NCAA STATE ACTION: NOT PRESENT WHEN REGULATING INTERCOLLEGIATE ATHLETICS - BUT DOES THAT INCLUDE DRUG TESTING STUDENT ATHLETES?

Alan Fecteau[1]

1. The author, a 1987 graduate of the University of Nebraska-Lincoln College of Law, operates a private legal practice in Clarkesville, Georgia. A member in good standing of the State Bar of Georgia's Entertainment and Sports Law section, Fecteau recently earned an advanced degree in the field of Sport Management from the University of Georgia.

I. INTRODUCTION

Since a National Collegiate Athletic Association (NCAA) investigation of the men's basketball program at the University of Nevada-Las Vegas (UNLV) in the early 1970s, the courts have struggled with a difficult and fundamental question regarding the legal relationship between the NCAA and the Constitution of the United States: Can otherwise private NCAA conduct, as applied to its member schools, be found to be "state action" for purposes of the 14th Amendment to the federal Constitution, and applicable federal laws?

Some observers contend the Supreme Court of the United States settled this issue in *NCAA v. Tarkanian*.[2] But this article stands for the proposition that the issue remains open.

The most reliable legal authority regarding this question remains the popular statement of law from the Fourth Circuit Court of Appeals in *Arlosoroff v. NCAA*.[3] In Arlosoroff, the court ruled that the "regulation of intercollegiate athletics"[4] was not a "function traditionally [and] exclusively reserved to the state."[5]

In other words, *Arlosoroff* stands for the view that one of three popular state action theories, the so-called "governmental function" theory, could not be applied to the NCAA to impute state action on the NCAA's otherwise private conduct. And, this article will articulate the view that the more correct state of federal Constitutional law, is that the NCAA is indeed a private actor, so long as it confines itself to "the regulation of intercollegiate athletics." Arguably, if the NCAA were to enforce certain rules in the name of regulating college sports that legally exceeded *Arlosoroff's* holding, then it's conceivable that the NCAA might be considered a state actor, under the Constitutional "governmental function" theory.

Few dispute that the Constitutional rights of coaches and athletes are not impacted where most NCAA rules are concerned. Most NCAA rules, in fact, simply seek to manage sports. Could college football place-kickers legally demand "notice and a hearing," under the Constitution if the NCAA voted to narrow end-zone goalposts further, making field goal attempts more difficult? That is not likely to happen.

But, the NCAA has been known to promulgate regulations that

2. 488 U.S. 179 (1988).
3. 746 F.2d 1019 (4th Cir. 1984).
4. *Id.* at 1021.
5. *Id.*

exceed the bounds of Saturday's "white lines." It's possible that certain NCAA rules, such as policies governing the drug testing of student athletes, might well be considered by a court as exceeding *Arlosoroff's* benchmark.

Part I of this perspective discusses the state action requirement and the United States Supreme Court trilogy of decisions that have outlined the criteria for finding state action. Part II analyzes case-law addressing the NCAA as a state actor following the "trilogy" and contends that these decisions have been flawed due to the courts lack of evaluating the NCAA rule at issue when determining the state actor status of the NCAA. Part III illustrates how the NCAA may overstep its boundry of regulatory intercollegiate athletics through its student-athlete drug testing programs. Part IV examines the federal and state constitutional challenges that can be made regarding the NCAA's current drug testing policies and argues that the courts have erred in not finding constitutional violations. Finally, Part V concludes with a critic of whether all or any of the NCAA's regulations may be considered to be state action.

II. STATE ACTION - IN GENERAL

The Constitution's 14th Amendment regulates state action with three important clauses. First, the Privileges and Immunities Clause allows for a limited number of enforceable individual rights as against state action.[6] Second, the Due Process Clause procedurally regulates state action impacting the life[7], property[8] or liberty interests of individuals. Also, state action impacting so-called "fundamental rights"[9] is severely limited under substantive Due Pro-

---

6. U.S. CONST. amend. XIV, § 1. The 14th Amendment's Privileges and Immunities Clause states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]

Id. See The Slaughterhouse Cases, 86 U.S. 36 (1873).

7. *Id.* The 14th Amendment's (procedural) Due Process Clause states, " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" *Id. See* Meyer v. Nebraska, 262 U.S. 390 (1923)(holding that an otherwise commendable interest in obtaining an education does not qualify as a "liberty" interest, under the 14th Amendment's Due Process Clause).

8. *Id. See* Goss v. Lopez, 419 U.S. 565 (1975)(asserting that public school attendance qualifies as a "property" interest, under the 14th Amendment).

9. 16A C.J.S. *Constitutional Law* § 447 (1984). The 14th Amendment's (substantive) Due Process and Equal Protection Clause "fundamental" rights include:

> [T]hose which have their origin in the *express terms* of the [C]onstitution *or* which are *necessarily implied* from those terms[.] . . . The test in whether a right is fundamental lies in assessing whether it is *explicitly or implicitly guaranteed* by the [C]onstitution.

cess. Finally, the Equal Protection Clause severely limits state action impacting so-called "suspect classifications,"[10] and the clause also determines who may exercise the (substantive) Due Process Clause fundamental rights, referred to above. State action[11] must be shown by the plaintiff before the protection of the 14th Amendment, and other Constitutional provisions, can be afforded to the plaintiff.[12]

In 1982, the Supreme Court attempted to clarify state action standards with a detailed trilogy of decisions, *Rendall-Baker v. Kohn*,[13] *Lugar v. Edmondson Oil Co.*,[14] and *Blum v. Yaretsky*.[15] Collectively, these three decisions create the criteria that is used in the determination of whether a state actions exists.

A. The Lugar Standard & Two-Prong Test

In *Lugar*, the Court defined a two-prong standard to be used in the determination of whether a private entity's conduct could be attributable to the state under the Fourteenth Amendment and other applicable federal law. If both prongs of the two-prong *Lugar* test are met, the *Lugar* standard is satisfied and state action is present.[16]

Id.(emphasis added).

The Supreme Court has held several rights to be considered fundamental, including: (1) the right to privacy, *see* Griswold v. Connecticut, 381 U.S. 479 (1965); (2) the right to interstate travel, *see* Shapiro v. Thompson, 394 U.S. 618 (1969); (3) the right to marry, and matters inherent to family, *see generally*, 16A C.J.S. *Constitutional Law* § 464 (1984); and (4) several 1st Amendment rights, *see, e.g.*, NAACP v. Alabama, 357 U.S. 449 (association); *see, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)(attend public trials). The Court has held, however, any so-called "right to an education" is not to be considered "fundamental" under the 14th Amendment's Equal Protection Clause. *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1972).

