfaction is attributable in part to the similarities between criminal proceedings and doping adjudications.<sup>25</sup> Indeed, an athlete might argue that constitutional due process demands the protection of the reasonable doubt standard of proof. However, the litigious athlete must clear a number of hurdles before claiming victory on this basis.<sup>26</sup> One such barrier is the state action doctrine. For due process protections to apply, the athlete must show that the USADA is a state actor, and that its proceedings are not merely private conduct.<sup>27</sup> Despite a prior Supreme Court holding that the USOC is not a state actor,<sup>28</sup> the premise of this Note is that current USADA doping adjudications using the “comfortable satisfaction” standard of proof may fairly be characterized as state action.

Part I of this Note describes the creation of the USADA, its current adjudication process, and the similarities between this process and the American criminal justice system.

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memos from Travis Tygart, USADA’s Director of Legal Affairs. *Id.* Tygart wrote: “Application of the ‘comfortable satisfaction’ standard is in the interest of justice because it is the standard of proof set forth in the World Anti-Doping Code . . . [which] most appropriately balance[s] the rights of clean athletes and fair sport against the interests of the accused.” *Id.*

21. See Linda Robertson, *A Sport Comes Clean*, MIAMI HERALD, July 18, 2004, at C8 (describing the track and field community’s negative reaction to the change).

22. Amy Shipley, *BALCO Tab Runs High for Agency*, WASH. POST, Jan. 11, 2005, at D1 [hereinafter Shipley, *BALCO Tab*].

23. *BALCO Timeline*, SAN JOSE MERCURY NEWS, July 4, 2004 (wire report).

24. See Robertson, *supra* note 21.

25. See *infra* Part I.C.

26. See *infra* Part II.

27. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (explaining the distinction between private conduct and state action subject to the constraints of the Fourteenth Amendment).

28. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987).

Part II poses a hypothetical due process challenge to the new standard of proof, and briefly explains some of the significant constitutional hurdles an athlete must overcome in order to succeed.

Part III explores the Supreme Court's state action jurisprudence and the various tests it has developed to distinguish private conduct from state action.

Finally, Part IV argues that the USADA's imposition of sanctions upon suspected dopers, following a proceeding using the comfortable satisfaction standard, is state action to which constitutional protections should apply.

## I. THE DEVELOPMENT OF THE USADA'S "RESULTS MANAGEMENT"

### A. *The Olympic Movement and the Creation of the USADA*

The world of international sport is built around the Olympic Movement, the centerpiece of which is the Olympic Games.<sup>29</sup> The Olympic Movement coordinates competition among athletes and also works to develop international sports law through its governing body, the International Olympic Committee (IOC).<sup>30</sup> Beneath the IOC in the Olympic Movement's pyramid-like structure lies a variety of athletic organizations. International Federations (IFs) autonomously supervise a specific sport at the international level.<sup>31</sup> National Governing Bodies (NGBs) perform the same function within each respective country.<sup>32</sup> National Olympic Committees supervise the NGBs and are responsible for the representation of their respective country at the Olympic Games.<sup>33</sup> The powers of these bodies overlap considerably,<sup>34</sup> and the history of doping control is marked by jurisdictional struggles and the attempts to resolve them.<sup>35</sup>

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29. Straubel, *supra* note 7, at 531.

30. See Melissa R. Bitting, Comment, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security"?*, 25 FLA. ST. U. L. REV. 655, 658 (1998).

31. *Id.* at 659. For example, an IF would conduct the world championships for its particular sport. *Id.*

32. *Id.*

33. *Id.*

34. See Straubel, *supra* note 7, at 532–33.

35. *Id.* at 533.

The cases of two American athletes, Mary Decker Slaney and Butch Reynolds, illustrate the jurisdictional struggles.<sup>36</sup> Each athlete tested positive for a banned substance following a competition.<sup>37</sup> They challenged the validity of their test results, and each received conflicting answers: the American NGB for track and field exonerated the athletes, but the IF insisted that the drug tests were valid, and imposed lengthy suspensions.<sup>38</sup> In each case, a resolution was delayed for several years as the national and international bodies vied for control of the anti-doping system.<sup>39</sup> The athletes' subsequent attempts to resort to the judicial system were unsuccessful, as each suit was dismissed on jurisdictional grounds.<sup>40</sup>

Within the United States the difficulties arose from the conflicting congressional mandates given to the USOC: produce the best athletes possible, and test those athletes for performance-enhancing drugs.<sup>41</sup> At the time of Slaney's and Reynold's cases the USOC had an anti-doping program, but its bylaws delegated the adjudication of positive

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36. Mary Decker Slaney was a middle distance runner who won "World Championship gold medals in the 1500 and 3000" meters. *Id.* at 526 n.12. Reynolds was a sprinter who held world records in the 400 meters (both individually and as a member of a 4x400 relay team), and won gold and silver medals at the 1988 Olympics. Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110, 1112 (6th Cir. 1994).

37. Slaney tested positive for elevated testosterone levels at the 1996 Olympic Trials. *See* Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 586 (7th Cir. 2001). Reynolds tested positive for the steroid Nandrolone after a 1990 meet. *Reynolds*, 23 F.3d at 1112.

38. *See Slaney*, 244 F.3d at 586; *Reynolds*, 23 F.3d at 1112.

39. Slaney tested positive in June of 1996 and withdrew from arbitration in late January 1999. *Slaney*, 244 F.3d at 587. She believed it scientifically impossible to meet her burden of proving by clear and convincing evidence that the elevated testosterone level was due to non-doping factors, and refused to attend her hearing. *Id.* This burden was imposed by the IF, not the American NGB. *Id.* Reynolds fought his test results for approximately two years. *Reynolds*, 23 F.3d at 1113.

40. *Slaney*, 244 F.3d at 597; *Reynolds*, 23 F.3d at 1121.

41. *See* Benedetti & Bunting, *supra* note 8, at 20. The power of the USOC to direct the representation of the United States at international sporting events and to resolve doping disputes is granted by the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501–220529 (2000) [hereinafter "Amateur Sports Act" or ASA]. The ASA established the USOC as a federally chartered corporation, and set forth multiple purposes to be met by the USOC. *Id.* §§ 220502(a), 220503. One purpose was to "provide swift resolution of conflicts and disputes involving amateur athletes . . . and protect the opportunity of any amateur athlete . . . to participate in amateur athletic competition." *Id.* § 220503(8). While drug testing is a large part of that conflict resolution, the USOC is also directed "to obtain for the United States . . . the most competent amateur representation possible in each event of the Olympic Games . . ." *Id.* § 220503(4).

tests to each sport's NGB.<sup>42</sup> This self-regulated system generated a significant amount of international mistrust.<sup>43</sup> The USOC's attempts to alleviate such concerns eventually led to the creation of the USADA.<sup>44</sup>

The USADA is a private, non-profit corporation created and then hired by the USOC to test and prosecute athletes for the use of performance-enhancing drugs.<sup>45</sup> Its operations are funded by the USOC and the United States government, with the latter covering approximately 60% of its costs.<sup>46</sup> The USADA proclaims its independence from the USOC,<sup>47</sup> but the nature of their relationship leads some commentators to cast doubt on this assertion.<sup>48</sup> Regardless, the USADA is given authority to test, *inter alia*, any athlete who belongs to a USOC-sanctioned organization or who competes in a USOC-sanctioned event.<sup>49</sup>

The USADA recently incorporated into its protocol the mandatory provisions of the Code introduced by WADA in 2003.<sup>50</sup> The USADA's adjudication procedures—collectively known as “Results

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42. See Benedetti & Bunting, *supra* note 8, at 20.

43. See *id.* at 20.

44. The USOC's Select Task Force on Drug Externalization “recommended an Independent Organization be created to conduct a comprehensive anti-doping program in the United States on behalf of the USOC.” *Id.* at 21.

45. See Straubel, *supra* note 7, at 559; see also U.S. ANTI-DOPING AGENCY, PROTOCOL FOR OLYMPIC MOVEMENT TESTING (2004), <http://www.usantidoping.org/files/active/what/protocol.pdf> [hereinafter USADA PROTOCOL].

46. See Shipley, *supra* note 22.

47. The first sentence of the USADA Protocol asserts that “USADA is an independent legal entity not subject to the control of the USOC.” See USADA PROTOCOL, *supra* note 45, at 1. The USADA website also attempts to distinguish the agency from the USOC. See U.S. Anti-Doping Agency, Who We Are: USADA History, <http://www.usantidoping.org/who/history.html> (last visited Apr. 8, 2006).

48. See Benedetti & Bunting, *supra* note 8, at 34; Straubel, *supra* note 7, at 561 (questioning whether the USADA is bound into an agency relationship with the USOC).

