

10-1-1987

State Action and the NCAA: Will Tarkanian Sport the Old Look?

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Recommended Citation

Lee Stewart Bender, *State Action and the NCAA: Will Tarkanian Sport the Old Look?*, 4 U. Miami Ent. & Sports L. Rev. 385 (1987)
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STATE ACTION AND THE NCAA: WILL TARKANIAN SPORT THE OLD LOOK?

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I. INTRODUCTION

In the majority of litigation in which an individual argues that his constitutional rights have been infringed, the court can award relief only if it finds that there has been "state action", i.e., some sort of participation by a governmental entity sufficient to make the particular constitutional provision applicable. This is because American constitutional theory is based on the fundamental truism that virtually all of the rights and liberties which the Constitution guarantees to individuals are safeguarded only against intrusion by governmental entities. It is well settled that the fourteenth amendment "erects no shield against merely private conduct however discriminatory or wrongful."¹ The fourteenth amendment's guarantees of equal protection and due process are introduced by the very words, "No state shall. . . ." Where a court finds that no state action exists, a plaintiff's due process or equal protection claims must fail.² The dichotomy between governmental and non-governmental action is therefore of critical importance for an individual's ability to launch a successful constitutional challenge. The merits of such a claim will not be reached unless the plaintiff can demonstrate that it is the government that has acted.

The existence of state action is obvious in many instances. For example, an individual challenging the constitutionality of a state statute or regulation under the equal protection or due process clauses will easily meet the state action requirement. Under those circumstances, the state clearly "acts" when it passes legislation.

1. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982).

2. *Hawkins v. NCAA*, 652 F. Supp. 602 (C.D. Ill. 1987)

On the other hand, where two private parties are in dispute over some aspect of their relationship, it is apparent that the state is not involved in the controversy. The state action requirement thus serves to preserve the sphere of individual liberty by exempting purely private actions.³

The area between these two orderly extremes is immense and hazy, with no coherent and consistent method of determining whether a controversy falls closer to one side or the other. The vagueness of the distinction is reflected in the Supreme Court's recent articulations on the issue. In an attempt to provide some clarity to the existence of state action, the Court has created a web of confusion, contraction and distortion. In a society where government plays such a pervasive and all-encompassing role, the borders dividing the acts of the government from those of the individual are not always as clear and one-dimensional as the Supreme Court has tried to characterize them. The NCAA has nearly 1000 members and controls almost \$50 million in revenues.⁴ The significance of attributing state action to collegiate athletic associations, such as the National Collegiate Athletic Association (NCAA), can hardly be exaggerated.

The recent cases regarding amateur athletics, and in particular the NCAA, set the stage for some excellent discourse on the more problematic and complex state action issues.⁵ While the discourse might be meaningful in the sense that it brings the state action issue to the forefront, its resolution has been troubling to the athlete who has legitimate constitutional grievances with the implementation and enforcement of various rules promulgated by the NCAA.⁶

3. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1149 (1979 Supp.).

4. See *supra* notes 105-11 and accompanying text.

5. R. YASSER, SPORTS LAW: CASES AND MATERIALS 37 (1985).

6. The opportunity to participate in extracurricular activities, including athletics, generally has not been deemed to be a "property" or "liberty" interest, see, e.g., 1 W. VALENTE, EDUCATION LAW, PUBLIC AND PRIVATE 167 (1985); W. KAPLAN, THE LAW OF HIGHER EDUCATION 349-50 (2d ed. 1985); *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F. Supp. 602 (D. Minn. 1972); *Regents of the Univ. of Minn. v. NCAA*, 422 F. Supp. 1158 (D. Minn. 1976), *rev'd*, 560 F.2d 352 (8th Cir. 1977); *Hall v. Univ. of Minn.*, 530 F. Supp. 104 (D. Minn. 1982); *Colorado Seminary v. NCAA*, 417 F. Supp. 885 (D. Colo. 1976)), courts have found that participation in extracurricular activities can be considered part of the total education process. In *Behagen*, University of Minnesota basketball players challenged their suspensions resulting from participating in a fight during a game. The court reasoned that the opportunity to participate in intercollegiate athletics is of substantial economic value to many students. 346 F. Supp. at 604. The court "takes judicial notice of the fact that, to many, the chance [for college athletes] to display their athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the

Although many amateur athletic organizations like the NCAA are called "private" in that they are not formal personages of the state, they nonetheless do perform state-like functions. The state is inextricably linked with their operations by providing funding, facilities, services, permission, licensing, tax incentives and encouragement. The status of private educational institutions becomes crucial when considering the application of the state action doctrine to athletic organizations. It can be argued that because providing an education is a public function and hence, a prerogative of the state, the provider of those services acts with state authority and must abide by the constitutional strictures placed upon public bodies.⁷ Therefore, where the private school is the recipient of substantial financial aid, regulatory supervision, or the delegation of governmental powers,⁸ state action is present in sufficient degree such that the school bears the indicia of a public entity.⁹ The argument is that these purportedly "private" actors are really performing state functions by carrying out the state's educational prerogative. If they did not exist, the state itself would have to step in and create such an organization. When this situation exists, these instrumentalities ought to be treated as though they were acting under "the color of state law." The NCAA appears to be just such an organization, although since the 1982 trilogy of Supreme Court state action cases (*Blum v. Yaretsky*,¹⁰ *Rendell-Baker v. Kohn*,¹¹

chance to get a college education." 346 F. Supp. at 604-05. The court further noted that it was basing its decision, in part, on the well recognized legal principal that the opportunity to receive an education is an interest of such "substantial importance" that it cannot be infringed without minimum standards of due process. The basis for this belief is the fact that "education is such a necessary ingredient of economic success in later life that it should not be arbitrarily interrupted or terminated." 346 F. Supp. at 604. Four years later, the same district court reaffirmed this position in *Regents of the Univ. of Minn. v. NCAA*, 422 F. Supp. 1158 (D. Minn. 1976), *rev'd*, 560 F.2d 352 (8th Cir. 1977) stating that the opportunity to participate in intercollegiate competition is a property interest meriting due process protection, not simply because of the possibility it affords to enter a lucrative career, but also because such participation is an important aspect of the student athlete's educational experience. To the same effect, *see Hall v. Univ. of Minn.*, 530 F. Supp. 104 (D. Minn. 1982).

For a contrary view, *see Colorado Seminary v. NCAA*, 417 F. Supp. 885 (D. Colo. 1976), which held that college athletes do not have liberty or property interests to play college sports, participate in championship competition or appear on television. The court did imply, however, that revocation of an athletic scholarship would impair liberty or property interests of the student and require due process safeguards.

7. *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968).