10. U.S. CONST. amend. XIV, § 1. The 14th Amendment's Equal Protection Clause states " . . . nor deny to any person within its jurisdiction the *equal protection* of the laws." *Id.*(emphasis added).

The so-called "suspect" classifications, applicable to the 14th Amendment's Equal Protection Clause include: (1) race or national origin; (2) religion; and (3) alienage. Suspect classifications by states are subject to strict scrutiny in federal courts. *See generally* 16A AM. JUR.2D *Constitutional Law* § 750 (1979).

11. The Constitutional term "state action" refers to government conduct, and also encompasses the legal term "under color of law." State action has been defined as: "[i]n general, the term used in connection with claims under due process clause and Civil Rights Act for which a private citizen is seeking damages or redress because of improper government intrusion into his life." BLACK'S LAW DICTIONARY 371 (5th ed. 1983).

12. Shelly v. Kraemer, 334 U.S. 1, 13 (1947).

13. 457 U.S. 830 (1982).

14. 457 U.S. 922 (1982).

15. 457 U.S. 991 (1982).

16. *Lugar*, 457 U.S. at 938. According to the Lugar Court, "[o]ur cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attrib-

The first prong of the test mandates that the deprivation the plaintiff experiences must be caused by some right, privilege or rule created by the State. Also, the first prong is satisfied if the party charged is a person for whom the state is responsible. The second prong is that the party charged with the deprivation must be a person who could "fairly"[17] be said to be a state actor. These two principles diverge when the constitutional claim is directed against a private party.[18] So under *Lugar*, an otherwise private actor must pass both *Lugar* prongs to be removed from legal classification as a state actor for Constitutional purposes.[19] And importantly, one can see the Court asserting that state action questions are to be examined in the context of a private actor's conduct in each particular case rather than in the context of a private actor's overall characteristics.

B. The Blum and *Rendell-Baker* Decisions

In *Blum v. Yaretsky*,[20] the Court evaluated a Constitutional state action question in relation to a state's participation in transferring nursing home patients to "reduced level(s) of care."[21] The Court emphasized that, despite substantial state funding and regulation, New York could not be constitutionally responsible for the nursing home's decision in question.[22]

The Court announced three situations where state action may be present under *Lugar*. First, the Court stated that the complaining party must show a sufficient connection between the state and the challenged action by the private entity. Secondly, the complaining party must illustrate that the state, which normally would not be held responsible for a private decision would be held responsible because it exercised coercive power or significant encouragement. But, this encouragement must be so overt that the choice would be deemed to be that of state control. Third, the required connection

---

utable to the [s]tate. *Id.* These cases reflect a two-part approach to this question of "fair attribution." *Id.*

17. *Id.* at 937. A state official or any other significant state employee may be considered a state actor so long as he has acted on behalf of the state. *Id.*

18. *Id.* at 938.

19. *Id.*

20. 457 U.S. 991 (1982).

21. *Id.*

22. *Id.* at 1008-09. The Court wrote that:

> [r]espondents' complaint is about nursing home decisions to discharge or transfer (the patients)[.] . . . . [W]e are not satisfied that the [s]tate is responsible for those decisions[.] . . . . Those decisions ultimately turn on medical judgements made by private parties according to professional standards that are not established by the [s]tate.

Id.

between the state and the private entity may be said to exist if the private entity has exercised such rights or powers that are usually with "the exclusive prerogative of [the] state.[23] The required connection between the state and the private entity may exist.

In a decision following the *Blum* court, the Court in *Rendall-Baker v. Kohn*[24] evaluated a constitutional state action question with regard to the state's participation in firing faculty from a privately-operated school for maladjusted high school students. The court reiterated that the while the Fourteenth Amendment both prohibits the states from denying constitutional rights and also guarantees due process, it only applies to state actions not the acts of private persons.[25]

Applying the facts of the case, the Court emphasized that, despite generally heavy state funding and regulation, the state had no connection with the conduct at issue. The school, according to the court, is not fundamentally different from other private entitites. Acts of such private entitites do not necessarily become acts of the states. Accordingly, the court found the school not to be a state actor because its conduct was not attriubutable to the state.[26]

---

23. *Id.* at 1004-05 (1982). Mr. Justice White concurred, quoting from *Rendall-Baker* and repeating his specific agreement with the Court's position that the state could not be held responsible for the conduct at issue, despite overall significant state involvement. *Id.* at 1013 (White, J., concurring).

24. 457 U.S. 830 (1982).

25. *Id.*

26. *Id.* at 840-41. As the Court explained, "[i]n contrast to the extensive regulation of the school generally, the various regulators showed little interest in the school's personnel matters." *Id.*

In a brief concurring opinion, Mr. Justice White took pains to highlight that specific point from the Court's otherwise lengthy decision, stating "[f]or me, the critical factor is the absence of any allegation that the employment decision itself was based upon some rule of conduct or policy put forth by the state." *Id.* at 845 (White. J., concurring).

In *Rendall-Baker* and *Blum*, the Court also refined two of the state action theories. Regarding the entanglement theory, Justice White, in his *Rendall-Baker* concurrence, wrote that a private/state relationship could only be considered entangled, for state action purposes, when a state ruling is responsible for the challenged conduct. *Id.* at 843-44 (White, J., concurring). With regards to the governmental function theory, the Court wrote in *Blum* that otherwise private conduct could only be imputed to the state where the conduct in question was the "traditional, exclusive prerogative of the [s]tate." *Blum*, 457 U.S. at 1011. With *Blum*, the Court completed the knot tying together the three state action theories with the two-part *Lugar* test. *Id.* The first and third factors, of *Blum's* three-factor analysis, refer to a "nexus" between state and private conduct, linking them (with entanglement and government function theories) to the second prong of *Lugar's* test, with regard to otherwise private conduct by "a person who may fairly be said to be a state actor," *Id.* And the second *Blum* factor, referring to private decisions for which the state is held responsible, corresponds (with state control theory) to *Lugar's* first prong, with regard to private conduct "imposed by the state," *Id.*

C. The NCAA in General

The National Collegiate Athletic Association (NCAA) is a privately-funded, unincorporated private association of about 1,000 member schools, headquartered near Kansas City. State-funded colleges and universities comprise roughly half the membership. The rest are privately-funded institutions, with a few funded by the federal government. The NCAA holds annual conventions, enacting and codifying rules governing scholarship, sportsmanship and amateurism. The member schools must abide by the association rules or face NCAA penalties.[27]

Despite the NCAA's status as a private association, federal courts throughout the 1970s found NCAA state action in a series of decisions, mostly regarding the NCAA's now-defunct "1.600"[28] rule. In these decisions, the courts relied upon three theories: state control theory, governmental function theory, and entanglment theory. The state control theory exists where circumstances surrounding private conduct reveal that the state controlled the private conduct to the degree of making the private conduct state action.[29] The governmental function theory involves private conduct that a-

---

27. 1993-94 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA) ARTICLE 19.1 — Committee on Infractions (illustrating the NCAA cataloging of rules by sections and subsection references appear for all editions of the NCAA manual through the 1989-90 academic year. Thereafter, the NCAA catalogued rules according to a more streamlined decimal system. However, the 1989-90 NCAA manual allows for cross-reference access to both systems). *See* Lederman, *Memphis State Draws Harsh Sanctions, But Averts the Death Penalty*, SPORTS ILLUSTRATED, August 9, 1989, at 28(A).

