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The Legal and Political Challenges to Academic Eligibility Requirements

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COMMENT

THE LEGAL AND POLITICAL CHALLENGES TO ACADEMIC ELIGIBILITY REQUIREMENTS

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THE LEGAL AND POLITICAL CHALLENGES TO ACADEMIC ELIGIBILITY REQUIREMENTS

> Each generation of Americans has outstripped its parents in education, in literacy, and in economic attainment. For the first time in the history of our country, the educational skills of one generation will not surpass, will not equal, will not even approach those of their parents. Paul Copperman within *A Nation At Risk* [1]

I. INTRODUCTION

America's once unchallenged pre-eminence in industrial, scientific and technological innovation is being surpassed by other nations.[2] What was unimaginable a generation ago has begun to occur — other countries are matching and surpassing America's educational attainments.[3] Underlying the many causes and dimensions of the problem is the quality, or lack thereof, of public education.[4] Historically, America's schools and colleges

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1. NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM at 11 (1983) [hereinafter A NATION AT RISK]. (A comprehensive study on the failure of public schools to provide quality education for America's youth.)

2. *See generally* A NATION AT RISK, *supra* note 1; EDUCATION COMMISSION OF THE STATES, TASK FORCE ON EDUCATION FOR ECONOMIC GROWTH, ACTION FOR EXCELLENCE: A COMPREHENSIVE PLAN TO IMPROVE OUR NATION'S SCHOOLS (1983) [hereinafter ACTION FOR EXCELLENCE] (a commissioned report on the urgent need for increased academic standards in the public schools); Twentieth Century Fund Task Force on Federal Elementary and Secondary Educational Policy, MAKING THE GRADE (1983) [hereinafter MAKING THE GRADE] (a commissioned report which recommends the establishment of state task forces to improve the ability of schools to train young people for worthwhile occupations and to improve the building of productive partnerships with the business community). NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, URBAN EDUCATION IN THE 80S: THE NEVER ENDING CHALLENGE (1980) (a comprehensive survey on the current state of urban education); COLEMAN, HOFFER & KILGORE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC AND PRIVATE COMPARED (1982) (a comparison of student achievement levels and other nonacademic variables of high school youth); NEW ORLEANS PUBLIC SCHOOLS, REPORT OF THE TASK FORCE TO EXAMINE THE CURRENT STATE OF PUBLIC EDUCATION IN NEW ORLEANS (1984) (an educational needs study initiated by the Urban League of Greater New Orleans with a follow-up report on implementation methods prepared by the Committee to Study Implementation of Task Force Recommendations, 1985); COMMITTEE FOR ECONOMIC DEVELOPMENT, RESEARCH, AND POLICY, INVESTING IN OUR CHILDREN: BUSINESS AND THE PUBLIC SCHOOLS (1985) (a discussion of schooling and economics); STANFORD EDUCATIONAL POLICY INSTITUTE, ON THE SOCIAL COSTS OF DROPPING OUT (1985) (a report on the economic and social effect of school dropouts); NATIONAL SCIENCE FOUNDATION, EDUCATING AMERICANS FOR THE 21ST CENTURY (1987) (a national report focusing on the expectation of government-supported schools to serve the predominant goals of the society, including those of economic development).

3. A NATION AT RISK, *supra* note 1, at 5.

4. *See* A NATION AT RISK, *supra* note 1(commissioned study on identified academic deficiencies of public school students); MAKING THE GRADE, *supra* note 2 (analysis of student achieve-

have contributed to the well-being of this country and its people. The accomplishments of the past generations are neither being matched, nor surpassed, in today's schools.[5] "[S]ociety and its educational institutions seem to have lost sight of the basic purposes of schooling."[6]

Schools exist for students to learn.[7] The purpose of the first public school was "to teach children to read."[8] This purpose has endured. Schools today are judged on the academic achievement of their students.[9] However, unlike the schools of a generation ago, today's students are not always engaged in the pursuit of educational activities during the day. Numerous extracurricular activities impact the school day.[10] According to many school reformers, the extracurricular activities negatively impact the instructional program and student achievement.[11] A concerned America wonders why its students attend school and fail to achieve. In response, these reformists have suggested that the students attend school but not

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ment with emphasis on mathematics and science); OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, UNITED STATES DEPARTMENT OF EDUCATION, DEALING WITH DROPOUTS (1987) (statistical, social and economic information on dropouts); NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT EDUCATIONAL TESTING SERVICE, THE NATION'S REPORT CARD—LEARNING TO BE LITERATE IN AMERICA: LEARNING, WRITING, AND REASONING (1987).

5. A NATION AT RISK *supra* note 1, at 1. *See, also,* the two other major reports which identified crisis situations: ACTION FOR EXCELLENCE and MAKING THE GRADE, *supra,* note 2. The three reports urge reconsideration of current educational objectives and curricular decisions.

6. *See generally* A NATION AT RISK, *supra* note 1; THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, A CARNEGIE FOUNDATION SPECIAL REPORT, AN IMPERILED GENERATION: SAVING URBAN SCHOOLS (1988) [hereinafter AN IMPERILED GENERATION] (a report on the failure of the initial reform efforts with emphasis on the gap between rhetoric and school reform); UNITED STATES DEPARTMENT OF EDUCATION, AMERICAN EDUCATION: MAKING IT WORK (1988) [hereinafter MAKING IT WORK] (a report by Secretary of Education William Bennett which assesses the United States' educational progress since the release of a A NATION AT RISK). The latter two reports concluded that the gains in student academic performance and educational progress have been insufficient since the launch of the initial reform efforts.

7. *See* A NATION AT RISK, *supra* note 1.

8. *See* A. ORNSTEIN & D. LEVINE, FOUNDATIONS OF EDUCATION 377-379 (1989). The authors summarize research on the correlation between participation in extracurricular activities and grades in the context of culture, socialization, and education.

9. *See* AN IMPERILED GENERATION and MAKING IT WORK, *supra* note 6. The reports call for accountability at every level to produce the result that matters most: student learning.

10. Extracurricular activities are activities that do not fall within the scope of a regular curriculum. They carry no academic credit. Such activities include athletics, student clubs, and organizations.

11. *See* A NATION AT RISK, *supra* note 1, at 21. In the section, "Findings Regarding Time," the report concluded that American students, compared to students of other nations, spend much less time on school work.

class. They have concluded that participation in extracurricular activities, especially athletics, has interfered with the quest for academic excellence.[12]

School reform efforts generally focus on the quality of classroom instruction. Improvements have been targeted to curriculum standards, teacher certification, and graduation requirements.[13] With limited success in classroom reform efforts, reformers have expanded their focus from what happens in the classroom, to why students are allowed to leave the classroom to participate in other activities.[14] They suggest that improving the quality of experiences in the classroom is useless if students are in school, but not in class, during the school day.

The school day is no longer the sacred domain of educators. Students attend school, but the amount of time that they spend in the classroom varies.[15] In some schools, instructional time is highly guarded, and students are not allowed to participate in any extra-curricular activities during the school day.[16] In other schools, students often spend many hours outside of the instructional program during the school day.[17]

Current reform efforts place a priority on the preservation of the school day for instructional time. Reformers suggest that the quality of instructional time, along with sanctions for nonachievement, will improve student performance.[18] This proposal is supported by a body of educational re-

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12. Extracurricular activities were the focus of reform efforts by legislators in Texas, Florida, West Virginia, and California. See discussion of standards, *infra* notes 105-127 and accompanying text.

13. *See* the three initial national reports on school reform efforts: A NATION AT RISK, ACTION FOR EXCELLENCE, and MAKING THE GRADE, *supra* notes 1, 2. The reports urge quality education through curricular standardization, teacher improvement, and the strengthening of graduation requirements. They conclude that the crisis demands urgent attention in order to increase scientific literacy, upgrade mathematical skills, reduce dropout rates, and eliminate unnecessary subject matter.

14. In addition to the reform efforts addressed in the national reports, *supra* notes 1, 2, several states and regional agencies proposed and implemented reform efforts. *See Educational Progress: Cities Mobolize to Improve Their Schools,* 16 Educ. Res. Service Bull. 3 (1989)(a report on the improvement efforts of school and community leaders in urban school districts in six cities nationwide); *School Reform in Ten States,* 16 Educ. Res. Service Bull. 4 (1989)(an analysis which concludes that change must shift from mandated packages of reform to more collaborative, cooperative, protracted endeavors).

15. *See,* F. ENGLISH, CURRICULUM MANAGEMENT, 249-250 (1987). Extracurricular activities consist of school related activities that are not formally attached to school subjects. Clubs, drama, interscholastic athletics, drill teams, and prep squads are examples of activities that are considered to be extracurricular. *See also* Frith, *Extracurricular Activities: Academic Incentives or Nonessential Functions?* 57 THE CLEARING HOUSE, 325 (1984).

16. F. ENGLISH, *supra* note 15.

17. *Id.*

18. *See generally* NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE ISSUES 1989: PRIORITY ISSUES FOR STATE LEGISLATORS (1989) (a survey on the top educational concerns in

search which has accumulated over the past twenty years. Often called Effective Schools Research[19], the studies indicate that student achievement is correlated with "time on task" and "high expectations."[20] Thus, the greater the time engaged in instruction and the higher the level of expectation held for the student's performance, the higher will be his level of achievement.[21]

One of the most controversial and far reaching actions of school reformers has been the restriction placed on student participation in extracurricular activities. For the privilege to participate in activities outside of the academic curriculum, school reformers demand acceptable academic per-

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state legislatures across the country). In 1989, accountability and at-risk youth emerged as priorities among legislatures. *See also*, NATIONAL GOVERNORS ASSOCIATION, TIME FOR RESULTS: THE GOVERNORS 1991 REPORT ON EDUCATION (1986).

19. See EDUCATIONAL RESEARCH SERVICE, EFFECTIVE SCHOOLS: A SUMMARY OF RESEARCH (1985) [hereinafter EFFECTIVE SCHOOLS RESEARCH] (research brief on school factors important to student achievement). The report summarizes the substantial body of research on effective schools that emerged in the 1970s and 1980s. Effective schools research emerged as a response to widely publicized studies in the 1960s and 1970s which reported that the amount of variation attributable to school input was negligible when compared to the amount attributable to student background characteristics. Many persons found unacceptable the conclusion that the determinants of student achievement lie outside the control of the schools, with the schools largely powerless to compensate for the effects of home, race, and socioeconomic background. As a result, there emerged a substantial body of research which focused on identifying and analyzing effective schools.

20. Two characteristics common to effective schools were identified as "time on task" and "high expectations." "Time on task" refers to the number of hours in which the student is actively engaged in learning. Maximizing the amount of time that students are engaged in planned learning activities improves performance. For further analysis of "time on task," *see* AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, TIME ON TASK (1983). "High expectations" refers to the level of expectancy held by the students' teachers. This concept refers to the belief that all students can master the curriculum. When school professionals behave as if all children can master the curriculum, students rise to their level of expectation. Student engagement time and high expectation of performance were factors which positively correlated with student achievement.

21. *See* EFFECTIVE SCHOOLS RESEARCH, *supra* note 19. The effective schools research demonstrated that, when schools were matched on student background characteristics, the levels of student achievement could greatly differ. The difference in school achievement corresponded with differences in school management, processes, instruction, and climate. *See also* W. BROOKOVER, CREATING EFFECTIVE SCHOOLS (1982). This publication summarizes the characteristics of effective schools, and it is based on the pioneer work by Wilbur Brookover and Lawrence Lezotte in this field. The characteristics of effective schools identified in the earliest studies continue to be the characteristics identified in current research. The characteristics are: 1) clear school mission, 2) instructional leadership by the principal, 3) high expectations, 4) student time on task, 5) frequent monitoring of pupil progress, 6) home-school relations, and 7) orderly climate.

formance.[22] The restrictions that call for acceptable academic performance as a prerequisite for participation in extracurricular activities are known as academic eligibility requirements.[23] The battleground for these restrictions has surfaced principally in the field of athletics. Known as "no pass, no play rules"[24], the restrictions require students to maintain a specific minimum grade point average and pass a minimum number of subjects in order to participate in interscholastic athletics. Academic eligibility requirements were embraced by school reformers in an effort to improve student achievement.[25] However, these requirements have become the target of numerous legal challenges.

This paper will focus on the legal challenges to academic eligibility requirements and the various political processes through which academic eligibility requirements are enacted. This paper will identify the legal challenges to academic eligibility requirements that have been formulated, primarily in the context of their constitutionality under the equal protection clause. The constitutional challenges question whether the eligibility requirements infringe upon a "fundamental right" or constitute a "suspect classification." Academic eligibility requirements have also been challenged on procedural and substantive due process grounds. Next, the paper will identify the various bodies that have enacted academic eligibility requirements along with the differences in the requirements enacted. The enacting bodies range from state legislatures to local school boards to athletic associations. Differences in the political powers behind the requirements re-

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22. *See* UNITED STATES DEPARTMENT OF EDUCATION, WHAT WORKS: SCHOOLS THAT WORK (1987) (an assessment of the "most reliable and practical information on what works" in education).