49. USADA PROTOCOL, *supra* note 45, at 1. Thus, any member of United States of America Track and Field (an NGB) is eligible for testing. Moreover, athletes who normally fall outside the USADA's jurisdiction could be tested should they participate in certain events. For example, an NBA player competing for the United States in an Olympic-qualifying tournament could be tested. See Panel II, *Regulations Governing Drugs and Performance Enhancers in Sports*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 337, 376–81 (2002) (discussing deterrent effect of extra drug testing on Olympic participation).

50. See USADA PROTOCOL, *supra* note 45, at 2. The Code provisions are contained in Annex A of the Protocol. *Id.*

Management”<sup>51</sup>—reflect the recent changes.<sup>52</sup> While the Code limits the USADA’s prior discretion in creating and implementing Results Management procedures, the Code still complies with the Amateur Sports Act’s<sup>53</sup> mandate that athletes be provided with notice and a hearing before being declared ineligible to participate.<sup>54</sup> The Results Management process is outlined below.

### *B. Results Management: Current Testing and Adjudication*

The USADA may conduct both “in-competition” and “out-of-competition” tests<sup>55</sup> in order to uncover the use of a substance on the Code’s “Prohibited List.”<sup>56</sup> Positive tests are submitted to an Anti-Doping Review Board, which decides whether there is sufficient evidence of doping to proceed with the adjudication.<sup>57</sup> Some

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51. See U.S. Anti-Doping Agency, What We Do: Results Management, <http://www.usantidoping.org/what/management/> (last visited Apr. 8, 2006).

52. See USADA PROTOCOL, *supra* note 45, at 9.

53. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501–220529 (2000).

54. *Id.* § 220522(a)(8). The USOC Athletes’ Advisory Council recommends a “Due Process Checklist” to be applied to all hearings which may result in an athlete’s ineligibility. See United States Olympic Committee Due Process Checklist, [http://www.usolympicteam.com/12946\\_12966.htm](http://www.usolympicteam.com/12946_12966.htm) (last visited Apr. 8, 2006) [hereinafter Due Process Checklist]. Details are left unspecified, but the breadth of protection offered indicates that the stakes are high for an athlete in a doping adjudication. The list includes: “a hearing before a[n] . . . impartial body of fact finders; . . . the right to . . . legal council, if desired; the right to call witnesses and present oral and written evidence . . . ; the right to confront and cross-examine adverse witnesses; . . . a burden of proof . . . [that is] at least a ‘preponderance of the evidence’” borne by the proponent of the charge; and the right to an appeal. *Id.*

55. See USADA PROTOCOL, *supra* note 45, at 3.

56. *Id.* See WORLD ANTI-DOPING AGENCY, THE 2005 PROHIBITED LIST, [http://www.wada-ama.org/docs/rtecontent/document/list\\_2005.pdf](http://www.wada-ama.org/docs/rtecontent/document/list_2005.pdf) [hereinafter 2005 PROHIBITED LIST]. A substance is included on the list if it meets two of the following three criteria: (1) it has the “potential to enhance performance”; (2) it results in actual or potential harm to the athlete; (3) it “violates the spirit of sport.” U.S. Anti-Doping Agency, Resources: FAQs, <http://www.usantidoping.org/resources/faqs.aspx> (follow “Code” hyperlink; then follow “How does a substance or method get included on the WADA Prohibited List?” hyperlink) (last visited Apr. 8, 2006).

57. USADA PROTOCOL, *supra* note 45, at 6. Positive results are derived from an analysis of two urine samples provided by the athlete when selected for testing. U.S. Anti-Doping Agency, Resources: FAQs, <http://www.usantidoping.org/resources/faqs.aspx> (follow “Code” hyperlink; follow “Adjudication Process” hyperlink). The “B” sample is only analyzed if the “A” sample indicates doping, and it must confirm the “A” sample analysis in order to constitute a positive test. *Id.* A non-positive “B” sample analysis can insulate a suspected athlete from prosecution and sanction, but it does little to dispel the stigma that attaches to an accused doper. Bernard Lagat’s struggle to clear his name is illustrative. See *Lagat Suing IAAF over False*

commentators analogize the Review Board stage to a preliminary hearing to determine probable cause in a criminal case.<sup>58</sup>

If the Review Board deems the evidence of doping sufficient to proceed with sanctions, it informs the USADA, who in turn notifies the athlete of the specific charges it wishes to adjudicate.<sup>59</sup> The athlete may either contest the sanction or accept the charges and penalty.<sup>60</sup> Contested charges are resolved through mandatory, binding arbitration.<sup>61</sup> Several legal and extra-legal factors in USADA arbitrations may influence the athlete's decision to accept or contest the charges.<sup>62</sup>

The basic doping violations—the presence of a prohibited substance in the body or the use of a prohibited substance—are considered strict liability offenses.<sup>63</sup> Unless the athlete is able to prove the existence of truly exceptional circumstances, any intent, or even negligence, on his part is irrelevant.<sup>64</sup> Two rationales are

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*Doping Charges*, COOL RUNNING, Sept. 14, 2005, [http://www.coolrunning.com/engine/3/3\\_1/lagat-suing-iaaf-over-fal.shtml](http://www.coolrunning.com/engine/3/3_1/lagat-suing-iaaf-over-fal.shtml).

58. See Straubel, *supra* note 7, at 563. The Review Board is comprised of three to five “experts independent of USADA with medical, technical, and legal knowledge of anti-doping matters.” USADA PROTOCOL, *supra* note 45, at 7.

59. USADA PROTOCOL, *supra* note 45, at 9.

60. *Id.*

61. *Id.* at 10. Typically, arbitration hearings take place before the American Arbitration Association (AAA), using a slightly modified version of the AAA's Commercial Arbitration Rules. *Id.* at 4. These rules are available at Annex E of the USADA Protocol. *Id.* The athlete may appeal the AAA decision to the International Court of Arbitration for Sport (CAS), which conducts a de novo review, and issues a final and binding decision. *Id.* at 10. Alternatively, the athlete may elect to proceed directly before the CAS. *Id.* Although the USADA is the party officially opposing the athlete in arbitration, the USOC pays the “court costs” of the AAA adjudication. *Id.* The appeals fee to the CAS is paid by the athlete. *Id.*

62. As a practical matter, the estimated cost of a legal challenge is \$60,000–\$80,000. See, e.g., Amy Shipley, *Caught Cheating, or Was She Cheated?*, WASH. POST, Nov. 8, 2004, at D1 [hereinafter Shipley, *Caught Cheating*]. This may not seem like an unfair price to pay in order to salvage a career, but one must consider that the “USADA has never lost a case.” *Id.*

63. See WORLD ANTI-DOPING CODE, *supra* note 2, at 8. “It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. . . . Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* on the *Athlete's* part be demonstrated . . .” *Id.*

64. See *id.* at 29–30. Article 10.5.1 of the Code permits a reduction or elimination of the period of ineligibility if the athlete can prove no fault or negligence based on exceptional circumstances. *Id.* The comment to Article 10.5.2 gives as an example the situation where an athlete is sabotaged by a competitor despite all due care. *Id.* at 30–31. However, the sanction could not be removed if a spouse, coach, or trainer sabotaged the athlete's food or drink. *Id.* at 31.

advanced to support this standard.<sup>65</sup> First, in balancing the equities between an athlete who unintentionally used a prohibited substance and his non-performance-enhanced competitors, the law deems it just to burden the athlete who tested positive for a prohibited substance (regardless of whether performance was actually enhanced).<sup>66</sup> Second, to require proof of guilty intent would allow many dopers to escape sanction.<sup>67</sup> Therefore, should a sample analysis indicate the presence of a prohibited substance,<sup>68</sup> the arbitration may be a mere formality.<sup>69</sup>

Though assertions of innocence fall on deaf ears,<sup>70</sup> the scientific standards employed by drug testing labs at least ensure that the substance actually entered the athlete's body.<sup>71</sup> But, what if the athlete never failed a drug test? The USADA recently resorted to so-called "non-analytical positives" in its prosecution of suspected dopers.<sup>72</sup> A non-analytical positive is essentially documentary evidence of drug use—calendar entries, drug schedules, canceled checks—that the USADA considers to be the equivalent of a failed drug test.<sup>73</sup> Some observers and athletes are highly critical of this tactic,<sup>74</sup> but the USADA successfully persuaded several athletes who

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65. *Id.* at 8–9 (contained in comment on Article 2.1.1).