28. 1965-66 NCAA MANUAL, BYLAWS, ARTICLE 4, § 6(b)(1) — (Institutional) Eligibility for NCAA Championship Events. The "1.600" rule barred member schools from post-season championship events, unless member school athletic programs limited scholarship awards to athletic recruits "predicting" at least a 1.600 freshman-year grade point average (GPA). *Id.*

Unilateral "official interpretation" by NCAA headquarters personnel later ruled that the "1.600" rule also: (1) subtracted a year of NCAA competition for each year of participation in violation of the rule; and (2) directed member schools to immediately remove from competition student-athletes found by the association's investigators not to have predicted 1.600. *Id.*

As interpreted, the rule effectively expanded to regulate regular-season competition. If a student-athlete merely participated without having predicted the required 1.600, the interpretation called for the member school to immediately declare the student-athlete ineligible to compete, or face severe "indefinite" penalties from the headquarters. *Id.*

NCAA membership adopted the rule in 1965, to become effective January 1, 1966. *Id.* The rule stated:

> A member [*school*] *shall not be eligible* to enter a team or individual competitors[,] in (a) NCAA sponsored meet, unless the [member school]: (1) limits its scholarships or grants-in-aid awards . . . and . . . participation to student-athletes who have predicted a minimum grade point average of at least 1.600 (based on a maximum of 4.000) as determined by the Association's national prediction tables or Association-approved conference or [member school] tables.

Id. (emphasis added).

29. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)(regarding private actor inside state facility).

ssumes some power reserved for the state.[30] Lastly, the entanglement theory comes into play when the circumstances surrounding private conduct reveal substantial "interdependence" between the private actor and the state.[31]

D. Key Post-Trilogy Cases Regarding NCAA Being Considered State Actor

Initially, at least two federal courts failed to acknowledge the applicability of the Supreme Court's *Lugar/Rendall-Baker/Blum* trilogy to issues of NCAA state action.[32] However in 1984, the Fourth Circuit Court of Appeals reassessed NCAA state action, in light of the trilogy, in *Arlosoroff v. NCAA*.[33]

The *Arlosoroff* court examined NCAA's "20th birthday" rule.[34] Claiming the rule unreasonably limited NCAA competition by older, foreign-born athletes, the plaintiff[35] sought to enjoin the NCAA

---

30. *See* Marsh v. Alabama, 326 U.S. 715 (1946)(regarding a company town).

31. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (concerning heavily-regulated monopolies).

32. *See* Jones v. Wichita State University, 698 F.2d 1082 (1983). In *Jones*, a college athlete would have been denied a preliminary injunction seeking to enjoin university from declaring him ineligible to compete on university's varsity basketball team based on NCAA rules. *Id.* This athlete's accusation did not present a substantial federal question so as to vest trial court with jurisdiction. *Id.*

See also Justice v. NCAA, 577 F. Supp. 356 (D.Ariz. 1983). In *Justice*, four members of university's football team were denied a preliminary injunction to prevent enforcement of sanctions imposed by National Intercollegiate Athletic Association on university's football team. *Id.* Actions of the National Intercollegiate Athletic Association constitutes "state action" for constitutional and jursidictional purposes. *Id.*

33. 746 F.2d 1019 (4th Cir. 1984).

34. *Id.* The case involved a student-athlete claim that the NCAA's so-called "20th birthday" rule unreasonably reduced plaintiff's years of NCAA eligibility to compete. *Id.* Adopted in 1980, the rule provided: "[a]ny participation by a student as an individual or as a representative of any team in organized competition in a sport during each twelve month period *after the student's 20th birthday* and prior to matriculation with a member [school] should count as one year of varsity competition in that sport." 1980-81 NCAA MANUAL, BYLAWS, art. 5, § 1(d) — (Individual) Eligibility for NCAA Championships (emphasis added).

In Howard University v. NCAA, 510 F.2d 213, 222 (D.C.Cir. 1975), the court struck an earlier, similar rule, known simply as the "foreign student rule," under the 14th Amendment's Equal Protection Clause. *Id.* The court held the "foreign student" rule created a "suspect classification" based upon alienage, and that it had failed a strict scrutiny analysis. *Id.*

35. *Id.* at 1020. Plaintiff, an Israeli citizen, competed on behalf of Duke University's men's tennis team after enrolling as a freshman at Duke as a 22-year-old. *Id.* Before his dispute with the NCAA, plaintiff won the NCAA men's singles tennis championship his freshman season. Plaintiff sued after the NCAA announced he was to be limited to a single season of tennis competition. *Id.* A former member of Israel's armed forces, plaintiff Arlosoroff had apparently assumed, incorrectly, that he would be eligible to compete four years under an exemption in the rule, allowing that time served "in the armed services" was not to count against a student-athlete's age. *Id.* The exemption read: "[p]articipation in organized competition during time spent *in the armed services*, on church missions or with recognized foreign

under the Equal Protection Clause. The court concluded that the NCAA did engage in private conduct.[36] To support that conclusion, the *Arlosoroff* court, indirectly and in reverse order, applied the *Lugar* two-prong test, to the NCAA rule at issue.[37]

The *Arlosoroff* court first applied the governmental function theory to *Lugar's* second prong in their examination of whether the NCAA's 20th birthday rule had been enacted by a person who could reasonably be considered a state actor."[38] The court rejected the applicability of the governmental function theory to the rule, and in effect, to most NCAA rules. The *Arlosoroff* Court stated that the management of intercollegiate athletics is not a function that is usually reserved solely for the state despite the fact that the NCAA's regulatory function is somewhat involved within public service.[39]

By that legal statement, *Arlosoroff* limited, but did not eliminate, the application of the governmental function theory to NCAA regulations. According to the court, so long as the NCAA, the National Association of Intercollegiate Athletics (NAIA), or any similar college sports organization, confined itself to what a court considered to be a regulation of intercollegiate athletics, then association rules would be safe from the governmental function theory.

