Loyola of Los Angeles
Entertainment Law Review

Volume 7 | Number 2 Article 5

3-1-1987

Constitutional Law: is the NCAA Eligible for a New Interpretation of State Action?

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CASENOTES

CONSTITUTIONAL LAW: IS THE NCAA ELIGIBLE FOR A NEW INTERPRETATION OF STATE ACTION?

Chaim Arlosoroff ("Arlosoroff") was playing the number one singles position for the Duke University ("Duke") tennis team when the National Collegiate Athletic Association ("NCAA") cut his collegiate career short. The NCAA told Duke that Arlosoroff violated one of the NCAA's many eligibility rules, and that continued participation by Arlosoroff would result in sanctions against the school.

Arlosoroff, an Israeli citizen, had served several years in Israel's army,[1] after which he participated for two and one-half years in many amateur tennis tournaments and on Israel's Davis Cup team. He subsequently enrolled at Duke and played the number one singles position on the tennis team in his freshman year. After the year was over, however, the NCAA declared Arlosoroff ineligible from further competition based on one of its eligibility rules.[2]

The rule provided that any participation in "organized competition in a sport during each twelve-month period after the student's twentieth birthday and prior to matriculation with a member institution should count as one year of varsity competition in that sport."[3] Additionally, NCAA rules limit participation in varsity competition to four years.[4] Arlosoroff did not begin to participate in tennis tournaments until he was age twenty-two,[5] when he participated for two and one-half years on Israel's Davis Cup team. Since Arlosoroff's participation in amateur tennis spanned three different "twelve-month periods," the NCAA ruled that his freshman year was the fourth and final year of his eligibility for collegiate competition.[6] Consequently, Duke prohibited Arlosoroff from playing due to the NCAA's threatened sanctions.[7]

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1. All Israeli young men must serve in the army. The time spent in the army caused Arlosoroff to be subject to the NCAA rule in question, since it delayed his entry into collegiate competition until after his twentieth birthday. Arlosoroff v. National Collegiate Athletic Ass'n, 746 F.2d 1019, 1020 (4th Cir. 1984).
2. *Id.*
3. NCAA Bylaw 5-1-(d)-(3) (1980).
4. NCAA CONST. art. III.
5. *See supra* note 1 and accompanying text.
6. *Arlosoroff*, 746 F.2d at 1020.
7. Some of the NCAA's prior sanctions have been to reduce the number of scholarships

Arlosoroff commenced suit against both Duke and the NCAA in a North Carolina state court. He alleged a denial of due process and equal protection under the United States Constitution and sought to enjoin the defendants from enforcing the rule.[8] The state court granted a temporary restraining order, which allowed Arlosoroff to participate on Duke's tennis team pending resolution of the case, but Duke and the NCAA promptly removed the case to federal court.[9] The district judge granted a preliminary injunction and the NCAA appealed.[10]

In *Arlosoroff v. National Collegiate Athletic Association*,[11] the Fourth Circuit Court of Appeals reversed the district court and held that the Equal Protection and Due Process clauses of the Fourteenth Amendment[12] were inapplicable because adoption of the rule by the NCAA was private conduct and not state action.[13]

To reach this result, the appellate court had to interpret the defendants' actions in light of the Fourteenth Amendment, which provides:

> *No State shall* make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[14]

As the phrase "No State shall" indicates, the Fourteenth Amendment applies only to acts of the state, not to the acts of private persons or

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available to a member institution, or to take away Bowl games, nonconference games, television rights and revenues, students' free ticket privileges, and, recently, the NCAA eliminated all of a school's football games for an entire season. L.A. Times, Feb. 26, 1987, Pt. III, at 1, col. 4.

8. *Arlosoroff*, 746 F.2d at 1020. Arlosoroff's equal protection claim was based upon an allegation that the challenged Bylaw was designed to exclude aliens from competition. *Id.* The due process claim was founded upon the fact that the Bylaw was being applied to Arlosoroff's playing in Israel, which occurred before the challenged Bylaw became effective. *Id.* at 1020 n.3. Arlosoroff was attempting to secure his participation on Duke's tennis team for three more years. Typically, the best players on a collegiate athletic team are given scholarships, so presumably Arlosoroff was also attempting to have his education funded by Duke for the next three years.