23. *See* R. LEPCHICK, PASS TO PLAY: STUDENT ATHLETES AND ACADEMICS (1989) (report on academic requirements for high school eligibility as of 1987). Lepchick produces a list of academic standards for eligibility. The list was developed with input from a national assembly of educators, businessmen, athletic coaches, and civil rights leaders. The recommended eligibility standards are: 1) a student should be allowed one "F" per year as long as the average remains at the "C" level, 2) once ineligible, athletes should receive academic help, and 3) exceptions should be made on an individual basis for students with extenuating circumstances.

24. The purpose of the "no pass, no play" rules was to make academic achievement a priority. The rules were meant to improve student academic performance by encouraging students to spend more time on their studies and by motivating students to raise their grades in order to participate. To allow underachieving students to participate in extracurricular activities meant that they were being denied maximum time on task to accomplish their educational objectives. Thus, academic eligibility requirements came to be viewed as integral to time on task. Once the student did not qualify academically, the student was not allowed to participate. The hours used in participation could now be used to accomplish schoolwork. Academic eligibility requirements were viewed by school reformers as a method to improve student achievement.

25. Standards for participation in athletics were the focus of reform efforts by legislators in Texas, Florida, West Virginia, and California. See discussion of standards, *infra* notes 105-127 and accompanying text.

sulted in differences in the requirements themselves. Some requirements are highly restrictive. Others are narrowly restrictive. The final section will discuss the rationale used by the enacting body to justify its respective level of restriction. This paper will conclude with a summary of the findings along with implications for the future agenda on academic eligibility requirements.

II. THE CONSTITUTIONALITY OF "NO PASS, NO PLAY" RULES

A. The Context of Constitutional Protections

Most legal challenges to the "no pass, no play" rules focus on the constitutionality of the rules. Those opposed to restrictions for participation argue that constitutional protections afford all students the right to participate in extracurricular activities.[26] Two major arguments are advanced in opposition to the eligibility requirements.[27] First, the opponents claim that participation in athletics is a fundamental right protected by the United States Constitution. Second, they claim that the requirements violate equal protection guarantees of the fourteenth amendment.

The origins of fundamental rights and fourteenth amendment rights are integral to the history of this country. The Declaration of Independence asserts that not only are all men created equal, but they are endowed by their creator with certain unalienable or fundamental rights.[28] These rights are confirmed by constitutional provisions and by positive enactment of man-made laws. Named in the Declaration as serving our right to pursue happiness are two natural rights: the right to life and the right to liberty.[29] The Constitution, as drafted in 1787, did not establish civil rights for the protection of the rights named in the Declaration. Shortly after the Constitution was adopted, proponents of a bill of rights were successful.[30] The first ten constitutional amendments — the Bill of Rights — were added to establish these civil rights.[31] Successive amendments, including the fourteenth amendment, addressed the equality of conditions necessary for all persons to secure their inalienable or fundamental rights.

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26. Dardenne, *Can Johnny Come Out and Play?* 5 La. Bar J. 149 (1986) (a review of the constitutional rights of the student athlete).

27. *See State ex rel.* Bartmess v. Board of Trustees, 726 P.2d 801 (Mont. 1986); Spring Branch I.S.D. v. Stamos, 695 S.W.2d 556 (Tex. 1985), *appeal dismissed*, 475 U.S. 1001(1986).

28. *See* M. ADLER, WE HOLD THESE TRUTHS (1987); R. BERNS, TAKING THE CONSTITUTION SERIOUSLY (1987).

29. The Declaration of Independence (U.S. 1776). *See also*, M. ADLER, *supra* note 28, at 47-50, 165-69.

30. *See* M. ADLER, *supra* note 28.

31. U.S. CONST. art. 1 § 2.

The Bill of Rights, adopted in 1891, imposed a series of substantial protections for the individual against governmental interference.[32] The courts play a major role in interpreting the Bill of Rights and the additional constitutional amendments. The fourteenth amendment, particularly the equal protection clause, has merited much of the Supreme Court's attention. It has been extended to include all people whom the Court finds to be the victims of "arbitrary and capricious" or "invidious" discrimination.[33] The search for the meaning of equality, as it relates to equal protection of fundamental rights under the fourteenth amendment, has presented some of the most perplexing questions of constitutional law.[34]

The following subsection will discuss the fundamental rights challenge and the fourteenth amendment challenge to academic eligibility requirements. The subsection includes a brief discussion of the due process challenges. Although due process challenges are often raised by opponents to academic eligibility requirements, they are generally negated in the absence of a finding of a constitutionally protected right. The concluding section will address a recent Seventh Circuit Court of Appeals decision, *Schaill v. Tippecanoe County School Corporation*,[35], and its potential impact on prior decisions relating to the constitutionality of "no pass, no play" rules.

B. Challenges to the Constitutionality of "No Pass, No Play" Rules

1. State Regulatory Schemes and Standards of Review

To initiate a constitutional challenge to a state regulatory scheme, the plaintiff must first show that state action is involved in the denial of his rights.[36] The plaintiff must demonstrate that the classification, or the rule, which prohibits his participation was promulgated by the state. Following a determination that the classification scheme was promulgated by the state, the court then uses the appropriate standard of review in deciding whether the scheme violates the individual's rights as provided by the Constitu-

32. *See* M. ADLER, *supra* note 28, at 147. The first Bill of Rights, all political, was enacted through the adoption of the first ten amendments. The second, an economic bill of rights, was not adopted until mid-twentieth century. Both the economic and political rights are inalienable natural human rights. Thus, the economic rights did not come into existence later than the political rights. What came into existence was the recognition of the economic rights.

33. *See generally* M. ADLER and R. BERNS, *supra* note 28.

34. A. COX, THE COURT AND THE CONSTITUTION 305-21 (1987) (historical background on invidious distinctions and fundamental rights).

35. 864 F.2d 1309 (7th Cir. 1988) (student brought action to prevent imposition of school's requirement that interscholastic athletes must consent to random urinalysis testing to be eligible to compete in sports).

36. *See generally* A. COX, *supra* note 34, at 306-21, 327-28, 336; Spring Branch I.S.D. v. Stamos, 695 S.W. 2d 556 (Tex. 1985), *appeal dismissed*, 475 U.S. 1001 (1986).

tion.[37] The specific standard of review depends upon whether the classification scheme infringes upon a fundamental right or whether it creates and burdens an inherently suspect class.[38] Such a classification scheme is subject to a test of strict scrutiny which requires that the action be based upon a compelling state interest.[39] Thus, in order to be upheld as constitutional, the classification and the resulting regulation must be "necessary to promote a compelling state interest."[40]

Not every state action which results in different treatment for different classes of citizens violates the United States Constitution.[41] A state may validly impose special burdens upon certain classes of its citizens in order to achieve permissible ends. However, the equal protection clause requires that in selecting and defining a class of citizens subject to such burdens, the distinctions which are drawn must have some "rational relationship" or relevance to the purpose for which the classification is made.[42] Thus, if the classification scheme neither infringes upon a fundamental right nor burdens an inherently suspect class, equal protection analysis requires only that the classification be rationally related to a legitimate government objective.[43]

"Classification affecting access to a fundamental right" and "suspect classifications" were two doctrinal theories developed during the social and political reforms of the 1960s.[44] The two theories emerged from the efforts of organized groups seeking to obtain, by constitutional interpretations, re-

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37. Shannon, *No Pass, No Play:' Equal Protection Analysis Under the Federal and State Constitutions*, 63 IND. L.J. 161 (1987) (analysis of the merits of the equal protection challenges under both the Federal and State Constitutions).

38. *Id.* at 162.

39. *Id.*

40. *See supra* note 27.

41. Bell v. Lone Oak Independent School Dist., 507 S.W. 2d 636, 638-642 (Tex. Civ. App. 1974) *dismissed in part*, 515 S.W.2d 252 (Tex. 1974).

42. *Id.* Judge Cornelius stated that the issue is not whether the right to participate in athletics is a constitutionally protected interest. The issue is whether the state, having voluntarily provided an athletic program for its students, can discriminate in the furnishing of that program so as to exclude some of those students from an opportunity to participate in it. The state cannot discriminate unless the characteristics of the excluded students have some rational relation to the activity from which they are excluded, which gives rise to a legitimate state interest that they not participate in the activity.

43. Shannon, *supra* note 37. If the court does not find that the classification infringes upon a fundamental right nor constitutes a suspect class, the class is then subject to a mere rational-basis standard of review.

44. A. COX, *supra* note 34, at 306. In Harper v. Virginia State Bd. of Education, 383 U.S. 663 (1966), the Supreme Court developed the doctrinal lines of the equal protection clause. A Virginia statute requiring payment of a modest poll tax as a condition of eligibility to vote was held unconstitutional because it created an invidious classification. Here strict scrutiny was justified because of the prevention of access to a fundamental right.

forms that they were unable to win in the political arena. In one of the earliest cases, the Court stated, "[w]e doubt very much whether any action not directed against the [N]egroes as a class, or on account of their race, will ever be held to come within the purview of the equal protection provision."[45] The resulting judicial "hands off" policy was illustrated in numerous other cases. However, this general rule of judicial tolerance was later challenged by the school desegregation cases and the reapportionment cases beginning in the mid-1960s.[46]

The United States Supreme Court provided the standard for cases involving segregation and other forms of racial or ethnic discrimination. The Court held that such regulatory schemes created a category of "suspect classifications," requiring "the strictest judicial scrutiny."[47] To be constitutionally acceptable, such classification schemes had to be "narrowly tailored to achieve some compelling public interest."[48] In the reapportionment cases, the courts concluded that any number of relevant considerations could be cited for giving some geographical constituencies greater per capita representation than others: economic importance, geographical size, and offsetting the weight of urban block voting.[49] In *Reynolds v. Sims*,[50] the Court justified strict scrutiny by stating that the "right of suffrage is a fundamental matter in a free and democratic society."[51] The Court concluded that any alleged infringement on that fundamental right must "be carefully and meticulously scrutinized."[52]

2. Constitutional Challenges

Fundamental Rights Issues

Classification schemes which infringe upon a recognized fundamental right are subject to a test of strict scrutiny. For such classification schemes to be upheld as constitutional, the test of strict scrutiny requires that the action be based upon a compelling state interest.

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45. Slaughterhouse Cases, 83 U.S. 410 (1872).

46. *See* Brown v. Board of Education, 349 U.S. 294 (1955); Reynolds v. Sims, 377 U.S. 533 (1964).

47. A. Cox, *supra* note 34, at 306.

48. *Id.*

49. *Id.*

50. 377 U.S. 533 (1964). In *Reynolds*, the Supreme Court added voting and apportionment cases to the category in which legislative determinations were subjected to strict judicial scrutiny. At first, the ruling was strongly attacked by professional politicians. Gradually, attempts to frustrate the constitutional ruling by legislators faded away. The decision was extremely popular among the people. *See* A. Cox, *supra* note 34, at 301.

51. *Reynolds*, 377 U.S. at 561-62

52. *Id.*

Whether a right rises to the level of a "fundamental right" under the Constitution is determined by the courts.[53] The Supreme Court held that the right to obtain a criminal appeal, the right to vote, and the right to travel are all fundamental rights.[54] However, the Supreme Court specifically stated that education itself is not a fundamental right. In *San Antonio Indep. School Dist. v. Rodriguez*,[55] the Supreme Court concluded, "We have carefully considered each of the arguments in support of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive."[56] Nearly ten years later, the Supreme Court reached the same conclusion in *Plyler v. Doe*.[57] The Court's pronouncement that "[p]ublic education is not a right granted to individuals by the Constitution"[58] continues to be upheld. As recently as 1988, in *Kadrmas v. Dickinson Public Schools*,[59] the Supreme Court refused to apply the test of strict scrutiny to determine if a North Dakota statute was unconstitutional.[60] The statute permitted some public school districts to charge a user's fee for public school transportation. The Court held: "The Constitution does not require that such service be provided at all, and it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free."[61]

Guided by the jurisprudence that education itself is not considered a fundamental right, courts have agreed that areas directly related to education are not fundamental rights in themselves.[62] When challenged, partici-

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53. *See* Shannon, *supra* note 37, at 168-69.

54. *Id.*

55. 411 U.S. 1 (1973).

56. *Id.* at 37. The *Rodriguez* case marked the end of doctrinal success in expanding access to fundamental rights under the Equal Protection Clause. Justice Powell concluded that it was not the province of the Supreme Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Education was not among the rights explicitly or impliedly guaranteed by the Constitution. *Id.*

57. 457 U.S. 202 (1982).

58. *Id.* In its opinion, the Court recognized the importance of education. Yet, the Court specifically held that education is not a fundamental right under the United States Constitution.

59. 487 U.S. 450 (1988). North Dakota statutes authorize sparsely populated school districts to provide for more efficient education services by reorganizing themselves into larger districts. The Dickinson Public Schools chose not to participate in such a reorganization. When the Dickinson school board instituted a door-to-door bus service and began to charge a user fee, the plaintiffs argued that the fee was unconstitutional.

60. The test of strict scrutiny is triggered when government interfers with an individual's access to a fundamental right.

61. 487 U.S. at 451.

62. Cooper v. Oregon School Activities Assn., 52 Or. App. 425, 438-41, 629 P.2d 386, 394-96 (1981) ("We cannot classify plaintiff's interest [in interscholastic sports] as fundamental. . ." The court noted that "the United States Supreme Court has held that the right to education itself is not fundamental."); *Bartmess*, 726 P.2d at 803 ("The United States Supreme Court has held that

pation in extracurricular activities has been denied as a constitutional guarantee on the basis that education itself is not a constitutional guarantee.