Arlosoroff's view would appear to cover most college sports association rules, especially student-athlete recruiting rules similar to the "20th birthday" rule. Some NCAA rules, such as rules related to drug testing programs which regulate member schools, would arguably severely impact the individual liberty of student-athletes after recruitment. It would appear then that the question of whether NCAA-mandated drug testing qualifies as "the regulation of intercollegiate athletics," for the purposes of *Arlosoroff*, remains

---

aid services of the U.S. government shall be excepted." 1980-81 NCAA MANUAL, Bylaws, art. 5, § 1(d) — (Individual) Eligibility for NCAA Championships (emphasis added).

In ruling Arlosoroff eligible to compete beyond his freshman season, NCAA headquarters interpreted the association's "20th birthday" rule so as not to include time-served in armed services of a country other than America. *Id.* And the rule has subsequently been amended to exempt only student-athletes who have served with the armed services of the United States. *Id.* The "20th birthday" rule continues to read: "[p]articipation in organized competition during time spent in the *U.S. armed services* shall be excepted." 1993-94 NCAA MANUAL, Bylaws, art. 14.2.4.5, Criteria for Determining Season of Eligibility (emphasis added).

36. *Arlosoroff*, 746 F.2d at 1022.

37. *Id.* at 1021. The *Arlosoroff* court first recognized the Supreme Court trilogy, stating that "earlier cases rested upon the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action. That notion has now been rejected by the Supreme Court [in the *Lugar/Rendall-Baker/Blum* trilogy]." *Id.*

38. *Id.*

39. *Id.*

open.

III. Rules and Regulations of the NCAA and State Action

NCAA state action analysis became more specified in 1985 when a student-athlete challenged the NCAA's so-called "transfer" rule[40] in *McHale v. Cornell University*.[41] Mirroring the *Lugar* two-prong standard, the *McHale* court announced a two-prong specific test for finding state action in the context of a given NCAA rule.

The court stated that the plaintiff first must demonstrate that the state-supported member of the NCAA exercised coercive power or provided such significant encouragement, either overt or covert, in promulgating the bylaw in question, that the choice would be deemed to be that of the state. Secondly, the plaintiff must establish that the NCAA, in applying its rules, has performed a public function which has traditionally been under the exclusive jurisdiction of the state.[42]

Both prongs seemed impossible to meet with the court's decision in *Hawkins v. NCAA*.[43] In *Hawkins*, the court concluded that little NCAA state action would likely ever be found under the first prong of *McHale's* NCAA-specific test. The *Hawkins* court noted that many NCAA actions require a majority vote for passage.[44] Since state-funded NCAA member schools account for only about half the NCAA's membership, the court concluded the extent to which an NCAA bylaw might be held to be state action under *McHale's* first prong has been "minimize[d], if not eliminate[d]"[45] And, the *Hawkins* court agreed with the Court in *Arlosoroff* in believing that regulating intercollegiate athletics could not be

---

40. At the time of the case, the NCAA's so-called "transfer" rule stated:

> A transfer student from a four-year institution shall not be eligible for any NCAA championship until the student has fulfilled the a residence requirement of one full academic year . . . and *one full calendar year has elapsed* from the first regular registration and attendance date at the certifying [member school].

1985-86 NCAA MANUAL, Bylaws, art. 5, § 1(j)(7) — (Individual) Eligibility for NCAA Championships (emphasis added).

The NCAA has since reduced the arguably harmful effect upon a student-athlete's option to travel interstate, impacted by the so-called "transfer" rule, eliminating the rule's "calendar year" requirement in 1991. The rule currently reads: "A student-[athlete] who transfers . . . to a member institution from any collegiate institution is required to complete *one full academic year of residence* at the [member] institution before being eligible to compete for or to receive travel expenses from . . . the member institution[.]" 1993-94 NCAA MANUAL, Bylaws, art. 14.6.1, Residence Requirement — General Principle (emphasis added).

41. 620 F. Supp. 67 (N.D.N.Y. 1985).

42. *Id.* at 69.

43. 652 F. Supp. 602 (C.D. Ill. 1987).

44. *Id.* at 608.

45. *Id.* at 609.

viewed a traditional and exclusive government function.[46]

A. *Impact Of the United States Supreme Court's Tarkanian Ruling*

In *NCAA v. Tarkanian*[47] (*Tarkanian II*), the United States Supreme Court quickly dispensed with the Nevada Supreme Court's intricate application of governmental function theory to the NCAA's conduct at issue.[48] The high federal court did so by disagreeing factually with the Nevada court's description of the NCAA's so-called "show cause" directive, which had been used by the NCAA to effectively force Tarkanian's suspension, as later carried out by the University Nevada-Las Vegas.[49]

The Court specifically described the "show cause" directive as granting the NCAA authority to direct a member school to "show cause why that member [school] should not suffer further penalties unless it imposes a prescribed discipline on [a member school's] employee; [but the NCAA] is not authorized, however, to sanction a member [school]'s employees directly."[50]

The Court recognized a key fact, that evaded the Nevada Supreme Court. The NCAA did not, in fact, order UNLV to suspend Tarkanian. The NCAA ordered UNLV to "show cause." What Nevada's high court found to be an "order," the Supreme Court of the United States found to be a "recommendation."Surprisingly, however, the Supreme Court failed to adopt *Arlosoroff's* holding that the "regulation of intercollegiate athletics" could not be viewed as NCAA assumption of a governmental function. In fact, the Court referred to *Arlosoroff* in mere historical terms —and indirectly discussed only one of three recognized state action theories, while examining other state action approaches.[51]

---

46. *Id.* The court stated "if providing education to our nation's children is not an exclusive state function, neither can regulating inter-collegiate sports be an exclusive state function." *Id.*

47. 488 U.S. 179 (1988).

48. NCAA v. Tarkanian, 741 P.2d 1345 (1987).

49. *Id.*

50. *Id.* at 184.

51. *Id.* at 182, n. 5. The Court indirectly addressed only of the state action theories — state control theory. *Id.* The Court held there had been no state action, as "the source of the legislation adopted by the NCAA is not Nevada, but the collective membership, speaking through an organization that is independent of any particular [s]tate." *Id.* at 192.