8. *Greene v. Howard Univ.*, 271 F. Supp. 609 (D.D.C. 1967), *remanded*, 412 F.2d 1128 (D.C. Cir. 1969).

9. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

10. 457 U.S. 991 (1982).

11. 457 U.S. 830 (1982).

and *Lugar v. Edmondson Oil Co.*¹²) the courts have, with one recent notable exception,¹³ seen fit to characterize it otherwise.

In response to the confusion of whether to characterize action as "state action", the courts have developed various tests to curb the behavior of private organizations. This occurs in settings where the state is either directly involved in the controversial action,¹⁴ encourages the activity,¹⁵ or delegates a "public function" to private individuals.¹⁶ The present view of the "public function" test is a severely narrowed version of the more traditional expansive approach. Under the current public function analysis, private conduct is subject to constitutional restrictions only if the defendant engages in an activity which is "traditionally and exclusively a function of the state."¹⁷

This extremely circumscribed interpretation typically leads to adverse decisions against plaintiffs who have attempted to make the public function argument. More importantly, it has put an effective end to the ability of individuals to seek constitutional relief from organizations which, until recently, had been classified as acting under the "color of state law."¹⁸ Under this post-1982 view of the state action doctrine as it applies to the NCAA, a litigant will not get an opportunity to present a constitutional claim against the NCAA for invalid, unjust enforcement of a rule promulgated by the NCAA.¹⁹ The NCAA simply is not said to be engaged in state

12. 457 U.S. 922 (1982).

13. The one exception is the recent decision of the Nevada Supreme Court in *Tarkanian v. NCAA*, 741 P.2d 1345 (Nev. 1987), *cert. granted*, — S. Ct. —.

14. *Lugar*, 457 U.S. at 941-42.

15. *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967).

16. *Evans v. Newton*, 382 U.S. 296, 299 (1966).

17. *Jackson v. Metropolitan Edison Corp.*, 419 U.S. 345, 353 (1974).

18. Note, *State Action and Chapter 766: Rendell-Baker and the Demise of the Public Function Doctrine*, 19 NEW ENG. L. REV. 237, 238 (1983).

19. The case law treats a preliminary injunction- which most plaintiff athletes seek against the NCAA in their fourteenth amendment challenges- as an extraordinary and drastic remedy which should not be granted unless a movant clearly persuades the court. *Barbay v. NCAA*, No. 86-5697, slip op. (E.D. La. Jan. 15, 1987) (LEXIS, Genfed library, Courts file). Courts tend to treat such relief as an exception rather than the rule. See *Mississippi Power and Light Co. v. United Gas Pipeline Co.*, 760 F.2d 618 (5th Cir. 1983). Nevertheless, a litigant should not be denied the opportunity to seek a preliminary injunction to enjoin a defendant from enforcing a particular course of action that the litigant claims is in violation of the fourteenth amendment. The plaintiff must establish four prerequisites before a court can determine the propriety for a request for injunctive relief:

- 1). a substantial likelihood of prevailing on the merits;
- 2). a substantial threat that irreparable injury will result in the absense of the injunction;
- 3). that the threatened harm to the plaintiff outweighs the threatened harm to the defendant; and

action. In effect, litigants who in the past had procured sympathetic results at the initial hearings on their requests for injunctions will now not be able to get to the hearing stage because they will not be able to overcome the threshold question of whether a federal constitutional issue exists.

This article analyzes, in light of *Arlosoroff v. NCAA*,²⁰ a case re-characterizing the NCAA under the state action doctrine as a "non-state" actor, the viability and applicability of the "public function" test to the operation and existence of the NCAA. Part II presents a brief historical sketch of the pre-1982 cases involving the NCAA and how the state action doctrine was applied to it in actions alleging violations of due process, equal protection and civil rights. Part III discusses the Supreme Court's narrow re-interpretation of the "public function" doctrine within the purview of state action in the 1982 trilogy of cases,²¹ with special focus on its applicability to actions against the NCAA beginning with *Arlosoroff* in 1984. Part IV discusses the recent decision of *Tarkanian v. NCAA* by the Supreme Court of Nevada. The case is important because it is the first post-trilogy case to hold that the NCAA is not involved in state action. Part V evaluates the impact of *Arlosoroff* on future actions against the NCAA, concluding that if the 1982 Supreme Court cases were correctly decided, then their principles were wrongly applied in *Arlosoroff* in light of the special nature, characteristics and circumstances of the NCAA, college sports and higher education. Finally, the article closes with some suggestions, observations and a proposal for a change in approach, concluding that it is dangerous practice to allow the NCAA, a "private" organization whose support, authority and power directly emanates from the states, and in turn state universities, to be able to flaunt the strictures of the United States Constitution.

II. THE PRE-1982 VIEW THAT THE NCAA IS A "STATE ACTOR"

Courts have had no difficulty finding state action with regard to the activities of public schools.²² As regards private schools, however, courts have routinely pronounced that their activities are not covered by the accepted definition of "state action" unless they

4). that granting the injunction will not disserve the public interest. *Behagen v. Intercollegiate Conference of Faculty Representatives*, 346 F. Supp. 602, 603 (D. Minn. 1972).

20. 746 F.2d 1019 (4th Cir. 1984).

21. See *supra* notes 9-11 and accompanying text.

22. See, e.g., *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Vt. 1970).

are associated with, or performing the functions of, duly constituted governmental entities.²³ At least in the context of state-wide high school athletic programs, there is no longer any question that the equal protection clause of the fourteenth amendment directly applies.²⁴ In *Louisiana High School Athletic Association v. St. Augustine High School*²⁵ the Fifth Circuit Court of Appeals held that the association was an instrumentality of the state of Louisiana because 85 percent of the association's members were state public schools.²⁶ The court noted additional evidence to support its finding: the public school principals, who nominally are members, were state paid and state supervised officers; the funds for support of the organization emanated from membership dues; and gate receipts were generated from games between members, the vast majority of which were held in state-owned facilities.²⁷

The case law regarding the NCAA prior to *Arlosoroff* was nearly unanimous²⁸ in holding that the NCAA was within the "state action" concept.²⁹ Federal judges adjudicating these cases in this pre-1982 era consistently "pierced" the NCAA's "private" character from nearly every angle imaginable.³⁰

In *Buckton v. NCAA*,³¹ the court found "that state universities make up one-half of the membership of the NCAA; that these public institutions pay dues to the NCAA, and that state involvement in the NCAA includes the support, control and regulation of member institutions as well as the provision of state facilities for NCAA

23. J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 32 (Supp. 1985); *Regents of Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir. 1977); *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155 (5th Cir. 1970); *Buckton v. NCAA*, 366 F. Supp. 1152 (D. Mass. 1973); *Howard Univ. v. NCAA*, 367 F. Supp. 926 (D.D.C. 1973), *aff'd*, 510 F.2d 213 (D.C. Cir. 1975); *Parish v. NCAA*, 361 F. Supp. 1214 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975).