9. *Id.* The allegation of denial of due process and equal protection would be sufficient to raise a federal question, invoking the jurisdiction of the federal courts, pursuant to 28 U.S.C. § 1331 (1982) and thereby permitting removal from state to federal court per 28 U.S.C. § 1441(a) (1982).

10. *Arlosoroff*, 746 F.2d at 1020.

11. 746 F.2d 1019 (4th Cir. 1984).

12. U.S. CONST. amend. XIV.

13. *Arlosoroff*, 746 F.2d at 1022. The pertinent rule was NCAA Bylaw 5-1-(d)-(3). *See supra* note 3 and accompanying text.

14. U.S. CONST. amend. XIV, § 1 (emphasis added).

entities.[15] Thus, the court had to decide whether the NCAA's acts were "acts of the state."

To aid its decision, the court first examined the defendant's status. The NCAA is a voluntary association of almost one thousand four-year colleges and universities. It conducts annual conventions to promulgate rules on minimum standards for scholarship, sportsmanship and amateurism for its member institutions to follow. The member institutions, of which about half are state and federal public institutions, are all represented at these conventions. The challenged eligibility rule was adopted by a majority vote of member institutions at one such convention.[16]

The *Arlosoroff* court then looked to existing case law, discovering a number of cases, none in the Fourth Circuit, which had held the NCAA to be a state actor.[17] The court stated that the holdings in those cases were based on "the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action."[18] However, the *Arlosoroff* court stated that the Supreme Court had recently rejected that notion,[19] and, therefore, reasoned that the earlier NCAA cases would now require the opposite conclusion.[20]

The appellate court noted that no precise formula existed to determine when otherwise private conduct was state action.[21] Rather, the inquiry in each case was whether the conduct is "fairly attributable to the state."[22] In *Arlosoroff,* the NCAA's conduct was held not to be fairly attributable to the state for two reasons. First, neither the act of disqualifying a college athlete's participation, nor the NCAA's regulation of intercollegiate athletics was a "function traditionally exclusively reserved to the state."[23] Second, the NCAA was formally a private entity and a

15. *See* Civil Rights Cases, 109 U.S. 3, 11 (1883); Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

16. *Arlosoroff,* 746 F.2d at 1020. The rule was adopted at the January 1980 convention. *Id.*

17. *Id.* at 1021 (citing Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974)).

18. *Arlosoroff,* 746 F.2d at 1021. The court cited no authority for this premise.

19. In Blum v. Yaretsky, 457 U.S. 991 (1982), the Court held 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." *Id.* at 1004. *See also* Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).

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

21. *Id.*

22. *Id.* (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

23. *Arlosoroff,* 746 F.2d at 1021 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1975)).

voluntary association of public and private institutions.[24]

The *Arlosoroff* court reasoned that, even though more than half of the NCAA's revenues came from public institutions, the public institutions alone did not cause the challenged rule to be passed. Thus, Arlosoroff's exclusion from competition at Duke was not pursuant to a state rule of conduct.[25] The court held that it was not enough that an institution be highly regulated and subsidized by a state. The state, in its regulatory or subsidizing function, must have ordered or caused the action complained of for state action to exist.[26] Arlosoroff had not made a sufficient showing that the state institutions dictated the result in his case, so the NCAA's adoption of the rule was held to be private conduct.[27]

The implications of *Arlosoroff* are very disturbing. The decision allows the NCAA to promulgate virtually whatever rules it desires, because most of the Constitution's guarantees of individual rights shield individuals only from government action.[28] For example, the member institutions recently voted to require random drug testing of all athletes.[29] The athletes now have no recourse to argue before the judiciary that this rule violates either their Fourteenth Amendment right to due process or their Fourth Amendment right to be free from unreasonable searches.[30] Their remaining alternatives would be to submit to (and pass) the test, play for a school not governed by the NCAA, or not participate at all in their sport.[31]

Making matters worse, since the NCAA sponsors virtually all collegiate athletic events,[32] an athlete really has only two alternatives.[33] In

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

25. *Id.* at 1022.

26. *Id.* (citing *Rendell-Baker*, 457 U.S. at 840, and *Blum*, 457 U.S. at 1004).

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

28. In addition to the Fourteenth Amendment, the individual guarantees protected from government conduct are found in Article I §§ 9 and 10 of the body of the Constitution, most of the first eight amendments as incorporated through the Fourteenth Amendment, and the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1147 n.1 (1978).