Instead, the Court examined more novel state action arguments. One such argument examined was as to whether UNLV "delegated" state action to the NCAA. And the Court found whether or not delegation existed, it would not have extended to Tarkanian. That conclusion was consistent with the Court's determination that the NCAA had not, in fact, participated in an order to suspend the plaintiff. Therefore, state action could not have jointly been committed against the coach by UNLV and the NCAA. And as to whether UNLV's NCAA membership left UNLV with "no choice" other than to suspend the coach, the Court

The Court also did not refer to the 1974 lower federal court decision in *McDonald v. NCAA*.[52] But *Tarkanian* and *McDonald* had much in common. The cases involved state-funded member schools and plaintiffs who claimed NCAA membership forced their member schools to violate federal Constitutional rights.[53]

B. *Courts Should Evaluate The NCAA's State Actor Status By Focusing On the Rule In Question And Not Simply the Organization*

Constitutional state action inquiries have long been described as featuring the quintessential "case-by-case"[54] analysis. The federal circuits should have examined NCAA state action questions in the context of the specific NCAA rule or rules being challenged, and not in the context of the nature of the NCAA generally.

If the Supreme Court reviewed the action being taken by the NCAA itself, rather than focusing on the fact that the NCAA took action, then the court might well find that the mandatory blood

---

recited three possible options:

> (1) Reject the sanction requiring (UNLV) to disassociate Tarkanian from the athletic program and take the risk of still heavier sanctions, e.g., possible extra years of probation .... (2) (Suspend) Tarkanian from his present position ... even while believing the NCAA was wrong .... (3) Pull out of the NCAA completely on the grounds that (UNLV) will not execute what (UNLV) hold(s) to be (the NCAA's) unjust judgments.

Id. at 187.

The Court then summarized UNLV's choices in a footnote: "(UNLV's) desire to remain a powerhouse among the nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal. But that UNLV's options were untenable does not mean they were nonexistent." *Id.* at 198, n. 19 (1988).

52. 370 F. Supp. 625 (C.D. Cal. 1974).

53. McDonald v. NCAA, 370 F. Supp 625, 631-32 (C.D.Calif. 1974). The *McDonald* court's words proved to be prophetic, considering the later result in *Tarkanian II*:

> [California State University Long Beach] argues that to place it in [these] circumstances puts it on the horns of a dilemma. In its action ... [CSULB] relies for its justification upon the compulsion entailed in its NCAA membership .... [*But, CSULB cannot*] *use its own independent action — that of* [*voluntary*] *concurrence in NCAA procedures* — to change ... private action into state action for [C]onstitutional purposes.

Id. (emphasis added).

54. 16A AM. JUR.2D *Constitutional Law* § 743 (1979). The direction of the law in this area has been consistently toward a case-by-case analysis in this area:

> [T]he Supreme Court has aptly pointed out that the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "state action," on the other hand, frequently admits no easy answer. Moreover, the [C]ourt has concluded that no precise or infallible formula for such determination exists, and has advised that by *only sifting the facts and weighing the circumstances in each case* can the state's nonobvious involvement in private conduct can be determined.

Id. (emphasis added).

testing procedures of the NCAA are violative of the due process clause through the 14th Amendment. Granted, it is not a traditional governmental function to regulate intercollegiate athletics, but it is the traditional function of the government to conduct blood tests of employees[55] and criminal suspects[56].

IV. DRUG TESTING AS AN EXAMPLE OF THE NCAA OVERSTEPPING ITS STATUS OF REGULATING INTERCOLLEGIATE ATHLETICS

After the high-profile cocaine-related deaths of former college football star Don Rogers, and former college basketball star Len Bias in 1986,[57] the NCAA became increasingly concerned about drug use by student-athletes. Although the NCAA banned the use of many drugs in post-season championship events in 1973,[58] in 1986 the association amended its Student-Athlete Statement (SAS) to make the SAS a consent form for local drug testing programs conducted by member schools before the start of regular-season competition.[59] Unlike most NCAA rules, drug testing creates a di-

---

55. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

56. *See* Schmerber v. California, 384 U.S. 757 (1966).

57. *See* Reilly, *When the Cheers Turned to Tears*, SPORTS ILLUSTRATED, July 14, 1986, at 28.

58. *See* Note, *The NCAA Drug Testing Program and the California Constitution: Has California Expanded the Right of Privacy?*, 23 U.S. FLA. L.REV. 253, 254 (1989).

59. The NCAA requires member schools to administer the SAS to all student-athletes. *See* 1993-94 NCAA MANUAL, CONSTITUTION, ARTICLE 3.2.4.5 — Student-Athlete Statement. The SAS-imposed drug testing program provides: "Prior to participation in intercollegiate competition each academic year, the student-athlete shall sign a statement . . . in which the student[-]athlete . . . consents to be tested for the use of drugs prohibited by NCAA legislation. *Failure to complete and sign the statement shall result in the student-athlete's ineligibility for NCAA competition.*" 1993-94 NCAA MANUAL, CONSTITUTION, Article 14.1.3.1 — Student-Athlete Statement (emphasis added).

There can be little doubt that the NCAA retains a sincere interest in drug free competition. Nevertheless, the NCAA's eye-witness collection system is most invasive. Even America's armed forces — whose members have for years been charged with each other's safety, and national security — have only recently begun to directly monitor service members while collecting samples. For example, the United States Army, and state Army National Guards, began collecting drug test samples from soldiers under a system allowing for direct monitoring only in recent years. One such regulation states:

> [i]n accordance with AR 600-85, dated 21 October 1988, subject: Alochol and Drug Abuse Prevention and Control Program (ADAPCP), command-directed urine test will be administered by the [Unit Alcohol and Drug Coordinator] appointed by the unit commander, following procedures set forth in this [regulation].
>
> a. Soldiers will be *directly observed* while providing urine specimens; however, they will be afforded the *maximum respect and concern for human dignity* as possible under the circumstances.

Georgia Army National Guard Regulation 600-85, Ch. 3 — Procedures (1 Oct 1992)(emphasis added).

One wonders whether the NCAA should not at least try to adopt similar cautious and respectful language, with regard to its procedures for drug testing student-athletes, who merely compete on playing fields and do not risk life and limb on the world's battlefields.

rect impact on individual liberties student-athletes might otherwise enjoy as American citizens, or state residents.

There are two levels for drug testing student-athletes. The SAS demands that a student-athlete consent to member school drug testing. If a student-athlete refuses, the association regards the student-athlete as ineligible to participate in NCAA competition. Other rules, governing NCAA member schools, require member schools to conduct testing for drugs on a list of NCAA-banned substances. Therefore, two levels of drug testing programs can be said to be mandated upon student-athletes: (1) NCAA drug-tests (post-season championship events, and during the regular season under the SAS); and (2) member school drug-tests during the regular season under the SAS, and/or via member school-developed consent forms.[60] Questions relevant to both levels of student-athlete drug testing may well be examined with respect to the federal Constitution, state constitutions, or state statutes.