66. *Id.*

67. *Id.* "[A] requirement of intent would invite costly litigation that may well cripple federations—particularly those run on modest budgets—in their fight against doping." *Id.*

68. WADA-accredited labs are subject to rigorous scientific standards set by the World Anti-Doping Agency in their *International Standard for Laboratories* ("International Standard"). See WORLD ANTI-DOPING AGENCY, INTERNATIONAL STANDARD FOR LABORATORIES (2004), [http://www.wada-ama.org/rtecontent/document/lab\\_aug\\_04.pdf](http://www.wada-ama.org/rtecontent/document/lab_aug_04.pdf) [hereinafter INTERNATIONAL STANDARD]. The Code creates a presumption that laboratory analyses and procedures presented in doping offense adjudications are conducted in accordance with the International Standard. See WORLD ANTI-DOPING CODE, *supra* note 2, at 13.

69. See Shipley, *Caught Cheating*, *supra* note 62.

70. When asked about the fairness of imposing sanctions for unintended violations, WADA Chairman Dick Pound replied, "I would just say, 'I'm sorry, but the doping offense is the presence of the stuff in your body. It doesn't matter how it got there.'" *Id.*

71. See INTERNATIONAL STANDARD, *supra* note 68.

72. See Robertson, *supra* note 21; Shipley, *BALCO Tab*, *supra* note 22.

73. See Robertson, *supra* note 21.

74. See Sally Jenkins, *This Agency Lacks the Inside Dope*, WASH. POST, May, 17, 2004, at D1. Jenkins described the tactic as "Un-American" and felt it was used for political grandstanding and bullying athletes. *Id.* Marion Jones, currently under investigation by the USADA, nevertheless stated: "What the USADA is trying to do is find athletes guilty without any form of investigation." *Id.*

never failed a drug test to accept sanctions after reviewing their “non-analytical positives.”<sup>75</sup> A major victory for the USADA came in December 2004 when sprinter Michelle Collins contested the imposition of sanctions based solely upon non-analytical positives and lost.<sup>76</sup> Thus it appears that a positive sample, the “smoking gun” of doping cases, is no longer a prerequisite to a USADA prosecution.

Of particular relevance to this Note is the source of the USADA’s non-analytical positives. In June 2003 a track coach sent the USADA a syringe containing a previously unknown and undetectable steroid.<sup>77</sup> A few months later, federal agents began investigating the financial and medical records of the Bay Area Laboratory Cooperative (BALCO), a nutritional supplements company.<sup>78</sup> The USADA became linked to this federal investigation when it determined that BALCO was the source of the new steroid and had allegedly distributed it to athletes within the USADA’s jurisdiction.<sup>79</sup>

Evidence uncovered in the BALCO investigation led to federal charges of steroid distribution and money laundering.<sup>80</sup> In April 2004

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75. For instance, Alvin Harrison, an Olympic gold medalist, accepted a four-year suspension and forfeited all his results and monetary winnings since February 1, 2001. Press Release, U.S. Anti-Doping Agency, U.S. Track Athlete Harrison Receives Four-Year Suspension for Participation in BALCO Drug Conspiracy (Oct. 19, 2004), *available at* [http://www.usantidoping.org/files/active/resources/press\\_releases/Tfaharrison101904\[1\].pdf](http://www.usantidoping.org/files/active/resources/press_releases/Tfaharrison101904[1].pdf). Because Harrison will not be able to compete again until age thirty-four, his career is effectively over. Harrison did not contest the non-analytical positives through the arbitration process. *Id.*

76. U.S. Anti-Doping Agency v. Collins, Am. Arb. Ass’n, Case No. 30 190 00658 04 (2004) (Rivkin, Arb.), *available at* <http://www.usantidoping.org/what/management/arbitration.aspx> (follow “2004” hyperlink; then follow “Former World Champion Collins” hyperlink). The panel of the North American Court of Arbitration for Sport based its decision on e-mails from Collins in which she admitted using some prohibited substances, and blood and urine test results from the private laboratory of Collins’s drug supplier. *Id.* at 16–17. Interestingly, Collins refused to explain the e-mails, asserting her Fifth Amendment right not to testify for fear of self-incrimination should she be indicted on a BALCO-related criminal charge. *Id.*

77. See *BALCO Timeline*, *supra* note 23. The substance was determined to be the steroid tetrahydrogestrone (THG). *Id.*

78. *Id.* FBI and IRS agents raided BALCO’s laboratories and offices, and a grand jury investigation began on October 23, 2003. *Id.* Many athletes, including track star Marion Jones and baseball player Barry Bonds, testified before the federal grand jury. *Id.*

79. *Id.* The athletes also include professional football and baseball players not subject to USADA testing. *Id.*

80. The forty-two-count indictment was announced on February 12, 2004, by Attorney General John Ashcroft against four men: BALCO president Victor Conte, vice-president James Valente, personal trainer Greg Anderson, and track coach Remi Korchemny. *Id.* On July 15,

the United States Senate's Commerce Committee issued a subpoena to the Department of Justice in order to obtain documents relating to the investigation.<sup>81</sup> The subpoena stemmed from a congressional interest in reducing the use of performance-enhancing drugs,<sup>82</sup> though at the time it was unclear how that goal would be achieved.<sup>83</sup>

One month later the Senate unanimously consented to turn these documents over to the USADA, at the agency's request.<sup>84</sup> The agency believed, and the Senate apparently agreed, that the evidence was "critical to the credibility and reputation of American sport . . . [and that] timely access to these records [would] enable [USADA] to use them as evidence, if justified, in disciplinary proceedings."<sup>85</sup> The USADA subsequently charged fifteen athletes connected to BALCO with doping violations.<sup>86</sup> The documentary evidence provided by the Senate became the "non-analytical positives" used to impose sanctions on athletes who had never tested positive for a banned substance.<sup>87</sup>

The final step in the adjudication process is the imposition of penalties. The standard penalty under the Code is comprised of two

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2005, Conte and Anderson each pleaded guilty to one count of conspiracy to distribute anabolic steroids and one count of money laundering. Valente pleaded guilty to conspiracy to distribute anabolic steroids. David Kravets, *Korchemy Pleads Guilty in BALCO Scandal*, USA TODAY, June 29, 2005, [http://www.usatoday.com/sports/2005-07-29-balco-korchemy-plea\\_x.htm](http://www.usatoday.com/sports/2005-07-29-balco-korchemy-plea_x.htm). Two weeks later Korchemy pleaded guilty to a misdemeanor count of distributing modanifil. Press Release, U.S. Dep't of Justice, Three Defendants Please Guilty in BALCO Case (July 15, 2005), available at [http://www.usatoday.com/sports/2005-07-29-balco-korchemy-plea\\_x.htm](http://www.usatoday.com/sports/2005-07-29-balco-korchemy-plea_x.htm).

81. See Press Release, U.S. Senate Comm. on Commerce, Sci. & Transp., Committee to Subpoena DOJ Documents Relating to Banned Substance Use in Olympics (Apr. 8, 2004), available at <http://commerce.senate.gov/newsroom/>. According to Senator John McCain, the subpoena sought evidence "relating to U.S. amateur athletes' alleged purchase of banned performance-enhancing substances from [BALCO], and their possible use of such substances." *Id.*

82. Senator McCain stated that he was "keenly interested in curbing the use of banned performance-enhancing drugs by our nation's athletes." *Id.*

83. "The Committee will not comment further on the substance of this inquiry at this point, except to say that it will take every measure to protect the privacy of the Olympic athletes that may be involved." *Id.*

84. See S. Res. 355, 108th Cong. (2004) (enacted). After considering the implications of athletes who may have doped participating in the summer Olympic Games, the Senate deemed the record production necessary for the promotion of justice. *Id.*

85. 150 CONG. REC. S5025 (daily ed. May 6, 2004) (statement of Sen. Frist).

86. See Shipley, *BALCO Tab*, *supra* note 22. Twelve of the fifteen charges have been resolved in the USADA's favor; three are currently unresolved. *Id.*

87. *Id.*

elements.<sup>88</sup> First, there is a disqualification of results and forfeiture of prizes from all events post-dating the initial rule violation.<sup>89</sup> Second, a period of ineligibility is imposed.<sup>90</sup> First time violators typically receive a two-year suspension, while repeat offenders are banned for life.<sup>91</sup> The athlete may “plea bargain” with the USADA, and reduce his sanction by assisting in the prosecution of other suspected dopers.<sup>92</sup>

However, under USOC anti-doping policies the athlete stands to lose considerably more than the opportunity to compete.<sup>93</sup> Lost benefits include: USOC performance-based awards, tuition grants, access to training centers and sites, residences at Olympic training centers, coaching and sports medicine services, and health insurance provided by the USOC.<sup>94</sup> Most commentators recognize that Olympic-caliber athletes today make a career of their sport, and equate the imposition of ineligibility with the loss of a job.<sup>95</sup>

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88. WORLD ANTI-DOPING CODE, *supra* note 2, at 26–27.