24. See *supra* note 22 and cases cited therein.

25. 396 F.2d 224 (5th Cir. 1968).

26. *Id.* at 227.

27. *Id.* at 227-28.

28. The one court which held differently, *McDonald v. NCAA*, 370 F. Supp. 625 (C.D. Cal. 1974), was subsequently repudiated by the Ninth Circuit Court of Appeals in *Associated Students, Inc. v. NCAA*, 493 F.2d 1251 (9th Cir. 1974).

29. See *Regents of the Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir. 1977); *Rivas Tenorio v. Liga Atletica Interuniversitaria*, 554 F.2d 492 (1st Cir. 1977); *Associated Students, Inc. v. NCAA*, 493 F.2d 1251 (9th Cir. 1974); *Colorado Seminary v. NCAA*, 417 F. Supp. 885 (D. Col. 1976); *Buckton v. NCAA*, 366 F. Supp. 1152 (D. Mass. 1973); *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975); *Howard Univ. v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975).

30. Martin, *The NCAA and Its Student-Athletes: Is There Still State Action?* 21 *NEW ENG. L. REV.* 49, 57 (1985-86).

31. 366 F. Supp. 1152 (D. Mass. 1973).

contests.”³² The court further held that the NCAA performs a public function in supervising and policing the major facets of intercollegiate athletics that is “sovereign in nature, that subjects it to constitutional scrutiny.”³³

In *Parish v. NCAA*,³⁴ the Fifth Circuit Court of Appeals similarly held that the substantial involvement of state-supported educational institutions, their officers, and members in the activities of the NCAA colored the NCAA with “state action” such that it was of no significance that private schools voluntarily joined the Association in conjunction with the state-supported ones. More significantly, the *Parish* court found that as meaningful regulation of the intercollegiate aspect of higher education is beyond the effective reach of any one state, the NCAA, by taking upon itself the role of overseer and coordinator of college athletics, was performing a “traditional governmental function,” thereby subjecting itself to federal civil rights jurisdiction.³⁵ In what to date is perhaps the most compelling rationale any court has advanced for allowing the NCAA to be exposed to federal constitutional liability, the court in *Parish* asserted:

It would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a “private” organization to which they have relinquished some portion of their governmental power. We have little doubt, in light of the national (and even international) scope of collegiate athletics and the traditional governmental concern with the educational system, that were the NCAA to disappear tomorrow, government would soon step in to fill the void.³⁶

The District of Columbia Circuit joined *Parish* two months later in *Howard University v. NCAA*,³⁷ holding that “the degree of public participation and entanglement between the entities is substantial and pervasive.”³⁸ The *Howard* court logically analyzed the NCAA from the perspective of its membership, finding that while

32. *Id.* at 1156.

33. *Id.* at 1156, citing *Curtis v. NCAA*, C-71 2088 ACW (N.D. Cal. Feb. 1, 1972) (unreported).

34. 506 F.2d 1028 (5th Cir. 1975).

35. *Id.* at 1032. See also *Evans v. Newton*, 382 U.S. 296 (1966): “[C]onduct that is formally ‘private’ may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed on state action.” *Id.* at 299.

36. *Id.* at 1033.

37. 510 F.2d at 220.

38. *Id.* at 220.

only half of the members are state or federally supported, the disproportionate majority of the NCAA's capital comes from public universities that generally have the largest student bodies. Moreover, as the state schools traditionally supply the majority of the members of the governing council and committees, the court held that "the state instrumentalities are a dominant force in determining NCAA policy and in dictating NCAA actions. . . . Thus, governmental involvement, while not exclusive, is significant and all NCAA actions appear 'impregnated with a governmental character.'"³⁹

The *Howard* court concluded that while the NCAA is not the delegated body that oversees one particular state's athletic program, nonetheless,

[t]he degree of NCAA regulation of and involvement in those universities' programs and the fact that half the NCAA's membership are public institutions sufficiently intertwines their interests and affairs so that the NCAA is subject to the fifth and fourteenth amendments.⁴⁰

Nothing in the NCAA's character has changed since that ruling was made. If anything, the investigations and sanctions handed down by the NCAA have made it more involved in the American intercollegiate environment. The actions of the Nebraska legislature also indicate how states are seeking to influence and control the NCAA. The change in the state action test has changed the outcome of the issue, not any change in the actor. An examination of this change in the test follows.

III. THE NEW STATE ACTION AND THE DEATH OF THE PUBLIC FUNCTION DOCTRINE

A. *The Supreme Court Cases*

The Supreme Court first severely weakened the public function test in 1974 in *Jackson v. Metropolitan Edison Co.*,⁴¹ where a customer challenged the ability of a private utility to turn off her electricity. The court held that there was not "a sufficiently close nexus between the state and the challenged action of the regulated entity so that the latter may be fairly treated as the state itself."⁴²

39. *Id.* at 221.

40. *Id.* at 219.

41. 419 U.S. 345 (1974).

42. *Id.* at 351. This test was used despite the extensive regulation of the utility by the state. *Id.* at 350.

The court refused to widen the breadth of the public function test, insisting that it applied only to "private action which is traditionally and exclusively a prerogative of the state."⁴³

In its next decision on the public function question, *Flagg Brothers v. Brooks*,⁴⁴ the Supreme Court again found no state action where a warehouseman wished to sell debtor's goods pursuant to state law.⁴⁵ The Court spurned the debtor's contention that the power which the State of New York had delegated to the warehouseman to resolve disputes was a power which was exclusively and traditionally reserved to the state.⁴⁶

The June 1982 cases created further restrictions. In *Blum v. Yaretsky*,⁴⁷ Justice Rehnquist found no "state action" in a private nursing home's decision to discharge or transfer Medicaid patients to lower levels of care without notice or an opportunity for a hearing.⁴⁸ The patients argued that there was a symbiotic relationship between the home and the state because the state heavily subsidized the operating and capital costs of the home, paid the medical expenses of more than 90 percent of the patients through the Medicaid program, and licensed the facilities. The Court rejected the claims that the state bore responsibility for these decisions by finding that the actual discharge or transfer decisions are ultimately based on medical judgments which were made by independent nursing home professionals who were not controlled by the state.⁴⁹ Finally, the Court, citing *Jackson*, noted that nursing homes do not perform a function that has been "traditionally the exclusive prerogative of the state," so as to establish the required nexus between the state and the challenged action.⁵⁰ In dissent, Justice Brennan argued for a return to the traditional state action analysis: where the state supports, encourages, and directs private parties to take specific action, state action exists.⁵¹

In similar fashion, Chief Justice Burger, in *Rendell-Baker v. Kohn*,⁵² held that a private school regulated by public authorities with income primarily from public funding, was not committing state action when it fired teachers and a vocational counselor. The

43. *Id.* at 353.