The question of the constitutionality of participation in extracurricular activities was addressed by the Supreme Court of Montana in *State ex rel. Bartmess v. Board of Trustees*.[63] This action was instituted for declaratory and injunctive relief against a grade average rule promulgated by the school district for student participation in extracurricular activities. The rule required students to maintain a 2.0 or "C" average for the preceding nine weeks in order to participate in extracurricular activities in the following nine week grading period.[64] The rule was adopted by the school district as an incentive for students to improve academic performance. The Montana Supreme Court upheld the constitutionality of the rule.[65] The court held that "the district court did not err in holding that participation in extracurricular activities is not a fundamental right."[66]

Thus, the United States Constitution does not guarantee the right to a free public education. The Supreme Court has held that education is neither a fundamental right nor a fundamental liberty. Using this reasoning, state courts have concluded that the right to participate in extracurricular activities does not rise to the level of a "fundamental right."[67]

Suspect Class Issues

Classification schemes that create and burden an inherently suspect class are also subject to a test of strict scrutiny. The equal protection clause of the fourteenth amendment prohibits the use of an arbitrary classification scheme that results in invidious treatment.[68] The critical fact in cases like *Brown v. Board of Education*[69] was not race, but membership in a

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education is not a fundamental right. . . [W]e conclude that participation in extracurricular activities is not a fundamental right. . . ").

63. 726 P.2d at 803.

64. The rule defined extracurricular activities as those which do not earn credit toward graduation, including athletics, band, choir, speech, drama, cheerleading, drill team, student council and holding class office.

65. *See Bartmess,* 726 P.2d at 802-805. Further, the court noted that the rule promoted adequate time to study for those students who have not maintained a 2.0 grade average. Thus, the rule is substantially related to an important governmental objective and is not violative of equal protection and equal educational opportunity concepts.

66. *Id.* at 804.

67. *See supra* notes 53-66 and accompanying text.

68. *See, e.g.*, Koester, *No Pass, No Play Rules: An Incentive or An Infringement?* 19 U. Tol. L. Rev. 87, 112 (1987) (*see* Section III: The Legal Issues Raised by "No Pass, No Play" Rules).

69. 349 U.S. 294 (1955). The Supreme Court overturned the educational systems of many states by ruling that racial segregation in the public schools is inconsistent with the fourteenth amendment's command that no state shall deny any person "equal protection of the law."

class victimized by arbitrary treatment. Equality is a pervasive theme of American culture and history. The fourteenth amendment guarantees all persons "the equal protection of the laws."[70]

The equal protection clause prohibits a statutory classification scheme that results in invidious treatment. Classifications based upon sex, race, alienage or national origin are inherently suspect.[71] In *Spring Branch I.S.D. v. Stamos*,[72] students maintained that the eligibility requirements for extracurricular activities created a suspect class. An academic eligibility rule for participation in extracurricular activities was codified by the Texas legislature as a part of that state's massive education reform efforts.[73] The Texas Education Code prohibits a student from participating in extracurricular activities for a six week period if the student failed any course during the preceding six week period, exclusive of summer school and the grading period prior to summer.[74] The statute recognizes exceptions for handicapped and honor students.[75] Known as the "no pass, no play" rule, its constitutionality was challenged on the grounds that it violated the equal protection clause. The plaintiffs in *Stamos* argued that the rule discriminated against students who failed to maintain a minimum level of proficiency in all of their classes.[76] They claimed that a classification of students based upon achievement levels in academic courses constituted a suspect class.

The Texas Supreme Court did not agree and it held that students who fail to maintain a minimum level of proficiency in all of their courses do not constitute the type of discrete, insular minority necessary to constitute a suspect class.[77] With an approaching championship game, the court acted quickly to resolve the conflicting opinions previously issued by two district

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70. *See* U.S. CONST. amend. XIV, § 1, which provides, in pertinent part, that: "[N]o State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

71. *See* A. COX, *supra* note 34, at 318.

72. 695 S.W.2d at 559. The appellants challenged the district court's ruling that, under the United States and Texas Constitutions, participation in extracurricular activities was not a fundamental right.

73. *Id.*

74. TEX. EDUC. CODE ANN. § 21.920 (Vernon 1987).

75. *Id.* The "honors" exception is further clarfied in note 2 of the statute's Notes of Decisions. Note 2 states that "arbitrary, capricious, or discriminatory exercise of school principal's discretion to remove suspension of student from extracurricular activities where class in which student failed to maintain requisite '70' average in identified honors or advanced class may give rise to claims based upon equal protection grounds, and accreditation audits of schools and school districts may also afford relief against improper utilization of 'honors' exception." *Id.*

76. *Stamos*, 695 S.W.2d at 560. (Tex. 1985), *appeal dismissed*, 475 U.S. 1001 (1986). *See also* Champion, *'No Pass, No Play:' Texas Style*, THE ENT. & SPORTS L., Fall 1986 at 5, for a review of the Texas legislation and challenges to the issue of "suspect class."

77. *Stamos*, 695 S.W.2d at 562-63.

courts. The Texas Supreme Court unequivocally upheld the constitutionality of the "no pass, no play" rule. Students who did not meet the rule's required academic standards were ineligible to participate.[78] The court concluded that students do not possess a constitutionally protected interest in participation in extracurricular activities.[79]

An athletic eligibility rule not based on academics was challenged on the ground that it created a suspect class. In *Mitchell v. Louisiana High School Athletic Association* (LHSAA),[80] the LHSAA eight semester rule was challenged. The rule barred students from voluntarily repeating a grade, then competing in athletics during the "extra year" of high school.[81] The Fifth Circuit Court of Appeals upheld the LHSAA ruling and stated that the equal protection challenge had no merit because the class created by the eligibility regulation was not suspect.[82] The court noted that participation in athletics was not a fundamental right.

In *Bell v. Lone Oak Indept. School Dist.*,[83] the Court of Appeals subjected a school regulation that restricted participation in extracurricular activities to a test of strict scrutiny. The regulation, prohibiting married students from participating in extracurricular activities, infringed upon the fundamental right of marriage. Under the test of strict scrutiny, the rule could be upheld only if the school district could show that a compelling state interest justified the rule. The court found no compelling state interest to justify a rule treating married students differently from the other students.[84] The court held that "it seems illogical to say that a school district can make a rule punishing a student for entering into a status authorized and sanctioned by the laws of this state."[85]

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78. *Id.* Texas Governor Mark White created a committee to study reforms to the public education system, and the "no pass, no play" rule was developed by the committee. After enactment into the Texas Educ. Code, the legislation met many challenges. District Judge Marsha Anthony ruled that the act was unconstitutional. The suit was brought by parents of students who would have been allowed to play except for the rule. When the students did play, as a result of Judge Anthony's ruling, the team was victorious. The losing team took exception and sued on the basis of unfair competition. District Judge David Dunn of Orange then upheld the "no pass, no play" rule as constitutional. Finally, the Texas Supreme Court in *Stamos*. *Stamos* made a clear statement that the rule was constitutional.

79. *Id.*

80. 430 F.2d 1155 (5th Cir. 1970).

81. *Id.* at 1156.

82. *Id.*

83. 507 S.W.2d 636, 638-39 (Tex. Civ. App. 1974).

84. *Id.* at 639. The court noted that the public policty of the state was to encourage marriage rather than living together unmarried.

85. *Id.* at 638-639.

The presence of a fundamental right distinguished *Bell* from *Stamos* and *Mitchell*, where the regulation did not infringe on a fundamental right nor burden a suspect class.[86] A student's right to participate in extracurricular activities does not rise to the level of a fundamental right.[87] Academic eligibility requirements do not create an inherently suspect class.[88] Thus, equal protection analysis only requires that the classification be rationally related to a legitimate state interest. The duty of each state legislature to establish provisions for the maintenance and support of free public schools provides for each state justification for determining the methods, restrictions, and regulations to carry out its duty.[89] In promulgating academic eligibility rules, state legislatures determine that the rules motivate students to maintain minimum levels of performance in order to participate in extracurricular activities. Because of the rule's objective to promote improved classroom performance, the rule rationally relates to a legitimate state interest in providing a quality education to public school students.[90]

The use of arbitrary classification schemes that result in different treatment for those who are victimized by the schemes can be successfully attacked on equal protection grounds. However, classification schemes which distinguish students on the basis of academic achievement are not considered arbitrary.[91] "No pass, no play" rules separate, distinguish, and classify students based on their academic achievement. The classification in "no pass, no play" rules is based on academic achievement. The factors normally associated with suspect class, race, and national origin, are not present here.[92] Thus, "no pass, no play" rules hardly give rise to a suspect class.

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86. See *Mitchell*, 430 F.2d at 1158 (5th Cir. 1970).

87. *See supra* notes 53-67 and accompanying text.

88. *See supra* notes 68-85 and accompanying text.

89. *See Stamos*, 695 S.W.2d at 557 ("The court has long recognized the important role [of] education . . . "); Mumme v. Marrs, 120 Tex. 388, 340 S.W.2d 31, 36 (1931) (Section I of Article VII of the Constitution establishes a mandatory duty upon the legislature to make suitable provisions for the support and maintenance of free public schools.); *Bartmess*, 726 P.2d at 803 (Mont. 1986).

90. *Id.*

91. *See generally, Bartmess*, 726 P.2d at 803-805; *Stamos*, 695 S.W. 2d at 556-559; United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). (Students who fail to maintain a minimum level of proficiency in all of their academic classes for purposes of eligibility did not constitute a suspect class.)

92. The typical examples of suspect class involve race and national origin. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (race) and Hernandez v. Texas, 347 U.S. 475 (1954) (national origin).

Due Process Issues

The due process clause of the fourteenth amendment has always been taken to guarantee procedural fairness in matters affecting life, liberty, or property.[93] However, the due process clause also safeguards against any action by Congress or a state legislature held by the judges to be unduly restrictive of the enjoyment of personal liberty, the use of property, or the privilege afforded by any other fundamental right. Thus, the words "due process of law" suggest more than procedural regularity.

The concepts of substantive due process and procedural due process are embodied by the fourteenth amendment.[94] The substantive due process clause compels a court to determine which liberties and which attributes of the ownership of property are so fundamental as to always be beyond the reach of government.[95] Procedural due process requires that an individual be given adequate notice and the opportunity to be heard when threatened with the deprivation of a constitutionally protected liberty or property interest.[96]

Any substantative due process challenge to academic eligibility rules will be defeated because courts have refused to recognize extracurricular participation as a fundamental right.[97] Similarly, procedural due process claims will be defeated.[98] A student's interest in participating in extracurricular activities is not a protected liberty or property interest. Therefore, deprivation of the right does not offend the student's due process guarantees.

In summary, the "no pass, no play" rule will not be subject to strict scrutiny under the United States Constitution.[99] Courts have ruled that the right to participate in extracurricular activities is not a fundamental right, nor are those who participate in extracurricular activities a part of an inherently suspect group. To justify the classification, the rule must only be rationally related to a state's interest. Each state's interest in providing quality education has been adequate to satisfy the "rationally related" stan-

93. U.S. CONST. amend. XIV, § 2.

94. *Id.*

95. *See* Koester, *supra* note 68, at 129-130 (discussion of "no pass, no play" rule challenges on substantive and due process grounds).

96. *Id.* at 131. On procedural due process challenges, Koester noted that "students who are rendered ineligible for participation will not be entitled to advance notice and prior hearing, giving school officials much discretion in making eligibility determinations." *Id.*

97. *See supra* notes 53-67 and accompanying text.

98. *Id.*

99. *See supra* notes 36-92 and accompanying text.

dard of review.[100] Thus, the "no pass, no play" rules continue to be upheld on constitutional grounds.

C. *Reassessing the Challenge to "No Pass, No Play" Rules Under the Schaill Decision*

1. *Schaill v. Tippecanoe County School Corporation*[101]

In deciding whether the right to participate in extracurricular activities is protected under the Fourteenth Amendment, courts have followed the reasoning of the United States Supreme Court in *San Antonio Independent School District v. Rodriguez.*[102] With regard to the issue of education as a fundamental right, the Court stated, "We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found these arguments unpersuasive."[103] In *Plyler v. Doe*, the Supreme Court reaffirmed that "public education is not a right granted to individuals by the Constitution."[104] Following this lead, the courts in *Stamos* and *Bartmess* concluded that participation in extracurricular activities was not a fundamental right because extracurricular activities are derivative of the process of education, which is not a fundamental right.[105]

Only when the right to participate in extracurricular activities infringes upon a fundamental right can the participation standard be separately challenged. In *Bell v. Lone Oak Independent School District*,[106] the court held that a regulation prohibiting married high school students from participating in extracurricular activities was a violation of the equal protection clause. The right to marry is a fundamental right, and deprivation of that right established a classification of individuals treated differently from the remainder of the students.[107] The right to participate in athletics has rarely been distinguished from the right to participate in other types of extracurricular activities.[108] The courts have concluded that athletics is an extra-

100. *Id.*
101. 864 F.2d 1309 (7th Cir. 1988).
102. 411 U.S. 1 (1973); *see also* Plyler v. Doe, 457 U.S. 202 (1982).
103. 411 U.S. at 37.
104. 457 U.S. at 221.
105. *See Bartmess*, 726 P.2d at 805; *Stamos*, 695 S.W.2d at 560.
106. 507 S.W.2d 636 (Tex. Cir. App. 1974).
107. *Id.* at 636-637.
108. The majority of jurisdictions have held that a student's right to participate in extracurricular activities does not constitute a fundamental right. *See, e.g.*, Hardy v. University Interscholastic League, 759 F.2d 1233, 1235 (5th Cir. 1985); Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152, 160-161 (5th Cir. 1980); Pennsylvania Interscholastic Athletic Ass'n, Inc. v. Greater Johnstown School Dist., 76 Pa. Commw. 65, 463 A.2d 1198, 1203 (1983); Smith v. Crim

curricular activity which, therefore, falls outside the parameters of a fundamental right.