89. *Id.* at 26 (disqualification of results from event in which violation occurs); *see also id.* at 34 (disqualification of results from competitions subsequent to sample collection).

90. *Id.* at 26–36 (defining ineligibility periods and possible reductions in certain circumstances).

91. *Id.* at 27.

92. *Id.* at 32. For example, sprinter Kelli White took advantage of this provision recently and the USADA reduced her ban from four years to two years. Amy Shipley, *USADA Bans White for 2 Years*, WASH. POST, May 20, 2004, at D1. White agreed to “clean[] up the sport” after being shown documentary evidence from the BALCO investigation. *Id.* She made good on her promise by testifying against fellow American sprinters Tim Montgomery and Chryste Gaines; the Court of Arbitration for Sport described her testimony as “fatal” to the sprinters’ cases. *See* John Powers, *Montgomery, Gaines Banned*, BOSTON GLOBE, Dec. 14, 2005, at F1.

93. *See* U.S. OLYMPIC COMM., NATIONAL ANTI-DOPING POLICIES, at annex C (2004), [http://www.usolympicteam.com/National\\_Anti-Doping\\_Policies\\_August\\_13\\_04.pdf](http://www.usolympicteam.com/National_Anti-Doping_Policies_August_13_04.pdf).

94. *Id.*

95. *See, e.g.*, Bitting, *supra* note 30, at 666 (“Couple the grants with prize money, throw in commercial endorsements and appearance fees, and top off the package by paying various coaching and training expenses, and an Olympic athlete may well have their entire livelihood dependent upon competing in their sport.”); Straubel, *supra* note 7, at 546 (“Olympic level performance demands professional level commitment: it is now a full time job.”).

### C. Analogies to the American Criminal Justice System

The indignation athletes directed toward the USADA<sup>96</sup> is understandable when one considers that the agency announced its application of a new, less stringent standard of proof shortly after receiving the documentary evidence from the Senate.<sup>97</sup> The athlete lost a certain amount of scientific protection, as verified sample analyses conducted by accredited laboratories were replaced with circumstantial evidence. He also lost the procedural protection of the reasonable doubt standard,<sup>98</sup> as “comfortable satisfaction” is an easier burden for the USADA to meet.<sup>99</sup>

The loss of this particular procedural protection may strike the athlete as especially unfair, given the similarities between the criminal justice system and the USADA’s “Results Management.”<sup>100</sup> Doping adjudications are part of an accusatorial system, with proscribed activities and punishments.<sup>101</sup> A stigma attaches to an athlete accused of doping, similar to that endured by many criminal defendants.<sup>102</sup> Many of the Sixth Amendment guarantees given to the

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96. Perhaps overstating the case a bit, hurdler Allen Johnson compared the USADA to the Gestapo. See Robertson, *supra* note 21. Marion Jones called the agency a “secret kangaroo court.” See Shipley, *BALCO Tab*, *supra* note 22.

97. The USADA received the BALCO-related evidence on May 6, 2004. *BALCO Timeline*, *supra* note 23. USADA Director of Legal Affairs Travis Tygart announced that the “reasonable doubt” burden of proof would be replaced with the “comfortable satisfaction” standard in a memo dated June 1, 2004. See Gloster, *supra* note 20.

98. “The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence . . . .” *In re Winship*, 397 U.S. 358, 363 (1970).

99. “This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.” WORLD ANTI-DOPING CODE, *supra* note 2, at 12. While this standard of proof is largely unfamiliar to the American legal system, the comment to Article 3.1 states that it “is comparable to the standard which is applied in most countries to cases involving professional misconduct.” *Id.*

100. See *supra* Part I.B.

101. See Straubel, *supra* note 7, at 569 (“[T]he athlete is being accused of an act of moral turpitude: cheating by intentionally taking illegal substances. These acts are *malum in se*. Then, as punishment, the athlete is . . . in a sense, being placed on probation.”).

102. *Id.* at 546; accord *In re Winship*, 397 U.S. at 363 (“The accused during a criminal prosecution has at stake interests of immense importance . . . because of the certainty that he would be stigmatized by the conviction.”).

accused in a criminal prosecution are also included in the USOC's "Due Process Checklist."<sup>103</sup>

Moreover, it is a federal crime to possess, use, or traffic in some of the substances included on the Code's Prohibited List. For example, possession of anabolic steroids is prohibited<sup>104</sup> and warrants a sentence of up to five years in prison.<sup>105</sup> In 2004 Congress devoted increased attention to this type of drug,<sup>106</sup> which is relatively common.<sup>107</sup> Federal regulation would extend to anabolic steroid precursors<sup>108</sup> and the standard penalties for distributing anabolic steroids would double should the distribution take place at or near a sports facility.<sup>109</sup> The Senate pressed even harder on the issue in 2005 with the introduction of the Clean Sports Act.<sup>110</sup> This bill sought to establish minimum drug testing standards for professional sports

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103. Both the Sixth Amendment and the "Due Process Checklist" include the right to be notified of the specific charges pending and their potential consequences; the right to a hearing at a time and place convenient to the accused, and held before an impartial fact finder; the right to legal counsel; the right to call witnesses; and the right to confront adverse witnesses. Compare U.S. CONST. amend. VI, with Due Process Checklist, *supra* note 54.

104. See 21 U.S.C. § 812(c), Schedule III(e) (2000); 2005 PROHIBITED LIST, *supra* note 56.

105. See 21 U.S.C. § 841(b)(1)(D). An individual also may be fined not more than \$250,000. *Id.*

106. See Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358, 2004 U.S.C.C.A.N. (118 Stat.) 1661.

107. See NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., RESEARCH REPORT SERIES—ANABOLIC STEROID ABUSE, available at <http://www.nida.nih.gov/PDF/RRSteroi.pdf>.

108. See § 2, 118 Stat. at 1661–63. Steroid precursors are a common ingredient in nutritional supplements used by athletes. See *Abuse of Anabolic Steroids and Their Precursors by Adolescent Amateur Athletes: Hearing Before the S. Caucus on International Narcotics Control*, 108th Cong. 17–19 (2004) (statement of Terrance P. Madden, Chief Executive Officer United States Anti-Doping Agency). An example of a steroid precursor is androstenedione, the supplement used by baseball player Mark McGuire during his home-run record-breaking season. *Id.* at 18.

109. See 150 CONG. REC. H3660 (daily ed. June 2, 2004) (statement of Sen. Sensenbrenner) (clerk's reading of text of H.R. 3866). The USADA fully supported the bill. See *Anabolic Steroid Control Act of 2004: Hearing on H.R. 3866 Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 10–12 (2004) (statement of Doctor Ralph Hale, Chairman, United States Anti-Doping Agency).

110. S. 1114, 109th Cong. (2005). The threatened passage of this legislation induced Major League Baseball to toughen its drug-testing policy in November 2005; this action stopped the bill's progress as Senator McCain believed it to achieve the Act's goals. NAT'L CTR. FOR DRUG FREE SPORT, INC., *MLB Drug-Testing*, INSIGHT, Fourth Quarter 2005, at 3, 3, available at <http://www.drugfreesport.com/home.asp> (follow "Insight Newsletter" hyperlink; then follow the "Fourth Quarter 2005" hyperlink; then follow "MLB Drug-Testing" hyperlink).

leagues, with such standards to be at least as stringent as those imposed by the USADA.<sup>111</sup> The Clean Sports Act prescribes suspensions and lifetime bans as punishment for positive drug tests,<sup>112</sup> but it does not address whether criminal punishment would be imposed for the same conduct. These similarities between doping offenses and their adjudication and the American criminal justice system form the basis for the athlete's hypothetical due process challenge regarding the "comfortable satisfaction" standard of proof.<sup>113</sup>

## II. THE DUE PROCESS CHALLENGE

As noted previously, the athlete must clear some significant hurdles in order to succeed on the due process challenge posed by the "comfortable satisfaction" standard of proof.<sup>114</sup> The potential stumbling blocks include: a judicial reluctance to interfere with arbitration results in general, and with athletic disputes in particular;<sup>115</sup> the burden of showing some liberty or property interest;<sup>116</sup> and the unpredictability of the *Mathews v. Eldridge* balancing test.<sup>117</sup>

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111. S. 1114 § 4(b).

112. S. 1114 § 4(b)(7).

113. Commentators recognize that doping adjudications also share characteristics of civil law, and while there is some disagreement over the requisite level of procedural protection, a trend toward criminal law protection has emerged at both the academic and political levels. See Antonio Rigozzi et al., *Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code*, INT'L SPORTS L. REV., Aug. 2003, at 37, 48–49. An International Sports Law Conference in 1999 emphasized the severity of the consequences for a suspended athlete, and recommended the application of criminal law procedures to protect the athlete. *Id.* at 48. Doping offenses are criminal offenses in several European nations, including Greece, Belgium, France, and Italy. See Gregory Ioannidis, *Legal Regulation of Doping in Sport: The Case for the Prosecution*, OBITER, Nov. 2003, at 15, 17, available at <http://www.lawfile.org.uk/obiter.htm> (follow "November 2003" hyperlink).