A. The Federal Constitution & Drug Testing

In order to impose federal Constitutional scrutiny on NCAA-level student-athlete drug testing programs, this activity must be found to be a state action. One may argue that NCAA-level drug testing programs fall outside the parameters of *Arlosoroff v. NCAA*[61], where the court announced that the "regulation of intercollegiate athletics . . . is not a function traditionally, exclusively reserved to the state."[62]

One court has specifically examined whether the NCAA's SAS mandate amounts to Constitutional state action. In *O'Halloran v. University of Washington*[63], the court held the SAS drug testing mandate to have been private conduct.[64] The *O'Halloran* court at-

---

60. O'Halloran v. University of Washington, 672 F. Supp. 1380, 1383 (W.D. Wash. 1987). The court stated that, "[i]t is evident . . . there are two separate drug testing programs involved. While there are obvious points where the[y] . . . coalesce (e.g. the SAS) . . . it appears . . . that the scope and procedures of each drug testing program vary, and they should be separately considered." *Id.*

61. 746 F.2d 1019.

62. *Id.* at 1021.

63. 679 F. Supp. 997 (W.D. Wash. 1987).

64. *Id.* at 1001-02. The court wrote:

> [f]ederal courts since *Blum* and *Rendell-Baker* have held that rule-making by the NCAA and enforcement of NCAA rules constitute private conduct rather than state action . . . . No different conclusion is warranted here. Plaintiff has not . . . demonstrat[ed] that conduct complained of, the NCAA's drug testing program, is committed by persons acting under color of state law: (1) there is no showing that the State of Washington has exercised coercive power or provided significant encouragement [for adoption of the SAS mandate]; and (2) neither is there a showing that the regu-

tempted to follow *Arlosoroff*, but its analysis seemed to fall short. In *O'Halloran*, the court fell prey to the same faulty inquiry used by the federal courts in the 1970s line of NCAA state action cases. Similiar to those earlier decisions, the court reached a conclusion by examining the nature of the NCAA generally, and not the nature of the NCAA rule in dispute.[65] Specifically, the court failed to examine whether the conduct at issue, NCAA-driven administrative drug testing procedures, ought to be considered as within the concept of the "regulation of intercollegiate athletics."

O'Halloran's outdated, overly broad approach would have us believe that every NCAA rule must be considered with the same eye. By way of extreme illustration, if the NCAA were to jail student-athletes for rules violations, in some sort of association detention center at its headquarters, would the *O'Halloran* court consider that sort of conduct merely the "regulation of intercollegiate athletics?"

Despite being reversed by the Supreme Court of the United States, the Nevada Supreme Court's decision in *Tarkanian v. NCAA*[66] is instructive because it demonstrates how a court can resist making the hasty assumption that every NCAA rule or ruling must be painted with same broad brush.[67]

If a court were to find NCAA-level drug testing outside the routine regulation of college sports, it is conceivable that the government function theory could be used to examine the rule in question. Employing that theory would create a separate state action inquiry.

Alcohol and drug testing programs featuring urinalysis, and other forms of testing, have been used historically by the government to detect criminal activity.[68] State-conducted "administrative" drug testing programs have recently become increasingly popular. State administrative drug testing programs have included high school athletes,[69] and some professional athletes.[70]

---

lation of intercollegiate athletics is a traditionally exclusive prerogative of the state. *Id.*

65. *Id.* at 1001-02.

66. 301 Nev. 331, 741 P.2d 1345 (1987).

67. *Id.* at 337. The Nevada Supreme Court concluded the prerogative "to discipline public employees" qualified as a governmental function "traditionally, exclusively reserved for the states." *Id.*

68. Schmerber v. California, 384 U.S. 757 (1966)(concerning state-conducted test for alcohol, enforcing state laws regarding driving while intoxicated).

69. Schaill (by Kross) v. Tippecanoe County School Corporation, 679 F. Supp. 833 (N.D. Ind. 1988), *aff'd*, 864 F.2d 1309 (7th Cir. 1989)(holding that the drug testing of high school athletes did not violate the Fourth Amendment).

70. Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136, *cert. denied*, 479 U.S. 986 (1986)(regarding state-conducted drug testing for horse racing jockeys up-

Under the governmental function theory, strict interpretation of exact Supreme Court language appears to leave this matter in some doubt. Was there a double-requirement of both "tradition" and "exclusivity," as described in *Blum v. Yaretsky*?[71]

If that were the case, a double-requirement would appear to weaken a court's ability to find state action in NCAA drug testing. Drug-tests may well be viewed as a traditional prerogative of the state, as alluded to above. But there's plenty of evidence to suggest that drug testing has not always been the exclusive prerogative of the state. In recent years, administrative drug testing programs have been conducted by private actors,[72] including professional sports leagues.[73]

But if the Court's language is to be viewed as creating a single requirement of exclusivity that is based, first and foremost, upon the concept of tradition only, then drug testing may more easily be viewed as triggering state action under governmental function theory. It's accurate to suggest that the tradition of drug testing began with the state.

B. O'Halloran Court's Dicta Concerning How Drug Tests Do Not Violate the Student-Athlete's Consititutional Rights

Drug testing programs conducted by state-funded NCAA member schools may more easily receive federal Constitutional scrutiny since about half of the NCAA membership consists of state-funded member schools. Unlike NCAA-level drug testing programs, or programs at privately-funded NCAA member schools, state action in the conduct of state-funded member school program can more easily be found.

Few actions against member school drug testing programs have been brought under the federal Constitution.[74] However, Oregon's

---

held).

71. 457 U.S. 991, 1011 (1982).

72. *See* Comment, *Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can be a Legitimate Tool for Helping Resolve the Nation's Drug Problem's if Competing Interests of Employer and Employee are Equitably Balanced*, 25 DUQ. L.REV. 597, 603 n. 8 (1987).

73. The National Football League (NFL) imposes an administrative drug testing program on its players. *See* Demak, *The NFL Fails its Drug Test*, SPORTS ILLUSTRATED, July 10, 1989, at 38.

74. O'Halloran v. NCAA, 856 F.2d 1375 (9th Cir. 1988). In 1987 and 1988, plaintiff Elizabeth O'Halloran challenged: (1) the University of Washington's (UW) drug-testing program, carried out in accordance with NCAA rules; and (2) the NCAA's Student-Athlete Statement (SAS) mandate under the federal Constitution, and Washington's state constitution. A state court held UW's program violated both constitutions. The Washington court ordered the NCAA joined as co-defendant and executed a temporary restraining order preventing the

attorney general published an opinion concluding the University of Oregon's program, as written in 1987, "probably"[75] violated the federal Constitution's 4th Amendment.