29. Selcraig, *The NCAA Goes After Drugs*, SPORTS ILLUSTRATED, Oct. 6, 1986, at 75.

30. Several courts have held random urine tests to be unconstitutional. *See, e.g.*, McDonell v. Hunter, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985); Shoemaker v. Handel, 619 F. Supp. 1089, 1098 (D.N.J. 1985). *See generally* Note, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?*, 19 LOY. L.A.L. REV. 1451 (1986).

31. This new policy kept Oklahoma University's All-American linebacker Brian Bosworth out of his team's Orange Bowl game on January 1, 1987, because he tested positive for steroids. Bosworth admitted taking the drug, which is not illegal, nine months prior to the drug test. L.A. Times, Dec. 26, 1986, Pt. III, at 15, col. 1.

32. *Associated Students*, 493 F.2d at 1253.

33. The NCAA's status as a near monopoly is not in itself sufficient to give rise to state

the drug testing example above, the student athlete must either submit or not play. One can envision other examples where the NCAA could enact purely discriminatory rules which bar certain athletes from participating in sports altogether.[34] The athlete would have no recourse from such rules. The *Arlosoroff* decision, then, gives the NCAA substantial practical control over thousands of young student-athletes' collegiate careers.

Interestingly, in the earlier cases which held the NCAA to be a state actor, the courts still found the NCAA rule to be constitutional.[35] In so doing, those courts avoided the ramifications presented by the *Arlosoroff* decision, and yet they reached a similar result; the NCAA was allowed to enforce its rules. A finding of state action, then, would be a "safer" approach because it would allow the judiciary to monitor the NCAA.

The development of the concept of state action versus private conduct has had a quite confusing history. Situations arose where justice required that private entities be considered state actors, and a plethora of rules developed to determine just who was or was not a state actor. Despite the precedents, as of 1978 the Supreme Court had not succeeded in developing a state action "doctrine," a coherent set of rules for determining whether private actors were responsible for an asserted constitutional violation.[36] However, earlier Court decisions primarily followed two theories to determine when a private entity became a state actor. One theory applied a "public function" analysis and the other examined the "nexus" between the state and private actor.[37] A recent decision of the

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action. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) and *Jackson,* 419 U.S. at 351-52.

34. For example, the NCAA could create a rule which allowed no foreign students to participate in athletic competition. This result would have to stand even though a similar rule was held unconstitutional. *See Howard Univ.,* 510 F.2d at 222. Also, the NCAA's enforcement branch could entrap students it did not like in order to forbid them from playing. "[I]n 1978, a 17-member U.S. House Subcommittee on Oversight and Investigations was also highly critical of the NCAA's investigative and enforcement tactics, particularly as they pertained to due process." McCallum, *In the Kingdom of the Solitary Man,* SPORTS ILLUSTRATED, Oct. 6, 1986, at 77.

35. Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 372 (8th Cir. 1977) (NCAA Bylaws 3-1-(a)-(3), 3-1-(g)-(6) and 3-4-(a), which involved impermissible payments to students); Howard Univ. v. NCAA, 510 F.2d 213, 222 (D.C. Cir. 1975) (NCAA CONST. art. III § 9(a), NCAA Bylaws 4-1-(f)-(2) and 4-6-(b)-(1), which involved a maximum eligibility period and a minimum required grade point average); Parish v. NCAA, 506 F.2d 1028, 1034 (5th Cir. 1975) (NCAA Bylaw 4-6-(b)-(1), which involved a minimum required grade point average); Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1256 (9th Cir. 1974) (NCAA Bylaw 4-6-(b)-(1), which involved a minimum required grade point average).

36. L. TRIBE, *supra* note 28 at 1148-49. The Supreme Court itself had noted that there was no "test" of state action. *See, e.g.,* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961); Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

37. G. GUNTHER, CONSTITUTIONAL LAW 866-67 (11th Ed. 1985).

Court has outlined a new test which may provide the elusive doctrine.[38]

The public function theory, which got its start in 1944 in a series of decisions which have been labeled the White Primary Cases, was significantly narrowed in scope after Chief Justice Burger joined the Court in 1969. The public function would now be required to be "traditionally exclusively reserved to the State."[39] With this new standard, the Court held that a privately owned utility, licensed and regulated by the state, was not performing a public function.[40] In addition, a warehouseman's sale of stored goods pursuant to a state granted lien was held not to be a public function.[41] More recently, the Court held in companion cases that neither the operation of a private nursing home nor the operation of a private school was exclusively reserved to the state.[42]

Unfortunately, despite the Court's narrow definition of a public function, the cases are still troublesome because "[n]o satisfactory crite-

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38. *Lugar*, 457 U.S. at 939. *See* discussion *infra* notes 55-61 and accompanying text.

39. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). The first White Primary case held that running a primary election was a government function. Smith v. Allwright, 321 U.S. 649, 664 (1944). Later, that rule was extended to cover even pre-primary elections in Terry v. Adams, 345 U.S. 461 (1953). The rule to be drawn from these cases was summarized "when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draws the Constitution's safeguards into play." *Id.* at 484 (Clark, J., concurring). The reasoning behind the rule was that state law made primary elections an integral part of the electoral scheme and primary election management was the responsibility of the political parties, so the political parties performed a "state function," thereby subjecting themselves to constitutional limitations. *Smith*, 321 U.S. at 663-64.

The public function theory was used in 1946 to find that a private company which owned and operated a town outside of Mobile, Alabama, performed a public function. Marsh v. Alabama, 326 U.S. 501 (1946). There, the finding of state action gave a Jehovah's Witness the right to distribute religious literature under the free press and religion clauses of the Constitution. *Id.* at 509. Finally, twenty years later, operation of a park was held to render services which were "powers or functions governmental in nature." Evans v. Newton, 382 U.S. 296, 299 (1966) (private trustees of a city-owned park, once found to be state actors, could not discriminate against non-whites as provided in the trust).

40. *Jackson*, 419 U.S. at 358-59. This result allowed the company to shut off power to a person's home without having to provide any of the traditional due process protections such as notice, hearing, counsel and impartial judgment.

41. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978). The plaintiff contended that dispute resolution via a state-created lien was a public function. The Court responded that private disputes are settled in many different ways without government intervention. *Id.* at 163. Likewise, the operation of a shopping center was not a public function, so union members could be prevented from picketing at a mall. Hudgens v. NLRB, 424 U.S. 507 (1976).

42. *Blum*, 457 U.S. at 1005 and *Rendell-Baker*, 457 U.S. at 840, respectively. The private entities were thus free to discharge patients or fire employees, despite various state regulations which governed their operations. The state's response to the private entity's decisions did not render it responsible for those actions. *Blum*, 457 U.S. at 1005.

ria exist to determine what is or is not inherently governmental . . . ."[43] None of the Burger Court "public function" cases has held the private entity to be a state actor. The Court has not indicated which functions will fit the narrow definition of "traditionally exclusively reserved to the state." It has said, though, that "education, fire and police protection, and tax collection" have a *large degree* of exclusivity, but the Court was unwilling to say that the government had *complete* exclusivity over those functions.[44] Thus, under the public function cases, it remains unclear what is exclusively governmental and who would be considered to be performing a public function.

The nexus theory is similarly problematic. The relevant inquiry here, though, is not what is inherently governmental, but rather what connection with the government is considered sufficient. The Court's analysis of earlier nexus cases has been divided into roughly four branches: (1) encouragement, (2) commandment, (3) symbiotic relationship, and (4) concerted action or entanglement.[45]

The "encouragement" branch will convert a private actor into a state actor if the state encouraged the private actor. The Court found sufficient encouragement to give rise to state action when California voters amended their Constitution to prohibit the government from interfering with private discrimination in the sale or lease of real estate.[46] The Court struck down the amendment because it would encourage and involve the state in racial discrimination.[47]

Since a finding of state encouragement is sufficient in itself to convert a private entity into a state actor, it logically follows that in the "commandment" branch, where the state commands the conduct, private actions would become state conduct. Even indirect commandments by the state can give rise to state action. Thus, where the judiciary was called upon to enforce a private, racially restrictive covenant, the Court held that, even though it applied neutral laws, such judicial enforcement could be construed as a commandment by the state to discriminate, and was therefore state action.[48]

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43. L. TRIBE, *supra* note 28, at 1163. To support this proposition, Professor Tribe compares *Jackson* (providing electrical service was not a public function) with *Evans* (providing a public park was a public function). *Id.* at 1163 n.3.

44. *Flagg Bros.*, 436 U.S. at 163. *But cf. Rendell-Baker*, 457 U.S at 840 (holding that operation of a private school was not traditionally exclusively reserved to the state).