114. See *supra* pp. 4–5.

115. See *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580 (7th Cir. 2001).

116. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972).

117. 424 U.S. 319, 347–49 (1976).

### A. Arbitration and the “Right to Compete”

Federal courts are not receptive to the complaints of a suspended athlete.<sup>118</sup> The arbitral awards of the International Court of Arbitration for Sport (CAS), to whom an athlete is required to appeal for a final and binding decision,<sup>119</sup> are rarely overturned by a federal court because of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”).<sup>120</sup> Moreover, courts have long held that the Amateur Sports Act does not create a “right to compete” giving rise to a private cause of action under the Act.<sup>121</sup> Deferring to the USOC’s jurisdiction, federal courts typically conclude that it is simply inappropriate for the judiciary to determine athletic eligibility.<sup>122</sup>

### B. Property and Liberty Interests of the Athlete

The athlete also must show that the challenged disciplinary action infringes upon a constitutionally protected liberty or property interest.<sup>123</sup> Some commentators assume that the athlete possesses a property interest that may be damaged by a ban from competition.<sup>124</sup>

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118. See, e.g., *Slaney*, 244 F.3d 580.

119. See *supra* note 61.

120. Urvasi Naidoo & Neil Sarin, *Dispute Resolution at Games Time*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 489, 493–94 (2002). The New York Convention provides for narrow grounds on which a court may refuse to recognize a foreign arbitral award. *Id.* at 494. One of these grounds—that the award was contrary to public policy—was considered and rejected by the *Slaney* court. *Slaney*, 244 F.3d at 593–94 (rebuttable presumption of guilt created by positive drug test not contrary to public policy).

121. See *Slaney*, 244 F.3d at 594; *Michels v. U.S. Olympic Comm.*, 741 F.2d 155 (7th Cir. 1984). The *Michels* court reviewed the interesting legislative history of the ASA, noting that at one point the Act contained an “‘Amateur Athlete’s Bill of Rights,’ which included a civil cause of action in federal district court for any athlete against an NGB, educational institution, or other sports organization that threatened to deny the athlete’s right to participate in certain events.” *Michels*, 741 F.2d at 157–58. Strong resistance by colleges and high schools led to removal of the provision. *Id.* at 158.

122. *Michels*, 741 F.2d at 159 (“[T]here can be few less suitable bodies than the federal courts for determining the eligibility . . . of athletes to participate in the Olympic Games.”) (Posner, J., concurring).

123. “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

124. See Thomas A. Mayes, Comment, *Tonya Harding’s Case: Contractual Due Process*,

Presumably, a court is increasingly likely to find a property interest as the economic benefits gained from competition become more certain.<sup>125</sup> Thus, the athlete's property interests could include the entitlements granted by the USOC or the prize money earned in past performances.<sup>126</sup>

Liberty interests are defined broadly.<sup>127</sup> Courts recognize that where governmental action places a person's reputation at stake, some form of due process may be required.<sup>128</sup> This is particularly true when the government imposes a stigma upon the person that forecloses his or her freedom to take advantage of other employment opportunities.<sup>129</sup> The court in *NCAA v. Yeo*<sup>130</sup> held that a swimmer possessed a liberty interest in protecting her athletic reputation.<sup>131</sup> Due to the swimmer's status as an Olympian, the court equated her athletic reputation with a professional reputation.<sup>132</sup>

This decision recognizes that Olympic-caliber athletes now earn a living and make a career of their sport.<sup>133</sup> When the USADA accuses an athlete of doping, a significant stigma attaches to him that may impede his ability to work at the highest level.<sup>134</sup> Thus, there is some

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*the Amateur Athlete, and the American Ideal of Fair Play*, 3 UCLA ENT. L. REV. 109, 134–36 (1995); Naidoo & Sarin, *supra* note 117, at 496.

125. Mayes, *supra* note 124, at 136.

126. *See supra* notes 93–95 and accompanying text. These assumptions are problematic because they depend on the USOC being classified as a state actor, a step the Supreme Court has refused to take. *See infra* Part III.B.

127. Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972). The liberty interest includes:

[T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

*Id.* at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

128. Roth, 408 U.S. at 573.

129. *Id.*

130. 114 S.W.3d 584 (Tex. App. 2003), *rev'd* by 171 S.W.3d 863 (Tex. 2005).

131. *Id.* at 598.

132. *Id.* At least part of this decision appears driven by Yeo's potential to benefit financially from her athletic career. The court distinguished Yeo from other intercollegiate athletes who had not established a similar international athletic reputation. *Id.* at 601. It believed the athlete's protected interest analysis to be fact-specific: "Each such case must be decided on its own merits, in light of the financial realities of contemporary athletic competition." *Id.* at 598.

133. *See supra* note 95.

134. *See* Robertson, *supra* note 21. Several track athletes implicated in the BALCO scandal

basis for claiming an interest worthy of protection under the Fifth Amendment.<sup>135</sup>

### C. *The Mathews v. Eldridge Balancing Test*

Finally, there is uncertainty inherent in a court's application of the *Mathews v. Eldridge* balancing test.<sup>136</sup> This test determines the specific dictates of due process for the disciplinary action—that is, the procedural safeguards necessary to protect the athlete's interest in competing. Three factors are considered:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>137</sup>

The inquiry is necessarily fact-specific.<sup>138</sup> There is a chance that a court will find the athlete's interest to be of little value, or that use of the “comfortable satisfaction” standard of proof runs only an insignificantly greater risk of depriving the athlete of that interest.<sup>139</sup> Conversely, the court could conclude that due process demands the use of the “reasonable doubt” standard in this situation. However, the nuances of the balancing test will not be addressed by a court until one more prerequisite is satisfied: the state action requirement.<sup>140</sup>

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blamed their poor performances at the Olympic Trials on the increased scrutiny that accompanied doping accusations. *Id.*

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

136. 424 U.S. 319, 347–49 (1976).

137. *Id.* at 335.

138. “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Id.* at 321 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

139. For an analysis of the difficulties in balancing an athlete's interest in competing with the potentially countervailing interests of the sports organization and society-at-large, see *Mayes*, *supra* note 124, at 141–47.

140. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (“Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not.”).

### III. THE STATE ACTION DOCTRINE

The requirement of state action under the Due Process Clauses of the Fifth and Fourteenth Amendments serves two purposes: it preserves individual freedom by limiting the reach of a federal law,<sup>141</sup> and it assures that constitutional standards are imposed “when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.”<sup>142</sup>

#### A. *The Blum Trilogy Tests*

To determine when a state is responsible for the complained-of conduct, the Supreme Court developed three guiding principles that were crystallized in a trio of cases known as the *Blum* Trilogy.<sup>143</sup> The first is known as the symbiotic relationship test.<sup>144</sup> Under this test, state action exists when a close nexus between the state and a private entity, resulting from joint actions or an interdependent relationship, transforms the private entity’s actions into those of the state.<sup>145</sup> The second test, the public function test, finds state action when a “private entity perform[s] an action that is traditionally performed exclusively by the state.”<sup>146</sup> Finally, the state compulsion test finds state action when the government coerces or encourages a private entity to engage in the challenged conduct.<sup>147</sup> The particular facts and

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141. *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

142. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

143. The cases are: *Blum*, 457 U.S. 991; *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982); and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). See, e.g., Megan M. Cooper, Casenotes, *Dusting Off the Old Play Book: How the Supreme Court Disregarded the Blum Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 35 CREIGHTON L. REV. 913 (2002).

144. See Cooper, *supra* note 143, at 913–14.

145. *Id.* This test evolved from the Court’s proclamation in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961): “The State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so ‘purely private’ as to fall without the scope of the Fourteenth Amendment.” *Burton*, 365 U.S. at 725.

146. See Cooper, *supra* note 143, at 914. The public function doctrine is not construed liberally. For example, in *Rendell-Baker v. Kohn* a private school providing special education for students unable to cope in a regular high school and funded almost exclusively by the state was not found to perform a function that was traditionally and exclusively public. *Rendell-Baker*, 457 U.S. at 842–43.