44. 436 U.S. 149 (1978).

45. *Id.* at 163.

46. *Id.* at 157.

47. 457 U.S. 991 (1982).

48. *Id.* at 1005.

49. *Id.* at 1005-07.

50. *Id.* at 1011.

51. *Id.* at 1026-29.

52. 457 U.S. 830 (1982).

question in *Rendell-Baker* was whether the state had delegated its statutory duty to provide free public education for all students, including those with special needs.⁵³ Although the Court acknowledged that education of emotionally disturbed high school students is undoubtedly a public function, the court again framed the issue in terms of whether the function performed was "traditionally the exclusive prerogative of the state."⁵⁴ The court answered this question in the negative. In a strong dissent, Justice Marshall took a position similar to the one the Fifth Circuit Court of Appeals took in *Parish* that a state should not be allowed to skirt its constitutional duties simply by delegating its statutory obligations to a private entity.⁵⁵

*Lugar v. Edmondson Oil Co.*⁵⁶ was the only opinion of the trilogy in which the Court found state action. The case demonstrates the Supreme Court's restrictive "direct action by formal governmental actors" approach to the state action question.⁵⁷ In *Lugar*, a creditor obtained a pre-judgment attachment against the property of Lugar, the debtor. The attachment had the effect of preventing the debtor from being able to sell his property even though he remained in possession. To obtain the attachment, Edmondson was required only to file an *ex parte* petition stating a belief that Lugar might dispose of the property to defeat his creditors. A clerk of the court then issued a writ of attachment, which was executed by the sheriff.⁵⁸ Justice White found that because the clerk and sheriff acted together with Edmondson, Edmondson's conduct in obtaining the attachment was state action. Therefore, Edmondson could be held liable for violating Lugar's constitutional rights if, as Lugar alleged, the attachment statute failed to comply with the requirements of due process. However, the Court only agreed with Lugar's allegation that the statutory procedure itself was unconstitutional, not that Edmondson misused the statute. Only the statutory procedure was held to involve state action. The Court articulated a two-part test for conduct to be fairly attributable to the state:

First, the alleged deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is

53. *Id.* at 833.

54. *Id.* at 842-43.

55. *Id.* at 850-52.

56. 457 U.S. 922 (1982).

57. Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150, 1179 (1985).

58. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 924 (1982).

responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.⁵⁹

The two tests merge when the defendant is a state official, and diverge when the defendant is a private party.⁶⁰ However, the Court also held that *Lugar* is strictly limited "to the particular context of prejudgment attachments."⁶¹ In essence, this means that outside of prejudgment cases, the scope of private party actions that will be subject to constitutional scrutiny without direct official action is greatly restricted, if not virtually eliminated.⁶² The holdings of *Rendell-Baker* and *Blum* can be harmonized with *Lugar* by understanding that the Court is focusing not on the amount of interaction between the state and the private defendant, but rather on the characterization of that interplay as it pertains to the dispossessed right.⁶³ The Court found that state action was present in *Lugar* even though there were comparatively minimal contacts with the state, because state officials were directly involved in the attachment.

On the other hand, in *Rendell-Baker* and *Blum*, the state was not found to have been directly involved in the specific acts that allegedly deprived plaintiffs of their rights, despite state funding and regulation of the activity. In short, the Court now applies a "one-dimensional state action test" which centers not on the general relationship between the private defendant and the state, but rather on whether the state was directly involved in denying the constitutional right.

B. *Arlosoroff and the NCAA State Action Cases*

Following the principles laid down by the Supreme Court in *Blum* and *Rendell-Baker*, the Fourth Circuit Court of Appeals in 1984 became the first court to find that the NCAA was not engaged in state action. *Arlosoroff v. NCAA*⁶⁴ was a suit by a college tennis player who sought to enjoin the NCAA from enforcing an eligibility rule which precluded him from further competition in intercollegiate tennis at Duke University. After the process of

59. *Id.* at 937.

60. *Id.* at 937.

61. *Id.* at 939 n.21.

62. See *Schneider*, *supra* note 57, at 1185.

63. Albamonte & Wheeler, *The Supreme Court Corrals A Runaway Section* 1983, 34 MERCER L. REV. 1073, 1092 (1983).

64. 746 F.2d 1019 (4th Cir. 1984).

"sifting facts and weighing circumstances,"⁶⁵ the court framed the inquiry as whether the challenged conduct is "fairly attributable to the state."⁶⁶ The Fourth Circuit found that no such attribution to the state could be made.⁶⁷ Although the NCAA may be said to perform a public service as the supervisor of the country's intercollegiate athletics by managing its programs and enforcing standardized rules of eligibility, the court declared that neither the regulation of intercollegiate athletics nor the operation of a school is a function traditionally and exclusively reserved to the state.⁶⁸ The court continued its state action analysis under the one-dimensional public function test by briefly characterizing the NCAA as a private, voluntary association of about 1000 public and private institutions. The court recognized that approximately one-half of the NCAA membership consists of public colleges and universities that provide more than one-half of the NCAA's revenue. However, the court determined that these facts alone do not "begin to suggest that the public institutions, in contrast to the private institutional members, caused or procured the adoption of the Bylaw" in question.⁶⁹ Bylaw 5-1-(d)-(3) enunciated the conditions under which a student-athlete such as Arlosoroff could play tennis on the intercollegiate level. With not even a cursory acknowledgement of the nature, status, and peculiar position of the NCAA in its composition and relationship to the federal government and the states, the court applied the one-dimensional tests of *Rendell-Baker* and *Blum*:

It is not enough that an institution is highly regulated and subsidized by a state. If the state, in its regulatory or subsidizing function does not order or cause the action complained of, and

65. *Id.* at 1021, quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

66. 746 F.2d at 1021.

67. *Id.*

68. *Id.* (quoting from *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982)). While this may be true with regard to the regulation of intercollegiate athletics, the Court has held otherwise with regard to education. In *Ambach v. Norwick*, 441 U.S. 68 (1979), the court stated that "public schools perform a task that goes to the heart of representative government." *Id.* at 75-76. Accordingly, public education "fulfills a most fundamental obligation of government to its constituency." *Id.* at 76. The social, moral, and educational aspects of public schooling are far-reaching, with the resulting perception that schools are an assimilative force, bringing together diverse and conflicting elements. *Id.* at 77. Such actions parallel the role of the NCAA: testing for drugs and examining gambling involvement, regulating recruiting and academic conduct, and policing the member institutions places the NCAA in a unique position to fulfill these expectations within the educational hierarchy.