This reasoning was challenged by the decision of the Seventh Circuit Court of Appeals in *Schaill v. Tippecanoe County School Corporation.*[109] The *Stamos* and *Bartmess* courts reasoned that deprivation of the right to participate in extracurricular activities does not establish a classification of individuals treated differently from the remainder of the students. However, in *Schaill*, the court found that participation in interscholastic athletic activities did create a classification of students who are to be treated differently from the rest of the students.[110]

In *Schaill*, two students challenged the random urinalysis program instituted by the Tippecanoe County School Corporation.[111] The students claimed that the program violated their rights under the fourteenth amendment, particularly the equal protection clause. Based upon information concerning possible drug use by athletes, the Tippecanoe County School system instituted the random urine testing program. Once randomly selected for the test, the student was accompanied by a school official of the same sex to a bathroom; however, the student produced the sample while not under direct visual observation. The sample was analyzed at a private testing laboratory. If it tested positively, the parents had the opportunity to have the remaining portion of the sample tested at a laboratory of their choice. A positive result required the student be suspended from participation in 30% of the athletic contests. A second positive result caused a 50% suspension, and a third positive result caused a suspension for the remainder of the year. No other penalties were imposed and the student could decrease the punishment by participation in an approved drug counseling program.

Urine testing constitutes a "search" in the constitutional sense.[112] The Supreme Court held that probable cause and warrant requirements are not

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240 Ga. 390, 240 S.E.2d 884, 885 (1977); Florida High School Activities Assn. v. Bradshaw, 369 So.2d 398, 403 (Fla. App. 1979); Mende v. Ohio High School Athletic Assn., 2 Ohio App.3d 244, 245, 441 N.E.2d 620, 624 (1981); Whipple v. Oregon School Activities Assn., 52 Or. App. 419, 423, 629 P.2d 384, 386 (1981); Caso v. New York State Pub. High School Athletic Assn., 78 A.D.2d 41, 46, 434 N.Y.S.2d 60, 64 (1980).

109. 864 F.2d 1309 (7th Cir. 1988).

110. *Id.* at 1310. "Probable cause and warrant requirements did not apply to the school system's random urine testing program for interscholastic athletes and cheerleaders." *Id.*

111. *Id.*

112. *See, e.g.,* Cupp v. Murphy, 412 U.S. 291, 295 (1973) (removal of scrappings from under an individual's fingernails constitutes a search); United States v. Montoya de Hernandez 473 U.S. 531 (1985) (detention of an individual until he or she has a bowel movement, and an examination of the matter excreted, constitutes a search.) Whereas, compelled production of a voice or handwriting exemplar is not a "search" because those "physical characteristics are constantly exposed

applicable to school searches.[113] However, the Court concluded that the search must be conducted with "reasonable" suspicion of drug use. On the other hand, in *Schaill*, the Tippecanoe County school system conducted search of athletes not only without probable cause, but in the absence of any reasonable suspicion of drug use by the athletes to be tested.[114] The Court, in justifying the search of athletes without reasonable suspicion, ruled that "sports are quite distinguishable from almost any other activity."[115]

2. The Distinction of Athletic Participation

The *Schaill* court distinguished participation in athletics from participation in other extracurricular activities.[116] The court found great significance in the fact that drug testing was being implemented solely with regard to participation in an interscholastic athletic program. The Court held that athletes can be held to standards different from the standards applied to students in other extracurricular activities.[117]

Traditionally, courts have selected an appropriate constitutional test, and they have used that test to determine the constitutionality of all rules which restrict participation in extracurricular activities.[118] Whatever test a court decided to use, that test was applied to all extracurricular eligibility challenges, from participation in school plays to participation in athletics. However, in *Schaill*, the court used one test to determine the constitutionality of rules which restricted participation in non-athletic extracurricular activities, and a different test to determine the constitutionality of rules which restricted participation in athletics. The court refused to apply the same test to both non-athletic extracurricular activities and athletics. Thus, the *Schaill* decision provides a vehicle for questioning the traditional basis for denial of equal protection guarantees to athletes.

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to the public." United States v. Mara, 410 U.S. 19, 21 (1973) (handwriting sample); United States v. Dionisio, 410 U.S. 1, 14 (1973) (voice exemplar).

113. New Jersey v. T.L.O., 469 U.S. 325 (1985) (a school official searched a student's purse, based on reasonable suspicion that the student had been smoking on school grounds, in violation of school rules).

114. *Schaill*, 864 F.2d at 1309, 1310-11.

115. *Id.* at 1319.

116. *Id.* at 1317. ("Suspicionless searches are more likely to be permissible in circumstances where an individual has diminished expectations of privacy.").

117. *Schaill*, 864 F.2d at 1317-19.

118. *See supra* note 108. The courts have concluded that the right to participate in extracurricular activities, including athletics, is not as fundamental right because the right to education itself is not a fundamental right.

III. ACADEMIC ELIGIBILITY STANDARDS AND THE POLITICAL POWERS BEHIND THEM

A. Determining Who Promulgates Academic Eligibility Standards

Academic eligibility requirements for participation in athletics range from highly limiting restrictions to loosely formulated restrictions.[119] The agencies and organizations that confer the restrictions range from state legislatures to athletic associations. This section will identify the agency or organization that promulgated the academic restriction, along with the type of restriction for athletics in a given geographical area. A comparative analysis of the type of restriction and the agency responsible for the restriction will be presented. The section will conclude with a discussion of policy issues underlying the various forms of restrictions.

1. Academic Eligibility Standards Specifically Promulgated by State Legislatures Through State Codes and Statutes

Four states specifically delineate academic standards for participation in extracurricular activities, including participation in athletics. Texas, Florida, California and New Mexico have codified eligibility standards through the state legislative bodies. As primary sources of law, the regulations promulgated by the state's codes and statutes are mandatory within the state.

In 1984, the Texas legislature enacted one of the most stringent, and most debated, academic eligibility requirements.[120] Section 21.920 of the Texas Education Code mandates that,

> a student enrolled in a school district in this state shall be suspended from participation in any extracurricular activity sponsored or sanctioned by the school district during the grade reporting period after a grade reporting period in which the student received a grade lower than the equivalent of 70 on a scale of 100 in any academic class.[121]

Students who fail to maintain this minimum proficiency are ineligible for extracurricular activities for the following six week period, with no carryover from one school year to the next school year.[122] Special provisions are

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119. Koester, *supra* note 68, at 93-94.

120. TEX. EDUC. CODE ANN. § 1.920 (Vernon 1987).

121. TEX. EDUC. CODE ANN. § 21.920 (Vernon 1987).

122. TEX. EDUC. CODE ANN. § 21.920(b) (Vernon 1987). Subsection "d" provides that "a student may not be suspended under this section during the period in which school is recessed for the summer or during the initial grading report period of a regular school term on the basis of grades received in the final grade reporting period of the preceding regular school term."

included which apply to honor and handicapped students.[123] A handicapped student's eligibility is determined on the basis of his individual education plan.[124] The principal may remove the suspension if the class is identified as an honors class.[125] In *Spring Branch I.S.D. v. Stamos*, the court held that distinctions for mentally retarded students and students enrolled in honors courses do not render Section 2160.2 a violation of equal protection guarantees.[126] The "no pass, no play" rules, promulgated as a part of massive education reforms, gave rise to numerous challenges in the Texas courts.[127] The constitutional issue was decided in 1985 when the Texas Supreme Court ruled:

> The constitution leaves to the legislature alone the determination of which methods, restrictions, and regulations are necessary and appropriate to carry out the duty for support and maintenance of public free schools, so long as that determination is not so arbitrary as to violate the constitutional rights of Texas citizens.[128]

The California legislature mandated eligibility requirements for extracurricular activities as a condition for receipt of funds from the state through the inflation adjustment index.[129] The Elementary and Secondary Education Code requires that each school district establish a policy of satisfactory educational progress in the previous grading period for participation in extracurricular activities.[130] The previous grading period does not include the grading period for which the student was not present for all or the majority of the grading period due to serious illnesses or approved travel. The district policy requires "maintenance of minimum passing grades, which is defined as at least a 2.0 grade point average in all enrolled courses on a 4.0 scale." The stringency of the requirement is eased by provision B7[131] which allows the governing board of each school district to incorpo-

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123. TEX. EDUC. CODE ANN. § 21.920(c) (Vernon 1987) (provisions for handicapped students). *See also, Stamos* 695 S.W.2d at 560 (provision for honors students).

124. TEX. EDUC. CODE ANN. § 21.920(c)(Vernon 1987).

125. TEX. EDUC. CODE ANN. § 21.920 (Vernon 1987).

126. *Stamos*, 695 S.W.2d 556 ("arbitrary or discriminatory exercise of school principal's authority to remove suspension of student from extracurricular activities where class in which student failed to maintain requisite "70" average in honors may give rise to claims based upon equal protection grounds").

127. *See* Champion, supra note 76, at 5.

128. *Stamos*, 695 S.W.2d at 559.

129. CAL. EDUC. CODE § 35160.5 (West 1989). Section 3 regulates "extracurricular and cocurricular activities by pupils in grades 7 through 12, inclusive."

130. *Id.*

131. Under Provision B(7), "the governing board of each school district may adopt . . . provisions that would allow a pupil who does not maintain satisfactory educational progress. . . in the previous grading period to remain eligible to participate in extracurricular and cocurricular activi-

rate a probationary period into its provision for implementing section 35160.5. According to the provision, the governing board may "allow a pupil who does not achieve satisfactory educational progress . . . to participate in . . . extracurricular activities during a probationary period."[132] The probationary period cannot exceed one semester in length. The provision regulates participation by students in grades seven through twelve, exclusive of handicapped and honor students, whose eligibility standards are regulated pursuant to section 51215.[133] The intent of the California legislation is to emphasize that each student's primary responsibility is to meet the academic challenge of learning.

Effective in the 1986-87 school year, the New Mexico legislature enacted eligibility requirements for participation in extracurricular activities.[134] The legislature mandated a 2.0 grade point average on a 4.0 scale, or its equivalent, for participation in extracurricular activities.[135] The 2.0 grade point average may be a cumulative grade point average or a grade point average for the grading period immediately preceding participation. The statute does not require that the student pass any minimum number of courses.[136] Special provisions are provided for handicapped students. The statute also addressed class attendance. Students shall not be absent for extracurricular activities "in excess of ten days per semester, and no class may be missed in excess of ten times per semester." In the event of state or national competition, the superintendent may issue a waiver regarding the number of absences. The standards for participation are applied beginning with a student's second semester of eighth grade.[137]

The Florida Education Code regulates student participation in interscholastic extracurricular activities.[138] A student "must maintain a grade point average of 1.5 on a 4.0 scale, or its equivalent, and must pass five subjects for the grading period immediately preceding participation."[139] El-

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ties during a probationary period. The probationary period shall not exceed one semester in length."

132. CAL. EDUC. CODE § 35160.5 provides special provisions for participation by honors and handicapped students pursuant to sec. 51215. However, sec. 51515 shall not be used to "classify a pupil as eligible for different standards of proficiency" for the purpose of circumventing the intent of this subdivision.

133. CAL. EDUC. CODE § 51215 (West 1989).

134. N.M. STAT. ANN. § 22-12-2.1 (1986).

135. *Id.*

136. *Id.* The regulation has five sections, A-E, which address: grade point average, absences, provisions to cover all extracurricular activities, waiver of absences for state and national competitions, and semester eligibility standards.

137. *Id.*

138. FLA. STAT. ANN. § 232.425 (West 1988).

139. *Id.*

igibility for the first grading period is based upon the preceding grading period or the interim summer school session. The standards are applied beginning with the first semester of the ninth grade.[140]

In conclusion, Texas, California, New Mexico and Florida have codified eligibility requirements for participation in extracurricular activities.[141] Florida's legislature addressed only participation in interscholastic extracurricular activities while the legislatures in the remaining three states addressed participation in all extracurricular activities. Texas, California, and New Mexico all require an overall 2.0 grade point average, while Florida requires an overall 1.5 grade point average. In each of the four states, grade point average is calculated from grades in all subjects. The Texas legislation specifically states that a student's grade point average must be calculated from the grades earned in "all academic classes." The grade point average must be earned in the grading period immediately preceding participation, except in New Mexico where the grade point average can be cumulative. The student must pass all of his subjects in Texas; in Florida, he must pass five of his subjects. The codes of New Mexico and California are silent on the number of subjects the student must pass. Students who do not attain the specified grade point average can be allowed to play under probation for one semester in California. Thus, the four states differ in the codified eligibility requirements for extracurricular participation. However, the legislatures share the belief, as evidenced by the state laws, that regulation of participation in extracurricular activities is a state function.