147. See Cooper, *supra* note 143, at 914; accord *Brentwood Acad.*, 531 U.S. at 296 (“[A]

circumstances of each case will determine the outcome under these three tests.<sup>148</sup>

To determine whether the current Supreme Court would find the USADA to be a state actor, several precedents must be examined. First, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*<sup>149</sup> is an unfavorable precedent that the current Court must distinguish on its facts. While the Court in that case narrowly interpreted the *Blum* Trilogy tests,<sup>150</sup> subsequent cases employed a more liberal analysis.<sup>151</sup> The Court further distanced itself from the *Blum* Trilogy tests in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,<sup>152</sup> where it employed a novel and somewhat undefined “pervasive entwinement” theory to find that a nominally private athletic association was in fact a state actor.<sup>153</sup>

### B. San Francisco Arts & Athletics

In *San Francisco Arts & Athletics*, the Supreme Court upheld the USOC’s injunction against San Francisco Arts & Athletics, Inc. (SFAA), preventing the petitioner from using the word “olympic” in its athletic competitions.<sup>154</sup> The Amateur Sports Act (ASA) grants the USOC the right to prohibit certain commercial and promotional uses

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challenged activity may be state action when it results from the State’s exercise of ‘coercive power’ [or] when the State provides ‘significant encouragement, either overt or covert’ . . . .” (citations omitted).

148. *Brentwood Acad.*, 531 U.S. at 295. “From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient . . . .” *Id.*

149. 483 U.S. 522 (1987).

150. *See infra* pp. 25–29 and accompanying notes.

151. *See infra* p. 29 and accompanying notes.

152. 531 U.S. 288 (2001).

153. *Id.* at 298. The dissent believed the “entwinement” theory to be a distortion of earlier state action cases and criticized its uncertain boundaries: “The majority does not define ‘entwinement,’ and the meaning of the term is not altogether clear. But whatever this new ‘entwinement’ theory may entail, it lacks any support in our state-action jurisprudence.” *Id.* at 312 (Thomas, J., dissenting).

154. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 548 (1987). San Francisco Arts and Athletics, Inc. wanted to host a “Gay Olympic Games,” including a cross-country relay wherein “the final runner would enter the stadium with the ‘Gay Olympic Torch’ and light the ‘Gay Olympic Flame.’” *Id.* at 525.

of the word “olympic.”<sup>155</sup> The SFAA argued that this exclusive use granted by the ASA violated the First Amendment,<sup>156</sup> and that the USOC’s enforcement of the right was discriminatory in violation of the Fifth Amendment.<sup>157</sup> The Court did not reach the merits of the second issue because it held that the USOC was not a governmental actor to whom the Fifth Amendment’s equal protection limitations could apply.<sup>158</sup>

First, the Court dismissed the argument that Congress’s grant of a corporate charter to the USOC rendered it a government agent.<sup>159</sup> The Court noted that all corporations operate under charters granted by a government.<sup>160</sup> To find state action on this basis would transform almost any corporate act into government conduct, a dramatic step the Court was unwilling to take.<sup>161</sup> Furthermore, extensive government subsidization and regulation of a corporation did not require the state to assume constitutional responsibility for the private conduct.<sup>162</sup>

Next, applying the public function test, the Court found that “[n]either the conduct nor the coordination of amateur sports has been a traditional government function.”<sup>163</sup> It acknowledged that the USOC’s activities served a national interest,<sup>164</sup> but found this insufficient to fairly attribute those activities to the state.<sup>165</sup>

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155. See 36 U.S.C. § 220506 (2000). In conjunction with its exclusive right to use the names and symbols listed in section 220506(a)(1)-(4), the USOC is authorized to file a civil action against any person who uses such words and symbols to promote an athletic performance without the USOC’s consent. *Id.*

156. *S.F. Arts & Athletics, Inc.*, 483 U.S. at 531–32.

157. *Id.* at 542.

158. *Id.* at 547.

159. *Id.* at 543.

160. *Id.* at 543–44. The Court also noted that “[a]ll enforceable rights in trademarks are created by some governmental act . . . .” *Id.* at 544.

161. *Id.* at 543 n.23.

162. *Id.* at 544 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982)).

163. *Id.* at 545.

164. *Id.* at 544. The USOC was created to coordinate the disorganized and discordant factions in American amateur sport, and also was intended to serve a representational function to the international athletic community. *Id.* at 545–46 n.27.

165. *Id.* at 544.

The Court concluded its analysis with the state compulsion test.<sup>166</sup> “Most fundamentally . . . a government ‘normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].’”<sup>167</sup> There was no evidence that the government encouraged or coerced the USOC in the choice of how to enforce its trademark rights.<sup>168</sup> At most, the government may have approved of or acquiesced in the USOC’s conduct.<sup>169</sup> Therefore, the Court held that the USOC was not a state actor.<sup>170</sup>

A dissenting opinion believed that the USOC’s action was governmental conduct.<sup>171</sup> The dissent’s opinion was based on the traditional governmental functions performed by the USOC, and the close nexus between the government and the challenged action of the USOC.<sup>172</sup> It concluded that while the government was free to privatize functions it would otherwise perform, that fact should not release the nominally private entity from constitutional obligations.<sup>173</sup>

In the years between *San Francisco Arts & Athletics* and *Brentwood Academy*, the Court heard two cases which some commentators interpret as a relaxation of the *Blum* Trilogy’s state action tests.<sup>174</sup> In *NCAA v. Tarkanian*,<sup>175</sup> the Court “modified the

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166. *Id.* at 546.

167. *Id.* at 546 (quoting *Blum*, 457 U.S. at 1004).

168. *Id.* at 547.

169. *Id.* (quoting *Blum*, 457 U.S. at 1004–05).

170. *Id.* at 547.

171. *Id.* at 548 (Brennan, J., dissenting).

172. *Id.* at 548–49. The dissent believed that the USOC did more than merely serve a public interest: it “has been endowed by the Federal Government with the exclusive power to serve a unique national, administrative, adjudicative, and representational role.” *Id.* at 555. Moreover, there was a symbiotic relationship between the government and the USOC which conferred a number of benefits on both parties. *See id.* at 556–59. Finally, making a point not addressed by the majority, the dissent found it significant that “in the eye of the public . . . the connection between the decisions of the United States Government and those of the [USOC] is profound.” *Id.* at 557.

173. *Id.* at 560.

174. *See Cooper*, *supra* note 143, at 951 (“In the years that followed the *Blum* Trilogy, the Court modified its state action tests.”).

175. 488 U.S. 179 (1988). In this case, former University of Nevada, Las Vegas basketball coach Jerry Tarkanian faced disciplinary action from his state university employer based upon recommendations made by the NCAA. *Id.* at 186–87. At issue was whether the NCAA was a state actor and thus required to afford Tarkanian some form of due process. *Id.* at 191–92.

symbiotic relationship test and analyzed all factors that created a symbiotic relationship between the parties, not just those directly related to the challenged conduct.”<sup>176</sup> In *Edmonson v. Leesville Concrete Co.*,<sup>177</sup> the Court allegedly altered the public function test by discarding the “exclusivity” requirement.<sup>178</sup> Assuming these interpretations of *Tarkanian* and *Edmonson* are correct, the modifications would significantly reduce a plaintiff’s burden in proving state action.<sup>179</sup>

### C. Brentwood Academy

The Supreme Court in *Brentwood Academy* continued the trend away from the *Blum* Trilogy’s state action tests.<sup>180</sup> The question presented in *Brentwood Academy* was whether the Tennessee Secondary School Athletic Association (TSSAA), a nominally private organization, was a state actor required to follow substantive and procedural due process guidelines in imposing sanctions on a member high school.<sup>181</sup> The TSSAA regulates interscholastic sports in Tennessee among the private and public high schools that choose to join the organization.<sup>182</sup> Its governing councils are comprised of principals, assistant principals, and superintendents from public schools.<sup>183</sup> TSSAA staff members are not paid by the state but are eligible to join the state’s public retirement system for its employees.<sup>184</sup> At one point in time the TSSAA was officially

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Phrasing the symbiotic relationship test somewhat differently, the Court asked whether the State “knowingly accept[ed] the benefits derived from unconstitutional behavior . . . [or] provided a mantle of authority that enhanced the power of the harm-causing individual . . . .” *Id.* at 192. The Court found no state action in this case. *Id.* at 199.

176. Cooper, *supra* note 143, at 951.

177. 500 U.S. 614, 628 (1991). The majority in *Edmonson* held that in a civil proceeding, a private litigant’s use of peremptory challenges on the basis of race constituted state action for Fourteenth Amendment equal protection purposes. *Id.*

178. Cooper, *supra* note 143, at 951.

179. *Id.* at 960 (describing the cases as lenient interpretations of existing state action doctrine).

180. *Id.* at 914.

181. *Id.* at 917–18.

182. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001). Public high schools comprised approximately 84% of the TSSAA’s voting membership. *Id.*

183. *Id.*

184. *Id.*

designated by the state as the organization to supervise and regulate high school sport in Tennessee.<sup>185</sup>

On the basis of these facts, the Court held that the private character of the TSSAA was “overborne by the pervasive entwinement of public institutions and public officials in its composition and workings . . . .”<sup>186</sup> The Court’s analysis did not require the facts of the case to fit within one of its standard state action tests.<sup>187</sup> It indicated that “entwinement” was merely a descriptive term used to characterize the various criteria applied in those earlier analyses.<sup>188</sup> Because the facts revealed a largely overlapping identity between the TSSAA and the state, a finding of state action in this case was appropriate.<sup>189</sup>

As might be expected, this departure from precedent drew a highly critical dissent<sup>190</sup> which viewed the “entwinement” theory as a dangerous expansion of the Court’s state action jurisprudence.<sup>191</sup> It examined the facts of the case using the *Blum* Trilogy’s state action

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185. *Id.* at 292.

186. *Id.* at 298. The Court also stated that “the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity’s inseparability from recognized government officials or agencies.” *Id.* at 296. In support of this proposition the Court cited *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), which held that Amtrak was a state actor “for constitutional purposes, regardless of its congressional designation as private; it was organized under federal law to attain governmental objectives and was directed and controlled by federal appointees.” *Brentwood Acad.*, 531 U.S. at 296.

187. “[T]his case does not turn on a public function test . . . it avails the [TSSAA] nothing to stress that the State neither coerced nor encouraged the actions complained of. . . . Facts that address any of these criteria are significant, but no one criterion must necessarily be applied.” *Brentwood Acad.*, 531 U.S. at 303.

188. *Id.*

189. *Id.* Interestingly, the Court indicated that some sort of balancing test could be applied which would allow the TSSAA to escape its classification as a state actor. “Even facts that suffice to show public action (or, standing alone, would require such a finding) may be outweighed in the name of some value at odds with finding public accountability in the circumstances.” *Id.* The Court considered the countervailing factors raised by the TSSAA—for instance, “an epidemic of unprecedented federal litigation”—but deemed them insufficient to change the outcome of the analysis. *Id.* at 304.

190. *Id.* at 305 (Thomas, J., dissenting). Justice Thomas was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy in his opinion. *Id.*

191. The dissent warned that the test could reach other organizations composed of or controlled by public officials, like firemen, policemen, or teachers. *Id.* at 314. “I am not prepared to say that any private organization that permits public entities and public officials to participate acts as the State in anything or everything it does, and our state-action jurisprudence has never reached that far.” *Id.* at 315.

tests and concluded that the TSSAA's disciplinary actions were not fairly attributable to the state.<sup>192</sup>

#### IV. THE USADA AS A STATE ACTOR

As noted earlier, an athlete's due process suit against the USADA is far from a guaranteed success.<sup>193</sup> The law, if not directly opposed to the athlete's position,<sup>194</sup> is at least so uncertain as to make the outcome largely unforeseeable.<sup>195</sup> This is the case with the state action doctrine, which underwent varying degrees of expansion and contraction before the *Brentwood Academy* Court further confused the issue.<sup>196</sup> Moreover, the Supreme Court as it now stands is almost evenly split, with four Justices showing no sign of relinquishing the prior state action tests.<sup>197</sup> Nevertheless, recent developments in the USADA's doping procedures and adjudications provide the factual basis for finding state action using either a *Blum* Trilogy or *Brentwood Academy* analysis.

##### A. The Public Function Test

The athlete should not expect the public function test to reveal state action.<sup>198</sup> Success hinges upon two factors: the Court's characterization of the function, and its adherence to the "exclusivity"

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192. The dissent noted that "organization of interscholastic sports is neither a traditional nor an exclusive public function of the States," *id.* at 309; that the state did not exercise coercive power or provide encouragement in the enforcement of TSSAA's rule, *id.* at 310 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)); and that there was "no symbiotic relationship" or close nexus between the private organization and the state. *Id.* at 311.

193. See *supra* Part II.

194. See, e.g., *Michels v. U.S. Olympic Comm.*, 741 F.2d 155 (7th Cir. 1984) (holding that the ASA does not create a private cause of action and that there is no right to compete).

195. See *supra* Part II.C (discussing the *Mathews v. Eldridge* balancing test).

196. Cooper, *supra* note 143, chronicles the advent of the "rigid" state action tests set forth in the *Blum* Trilogy, *id.* at 936-51; the tests' subsequent relaxations, *id.* at 951-59; and *Brentwood Academy's* return to a pre-*Blum* Trilogy "entanglement" or "totality of contacts" theory. *Id.* at 986.

197. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 305-15 (Thomas, J., dissenting).

198. The Court has found government action when the challenged entity performs functions that are "traditionally the exclusive prerogative" of the government. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

prong. The Court's description of the function performed by the USADA will be important. If the Court adopted the USADA's mission statement—the "USADA is dedicated to preserving the well being of Olympic sport, the integrity of competition, and ensuring the health of athletes"<sup>199</sup>—it is unlikely to treat this function as traditionally governmental.<sup>200</sup> However, a more specific characterization (for instance, the prerogative to impose regulations upon and punishment for the use of specified drugs) could be seen as a traditional government function.<sup>201</sup>

Both the USADA and the government regulate the use and distribution of cocaine, amphetamines, marijuana, and certain steroids;<sup>202</sup> and each entity imposes punishments for violations.<sup>203</sup> Although the list of drugs subject to regulation is constantly evolving<sup>204</sup> and different punishments are meted out by each entity,<sup>205</sup> such details do not alter the nature of this function. In contrast to the non-governmental duties described in its mission statement, the USADA performs a traditional government function in this respect.

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199. See U.S. Anti-Doping Agency, USADA Mission, <http://www.usantidoping.org/who/mission.html> (last visited Apr. 11, 2006).

200. In *San Francisco Arts & Athletics*, the majority described the USOC's function as "the conduct [and] . . . coordination of amateur sports," and concluded that this was not "a traditional governmental function." *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 545 (1987). The dissent reached a contrary conclusion regarding this function, *id.* at 553 (Brennan, J., dissenting), and added one of its own: the USOC performed the "distinctive, traditional government function [of] represent[ing] this Nation to the world community." *Id.* at 550.

201. See 25 AM. JUR. 2D *Drugs and Controlled Substances* § 19 (2004). American Jurisprudence states:

The regulation of the possession, sale and use of various drugs is within the police power of the state. . . . [A] state legislature, in the exercise of its police power, has the right to reasonably regulate the administration of drugs for the protection of the lives, health, safety, and welfare of the people. . . .

With regard to federal regulation, Congress undoubtedly possesses the authority to proscribe drugs it considers dangerous to the public welfare.

*Id.* (footnotes omitted).

202. See 21 U.S.C. § 841 (2000); 2005 PROHIBITED LIST, *supra* note 56.

203. See *supra* notes 88–92, 104–06 and accompanying text.

204. See *supra* notes 106–08 and accompanying text.

205. Compare WORLD ANTI-DOPING CODE, *supra* note 2, at 27 (imposing two-year ban on competition), with 21 U.S.C. § 841(b)(1)(D) (imposing punishment not to exceed five years in prison or \$250,000 in fines).

Similarly, the Supreme Court's adherence to the "exclusivity" prong of the public function test could be dispositive.<sup>206</sup> One may assume that imposing sanctions for the use and distribution of drugs that are dangerous to health and safety is a traditional function of government.<sup>207</sup> However, it is not uncommon for private employers to condition employment upon compliance with drug testing and usage guidelines.<sup>208</sup> If, as the *Brentwood Academy* dissent insists, the challenged function must be both traditionally and exclusively public, then state action will not be found under this test.<sup>209</sup> Alternatively, if commentators are correct in asserting that *Edmonson* discarded the exclusivity prong,<sup>210</sup> the athlete's position under the public function test is substantially stronger.

### B. *The Symbiotic Relationship Test*

State action is more readily found under the symbiotic relationship test.<sup>211</sup> The relationship between the USADA and the federal government confers a variety of benefits upon each entity.<sup>212</sup> The

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206. See Cooper, *supra* note 143, at 951 (asserting that the *Edmonson* Court abandoned the exclusivity prong).

207. See *supra* note 198.

208. The Department of Labor attempts to provide drug-testing guidance to employers through its Working Partners for an Alcohol- and Drug-Free Workplace program. See U.S. Dep't of Labor, Working Partners for an Alcohol- and Drug-Free Workplace, <http://www.dol.gov/workingpartners/welcome.html> (last visited Apr. 11, 2006). The program's website contains sample drug-testing policies and information on various state and federal laws that may impact those policies. *Id.*

209. "The organization of interscholastic sports is neither a traditional nor an exclusive public function of the States." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 309 (2001) (Thomas, J., dissenting).