69. *Arlosoroff*, 746 F.2d at 1021.

the function is not one traditionally reserved to the state, there is no state action.⁷⁰

The court held that there was no showing that the state schools directed or controlled the result of the rule's passage because there was no suggestion that the representatives of the state schools joined forces "to vote together as a bloc to effect the adoption of the Bylaw over the objection of private institutions."⁷¹

After *Arlosoroff*, every court except one⁷² presented with a fourteenth amendment constitutional challenge to an NCAA rule has found that the NCAA is not involved in state action.⁷³ In *McHale v. Cornell*,⁷⁴ a college athlete brought suit against the university and the NCAA seeking to enjoin the application of an eligibility rule denying him the opportunity to play intercollegiate football following a transfer from another school. Using the *Arlosoroff* rationale, the court found that the plaintiff failed to demonstrate that the state-supported members voted together in opposition to the wishes of the private members, or otherwise controlled the actions of the NCAA regarding the adoption and enforcement of the eligibility rule applicable to transfer students.⁷⁵ Citing *Blum*, the court reiterated the narrowness of the state action inquiry with regard to the NCAA:

Regulation of intercollegiate sports cannot fairly be said to be traditionally and exclusively a state function. Constitutional standards are only involved where it can be shown that the state is responsible for the specific conduct of which the plaintiff complains.⁷⁶

In a 1986 case concerning a similar challenge to the NCAA's transfer and "five-year" rules, the Sixth Circuit Court of Appeals in *Graham v. NCAA*⁷⁷ found *McHale* and *Arlosoroff* both persuasive and controlling. Though recognizing that public state-subsidized schools follow the rules promulgated by the NCAA, the court

70. *Id.* at 1022.

71. *Id.*

72. See *infra* note 84 and accompanying text.

73. See *McHale v. Cornell*, 620 F. Supp. 67 (N.D.N.Y. 1985); *Graham v. NCAA*, 804 F.2d 953 (6th Cir. 1986); *Hawkins v. NCAA*, 652 F. Supp. 602 (C.D. Ill. 1987); *Barbay v. NCAA*, No. 86-5697, slip op. (E.D. La. Jan. 15, 1987) (LEXIS, Genfed Library, Courts file); *O'Halloran v. University of Washington*, No. C87-1024M, (W.D. Wash. Feb. 25, 1988) (LEXIS, Genfed Library, Courts file).

74. 620 F. Supp. at 67.

75. *Id.* at 69-70.

76. *Id.* at 70.

77. 804 F.2d at 953.

nevertheless held that that fact "does not imply that the decision to promulgate the transfer and five-year rules was the decision of the state."⁷⁸ Since the plaintiff failed to establish that the state-supported universities "caused or procured the adoption"⁷⁹ of the transfer and five-year rules, no state action existed. Five months later in *Karmanos v. Baker*,⁸⁰ the Sixth Circuit Court of Appeals invoked its decision in *Graham*, again concluding that the NCAA is not a state actor.

More recently, the United States District Court for the Central District of Illinois in *Hawkins v. NCAA*⁸¹ stated the case with even greater pointedness. The case sprung out of a June 1986 report by the NCAA Committee on Infractions that found that Bradley University men's basketball program violated several NCAA regulations. The sanctions imposed, though harsh, were within NCAA rules, and included a public reprimand, a two-year probation period, a one year prohibition of off-campus recruiting, and a suspension from any post-season basketball competition including the NCAA Division I championship basketball tournament. The plaintiffs, members of the Bradley University basketball team, filed suit to enjoin the NCAA from enforcing the disciplinary actions. The plaintiffs alleged that the NCAA action was a violation of the equal protection guarantees of the fourteenth amendment because it inhibited their fundamental right to prepare for and pursue the vocation of their choosing. Due process violations were also presented based on the NCAA's alleged failure to give them an adequate opportunity to be heard. In greater detail than any previous decision to date, the court described how the NCAA implements its governing function through annual conventions which represent member institutions.⁸² Through these conventions, the NCAA promulgates rules to ensure minimum standards for sportsmanship, amateurism and scholarship. Most rules require a two-thirds vote for passage. All members are obligated to abide by the rules adopted by the convention, and an elected committee has

78. *Id.* at 958.

79. *Arlosoroff*, 746 F.2d at 1021.

80. In *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987), a father and his student son brought an action against the NCAA and University of Michigan pursuant to 42 U.S.C. § 1983 based on an NCAA ruling prohibiting the student from playing amateur intercollegiate hockey because he had played on a professional team in Canada. Again, the court found that the plaintiff had failed to allege that the University of Michigan or any other state university "caused, directed, or controlled implementation of the rules at issue." 816 F.2d at 258.

81. 652 F. Supp. 602 (C.D. Ill. 1987)

82. *Id.* at 608.

power to police them. The committee imposes sanctions where an institution or its players are found to have violated the rules.⁸³

In finding no state action, the court once again applied the *Arlosoroff* rationale:

The NCAA is not an agency subjected to or governed by any state government. It is governed by its own conventions and designated committees, which are established through election by member institutions. The two-third vote provision carefully avoids public institution collusion, if such action be contemplated. This minimizes, if not eliminates, the extent to which the NCAA could be subject to state regulation.⁸⁴

The *Hawkins* court admitted that its decision did not mean that certain states do not have some involvement in NCAA decisions through public institutional membership:

Of course they do. However, what this court concludes is that such input does not rise to the level of 'exercising coercive power or significant encouragement' so that the decision must be deemed to be that of the state itself. Of particular significance is the NCAA rule calling for a two-third vote on most matters, and that there is no evidence in the record that the NCAA has ever been used by any state as a tool to carry out any state policy.⁸⁵

In a further case, *Barbay v. NCAA*,⁸⁶ the plaintiff, a college football player sought a temporary restraining order and/or preliminary injunction to restrain Louisiana State University and the NCAA from declaring him ineligible to prepare for and participate in the 1987 Sugar Bowl because he tested positive for steroid use. In perfunctory fashion, the district court re-stated the one-dimensional test and its application to the NCAA drug-testing rule:

Although the rules promulgated by the NCAA are followed by public, state-subsidized institutions such as LSU, that fact alone does not require a finding that the decision to promulgate the list of banned substances and the drug testing procedures was the decision of the state. Barbay has never alleged nor sought to prove that LSU caused, directed or controlled the implementation of these NCAA regulations.⁸⁷

83. *Id.*

84. *Id.*

85. *Id.* at 609.