2. Academic Eligibility Standards Promulgated by State Education Boards Through Specific Mandates in State Codes and Statutes

The legislatures of Arizona, Iowa, and Louisiana did not mandate specific academic requirements for participation in extracurricular activities. However, each legislature codified a provision which specifically requires the state education board to adopt policies regarding student participation in extracurricular activities. While the legislatures did not address extracurricular participation directly, each mandated such action by the state education governing board.[142]

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140. FLA. STAT. ANN. § 232.425 at 536 further provides that "any student who is exempt from attending a full day of school . . . must maintain a 1.5 grade point average and pass each class for which he is enrolled."

141. *See supra* notes 120-140 and accompanying text.

142. *See* discussion of legislative mandates to state governing boards, *infra* notes 143-154 and accompanying text.

Under the Arizona Revised Statutes, both the state board of education and each local governing board must prescribe policies regarding student participation in extracurricular activities.[143] Each local governing board, after consulting with parents and teachers, must adopt policies concerning participation for students in grade six, if grade six is part of middle school, and grades seven through twelve.[144] The state board of education must prescribe minimum requirements, and the requirements prescribed by the local boards must meet or exceed those of the state. The legislature determined that the minimum requirements shall be based on the number of courses passed or failed, grades received, or a combination of these factors.[145] The policies drafted by the state board of education must be submitted to the Arizona legislature.[146]

In the Standards for Accredited Schools of Iowa, the legislature set forth procedures for the state board of education relative to student participation in extracurricular activities.[147] The legislature directed the state board of education to review the literature on effective schools, consult with representatives from education, the business community, parents, teachers and students, and to develop standards for accredited schools.[148] The standards must encompass the fourteen areas provided in the Code of Iowa, one of which addresses extracurricular activities. The standards for accredited schools must encompass "curriculum standards that include the coordination of extracurricular and academic education goals."[149] Thus, the Iowa legislature did not directly mandate the state board to establish minimum requirements for participation in extracurricular activities. However, such

143. ARIZ. REV. STAT. ANN. § 15-705 (1988).

144. *Id.* Section A provides that the consultation may be accomplished by holding a public hearing or forming an advisory committee.

145. *Id.* Section B(3) permits additional factors to be incorporated.

146. ARIZ. REV. STAT. ANN. ch. 293, § 4 (1988) provides "Notwithstanding sec.15-705, *Arizona Revised Statutes*, as amended by this act, the state board of education shall prescribe rules for policies regarding pupils participation in extracurricular activities including statewide minimum standards no later than September 1, 1988. Each governing board shall adopt policies and procedures based on the state board rules and procedures no later than January 1, 1989, and shall submit a copy of the policy and procedures to the department of education no later than January 31, 1989."

147. IOWA CODE ANN. § 280.13 (West 1989).

148. *Id.*

149. *Id.* The fourteen areas also cover discipline policies, needs assessment, parental involvement, curriculum directives, staff development, learning opportunities, career exploration, and objectives.

regulation is viewed to be within the parameters of the state education board's powers to coordinate the extracurricular and academic goals.[150]

Under a Louisiana Revised Statute, the legislature mandated the review of extracurricular programs in the schools. In each local school system, the superintendent was directed to review the extracurricular activities and programs during the 1984-85 school year and at other times as the superintendent might deem appropriate.[151] The review must be conducted together with the secondary school principals in the system.[152] The purpose of the review is to determine if the extracurricular programs are adequately meeting the needs of the students, and if the educational program standards are diminished by reason of the participation of the students in the extracurricular activities.[153] The state legislature mandated the local boards to adopt a policy, (no later than 1985) which adhered to the minimum standards of the state's athletic association. The state board of education was further directed to review the policy on an annual basis to insure that the minimum standards are maintained or upgraded.[154]

Thus, the legislatures in Arizona, Iowa, and Louisiana have codified specific direction to the state and local boards of education regarding extracurricular activities. While not specifically regulating eligibility requirements for participation, the legislatures in these states have deemed extracurricular activities sufficiently important to give direction to the education governing bodies through the state's statutes or codes.

3. Academic Eligibility Standards Promulgated by State Education Boards Through the State's "General Supervision" Provision

In the absence of specific authority to regulate athletic participation through academic eligibility requirements, all state boards of education are capable of coordinating the state's educational system through the general authority provided by the state's laws.[155] The responsibility for the educa-

150. IOWA CODE ANN. § 280.13 concludes that the "state board shall adopt rules establishing new standards for accredited schools. The rules . . . shall require that schools and school districts meet the standards adopted by the state board not later than July 1, 1989."

151. LA. REV. STAT. ANN. § 17:176 (West 1989).

152. LA. REV. STAT. ANN. § 17:176 B (West 1989). The local superintendent shall direct the principals to upgrade the standards "such that each such athlete, to the extent possible, accomplishes his maximum potential in academic endeavors while participating in interscholastic athletics."

153. LA. REV. STAT. ANN. § 17:176 C (West 1989).

154. *Id.*

155. A. ORNSTEIN & D. LEVINE, *supra* note 8, at 262-264. With the exception of Wisconsin, all states have state boards of education. The state boards are dependent on the state legislature for appropriations and authority, and serve an advisory function for the legislature.

tion of its citizens rests with each state.[156] To carry into effect the state's laws and policies relating to education, each state has established a board of education. The state board of education determines education policies and promulgates rules in such areas as the physical welfare of pupils, the education of the handicapped, school attendance, and the issuance of textbooks.[157]

Within its authority to establish rules and regulations governing public education, several state boards have promulgated academic eligibility rules for participation in extracurricular activities.[158] In 1983, the West Virginia state education board established a rule which required students to maintain a 2.0 grade point average in order to participate in extracurricular activities. The Wood County Board of Education voted unanimously to refuse to implement the new policy.[159] The state board and the county board each maintained that it had the exclusive power to enact academic eligibility requirements. The state board cited as authority for its power the language in Article XII, section 2 of the West Virginia Constitution, which provided that "[t]he general supervision of the free schools of the state shall be vested in the West Virginia Board of Education."[160] Asserting its power, the county board relied on language contained in the West Virginia Code which stated that "[t]he county boards of education are hereby granted and shall exercise the control, supervision and regulation of all interscholastic athletic events and other extracurricular activities. . . ."[161] The county board did not challenge the state board's authority to promulgate academic or attendance rules; instead the county board's challenge was directed solely at the state board's rule for participation in extracurricular activities. Thus, the Wood County Board of Education petitioned the court to compel withdrawal of the rule.[162] Consolidating the two petitions, the West Virginia Supreme Court addressed the challenge to the state board of education's 2.0 grade point average academic eligibility rule.[163] The court held

156. *Id.* at 237-273. The political, economic, and legal foundations of education are discussed.

157. *Id.*

158. W. VA. CONST. Article XII, § 2 (1982 Replacement Vol.) provides: "The general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law." In defining the duties, the Legislature provided that the "state board of education shall determine the education policies of the State. . . " W.VA. CODE § 18-2-5 (1984 Replacement Vol.)

159. Bailey v. Truby, 321 S.E.2d 302, 306 (W.Va. 1984).

160. W. VA. CONST. art. XII § 2.

161. *Id.*

162. *Bailey*, 321 S.E.2d at 306.

163. W. VA. CONST. Art. XIII § 18-2-25. In *Bailey*, the second petition addressed the appeal of a high school student who was denied relief from the county board of education's rule requiring

that the state's authority to promulgate an academic eligibility rule for extracurricular participation was a legitimate exercise of its power of "general supervision" over the state's educational system.[164] The court concluded that the rule was in furtherance of the state's fundamental educational goal of academic excellence.

In the case of *State ex rel. Miller v. Board of Education*,[165] the Kansas Supreme Court ruled on substantially the same issue. The Kansas Constitution provided the State Board of Education with authority for the "general supervision of the public schools, educational institutions and all the educational interests of the state."[166] *Miller* involved a conflict between the state board of education and a local school board over the validity of certain regulations promulgated by the state board. An issue raised in *Miller* was the meaning of the term "general supervision" as used in the constitutional provision. The Kansas Supreme Court interpreted the term broadly to mean "something more than than to advise but something less control."[167] Thus, the state board of education appropriately exercised its powers of general supervision in promulgating regulations.

Many other states have initiated studies or have enacted standing committees to examine the relationship between student activities and academic standards. In Wyoming, a Blue Ribbon Committee for Excellence in Education recommended that districts reduce classroom interruptions, classes missed for student activities, and time lost to athletic events by rescheduling games on weekends.[168] The Maryland Commission on Secondary Education made thirteen recommendations pertaining to student activities.[169] In Colorado, a special Governor's Task Force on Excellence in Education proposed that school districts discourage student activities that take time away from academics. The Colorado High School Activities Association initiated new eligibility requirements calling for students to be enrolled in 2 ½ Carnegie units of credit per semester.[170]

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students to receive passing grades in all of their classes. For a review of this appeal *see infra*, notes 173-179 and accompanying text.

164. *Bailey*, 321 S.E.2d at 308. In concluding that the state board had authority to promulgate regulations, the court stated: "The people, by the Constitution have provided not only for a free school system, but that the system must be thorough and efficient." (W. VA. CONST. Art. XII, § 1). The West Virginia Board of Education has the "statutory authority to make rules for carrying into effect the laws and policies of the State relating to education."

165. State *ex rel.* Miller v. Board of Educ., 212 Kan. 482, 511 P.2d 705 (1973).

166. KAN. CONST. art. 6 § 2(a).

167. *Miller*, 212 Kan. at 486, 511 P.2d at 709.

168. National Association of Secondary School Principals, 7 The Practitioner 3 (1986).

169. *Id.*

170. A Carnegie unit is the quantitative measure that represents one year of study in a given course in a secondary school.

In conclusion, state legislation grants to state boards of education the powers of general supervision over the state's educational system within the constitutionally mandated educational goals of the state. The courts have interpreted the state's powers of general supervision broadly to encompass authority to regulate the state's school systems to further the state's goals of educational excellence. The regulation of academic participation by use of academic eligibility requirements has been found to be within the state education boards' powers of general supervision.[171]

4. Academic Eligibility Standards Promulgated by Local Schools

Some local school boards have assumed the initiative to adopt academic eligibility requirements in the absence of such requirements from the state board, or in addition to the state's requirements. Local school systems are held accountable for student academic performance under the state's accountability legislation or state board policy or both. To promote academic excellence, local school boards develop their plans and policies to ensure maximum student growth.[172] In some cases, these regulations have restricted participation in athletics by strict academic eligibility requirements.

Under the "general supervision " provision of the West Virginia Constitution, the state board of education required students to maintain a 2.0 grade point average in order to participate in nonacademic extracurricular activities.[173] One of West Virginia's county boards increased the academic eligibility requirements by including a provision that students must receive passing grades in all classes. In *Bailey v. Truby*,[174] an action was brought on behalf of a student who maintained an overall 2.0 grade point average but failed to pass all of his subjects. The student contended that the action of the county board in declaring him ineligible to participate in athletics violated his rights to equal protection and due process under the fourteenth amendment. The court held that the student's asserted right to participate in extracurricular activities did not rise to the level of a constitutionally protected "property" or "liberty" interest.[175] Thus, the student was not entitled to any procedural due process protections with regard to the right.

171. *See supra* notes 155-170 and accompanying text.

172. *See, generally* NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, ORGANIZING FOR LEARNING: TOWARD THE 21ST CENTURY (1989) (perspectives from 21 authors on the essential components of good schools); AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, CHALLENGES FOR SCHOOL LEADERS (1988) (reform initiatives from key persons in the position of change agent: school leaders).

173. W. VA. CONST. § 2:7 (1982).

174. 321 S.E.2d at 313.

175. *Id.* at 317.

The student argued that the rule denied him equal protection under the law because the state board of education provided one rule for eligibility, whereas the local board provided a more restrictive rule.[176] The student maintained that exclusive authority for academic eligibility standards vests, not with the county board of education, but with the state board of education.[177] The thrust of the student's equal protection argument was that the West Virginia Code impermissibly allowed county boards of education, on their own initiative, to establish individual extracurricular activities policies, thereby undermining the need for uniformity. The student argued that the statute created a situation whereby students with identical academic records are permitted to participate in extracurricular activities in some counties, but are not permitted to participate in others. However, the West Virginia Supreme Court held that establishment of an extracurricular policy is not the exclusive province of either the state or county boards of education. Plan development for policies and procedures remained at the county level, with approval of those plans by the state board of education through the state superintendent of schools. In exercising its power of general supervision, the state board of education had the ultimate authority.[178] However, county boards were granted authority in specific areas to supplement state education policy in order to accommodate local educational needs and foster academic achievement.[179] Thus, the court held that the county board's rule requiring that students receive passing grades in all of their classes, in addition to the state board's 2.0 grade point average rule, was a legitimate exercise of its power.