210. See Cooper, *supra* note 143, at 951. The *Edmonson* Court asked only "whether the action in question involves the performance of a traditional function of the government." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991). The *Edmonson* dissent believed the majority misstated the law: "In order to constitute state action under this doctrine, private conduct must not only comprise something that the government traditionally does, but something that *only* the government traditionally does." *Id.* at 640 (O'Connor, J., dissenting). Interestingly, Justice O'Connor joined the majority in *Brentwood Academy*, where a strict application of the public function test would almost certainly have been fatal to the plaintiff's state action claim. See *Brentwood Acad.*, 531 U.S. at 290.

211. See *supra* note 141 and accompanying text.

212. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961) ("It cannot be doubted that the peculiar relationship . . . confers on each [party] an incidental variety of mutual benefits.").

evidence derived from the BALCO investigation aided the USADA significantly in its mission to preserve the integrity of sport and the health of athletes.<sup>213</sup> This is true in regard to both deterrence and punishment. As one athletics official stated, “[T]he fear factor created by the BALCO investigation and the new weapon of non-analytical positives holds real promise for deterring, or catching, the group of athletes I call ‘dedicated cheaters.’”<sup>214</sup> The United States government benefits as well. By facilitating the suspension of athletes who compete under a cloud of suspicion but have never tested positive, the United States can quickly rehabilitate its reputation for fair play in the international sports community.<sup>215</sup> The statements of Senator McCain<sup>216</sup> and the Senate’s resolution to share the BALCO documents<sup>217</sup> indicate that United States’ athletic credibility and reputation are, in fact, valued benefits.<sup>218</sup>

### C. The State Compulsion Test

The state action test most favorable to the athlete is the state compulsion test.<sup>219</sup> In *San Francisco Arts & Athletics, Inc.*,<sup>220</sup> the majority found this to be the most fundamental criterion in finding state action.<sup>221</sup> It is difficult to maintain that the government did not

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213. See *supra* notes 80–87 and accompanying text.

214. See Craig A. Masback, Chief Executive Officer, U.S.A. Track & Field, Statement to Media (July 6, 2004), available at [http://www.usatf.org/news/view.aspx?DUID=USATF\\_2004\\_07\\_06\\_10\\_24\\_20](http://www.usatf.org/news/view.aspx?DUID=USATF_2004_07_06_10_24_20) (last visited Apr. 11, 2006).

215. See *supra* notes 8–9 and accompanying text.

216. See *supra* note 82.

217. See *supra* notes 84–85 and accompanying text.

218. It is relevant that the interests of the USADA and the government of the United States (or at least, the Senate) are nearly identical. In contrast, the *Tarkanian* Court rejected a “symbiotic relationship” argument by noting that “the state and private parties’ relevant interests do not coincide, as they did in *Burton*; rather, they have clashed throughout . . . . UNLV and the NCAA were antagonists, not joint participants . . . .” *NCAA v. Tarkanian*, 488 U.S. 179, 196–97 n.16 (1988). *But see* *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987) (“The fact [t]hat a private entity performs a function which serves the public does not make its acts [governmental] action.” (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982))).

219. The test investigates whether the state “has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government.” *S.F. Arts & Athletics, Inc.*, 483 U.S. at 546 (1987).

220. 483 U.S. 522 (1987).

221. *Id.* at 546.

provide significant, overt encouragement to the USADA. The Senate subpoenaed the Department of Justice to obtain its BALCO evidence.<sup>222</sup> The Senate met with the USADA to discuss that evidence, and then gave it to the agency so that certain athletes could be suspended prior to the Olympic Games.<sup>223</sup> The government influenced the USADA's choice of how to enforce its doping rules by supplying it with the means to prosecute without a positive drug test.<sup>224</sup> This action by the Senate cannot honestly be characterized as "mere approval of or acquiescence in the initiatives" of the USADA.<sup>225</sup>

#### *D. The Entwinement Theory*

For many of the same reasons, state action could be found under the "entwinement" theory.<sup>226</sup> In addition, recent bills such as the Clean Sports Act, which would require professional sports leagues to consult with the USADA in implementing drug testing and adjudication procedures,<sup>227</sup> indicate that federal interaction with the agency is extending well beyond the BALCO scandal. The benefit of the entwinement theory for the plaintiff—athlete is that unfavorable elements of the *Blum* Trilogy tests, for example, the exclusivity

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222. See *supra* notes 81–83 and accompanying text.

223. See *supra* notes 84–87 and accompanying text.

224. Cf. *S.F. Arts & Athletics, Inc.*, 483 U.S. at 547 n.29 ("The SFAA has failed to demonstrate that the Federal Government can or does exert any influence over the exercise of the USOC's enforcement decisions."). After documentary evidence from the BALCO investigation led sprinter Alvin Harrison to accept a four-year suspension for drug violations (despite the absence of a positive test), USADA CEO Terry Madden stated that the agency was "thankful for the steadfast support of . . . the U.S. Senate . . ." See Press Release, *supra* note 75. In answering the question of "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual," the *Tarkanian* Court noted that "[t]he NCAA enjoyed no governmental powers to facilitate its investigation." *NCAA v. Tarkanian*, 488 U.S. 179, 197 (1988). Given the USADA's relationship with the Senate, this framework of analysis could reveal state action.

225. *S.F. Arts & Athletics, Inc.*, 483 U.S. at 547. It should be noted that significant government funding of the USADA, even if used in BALCO cases, would not amount to more than "mere approval of or acquiescence in" those cases. See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 544 ("The Government may subsidize private entities without assuming constitutional responsibility for their actions."); Shipley, *BALCO Tab*, *supra* note 22 (outlining USADA funding).

226. See *supra* Part III.C.

227. S. 1114 § 4(b), 109th Cong. (2005).

requirement,<sup>228</sup> will not preclude a finding of government action.<sup>229</sup> The *Brentwood Academy* Court indicated that it would focus on substance over form.<sup>230</sup> Some view the *Brentwood Academy* entwinement theory as an alarming expansion of traditional state action analysis.<sup>231</sup> However, it is not clear that a fact-specific, totality-of-contacts inquiry confers any extra advantage on a plaintiff seeking to classify the USADA as a state actor. Significant integration with the government exists with regard to the use of non-analytical positives in doping adjudications,<sup>232</sup> but the facts as a whole may not rise to the level of “overlapping identities” or “pervasive entwinement.”<sup>233</sup> The ambiguity of the *Brentwood Academy* analysis both benefits and burdens the plaintiff in this hypothetical case. On the whole, however, the state action doctrine articulated by the Supreme Court leads one to conclude that the USADA is a state actor.

#### CONCLUSION

The concept of fair play is central to both the “spirit of sport” and due process.<sup>234</sup> The use of illicit substances to enhance athletic performance is offensive to this concept.<sup>235</sup> By the same token, however, the government should not be allowed to enhance the

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228. See *supra* Part IV.A.

229. “[T]he facts justify a conclusion of state action under the criterion of entwinement, a conclusion in no sense unsettled merely because other criteria of state action may not be satisfied by the same facts.” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 302 (2001).

230. “Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards . . .” *Id.*

231. See Cooper, *supra* note 143, at 991 (describing the entwinement test as “overly inclusive” and as “provid[ing] attorneys with judicially acceptable means of circumventing traditionally rigid state action analyses”).

232. See *supra* Part IV.B–C.

233. The *Brentwood Academy* majority held that “the relevant facts show pervasive entwinement to the point of largely overlapping identity.” *Brentwood Acad.*, 531 U.S. at 303. Justice Thomas observed that “[b]ecause the majority never defines ‘entwinement,’ the scope of its holding is unclear.” *Id.* at 314 (Thomas, J., dissenting).

234. See Mayes, *supra* note 124, at 154 (“[T]he two ideals which seem to conflict—due process and sportsmanship—are manifestations of the same core value: fair play.”).

235. “[D]oping is contrary to the values of sport and the principles for which it stands: fair play, equal chances, [and] loyal competition. . . .” Rigozzi et al., *supra* note 113, at 42.

prosecutorial performance of the USADA without applying standards of due process, a parallel form of fair play. It is clear that doping is fundamentally wrong.<sup>236</sup> However, the USADA undermines the integrity of its fight against doping by taking advantage of a nominally private character and an inadequate standard of proof.<sup>237</sup> A level playing field will be achieved only when the USADA is classified as a state actor and held to the constitutional standards of due process.

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236. *Id.* at 42–43 (discussing both moral and medical problems created by doping).

237. “[T]o have full legitimacy and credibility and to satisfy notions of fundamental fairness, the . . . doping control process should possess a high level of procedural due process protection . . .” Straubel, *supra* note 7, at 545; *see also In re Winship*, 397 U.S. 358, 364 (1970) (“It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”).