86. No. 86-5697, slip op., (E.D. La. Jan. 15, 1987) (LEXIS, Genfed Library, Courts File).

87. *Id.*

*O'Halloran v. University of Washington*⁸⁸ is the most recent, and probably the last, in the series of NCAA-state action cases to be decided before the Supreme Court rules on the *Tarkanian* case. *O'Halloran* arose out of an indoor track team member's claim that the NCAA's drug testing program (as implemented by the University of Washington) violated her civil rights to participate in intercollegiate athletics during the academic year.⁸⁹ The drug testing program mandates that student athletes submit an annual statement prior to competition in intercollegiate athletics. The statement requires that the student disclose information relating to eligibility, recruiting, financial aid, amateur status, participation in organized gambling regarding college athletics, and a consent to be tested for drugs. The NCAA designates which drugs are prohibited and subject to testing. Failure to supply the information or sign the statement results in automatic ineligibility for the athlete. The plaintiff was barred from competition for failing to sign the consent form.

The court denied the student's request for a preliminary injunction under 42 U.S.C. § 1983 by sailing down the straight and narrow path prescribed by *Arlosoroff*, coming to the expected conclusion that no state action was present in the NCAA's actions. In reviewing the prior cases on the issue, the court determined that the early cases finding state action did so because a certain level of involvement by state institutions in the NCAA could convert what would otherwise be private conduct into state action. That notion was changed after *Arlosoroff* interpreted the 1982 Supreme Court trilogy and determined that NCAA rulemaking and enforcement are private and not public actions. "All federal courts since *Arlosoroff* have so held," and therefore "no different conclusion is warranted here."⁹⁰ The plaintiff would have had to have shown that the state of Washington "exercised coercive power or provided significant encouragement, overtly or covertly, such that either the promulgation or enforcement of the drug screening rule must be deemed to be state action" and that the regulation of intercollegiate athletics is traditionally an exclusive prerogative of the state."⁹¹

88. No. C87-1024M (W.D. Wash. Feb. 25, 1988) (LEXIS, Genfed Library, Courts file).

89. *Id.*

90. *Id.* Even though it was decided by a state court, it is suprising that the court did not mention *Tarkanian*, with its unique conclusion on the issue.

91. *Id.*

IV. THE CHINK IN THE ARMOR: *TARKANIAN v. NCAA*

In August 1987, the Supreme Court of Nevada found that the NCAA was engaged in state action. Jerry Tarkanian, men's basketball coach at the University of Nevada - Las Vegas (UNLV) filed suit against the NCAA to enjoin UNLV from suspending Tarkanian as the basketball coach.⁹² The NCAA found that Tarkanian was guilty of numerous violations of NCAA policies and rules and directed UNLV to suspend him. UNLV conducted a hearing to determine whether to follow the NCAA's directive, and although a hearing officer questioned the factual basis of the charges against Tarkanian, UNLV felt it had no choice but to accept the penalties.⁹³ Tarkanian then obtained injunctive relief against UNLV and the NCAA in state court. On appeal, the Nevada Supreme Court first laid out the historical underpinnings of the state action doctrine and the early cases which held that NCAA regulatory activity constituted state action.⁹⁴ The rationale behind these cases was that many NCAA member institutions were publicly supported. The court disagreed with the NCAA's argument that the 1982 Supreme Court trilogy of state action decisions and subsequent applications required a different result. The Court also pointed out how *Arlosoroff* rejected the earlier precedent by applying the *Blum* "coercive power" test:⁹⁵ whether the state schools joined as a bloc to cause the bylaw in question to be adopted.⁹⁶

Using the familiar language of *Rendell-Baker* and *Blum* that state action may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the state,"⁹⁷ the Court stated:

UNLV is a public institution, existing by virtue of Article 11, section 4 of the Nevada Constitution. Tarkanian is therefore a public employee. In our view, the right to discipline public em-

92. *Tarkanian v. NCAA*, 741 P.2d 1345 (Nev. 1987), *cert. granted*, 108 S. Ct. 1011.

93. *Id.* at 1347. The trial court granted Tarkanian injunctive relief because of the NCAA's failure to comply with due process standards during its thirty month long investigation.

94. *Id.*

95. *Blum* actually stated that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." 457 U.S. at 1004.

96. *Tarkanian*, 741 F.2d at 1348.

97. *Blum*, 457 U.S. at 1005 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 345, 353 (1974)). See also *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

ployees is traditionally the exclusive prerogative of the state. UNLV cannot escape responsibility for disciplinary action against employees by delegating that duty to a private entity.⁹⁸

Furthermore, the Court noted that the facts of *Tarkanian* were distinguishable from *Arlosoroff* and the other cases relied on by the NCAA in a significant respect: all involved private schools.⁹⁹ According to the court, the most important factor in determining whether the NCAA is an entity engaging in state action is to whom the NCAA's power is being delegated to. If the power is being delegated to a state supported school — such as UNLV — then the NCAA, at least for these purposes, is a state actor subject to federal constitutional restraints and liabilities. The court finally stated that the two-part approach articulated in *Lugar* required a finding that state action is present. In the court's words:

The first prong is met because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.¹⁰⁰

The United States Supreme Court granted certiorari to resolve the question of whether

action of the NCAA in directing one of its state university members to show cause why it should not temporarily suspend an employee from his duties relating to intercollegiate athletics for violating the NCAA's rules constitute[s] state action where the member university, in compliance with NCAA rules, suspends the coach from coaching?¹⁰¹

98. *Tarkanian*, 741 P.2d at 1348.

99. The court cites *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1987), and *Graham v. NCAA*, 804 F.2d 953 (6th Cir. 1986) which both concerned private schools. For whatever reason, whether because the NCAA did not cite it, or because the case had not yet been decided at the time, the court failed to mention *Barbay v. NCAA*, No. 86-5697, slip op. (E.D. La. Jan. 15, 1987) (LEXIS, Genfed library, Courts file) which involves Louisiana State University and supports the NCAA's "no state action" position.

100. *Tarkanian*, 741 P.2d at 1349.