In August 1989, a local school system in Louisiana enacted academic eligibility requirements in the absence of any requirements from the state. The Jefferson Parish School Board, acting on a recommendation from the superintendent of schools, adopted a policy regarding academic eligibility requirements.[180] To be eligible, a student must maintain an overall 2.0 grade point average and pass all subjects. A local school system committee was formed to establish guidelines for the uniform implementation of the

176. *Id.* at 318. The court relied on W. VA. CODE 18-2-23 (1984 Replacement Vol.), which provides, in pertinent part, that "the West Virginia board of education, through the state superintendent of schools, shall establish standards . . . designed to guide the development of plans for a comprehensive educational program . . . ," and on W. VA. CODE § 18-2-25 (1984 Replacement Vol.) which provides that plan development still remain at the county level.

177. *Baily*, 321 S.E.2d at 318.

178. *Id.* at 319.

179. *Id.*

180. *See* JEFFERSON PARISH PUBLIC SCHOOL SYSTEM: CRITERIA FOR PARTICIPATION IN ATHLETICS AND EXTRACURRICULAR ACTIVITIES (August 1989) (prepared by the Academic Eligibility Implementation and Oversight Committee, Russell Protti, Superintendent).

eligibility rule.[181] In promoting the eligibility requirement, the committee and school board noted that "extracurricular activities exist in schools primarily to support the academic program."[182] According to the Jefferson Parish rule, eligibility is determined at the end of each marking period. Students who fail to meet the requirements are ineligible on the fifth day of school following the end of the marking period. Students who are ineligible to participate cannot practice with the team. Special requirements were set forth for handicapped students and students in honors courses. The eligibility requirements became effective in the 1989-90 school year.[183] These academic eligibility standards are among the nation's highest. According to Superintendent Russell Protti, "the level you set isn't as important as the message you send."[184] The message is that classroom success is a prerequisite to the opportunity to participate in activities outside of the classroom. If challenged, the rules will probably be upheld as constitutional under the state's general supervision provision which vests local schools with the authority to regulate educational policies and practices.

In the 1990 Louisiana legislative session, several bills were introduced that would impose the academic eligibility standards of the Jefferson Parish public schools throughout the state.[185] Generally, the bills were met with opposition. Officials of the Louisiana High School Athletic Association (LHSAA) lobbied against the bill.[186] The LHSAA requires a 1.5 grade point average with at least five subjects passed per semester and five units earned per year. The Louisiana State Board of Elementary and Secondary Education opposed the bill, contending that the bill required too much of

181. *Id.*

182. *Id.* at 1.

183. The Jefferson Parish Rule affects students in middle, junior, and senior high schools who participate in extracurricular and cocurricular activities. The rule applies to all participants and to ancillary persons, such as managers and equipment personnel.

184. The Times Picayune (New Orleans), May 6, 1990, at C-10, col. 1. Proponents of the bill contended that the right to play interscholastic sports should be treated as a reward for acceptable classroom performance. They pointed to the need to improve Louisiana's average score of 17.1 on the American College Test. Louisiana ranks 27th on a list of 28 states in which the ACT is the prevelant college entrance exam.

185. Lousiana Regular Legislative Session, 1990: Senate Bill No. 11, Senate Bill No. 204, House Bill No. 84, House Bill No. 961. The legislation called for Louisiana State Board of Elementary and Secondary Education (BESE) to develop standards for student participation in extracurricular activities, including interscholastic athletics. Specifically, the bills required the student to receive an overall 2.0 grade point average and to pass all subjects for participation.

186. The Times Picayune, *supra* note 184, at C-1, col. 3. The LHSAA successfully lobbied against six other bills in previous years that would have upgraded standards for athletic participation.

students.[187] The support of the bill by the University of New Orleans Business and Higher Education Council was not sufficient to overcome the opposition.[188] Thus, the Jefferson Parish public school system remains the only school system in Louisiana with a "no pass, no play" 2.0 grade point average eligibility rule.

Academic eligibility requirements which applied to only two schools in a county school system were upheld by the Montana Supreme Court. In Lewis and Clark county, two Helena high schools enacted a requirement that students participating in extracurricular activities maintain a 2.0 grade point average.[189] In upholding the rule, the school district noted that the requirement operated as an incentive for those students who wished to participate in extracurricular activities. Two high school students challenged the ruling on constitutional grounds. The Montana Supreme Court relied on a previous decision wherein the court recognized that not all constitutionally important rights are fundamental rights,[190] and that participation in extracurricular activities is not a fundamental right under the state or federal Constitutions. The court held that the 2.0 rule is neither a violation of equal protection nor of equal educational opportunity concepts.[191] Although the rule applied to only two high schools within the county, that fact did not hinder the court's decision on the constitutionality of the rule.

Other local school districts have examined their policies for eligibility and participation. The Prince George's County School District in Maryland required students to earn a "C" average to participate in extracurricular activities.[192] In February 1985, the Springfield School District in Massachusetts implemented a rule requiring students to earn a "C" in each major subject in order to participate.[193] When the rule reportedly rendered fifty-two percent of one high school's students ineligible, the school changed the rule to require only a "C" average. The Charleston County School Dis-

187. *Id.* at C-10, col. 2; The Times Picayune (New Orleans), May 8, 1990, at C-3, col. 2. According to BESE, the standards called for would eliminate too may students from competition.

188. The Times Picayune (New Orleans) May 8, 1990, at C-3, col. 1.

189. *Bartmess*, 726 P.2d at 801-805. The action was instituted for declaratory and injunctive relief against a grade average academic eligibility rule promulgated by the two high schools for participation in extracurricular activities.

190. *See* Butte Community Union v. Lewis, 712 P.2d 1309 (Mont. 1986).

191. *Bartmess*, 726 P.2d at 805. The court concluded that the opportunity to participate in extracurricular activities was not more important than the achievement of average academic performance. "[G]overnment interests in developing the full educational potential of each person and providing a basic system of quality public education by the enactment of the 2.0 rule outweigh the students' interest in participating in existing extracurricular activities."

192. *See* The Practitioner, *supra* note 168, at 7-8.

193. *Id.*

trict in South Carolina enacted a rule that declared ineligible any student who failed one required course.[194]

In conclusion, local school districts and local schools have assumed the initiative for academic eligibility requirements in several states. The local school district has either increased the requirement set by the state, or set a requirement in the absence of the state's promulgation of such a requirement. These local districts view stringent academic eligibility requirements as one method for improving student academic performance. The academic eligibility requirements set at the local system and the local school site level have often been challenged in court. Thus far, these challenges have been successfully defended, and the establishment of academic eligibility requirements has been ruled as within the system's domain.[195]

5. Academic Eligibility Standards Promulgated by High School Athletic Associations

State high school athletic associations establish regulations for students who participate in interscholastic athletics.[196] As a member of the association, a high school must adhere to the rules in order for the students to participate in interscholastic sports within the state.[197] Athletic associations are usually private, non-profit organizations.

All major state high school athletic associations belong to the National Federation of State High School Associations (National Federation).[198] The National Federation, with input from all fifty state associations, establishes minimum scholastic standards for athletics.[199] In the 1988-89 year, only one academic standard was established by the National Federation: A student athlete must pass at least four subjects for academic eligibility.[200] No minimum grade point average was required.

The academic standard established by the National Federation is recommended to each state organization, which can then modify the standard. Some states' associations have adopted the standard, others have enacted a

194. *Id.*

195. *See supra* notes 172-194 and accompanying text.

196. *See* NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS: STATE ASSOCIATION RULES TO RECOMMENDED MINIMUM ELIGIBILITY STANDARDS FOR ATHLETICS (1987-88) [hereinafter NATIONAL FEDERATION]; Durbin, *High School Athletics: A Valuable Educational Experience*, 70 National Assoc. of Secondary School Principals Bulletin 32 (1986) (a discussion of pressure on state associations to increase academic standards).

197. *See* Koester, *supra* note 68, at 93-94.

198. *See* NATIONAL FEDERATION, *supra* note 196.

199. NATIONAL FEDERATION OF STATE HIGH SCHOOLS ASSOCIATION HANDBOOK, 52-55 (1987-88).

200. *Id. See also Academics Plus Athletics Equals Curriculum Partners,* LHSAA Brochure.

more restrictive standard, and still others have reduced the standard.[201] In a 1987-88 study of state association rules, the National Federation found that sixteen states had less restrictive standards than the Federation's singular requirement that a student pass four subjects per grading period for eligibility.[202] Twenty-one states adopted the Federation's recommendation, and the remaining states had increased the eligibility standard. Thus, the study revealed that over 60 percent of the state associations had not provided a grade point average minimum requirement for participation in athletic events.

Once a state athletic association adopts minimum standards for participation, the member schools are bound to adhere to the standards.[203] Less restrictive rules may not be adopted. However, most state associations allow schools to adopt rules that are more restrictive. When a state athletic association votes to increase the minimum eligibility requirements, the increase may take one of three forms: the enactment of a minimum grade point average, an increase in the number of subjects which the student is required to pass, or both. The athletic associations in California, West Virginia, and Nevada added a minimum grade point average to the requirement of passing at least four subjects.[204] The Delaware association noted that at least two academic subjects must be included in the four subjects passed.[205] Some state associations simply increased the minimum number of courses that a student is required to pass for eligibility. The student must pass five subjects according to the state association regulations in Colorado, Florida, Georgia, Idaho, Kentucky, Kansas, Tennessee, and Virginia.[206] A more restrictive requirement of passing five subjects plus a specific grade point average was adopted in some state athletic associations. The Louisiana High School Athletic Association determined that students must pass five subjects and maintain an overall 1.5 grade point average.[207] The Texas

201. *See* NATIONAL FEDERATION, *supra* note 196.

202. *Id.*

203. *See* Koester, *supra* note 68, at 93.

204. Each year, state association rules are compared with the "Recommended Minimum Eligibility" standards promulgated by the National Federation. The comparison herewith is for the year 1987-88. According to the National Federation, the California Association requires a grade point average as set forth by the Board of Trustees. The West Virginia Association requires a "C" grade point average. The Nevada Association requirements vary: " Some school districts also require a 'C' grade point average" . . . [or, may require that the student] not fail any course during the sport season."

205. *See* NATIONAL FEDERATION, *supra* note 196.

206. *Id.* In addition to requiring that the student pass five subjects, the Colorado Association adds that the student can fail only one subject.

207. LOUISIANA HIGH SCHOOL ATHLETIC ASSOCIATION, OFFICIAL HANDBOOK 1989-90 (requires that regular education students of the LHSAA pass at least five subjects which count

association recommended five subjects with a 70% average in all courses.[208] In New Mexico, the state association mandated that students cannot fail more than one subject and must maintain an overall grade point average of 2.0.[209] Thus, various combinations of increased academic eligibility requirements are present in state organizations that have chosen to increase the recommended requirements of the National Federation.

In summary, athletic associations operate in each state. Member schools are bound to follow the eligibility requirements in order for their students to participate in interscholastic sports. [210] All major state organizations are members of the National Federation of State High School Associations. The National Federation, with input from all fifty states and the District of Columbia, recommend a minimum academic eligibility requirement. Many states adopt the recommendation, others modify it. Once adopted, the state athletic association's academic eligibility rules become the minimum academic eligibility rules which govern a student's participation. Member schools can, and often do, adopt more restrictive regulations for participation. Thus, the school rule can be more, but not less, restrictive than the state rule. The state association rule can either be more or less restrictive than the Federation rule. Therefore, the role of academic eligibility rules as promulgated by state athletic associations must be viewed on a state-by-state basis.

B. Limiting the Constitutional Challenge By Promulgating the Rules Through Private Bodies

Constitutional challenges to classification schemes on equal protection grounds begin by addressing the "state action" issue. The plaintiff must show that state action is involved in the denial of his/her rights.[211] Specifically, the plaintiff must show that the conduct complained of was committed by a person or body acting under color of state law. Following a determination that the classification scheme was promulgated by the state, the court will follow the appropriate standard of review.

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toward graduation and earn at least a 1.5 grade point average (based on a 4.0 system) in all subjects pursued in order to be eligible for the second semester of that same school year).

208. *See* NATIONAL FEDERATION, *supra* note 196.

209. *Id.*

210. An example of a statement guaranteeing adherence to the NATIONAL FEDERATION rules from the LHSAA HANDBOOK, Article XI: "The LHSAA is a member of the National Federation of State High School Associations and all rules of the National Association must be observed by member schools."

211. *See generally* Graham v. NCAA, 804 F.2d 953 (6th Cir.1986); Karamanos v. NCAA, 816 F.2d 258 (6th Cir. 1987).