45. *See Rendell-Baker*, 457 U.S. at 840-42.

46. *See* Reitman v. Mulkey, 387 U.S. 369 (1967).

47. *Id.* at 381. *See also* Hunter v. Erickson, 393 U.S. 385 (1969) (striking down a provision which required all fair housing legislation to be submitted for referendum prior to adoption because this would encourage discrimination).

48. Shelley v. Kraemer, 334 U.S. 1, 19 (1948). The Court reasoned that but for judicial

The "symbiotic relationship" branch finds state action when the government enters into a symbiotic, i.e. mutually beneficial, relationship with a private entity. The Court found such a relationship to exist where a state parking agency leased out space for a privately owned restaurant within the public building, and the restaurant refused to serve blacks.[49] The Court reasoned that the restaurant was essential to successful operation of the public parking facility due to the rents received, and the restaurant's success depended on its ability to discriminate in order to attract customers.[50] However, no symbiotic relationship was found in the operation of a privately owned nursing home despite state licensing and subsidy of the nursing home, which cared for patients that otherwise might go to public hospitals.[51]

The "concerted action" branch of the nexus theory considers the state's entanglement with the private entity, even though the state does not benefit from or encourage the private action. Joint participation by state officials with a private party in a challenged prejudgment attachment proceeding was sufficient state involvement to give rise to state action.[52] However, state licensing of a private entity was held not sufficient to make the entity's private conduct into state action.[53] Likewise, substantial state funding does not show concerted action which would convert private conduct into state action.[54]

The Supreme Court in *Lugar v. Edmondson Oil Co.*[55] recently attempted to define (or perhaps redefine) the test for state action. The new standard uses a two-part approach. First, "the party charged with the deprivation must be a person who may fairly be said to be a state actor . . . [either] because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."[56] Second, "the depriva-

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intervention there would be no discrimination because the seller was willing to transfer ownership to a buyer who was subject to the covenant. *Id.*

49. Burton v. Wilmington Parking Auth., 365 U.S. 715, 724-25 (1961).

50. *Id.* at 723. "It was also relevant that the restaurant was visually indistinguishable from a public entity." L. TRIBE, *supra* note 28 at 1160 n.13.

51. *Blum,* 457 U.S. at 1011. *See supra* note 19 and accompanying text.

52. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). In *Adickes,* a private party participated with a state official in a conspiracy to discriminate against the plaintiff on the basis of his race. The Court held that joint participation with the state yielded state action. *Id.* at 152.

53. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding a private club could discriminate in its service even when only a limited number of liquor licenses were given out). *See also Jackson,* 419 U.S. 345 and *Blum,* 457 U.S. 991.

54. *Rendell-Baker,* 457 U.S. at 840. The NCAA was substantially funded through state institution dollars. *See supra* note 25 and accompanying text.

55. 457 U.S. 922 (1982).

56. *Id.* at 937.

tion 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 responsible."[57]

The first part of the test requires that the private entity be a state actor. The *Lugar* Court's examples of a "state actor" were "public function," "compulsion [commandment]," "nexus [symbiotic relationship]," or "joint [concerted] action,"[58] all of which were among the traditional tests for state actor referenced above. The examples given by the Court left out the "encouragement" branch of the nexus theory. The Court did not say that this branch would no longer convert a private entity into a state actor. In fact, the "obtained significant aid from state officials" language iln the test indicates that the "encouragement" branch continues to be an acceptable test for state actor.

The second part of the test poses the additional requirement that the deprivation must be caused by the exercise of a state rule of conduct. The example given of this was the *Flagg Brothers* case which involved a warehouseman's sale pursuant to a state granted lien.[59] The state statute giving the power to consummate the sale satisfied the second part of the test, but no state action was found because the private entity's acts were not attributable to the state.[60] Another example, exhibiting the opposite conclusion, would be a public defender's decision on how to handle a case. The Court in such a case held that there was no state action despite the public defender's status as a state official, because the lawyer acted pursuant to the American Bar Association's Code of Professional Conduct, which was not a state rule of conduct or a "privilege created by the state."[61]

Given the varied means to find state action, the court could easily have found state action here. It could have followed prior case law, used a more appropriate test, or even applied some completely different standard. The easiest way to find state action would be to follow the earlier NCAA cases.[62] Although not binding, those cases did offer several ways to find state action. The *Arlosoroff* court, however, summarily dismissed them by a two-step reasoning process: (1) the earlier cases rested on the notion that indirect involvement of a state government could convert pri-

57. *Id.*

58. *Id.* at 939. Though the court referred to one of the examples as the "nexus" test, it cited *Burton*, 365 U.S. 715 (1961), as authority. The test there has traditionally been referred to as the "symbiotic relationship" test. *See supra* notes 49-50 and accompanying text.