Upon a finding of state action, the federal Constitutional provisions implicated by either level of drug testing include the: (1) 4th Amendment's ban on unreasonable searches and seizures;[76] (2) 14th Amendment's (procedural) Due Process Clause;[77] (3) 14th Amendment (substantive) Due Process Clause fundamental right to privacy;[78] and (4) the 14th Amendment's Equal Protection Clause fundamental right to privacy.[79]

Finding no NCAA state action, *O'Halloran* nevertheless examined the NCAA's SAS mandate under the 4th Amendment, the Constitutional provision arguably most clearly implicated by drug testing. In *O'Halloran*, the court first held the SAS drug testing mandate to be a "search"[80] for the purposes of the 4th Amendment. As to whether the search was unreasonable, *O'Halloran* applied the traditional "balancing test," comparing: (1) the NCAA's legitimate regulatory interests; and (2) the student-athlete's reasonable privacy expectations.[81]

NCAA from declaring any UW student-athlete ineligible to compete for not signing the SAS. The court then ordered the NCAA to appear to show cause why a preliminary injunction should not ensue. Prior to the NCAA's scheduled appearance, UW filed a third-party complaint against the NCAA, and the association removed the case to the federal court system. After denial of O'Halloran's motion to remand to the state system, O'Halloran filed a complaint against UW and the NCAA. The plaintiff then dismissed her case against UW. *Id.*

75. Op. Att'y Gen. 8191 (1987), at 34-60.

76. U.S. CONST. amend. IV. The 4th Amendment states: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . [.]" *Id.*

77. Courts have consistently held that neither interscholastic nor intercollegiate athletics participation qualify as 14th Amendment (procedural) Due Process "liberty" or "property" interests. *See supra* note 8. *See also* Bailey v. Truby, 321 S.E.2d 302, 314-15 (W. Va. 1984). *But see* Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972). Some courts have suggest the so-called "contractual" nature of an athletic scholarship may trigger Constitutional due process. *See* Colorado Seminary v. NCAA, 417 F. Supp. 885, 895 (D. Colo. 1976); *see* Schaill (by Kross) v. Tippecanoe County School District, 679 F. Supp. 833, 853 (N.D. Ind. 1988).

78. *See supra* note 6.

79. *See* Schaill (by Kross) v. Tippecanoe County School Corporation, 679 F. Supp. 833, 854 (N.D. Ind. 1988)(holding that 14th Amendment's Equal Protection Clause is a fundamental right to privacy that is not to be violated, testing rationally-related to legitimate interest in clean competition).

80. O'Halloran, 679 F. Supp. at 1002.

81. *Id.* The court stated,

> [t]he conclusion to be reached in this case is that while a urine test may be a "search," it is reasonable, there being a diminished expectation of privacy in the context of a university athletic program and there being a *compelling interest* by the university and the NCAA that outweighs the relatively small compromise of privacy under the circumstances.

Id.

As to reasonable expectations of privacy, the *O'Halloran* court acknowledged a student-athlete's privacy expectation with respect to urinating. But, the court concluded that eye-witness "monitored urination,"[82] was a "relatively small intrusion."[83]

O'Halloran reached that conclusion after considering: (1) the reduced expectation of privacy inherent in athletics participation, by virtue of "communal undress;"[84] (2) the focus of the rules on the health of student-athletes;[85] (3) local procedural safeguards, reducing the risk "private facts"[86] might otherwise be revealed; and (4) the absence of any criminal investigation.

The Ninth Circuit Court of Appeals limited *O'Halloran's* precedent-setting value.[87] *O'Halloran's* analysis on the merits, however, demonstrates federal Constitutional protection in this area may be limited, even if NCAA state action can be found.

It is preposterous to believe that participating in intercollegiate sporting events requires athletes to surrender their right to privacy. An athlete's right to privacy is the same on the field as it is off the field. The sacred right of privacy is most often thought of in the context of abortion, pro-creation and marriage. However, there is no reason why the right of privacy should not attach to adults who wish to participate in college athletics. The courts have protected the NCAA's drug testing program by holding that it does not constitute state action because the state has not traditionally regulated college athletics. The NCAA's drug testing policy goes beyond regulating college athletics and into the regulation of the private lives of its athletes.

C. State Constitutions & NCAA Drug Testing

Consistent with the concept of "federalism,"[88] the federal Constitution is commonly-referred to as the "ground floor" of individual liberty in the United States. Via state constitutions, states are free

---

82. *Id.* at 999. According to the court, "The student[-]athlete must among other things appear at a time certain as notified, provide adequate identification, and provide a urine sample in a beaker provided in a sealed plastic bag. The furnishing of the specimen *will be monitored by observation* to [e]nsure the integrity of the sample." *Id.*

83. *Id.* at 1005.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See* O'Halloran v. NCAA, 856 F.2d 1375 (9th Cir. 1988)(reversing lower court on jurisdiction, case remanded to state system).

88. The law loosely defines "federalism" as a "[t]erm which includes interrelationships among the states and the relationship between the states and the federal government." BLACK'S LAW DICTIONARY 315 (5th ed. 1983).

to add individual liberties.

Federalism could pose difficulty for NCAA-level drug testing programs. Although the NCAA is a private association, the NCAA is nationwide. As such, the NCAA faces examination of its many rules under each of the state constitutions.

For example, states like California have constitutional amendments protecting a "right to privacy."[89] And unlike the federal Constitution, a state's constitution may eliminate the requirement for finding NCAA state action, with respect to any or all state constitutional rights.[90] Recently, the NCAA won a stunning victory in California, as that state's supreme court by a 6-1 vote, upheld the current NCAA drug testing system in *Hill v. NCAA*.[91]

In *Hill*, Stanford University student-athletes sued the NCAA to prevent the enforcement of its drug testing program. The student-athletes argued that the drug tests were a violation of their right to privacy, guaranteed by Article 1, Section 1 of the California Constitution.[92]

At the trial level, the court issued a preliminary injunction, concluding that the NCAA did not establish a compelling need to test athletes for drugs nor had the NCAA proven that its drug testing program was narrowly tailored to meet its goals. The California Court of Appeals affirmed the trial court's decision, holding that student-athletes' right to privacy was violated by the NCAA's drug testing policy.[93]

Unlike the *O'Halloran* federal case against member school University of Washington,[94] California's lower courts found no "com-

---

89. Note, *The Drug Testing of College Athletes*, 16 J. OF COLL. & UNIV. LAW 325 (1989) The article lists 10 such states, which include: Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. *Id.* at 327, n. 20.