A survey of academic eligibility rules for participation in athletics revealed that the rules were promulgated by state legislatures, state education boards, local school boards, local school administrators, or high school athletic associations.[212] The origin of the rule is important to the type of challenge that can be asserted. Only rules promulgated by bodies or persons acting under color of state law can be challenged on constitutional grounds.[213] Private conduct, as opposed to state action, is not within the protection afforded by the fourteenth amendment. Private conduct, however discriminatory or wrongful, cannot be challenged on equal protection grounds.[214]

Of the bodies that promulgate academic eligibility regulations, only high school athletic associations are not firmly within the concept of "state actors." State legislatures, boards of education, and public school administrators are entrusted to provide support and maintenance for quality education in the state's free public schools. Therefore, their actions in promulgating "no pass, no play" regulations are under color of state law.[215] However, athletic associations are private entities that exist through the voluntary association of public and private institutions.[216] Membership is usually contingent upon strict adherence to rules and regulations promulgated by the association. Pursuant to the entanglement theory,[217] administration of interscholastic sports by athletic associations had been considered "state action."[218] The entanglement theory rested upon the notion that indirect involvement of state government could convert what otherwise would be considered private conduct into state action. This notion was rejected by the United States Supreme Court in 1982.[219] In deciding whether state action exists, the court now requires a three factor analysis: (1) to what extent the business is subjected to state regulations; (2) the sufficiency of a close

212. *See supra* notes 120-209 and accompanying text.

213. Shelley v. Kraemer, 334 U.S. 1, 11 (1948) ("... action inhibited by the first section of the fourteenth amendment is only such action as may fairly be said to be that of the state.").

214. Blum v. Yaretsky, 475 U.S. 991, 1002 (1982).

215. *See* A. ORNSTEIN & D. LEVINE, *supra* note 8. The author discusses the roles and functions of legislatures, boards of education, and educators in the administration and supervision of schools.

216. *See generally* Walsh v. La. High School Athletic Ass'n., 616 F.2d 152 (5th Cir. 1980); Mitchell v. Louisiana High School Athletic Ass'n., 430 F.2d 1155 (5th Cir. 1970).

217. The entanglement theory provides that the government's involvement need not be either inclusive or direct, rather government action may be found if the government's action was peripheral or one of several factors leading to the constitutional violation. *See* Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975), *noted in* Anderson v. Indiana High School Athletic Ass'n., 699 F. Supp. 719 (S.D. Ind. 1988).

218. *Id.*

219. Blum v. Yaretsky, 457 U.S. 991 (1982); Bendell-Baker v. Kohn, 457 U.S. 839 (1982).

nexus between the state and the challenged action of the regulatory entity, so that the action of the entity may be fairly treated as that of the state itself; and (3) whether the private decision involves such coercive power or significant encouragement, either overt or covert, by the state that the choice must in law be deemed to be that of the state.[220]

In *Anderson v. Indiana High School Athletic Ass'n.*,[221] the United States District Court for the Southern District of Indiana applied the factor analysis test to determine if relief could be obtained by a plaintiff who challenged a state athletic association eligibility requirement. The plaintiff sought injunctive relief for the purpose of restraining the Indiana High School Athletic Association (IHSAA) from declaring her ineligible for participation in interscholastic athletics. Anderson transferred from a small private school to a larger private school without an accompanying change in residence. According to the IHSAA transfer rule, a student who changes schools without a corresponding change of residence is ineligible to participate in athletics for a period of up to 365 days.[222] The purpose of the rule was to achieve consistency in eligibility rulings and prevent recruiting. The court concluded that Anderson was transferring simply to attend a larger school which had more social and extracurricular opportunities.[223] There was no evidence that Anderson was a star athlete or that her transfer was motivated by undue influence. The court held that the application of the rule's ineligibility bar to Anderson was unreasonable. Yet, in applying the three factor test, the court concluded that the IHSAA was not engaged in state action. The IHSAA is not, nor has ever been, an official arm of the state of Indiana. State action was not established by the fact that public institutions generated revenues for the IHSAA. Without a showing that state action was involved in the denial of her rights to compete in interscholastic athletics, Anderson could not assert a claim based on equal protection grounds.[224]

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220. *Id.*

221. 699 F.Supp. 719 (S.D. Ind. 1988). The plaintiff, Allison Lynn Anderson, is a sixteen year old minor. The action was initiated by her next friend and parent, Terry Anderson.

222. *Id.* at 721-722. IHSAA's transfer fule (rule 19) provided for an automatic 365 day suspension when a transfer was made without a corresponding residence change. Rules 19-6 and 19-3 provided the conditions which, if satisfied, would exempt the student from ineligibility. The conditions were: 1) there was no evidence of transferring for primarily athletic reasons; 2) there was no evidence of undue influence; and 3) there was bona fide evidence that one of the following was true: student was a ward of the court or an orphan, student's parents have divorced, student erroneously attended the wrong school, transfer was pursuant to board mandate or from correctional school, former school is unaccredited or has closed. Anderson satisfied the first and second conditions. However, she failed to satisfy the third condition. *Id.*

223. *Id.* at 730.

224. *Id.* at 726-28.

The Supreme Court's three factor analysis, applied to a state athletic association in *Anderson*, resulted in the decision that the athletic association rules could not be challenged on equal protection grounds.[225] The IHSAA's conduct did not constitute state action. Thus, using the same analysis, the conduct of other state athletic associations cannot be challenged on constitutional grounds. However, academic eligibility regulations promulgated by legislators and boards of education, as state actors, continue to be targets of challenges on equal protection grounds.

Athletes benefit by, or suffer from, the restrictions placed on their participation regardless of the source of such restrictions. Whether coming from the athletic association or the state governing body, the restrictions have the same forceful impact on the students. Whether coming from the athletic association or the state governing body, the student must adhere to the restrictions in order to participate. If the student feels that a restriction is unfair, the student can challenge the restriction if it was promulgated by a state governing body. Yet, however wrongful, unfair, or discriminatory, restrictions promulgated by athletic associations cannot be successfully challenged on equal protection grounds.[226]

C. Policy Issues

Whether promulgated by a public or private body, academic eligibility requirements range from highly restrictive to loosely restrictive to absent altogether.[227] While athletic association requirements are generally less restrictive than those of public agencies,[228] the motives behind the restrictions of private and public agencies are similar. Academic eligibility requirements are promulgated in recognition of the importance of academics in the life of the student athlete.[229] Thus, the issue is not quantitative. It is not whether academic eligibility requirements are necessary. Rather, the issue is qualitative. Determining the degree, or the standard of regulation continues to be the area of controversy. Specifically, when academic eligibility requirements are increased, the more stringent requirements are often met with resistance from those who favor less stringent requirements.

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225. *Id.* at 727. The court concluded that although the IHSAA performed a public function in overseeing the state's interscholastic activities, it remained a voluntary organization, private because it was separate from the state.

226. *See supra* notes 211-225 and accompanying text.

227. *See supra* notes 119-210 and accompanying text.

228. *See* NATIONAL FEDERATION, *supra* note 196.

229. *See* Koester, *supra* note 68, at 88-89, and *Academics Plus Athletics Equals Curriculum Partners*, *supra* note 200.

The Louisiana High School Athletic Association (LHSAA) supports a rule of academic eligibility which requires students to maintain an overall 1.5 grade point average and to pass five subjects.[230] The Louisiana High School Athletic Association does not support the rule of a local Louisiana school system which requires that the student maintain an overall 2.0 grade point average and pass five subjects.[231] The same reasons given by the athletic association for supporting its rule are given by the local school system for supporting its rule. In support of its rule, the LHSAA stated that rules were adopted to impress upon students "that the classroom was built before the playing field and that a student's high school education would have to serve him a lifetime."[232] In support of its rule, the Jefferson Parish School Board acknowledged that "extracurricular activities support the academic mission of the schools."[233] Thus, each acknowledged the relative role of extracurricular activities in education.

The importance of a student's education and the related role of extracurricular activities has been emphasized by state athletic organizations, by school boards, legislative bodies, and judicial rulings. The Ohio High School Athletic Association stated that its purpose in administering interscholastic athletics is "to the end that the interscholastic program can be an integral factor in the total education program of the schools."[234] In a resolution to raise academic requirements for participation in interscholastic athletics, the Toledo Public School System stated that "interscholastic athletics should serve a motivating factor for academic achievement. . . ."[235] The Kansas Supreme Court noted that "[t]he fostering of scholastic, not athletic, achievement is the primary objective of the academic institu-

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230. *See* NATIONAL FEDERATION, *supra* note 196.

231. *LHSAA: The Position of the LHSAA on Academic Excellence for Its Student-Athletes*, January 12, 1989.

> Based on . . . data obtained in four academic studies conducted since 1984, a 1988 State Department of education study, feedback from member school principals who work directly with student-athletes and their parents, and supported by the fact that LHSAA member school principals, through the association's legislative processes, have not attempted to increase the present academic requirements, it is our position that our current rule is serving our student-athletes statewide in a fair, reasonable and demanding manner and does not need to be upgraded. *Id.*

232. *See Academics Plus Athletics Equals Curriculum Partners*, *supra* note 200, at 1 (Master Teacher of Values.)

233. *See* JEFFERSON PARISH PUBLIC SCHOOL SYSTEM: CRITERIA FOR PARTICIPATION IN ATHLETICS AND EXTRACURRICULAR ACTIVITIES, *supra* note 180.

234. OHSAA CONST. art. 2, § 2-1-1 states that "the purpose of the Association shall be to regulate, supervise and administer interscholastic athletic competition . . . "

235. *See* RESOLUTION TO RAISE ACADEMIC REQUIREMENTS FOR PARTICIPATION IN INTERSCHOLASTIC ATHLETICS, SUPERINTENDENT, TOLEDO PUBLIC SCHOOLS (Aug. 26, 1986) *noted in* Koester, *supra* note 68.

tion."[236] Thus, the rationale behind any rule of academic eligibility is the focus on the academic foundation of the student.

The various bodies that promulgate academic eligibility requirements believe that there is a relationship between extracurricular and academic performance.[237] However, the belief that academic eligibility requirements are related to achievement does not translate into the belief that the more stringent the eligibility requirement, the better the academic performance. It is on this issue that the division is pivotal. On the one hand, there are the supporters of the most stringent academic requirements. They believe that the more stringent the requirement, the better the academic performance. On the other hand, proponents of less stringent requirements believe that student participation will be diminished if requirements are too restrictive. They conclude that fewer students would have the opportunity to participate in activities which benefit the student's total school education. Thus, the debate ensues, not on the necessity for requirements, but on the level of requirement.

Legislatures and boards of education are the forces behind more restrictive academic eligibility requirements.[238] In recent years, concern has focused on the quality of public education and on its basic importance to America's social, economic, and political future.[239] Many commissions and task forces have studied education and made recommendations concerning various aspects of the educational system.[240] Governors and state legislators bear the "primary constitutional responsibility for our schools."[241] An indicator of the importance placed on education by the National Governors Association was the development in 1986 of a five year agenda culminating with the publication of *A Time For Results*.[242] Education is a top priority at

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236. State *ex rel.* Miller v. Board of Educ., 212 Kan. 482, 511 P.2d 705, 706 (1973).

237. *See* Brown, *Should Eligibility Standards Go Beyond Minimum Requirements?* 72 NATIONAL ASS'N OF SECONDARY SCHOOL PRINCIPALS BULL. 46 (1988) (review of the literature on standards); Harper and Ruffin, *Academic Eligibility Requirements for Student Athletes:Two Points of View*, 70 NATIONAL ASS'N OF SECONDARY SCHOOL PRINCIPALS BULL. 1 (1986) (opposing viewpoints on the issue of eligibility standards).

238. *See supra* notes 106-176 and accompanying text. *See, also*, Frith and Clard, *Extracurricular Activities: Academic Incentives or Essential Nonfunctions?* 57 THE CLEARING HOUSE 325 (1984) (discussion of the use of eligibility requirements as incentives to academic progress).

239. *See, e.g.*, A NATION AT RISK and other national reports, *supra* notes 1, 2.

240. *Id.*

241. *See* MAKING IT WORK, *supra* note 6.

242. TIME FOR RESULTS: THE GOVERNORS 1991 REPORT ON EDUCATION, *supra* note 18; EDUCATIONAL RESEARCH SERVICE, COST OF EDUCATION: AN INVESTMENT IN AMERICA'S FUTURE (1987). In the report, Governor Alexander of Tennessee, Chairman of the National Governor's Association, stated that: "The Governors are ready to provide the leadership needed to get results on the hard issues that confront the better schools movement. We are ready to lead the

the state level. The agenda of reform has filtered down to the local system level, the local school level, and ultimately to the classroom.

Those responsible for making educational decisions — school boards, school administrators, legislators, governors — have a responsibility to make decisions that maximize student learning. They have embraced research data to assist in making these decisions.[243] The effective schools research identifies basic differences between effective and ineffective schools. The research indicates that no single factor accounts for school success in generating high levels of student achievement.[244] However, the research has identified specific factors and elements common to effective schools. "Time on task" [245] has consistently been isolated as a variable which impacts student achievement. The greater the amount of time engaged in learning, the more successful the outcomes. One other factor that has been consistently identified with student achievement is "high expectations."[246] Students will perform to the level of expectation held by those administering the educational program. Students who are expected to achieve, will achieve; those who are not, will not. Armed with educational research[247] and the responsibility inherent in their positions, numerous legislatures and boards of education have enacted strict academic eligibility requirements for participation in extracurricular activities. These eligibility requirements reward students who achieve and provide more time for the underachiever to study.[248] Viewed in this manner, stringent eligibility requirements translate into improved student achievement.

State athletic organizations have generated academic eligibility requirements lower than those embraced by the proponents of the reform movement.[249] Through rules, the state high school athletic associations regulate interscholastic sports activities within the state. The scholastic eligibility rule promulgated by the high school athletic association is but one of the association's numerous rules which govern competition.[250] High school

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second wave of reform in American Public education." The report asked: "What has gotten the governors' attention?" The reply was couched in simple economic terms: "Jobs . . . ." *Id.*

243. *Id.*

244. *Id.* at 89.