101. 56 U.S.L.W. 3555 (U.S. Feb. 23, 1988) (No. 87-1061). Oral arguments are scheduled for the October 1988 term. NCAA officials argued that Tarkanian got a "home court advantage" by taking his case to a Nevada state judge, who overruled the findings of the NCAA investigator "in favor of a popular local personality." NCAA spokesman Jim Marchiony stated that "we expect the Supreme Court to focus on the general question of

V. THE IMPACT OF *Arlosoroff* ON FUTURE CONSTITUTIONAL CHALLENGES TO THE NCAA

In both *Rendell-Baker* and *Blum*, the Supreme Court focused upon the private decision-maker in determining that the actions taken by them were tantamount to state action.¹⁰² The core issue became whether the alleged infringement of federal rights was "fairly attributable to the state,"¹⁰³ and in both instances it was decided adversely to the plaintiffs. But in regard to their applicability to the NCAA, one commentator has observed:

Rendell-Baker and *Blum* represent important brakes on the expansion of the state action concept, but their applicability to the NCAA is dubious. That organization receives from its member institutions delegated powers of a breadth and scope unknown to one small urban school or physician's committee, important though their work be.¹⁰⁴

Other writers have pointed out that while *Arlosoroff* is a radical divergence from the earlier line of cases, its impact is limited in a significant respect.¹⁰⁵ Weistart and Lowell argue that even in the "state action" era few plaintiff-athletes were able to maintain a constitutional challenge to an NCAA regulation. Their due process challenges were generally rejected because athletes are not deemed to have a protectible interest in participating in intercollegiate sports.¹⁰⁶ Their equal protection objections were generally dismissed because of the application of the highly deferential, low-scrutiny rational basis test.¹⁰⁷ Therefore, it might not seem at first blush as if *Arlosoroff* took away from many plaintiff-athletes previously recognized constitutional rights.

Arlosoroff is nonetheless consequential to litigants devising strategy to pursue against the NCAA. Before *Arlosoroff*, the "law" in the strict sense was largely unfavorable to athletes, but there were other motivations for continuing to press ahead with constitutional claims:

whether the members of the NCAA can adopt rules governing themselves, the student-athletes, and coaches with respect to intercollegiate matters. The NCAA maintains that regulation of student-athlete recruiting, admission, financial aid, and the conduct of institutions, students and coaches in these areas should be left to NCAA membership, and not be deemed to be governmental actions." *The Daily Press*, Feb. 23, 1988.

102. *Rendell-Baker*, 457 U.S. at 840; *Blum*, 457 U.S. at 1005.

103. *Rendell-Baker*, 457 U.S. at 838.

104. See Martin, *supra* note 30, at 71.

105. J. WEISTART & C. LOWELL, *supra* note 23, at 34 (Supp. 1985).

106. See *supra* note 6 and accompanying text.

107. J. WEISTART & C. LOWELL, *supra* note 23, at 34 n.167.

Litigants against the NCAA have frequently received sympathetic results at the initial hearings on their requests for injunctions. It is not uncommon for an athlete to receive a preliminary injunction against NCAA enforcement, only to have that order vacated or the case deemed moot on appeal. But since periods of remaining eligibility are frequently short, temporary relief is often effectively permanent relief.¹⁰⁸

Thus if *Arlosoroff* is followed, a substantial strategic initiative may be unavailable to players because a court will determine from the outset that there are no meaningful federal constitutional issues to be reviewed. What *Arlosoroff* really means is that the ambiguity of constitutional doctrine will no longer be permitted as a justification for upholding the status quo while the merits of the complaint are being deliberated.

Though rulings on the state action issue since *Arlosoroff* have been consistently negative to plaintiffs, there does appear to be a chink in the NCAA's armor. The ultimate issue in the NCAA state action cases is not as the courts have attempted to characterize it. The issue is not simply whether the NCAA performs a function "traditionally and exclusively reserved to the state" or whether the state directs and commands the operations of the NCAA. The ultimate issue appears to be that of delegation:

The critical question to be examined is whether the state's constitutional responsibility ends when the state agrees to have standards of conduct and eligibility defined in a collective venture in which it participates. It is likely that there are limits on the extent to which the state can use the delegation device to confine its obligations. The prospect of a continuing constitutional duty seems especially strong in those situations in which the state agrees to have the NCAA apply to athletes standards devised by the latter group.¹⁰⁹

The best example is state-subsidized educational institutions in the matter of drug testing. If the state endeavors to test its student-athletes, there is no question that state action is present and that constitutional strictures must be met. However, evasion of those constitutional responsibilities should not be easily accomplished by delegating drug testing authority to the NCAA. As Weistart and Lowell contend, the applicability of this sort of analysis to private school members of the NCAA needs polishing. The NCAA is unlike the private nursing home in *Rendell-Baker* or the

108. *Id.*

109. *Id.*

private school in *Blum* where the underlying activity of the defendants was essentially private:

[The NCAA] is not simply providing a service to the state; it is exercising authority that comes from the state. And its very "authority" within college athletics depends on broad-based state involvement. It would not be the ultimate arbiter of eligibility in big-time college athletics if it did not have grants of power from government. The import of such grants does not vary on an action-by-action basis. Rather it is the organization that partakes of state authority. Hence all of its actions should be deemed affected, including those that involve private members.¹¹⁰

At the very least, states have a tremendous economic motive to unite under the umbrella of the NCAA. The marriage has been financially rewarding and profitable, but the device should not be used as vehicle to escape constitutional liability and responsibility.

The preceding discussion may be mooted by the precedent and reasoning established in *Tarkanian* at least with regard to state schools in state courts. Nevertheless, the Supreme Court should take this opportunity to decide the full extent of the NCAA's status as a state actor with regard to both its public and private educational institutional members, in both federal and state court systems.

VI. CONCLUSION AND OBSERVATIONS

There is no question as to the importance of the NCAA as a regulator, overseer, and supervisor of intercollegiate athletics.¹¹¹ The NCAA is a voluntary, unincorporated non-profit association which listed 981 institutions and conferences as members as of October 1986, 792 of which are active four-year public and private institutions of higher education.¹¹² Approximately one-half of its members are public institutions and these institutions provide more than one-half of the NCAA's revenues.¹¹³ Member schools rely on the NCAA to conduct college championships in seventeen sports.¹¹⁴ In addition, the NCAA organizes and accepts the bids of television networks for broadcast rights to the games played be-

110. *Id.*

111. *Id.* at 760. See generally *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984); *Hawkins v. NCAA*, 652 F. Supp. 602 (C.D. Ill. 1987) (LEXIS, Genfed Library, Courts file).

112. See NCAA DIRECTORY 1986-87.

113. See generally 1985-86 Annual Reports of the National Collegiate Athletic Association.

114. *Id.* at 24.

tween NCAA members, and controls the ability of members to make their own broadcast arrangements.¹¹⁵ The NCAA's activities are financed by a percentage of the broadcast receipts and by membership dues.¹¹⁶ Big money is involved: the 1985-86 NCAA championship program took in combined gross receipts of \$49,032,762.¹¹⁷

The NCAA also performs administrative and judicial functions in enforcing the rules it promulgates to control the affairs of its members. The NCAA generally opts to enforce its rules by suspensions, prohibitions and expulsions directed to member schools.¹¹⁸ The primary goal of most NCAA members is not financial return or commercial success. The NCAA is essentially an organization with primarily non-commercial, educational objectives relating to the standardization and improvement of programs for student-athletes.¹¹⁹ The organization nonetheless involves itself in the regulation of activities that have a significant commercial value.