90. *Id.* at 320, n. 21. Of the 10 states with "right to privacy" amendments, at least four states apply their amendments to private institutions. *Id.* The states include: Alaska, California, Hawaii and Montana. *Id.*

91. 26 Cal. Rptr. 2d 834 (Cal. 1994).

92. *Id.* Article I, section 1 of the California Constitution states: "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy." CAL. CONST. art. 1, § 1.

93. Hill v. NCAA, 273 Cal.Rptr. 402, 422 (Cal. Ct. App. 1990). The California Court of Appeals stated that "[p]rivacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone." *Id.*

The court of appeals also explained what the NCAA would have to establish in order to avoid a right to privacy violation. The court stated that "the NCAA must demonstrate that: (1) the testing program relates to the purposes of the NCAA regulations which confer the benefit (participation in intercollegiate competition); (2) the utility of imposing the program maifestly outwighs any resulting impariment of the constitutional rights; and (3) there are no less offensive alternatives." *Id.* at 410.

94. O'Halloran v. University of Washington, 679 F.Supp. 997 (W.D.Wash. 1987). As the *O'Halloran* court examined NCAA drug-testing under the federal Constitution's 4th Amend-

pelling" interests advanced by the NCAA to justify its drug testing program.[95] The California Supreme Court however, found such compelling interest, and in addition, shifted the initial burden of proof to the plaintiffs to demonstrate how their privacy rights were violated.[96]

The California Supreme Court wrote that the lower California courts had relied upon an "erroneous view of the applicable legal standard,"[97] in rejecting the need for a compelling interest to be shown by the NCAA. Instead, the *Hill* court relied upon a defendant-friendly "balancing of interests" test,[98] not unlike that which was employed in federal 4th Amendment-based inquiries.

The NCAA interests put forth included: (1) protecting the health and safety of student-athletes; and (2) ensuring fair competition.[99] All proved worthy at the state supreme court level, as California's standard regarding its "right-to-privacy" amendment evolved to accommodate the NCAA's interests.[100]

With its current drug testing in jeopardy of being enjoined throughout California,[101] the NCAA must have been relieved by the California Supreme Court's decision. Many NCAA member schools can be found in California, and the association faced tolerating disparate treatment between member schools located in that state, and the rest of the membership. Such disparate treatment might well have forced the NCAA to at least modify its programs.[102]

---

ment, no legal requirement existed for the court to find "compelling" NCAA interests to justify drug-testing programs. *Id.* Nonetheless, *O'Halloran* regarded the NCAA's interest as compelling. *Id.*

95. *Hill*, 273 Cal. Rptr. at 410.

96. *Hill*, 26 Cal. Rptr. 2d 834 (1994). California's high court clearly announced the burden of proof would from this point forward fall upon the plaintiff in cases of this type. The court stated:

> [W]e hold that a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by the defendant constituting a serious invasion of privacy.

Id. at 859.

97. *Id.* at 870.

98. *Id.* at 859.

99. *Id.* at 871.

100. Two of the judges in the court's 6-1 decision would have voted to remand the case to the lower courts, in light of the new apparent standards. And in a concurring opinion, Mr. Justice George went so far as to write that he "dissent[ed] from the majority opinion insofar as it fashions a novel general legal standard for the evaluation of privacy claims arising under the California [c]onstitution." *Id.* at 874 (George, J., concurring in part, dissenting in part). But despite a dissent, and two concurring opinions that would have remanded the case, the majority's remaining four votes would not allow for such an outcome.

101. *See* Wong, *Impact of Stanford Drug Testing Decision Uncertain*, ATHLETIC BUSINESS, December, 1988, at 14.

102. *Id.* With California covered, the NCAA would appear only to have to worry about

V. CONCLUSION

In the 1970s, a string of federal decisions consistently found NCAA state action. But with one exception, the courts made such state action findings based upon an examination of the nature of the NCAA generally, not based on the NCAA's conduct at issue in the cases.

Decisions by the Supreme Court reasserted that Constitutional state action questions are to be examined in the context of conduct. The lower federal courts however, reversed themselves, beginning with *Arlosoroff v. NCAA*.[103]

Arlosoroff held only that the "regulation of intercollegiate athletics" is not to be regarded as a governmental function. That leaves open a reasonable question: Does everything in the NCAA rulebook involve "the regulation of intercollegiate athletics?"

But, when offered the chance, the Supreme Court failed specifically to adopt *Arlosoroff*. The Court equally did not discuss the Nevada court's advancement of governmental function theory with respect to the NCAA's "show cause" order against member school UNLV, which the Nevada court deemed to be outside the bounds of regulating college sports.

More than anything else, the Court disagreed factually with Nevada's high court. Therefore, the Court's decision should not be read as holding all NCAA rules to be immune from legal findings of state action under governmental function theory.

So despite reversal by the Supreme Court, Nevada's court highlighted how NCAA state action might be found if the NCAA were to be deemed to extend beyond the bounds of some legally-determined boundary marked the "regulation of intercollegiate athletics," and then go so far as to assume a governmental function.

Accordingly, NCAA state action might be found with regard to NCAA-level drug testing. NCAA drug testing directly impacts individual liberty, under the guise of regulating NCAA member schools. Courts may well find, with respect to rules regarding student-athlete drug testing that the NCAA has assumed a governmental function. Of course, even such finding does not guarantee a result on the merits favorable to the student-athlete.

Constitutional state action questions truly reflect the classic "case-by-case" legal framework. The NCAA has many rules. As

---

contradictory results in three other states — Alaska, Hawaii and Montana. Compared to California, few NCAA member schools are located within the borders of those three less-populated states. Though Washington has no "right-to-privacy" amendment in its constitution, state courts in that jurisdiction may consider an ongoing case involving the University of Washington's (UW) student-athlete drug testing program.

103. 746 F.2d 1019 (4th Cir. 1984).

tempting as it may be for courts to classify all NCAA rules[104] as the "regulation of intercollegiate athletics," and thus, beyond the reach of Constitutional scrutiny -- the better view is that each contested association rule must be examined on its own merits to find whether NCAA state action exists.

104. Indeed, some commentators conclude the due process protections of the Constitution have been removed from impacting any and all rules and regulations enacted by the NCAA, in light of the decision in *Tarkanian II*. One observer has written bluntly "the NCAA, a private entity, cannot violate the fourteenth amendment." Note, *The Drug Testing of College Athletes*, 16 J. OF COLL. & UNIV. LAW 325, 331 (1989).