245. *See* BROOKOVER, *supra* note 21.

246. *See* EFFECTIVE SCHOOLS RESEARCH, *supra* note 19.

247. *Id.*

248. *See* Brown, *supra* note 237, at 46-49. The question addressed is whether minimal or more restrictive standards are most effective to meet academic requirements. The article presents arguments for both minimal and higher standards and suggests that higher standards should be a positive motivating force.

249. *See supra* notes 196-210 and accompanying text.

250. *See* handbooks of various state high school athletic associations, *e.g.*, LHSAA HANDBOOK, *supra* note 207.

athletic associations are private, non-profit organizations. Thus, they differ from the public bodies, which enact eligibility rules because the primary purpose of the athletic associations' rule is not the academic advancement of students.[251] The athletic associations view participation in athletics as supporting the school's total educational program. They focus on the positive effects of participation in sports.

A discussion of the effect of eligibility requirements on dropout rates merits discussion. Most high school athletic associations claim that a less restrictive rule is challenging, yet not prohibitive to the degree that it could adversely contribute to the dropout rate.[252] The theory is that students who participate in extracurricular activities, specifically athletics, stay in school. However, the results in a study of the Texas "no pass, no play" rule indicated otherwise.[253] The rule required a student to have a six week average of at least 70 in every course for eligibility in extracurricular activities. The study was conducted in the Austin Independent School District and provided evidence that most of the feared negative effects of "no pass, no play" rule have failed to occur.[254] In fact, students have failed slightly fewer courses since passage of the "no pass, no play" rule. Moreover, the decline in failing grades has been greater for students enrolled in extra curricular

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251. An example of objectives and purpose from the LHSAA Constitution (1989-90) art. II: Objective of the Association: The objective of this Association, a voluntary organization, shall be to promote, regulate and direct the interscholastic athletic activities of the high schools of Louisiana. Its purpose shall be as follows: 1. To assist, advise and aid schools in organizing and conducting interscholastic sports; 2. To protect members of the Association by preparing and enforcing eligibility rules that will equalize and stimulate wholesome competition; 3. To prevent the exploitation of the programs of member schools by special interest groups; 4. To preserve the game for the boys and girls and not sacrafice the boys and girls to the game; 5. To promote the spirit of sportsmanship and fair play in all athletic contests. The Association is vitally interested in the welfare of every boy and girl participating in the athletic contests. It is for the protection of their interests that the association operates.

252. Joekel, *Student Activities and Eligibility Requirements,* 69 NATIONAL ASS'N OF SECONDARY SCHOOL PRINCIPALS BULL. 3 (1985) (movements to limit participation in activities by academic eligibility requirements do not take into account research that shows that the most consistent prediction of a person's life success is achievement in extracurricular activities). *Compare* J. COLEMAN, THE ADOLESCENT SOCIETY (1961) AND UNITED STATES DEPARTMENT OF EDUCATION, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) (The strongest predictor of success is "locus of control," *i.e.*, the degree to which an individual believes that he has control over his destiny).

253. Ligon, *'No Pass, No Play': Impact on Failures, Dropouts and Course Enrollments,* 7 EDUC. RESEARCH SERV. 17 (1988). The impact of some student behaviors on the "no pass, no play" rule enacted in Texas was studied for the variables of: 1) grades, 2) enrollment in honors courses, and 3) dropping out.

254. *Id.* Selected student data for the school years between 1982 and 1988 were provided. Students did fail fewer courses under the new rule, particularly in the fall semester.

activities. The study found that the overall dropout rate has not increased under the influence of "no pass, no play," although there was a possible increase for those participating in varsity sports.[255] On balance, the new rule appears to have had a positive effect. Most importantly, a growing percentage of students each year has agreed that the "no pass, no play" rule encouraged them to improve their grades.[256] The 1987-88 school year was the first time that the majority of students (52%) agreed.[257] Thus, "no pass, no play" appears to have been a positive change.

A recent study on school characteristics and dropout rates failed to reveal any relationship between dropout rate and participation in extracurricular activities.[258] The researchers investigated the effects of school features on both the probability of dropping out and the strongest behavioral predictor of dropping out, absenteeism. The results indicated that dropout rates and absenteeism were lower in schools where the faculty was interested and engaged with students, and where academic pursuits and an orderly school climate were emphasized.[259] Thus, involvement in school activities was not a factor in reducing the number of dropouts.

Whether formulated by public boards or by athletic associations, two basic concepts are embraced by academic eligibility rules: grade point average and subjects passed. Regarding grade point average, an average of 2.0, or "C" average, does not appear to be unrealistic. Expectation level is a primary motivator of behavior.[260] Thus, the standard of a "C" average should be expected of students. Also, the number of subjects that a student must pass should be included in the eligibility requirement. However, the requirement should never be such that any one teacher would have absolute control over the student's destiny. Requiring the student to pass all of his subjects means that any one of the child's teachers has the power to prevent his participation. This is true relative to the academic teachers if the student is required to pass all of his academic classes. A more realistic requirement could be framed, "The student must pass all but one of his classes and must pass at least three academic classes." If all teachers were perceived as fair by students and administrators, requiring a passing grade in all of the

255. *Id.* at 19-20.

256. *Id.* at 21.

257. *Id.*

258. CENTER FOR POLICY RESEARCH IN EDUCATION, THE EFFECTS OF HIGH SCHOOL ORGANIZATION AND DROPPING OUT: AN EXPLORATORY INVESTIGATION (1989).

259. *Id.* The researchers used a subsample of 160 schools and 4,450 students from the High School and Beyond database to investigate the effects of school features on both the probability of dropping out and the strongest behavioral predicator of dropping out, absenteeism.

260. *See* EFFECTIVE SCHOOLS RESEARCH and CREATING EFFECTIVE SCHOOLS, *supra* notes 19 and 21.

subjects would present no problem. However, "fair and effective exercise of adult authority" is not present in all classrooms.[261] The lack of "fair and effective exercise of adult authority" has been associated with higher absenteeism rates, higher dropout rates, and more disequalizing effects with regard to social class.[262] Thus, while high expectations can translate into expectations of a high grade point average, it must be realistically translated when it relates to subjects passed.

To summarize, the debate over the restrictiveness of the eligibility requirements continues. Because schools exist for academic purposes, the most desirable group to control the academic eligibility requirements should be the group held responsible for the academic achievement of the students. The governors, legislators, school boards, and school administrators bear the primary responsibility for the education of our nation's youth. The eligibility requirements set by athletic associations are not necessarily at odds with those set by the public bodies. Often, the athletic associations have assumed a leadership role and set the rules when those responsible for education have failed to do so.

IV. CONCLUSION AND OBSERVATIONS

Academic eligibility requirements for participation in extracurricular activities have been enacted by state legislatures, state boards of education, local school boards, individual schools, and athletic associations. The legal challenges to the academic eligibility requirements have surfaced in courts across the country. The challenges are rooted in the equal protection clause of the United States Constitution. Those opposed to academic eligibility requirements contend that the requirements affect access to a fundamental right by creating a class of individuals subject to invidious treatment. Opposition to eligibility requirements on constitutional grounds has always been abruptly halted by a state court's ruling that the right to participate in extracurricular activities is not deemed a fundamental right. The foundation of the ruling stems from the United States Supreme Court's unequivocal pronouncement that education, itself, is not a fundamental right.

The challengers to academic eligibility requirements on constitutional grounds might have an alternate route into the courts in view of the recent *Schaill* decision.[263] The contention that extracurricular activities must be viewed within the context of educational decisions was analyzed by the

261. *See* THE EFFECTS OF HIGH SCHOOL ORGANIZATION AND DROPPING OUT: AN EXPLORATORY INVESTIGATION, *supra* note 258.

262. *Id.*

263. *See supra* notes 101-118 and accompanying text.

Schaill court. On a constitutional issue, student athletes were held to standards different from those of students in general. Thus, challenges on equal protection grounds may, in the future, be brought on the grounds that academic eligibility rules create a suspect class. Equal protection analysis will then require that the academic eligibility requirements be subjected to a test of strict scrutiny. The legal battles over academic eligibility requirements will probably continue to be waged in the courts.

The political challenges to academic eligibility requirements are integral to the enacting bodies which promulgate the regulations.[264] Resistance is usually met whenever an enacting body endeavors to tighten the existing academic eligibility requirement. Two groups have emerged. First, there are the enacting bodies that support and promulgate more restrictive requirements. Second, there are the enacting bodies who are in favor of less restrictive requirements.

Those who enact the more restrictive requirements are the state legislatures, the state boards of education, local school boards, and individual schools. Those who enact less restrictive requirements are the athletic associations. Theoretically, neither group denies that the student-athlete is a school student, and that the primary mission of the school is the academic achievement of students. The differences between the groups lie in their philosophical approach to the learning process. Those in favor of less restrictive requirements contend that participation in athletics is an incentive for students to do better in school. They maintain that participation in extracurricular activities motivates students to learn. Those in favor of more restrictive requirements contend that academic achievement, the primary mission of the school, can only be accomplished through instruction in the academic subjects. They maintain that removing a student from his/her class to participate in extracurricular activities robs him of valuable time that could be spent engaged in learning activities. Further, they view participating in athletics as an incentive to achieve good grades, a reward, in fact, for those who do accomplish their academic goals.

Through the years, each group has relied on independent studies and assessments to validate their respective position. Independent research studies are numerous and they can be used to justify either position. As noted in this paper, individual research studies have been cited to show that student athletes perform well academically, and that failure among student athletes is commonplace.

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264. *See supra* notes 119-210 and accompanying text.

Educational practices that are not grounded in sound theory can no longer determine the direction of public schools. The crisis in public education, as noted in *A Nation At Risk*,[265] threatens the very existence of American democracy. Public schools are the vehicle through which this nation educates its citizens, perpetuating both its democracy and its economy. If public schools fail, an undereducated population weakens economic growth. Dropouts cannot get jobs; illiterates drain America's resources. Today's reality is that public schools have failed to accomplish their academic mission.

Educational practices must be grounded in sound research. For nearly twenty years, a body of research has developed, on specific educational practices which translate into student achievement. The Effective Schools Research,[266] is a summary of research studies on instructionally effective schools which identifies specific school related factors that translate into student academic gains. The literature suggests that students must be held to high standards of accomplishment and that they must be given a maximum time to learn. Thus, restrictive academic eligibility requirements, in view of the research, would advance academic achievement of student athletes. However, the Effective Schools Research never found that participation in extracurricular activities improved student achievement.

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265. A NATION AT RISK, *supra* note 1.

266. *See* EFFECTIVE SCHOOLS RESEARCH, *supra* note 19. In 1966, educators were stunned by the negative conclusions of James Coleman in the Equality of Educational Opportunity Study. Coleman stated that schools are not powerful enough to overcome the debilitating effects of home and family background. He concluded that schools had little impact on student achievement. Challenged by these conclusions, educators and researchers began to study and analysis the effects of schooling. Using schools that were analogous with regard to the number of minority students, the percentage of students in low socioeconomic status, and the level of educational attainment of the parents, they compared student achievement. Though the schools were analogous with regard to family background characteristics, the researchers found that students in certain schools improved in achievement; students in other schools did not improve. Those schools with high levels of student achievement were studied. The schools came to be known as "instructionally effective schools." Researchers isolated characteristics common to the instructionally effective schools. Such schools have continued to be analyzed for the past twenty years. Though the research has been conducted by various and independent agencies, the results have been basically the same: Certain characteristics can be found in instructionally effective schools. Schools where student achievement increased, as opposed to schools with low levels of student achievement, shared similar characteristics. The characteristics of instructionally effective schools are: 1) clear school mission, 2) instructional leadership by the principal, 3) high expectations for student performance, 4) student time on task, 5) frequent monitoring of pupil progress, 6) home-school relations, and 7) orderly climate. Further, teacher specific behaviors that result in student achievement gains were defined in the studies. This body of research, conducted over a twenty year period, showed that participation in extracurricular activities was not a characteristic of an instructionally effective school. Rather, instructionally effective schools had as a common mission high expectation of student classroom performance.

The research suggests that students in public schools must be held to high levels of achievement. Thus, the requirement of an overall "C" average does not appear to be unrealistic. However, in practical terms, the requirement that a student must pass all of his classes fails to take into consideration the inappropriate power that would be placed in the hands of any one teacher. A requirement that the student pass all of his classes means that one teacher would have the power to determine the student's destiny. While the overwhelming majority of teachers are fair and supportive, some teachers are punitive. Thus, the requirement that a student be required to pass all classes must be carefully scrutinized.

To confront the crisis in America's public schools, the practices that prevail in the schools must be grounded in sound educational theory. Student achievement gains can be related to certain school-specific behaviors. Trying to improve education without looking at what works is futile. The current deterioration of America's public schools demands that unproven practices no longer be employed. Legislators and educators, with the authority to enact academic eligibility requirements, would be wise to adhere to the body of Effective Schools Research, promulgated over the past twenty years. The primary mission of the school, student achievement, can be realized through the leadership of legislators and educators.

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