But while the NCAA characterizes itself as a voluntary association of public and private educational institutions, one must question how "voluntary" the NCAA is in actuality. It is submitted here that the NCAA really is "the only game in town."¹²⁰ If a school wishes to field teams for intercollegiate athletic competition, and have them be "sanctioned" and "recognized", it has no alternative but to deal with the NCAA. The NCAA regulation of all commercial, educational and economic aspects of college sports gives it an effective monopoly. If the NCAA did not exist today it would have to be invented or created by state or federal governments. The NCAA is and has to be national in scope as college sports are far beyond the reach and power of any one state to control. It would be inconvenient and inefficient, to say the least, for schools to have to carry on intercollegiate competition with 50 different "little NCAA's," each with its own set of rules, regulations, personnel and jurisdiction. It is obvious that the NCAA is performing some governmental function without which a like entity would

115. See J. WEISTART & C. LOWELL, *supra* note 23, at 761.

116. Division I members pay annual dues of \$1800; Division II and III members each pay annual dues of \$900. The Division I schools are mostly the large state-subsidized schools. (Source: Jim Marchiony, NCAA Director of Public Relations).

117. 1985-86 Annual Report of the NCAA at 24-26.

118. See J. WEISTART & C. LOWELL, *supra* note 23, at 761.

119. *Id.* at 761 n.84, (citing Constitution of NCAA, art.2, § 1).

120. Board of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1273, 1308, *aff'd in part and rev'd in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

have to fill the void. The states and the federal government have a traditional interest in all aspects of this country's educational system¹²¹ As the court in *Parish* clearly pointed out:

Organized athletics play a large role in higher education, and improved means of transportation have made it possible for any college, no matter what its location, to compete athletically with other colleges throughout the country. Hence, meaningful regulation of this aspect of education is now beyond the effective reach of any one state. In a real sense, then, the NCAA, by taking upon itself the role of coordinator and overseer of college athletics- in the interest of both the individual student and of the institution he attends- is performing a traditional government function.¹²²

Those who defend the *Arlosoroff* finding that the NCAA is not involved in state action will argue that the NCAA is still under the watchful eye of the law and will not be able to stampede over student-athletes' rights in contravention of the federal constitution. The NCAA will still be constrained by the common law of "voluntary private associations," and can be sued in state court.¹²³ These principles would mandate that the NCAA adhere to its own rules and procedures, fairly and in good faith, in its relations with its member institutions. However, state courts are simply not equipped to cope with a national entity of the size, shape, and magnitude of the NCAA.¹²⁴ When a plaintiff initiates an action in a state court against the NCAA, it will probably be removed to the appropriate federal court.¹²⁵ If the NCAA prefers to litigate in federal court, it should therefore be subject to the strictures of federal constitutional law.

However, the point is not simply that there are other avenues through which the plaintiff student-athlete can initiate a cause of action against the NCAA. The NCAA is different than the nursing home in *Blum* or the high school for maladjusted students in *Rendell-Baker*. The NCAA is a mammoth organization, national in scope, whose major members are large state-run and supported educational institutions that supply the vast majority of its capital and allow the NCAA to use its facilities to sponsor NCAA sporting events. This situation is closer to *Lugar* where state action was

121. *Parish*, 506 F.2d at 1032.

122. *Id.* at 1033.

123. Note, *Judicial Review of Disputes Between Athletes and the NCAA*, 24 STAN. L. REV. 903, 909-916 (1972).

124. 506 F.2d at 1033.

125. *E.g.*, *Knight v. NCAA*, Civ. No. IP 75-693-C, slip op. (S.D.Ind. Dec. 10, 1975).

found because officials representing the state-supported members of the NCAA act jointly with their private official counterparts in promulgating and enforcing NCAA rules and regulations.

The NCAA should neither be permitted to be insulated from the fourteenth amendment in carrying out its policies and regulations with its member institutions nor force its member schools to do its police work. It makes little sense that if a member institution is public, the United States Constitution may apply to the particular controversy even if the courts do not consider the NCAA itself to be engaged in state action. The state-supported school will be liable as the delegatee of the NCAA's power. Student-athlete complainants should not be denied injunctive relief against the NCAA at the outset of their civil rights cases merely because of this "new" standard that the NCAA is not engaged in conduct "traditionally and exclusively reserved to the state."¹²⁶ The better question is to what extent the NCAA is involved in "government action," as opposed to simply "state action."¹²⁷ This is the crux of the matter which no court as of yet has sufficiently addressed and every court has so far avoided. One must come back to the prophetic words of *Parish*:

It would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a "private" organization to which they have relinquished some portion of their governmental power. We have little doubt . . . that were the NCAA to disappear tomorrow, government would soon step in to fill the void.¹²⁸

Tarkanian, though seemingly result-oriented, nonetheless represents a return to the older and more plausible notion that the

126. *Arlosoroff*, 746 F.2d at 1021.

127. One writer has argued that the *Arlosoroff* court did not consider the possibility that an alternate standard could apply which would recognize the uniqueness of the NCAA.

No individual state is involved to even create the question of "state action" with regard to the functioning of the NCAA. Rather, the real involvement is by a group of states acting in concert. The NCAA does business throughout the nation. Therefore "no single state can dictate the NCAA's acts sufficiently to create state action under the court's traditional formulation of the rule. . . . In this instance, a 'national action' test could be created so that an entity would be subject to Fourteenth Amendment guarantees when states bend together to perform some portion of the states' function. The NCAA would be subject to this test because this is exactly how the NCAA was formed.

Note, *Constitutional Law: Is the NCAA Eligible for a New Interpretation of State Action?* 7 LOY. ENT. L.J. 337, 349-50 (vol. 2 1987).

128. *Parish v. NCAA*, 506 F.2d 1028, 1033 (5th Cir. 1975).

NCAA is an organization acting with the permission and guidance of the states. The NCAA should simply not be allowed to skirt the restraints of the United States Constitution, and should be held accountable for its actions as a regulator of an important aspect of higher education. There is too much at stake financially, economically, morally, and legally to permit the vast powerful group of large state schools and smaller private schools that make up the NCAA to be its own overseer. The NCAA is given its power to act on behalf of and in lieu of the government. The government cannot now allow it to be accountable simply to itself, especially where state facilities, capital, and permission are inherently involved.

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