59. 436 U.S. 149 (1978). *See supra* note 41 for a discussion of the holding in this case.

60. *Lugar*, 457 U.S. at 938-39 (citing *Flagg Bros.*, 436 U.S. at 157).

61. Polk County v. Dodson, 454 U.S. 312, 324-25 (1981).

62. *See supra* note 17.

vate conduct into state action;[63] and, (2) that notion was rejected by the Supreme Court.[64]

Both elements of the *Arlosoroff* court's reasoning are flawed. First, the court did not say what it meant by indirect, but some of the earlier NCAA cases rested on the public function theory, which need not involve *any* government action. In *Parish v. NCAA*,[65] for example, the court noted that organized athletics play a large role in higher education and, further, meaningful regulation of this aspect of education is beyond the reach of any one state.[66] Thus, the court held that the NCAA was "performing a traditional governmental function," because it took upon itself the role of coordinating and overseeing college athletics.[67] Further, in another case, the Supreme Court stated that education has a high degree of exclusivity.[68] Thus, the *Parish* holding fits the new narrow standard for public function enunciated by the Supreme Court.[69]

Additionally, some of the earlier NCAA cases which found state action rested partly on the concerted action theory, which requires *direct* action on the part of the government, not indirect involvement. In *Associated Students, Inc. v. NCAA*,[70] for example, the court examined the entanglement between the NCAA and the public schools (which were state agencies).[71] It stated that the NCAA does control public schools' athletic programs, state funds are used to pay membership dues, and the NCAA enforces the rules which are enacted by its members, at least half of which are public institutions.[72] Duke's control over athletic programs, together with the NCAA's enforcement of rules, operated to deprive Arlosoroff of his opportunity to play collegiate tennis.

Second, the Supreme Court cases did *not* reject the notion that indirect state involvement could never convert private conduct into state ac-

63. *See, e.g., Howard Univ.*, 510 F.2d at 217. "[T]he government's involvement need not be either exclusive or direct; governmental action may be found even though the government's participation 'was peripheral . . . .' " *Id.* (citing United States v. Guest, 383 U.S. 745, 755-56 (1966)).

64. *Arlosoroff*, 746 F.2d at 1021 (citing Rendell-Baker v. Kohn, 457 U.S. 830 (1982) and Blum v. Yaretsky, 457 U.S. 991 (1982)).

65. 506 F.2d 1028 (5th Cir. 1975).

66. *Id.* at 1032. Another traditional governmental function is that of protecting health and safety. The NCAA grew out of a meeting to agree on some rules to try to cut down on the number of football players being killed. L.A. Times, Jan. 11, 1987, Pt. III, at 14, col. 4.

67. *Parish*, 506 F.2d at 1032-33.

68. *Flagg Bros.*, 436 U.S. at 163. The Court, though, was unwilling to characterize it as complete exclusivity. *Id.*

69. *See supra* note 39 and accompanying text.

70. 493 F.2d 1251 (9th Cir. 1974).

71. *Id.* at 1254-55 (adopting the court's analysis in *Parish*, 361 F. Supp. at 1219).

72. *Associated Students*, 493 F.2d at 1254-55.

tion. Those cases, *Rendell-Baker v. Kohn* and *Blum v. Yaretsky*, merely held that substantial state financial support and close government regulation were not sufficient involvement to give rise to state action.[73] Even though financial and regulatory involvement are forms of indirect involvement, in neither case did the Supreme Court specifically say that indirect involvement would always be insufficient to convert private conduct to state action.

For example, one form of indirect action the *Arlosoroff* court should have considered was that the state (through its institutions) had a "symbiotic relationship" with the NCAA.[74] The Court in *Lugar* explicitly recognized the viability of this branch.[75] Plus, one of the prior NCAA cases, *Howard University v. NCAA*,[76] relied on that theory. There, the court established interdependence by the state institutions' need for an agency to regulate and supervise intercollegiate athletics and the NCAA's need for both members and funds. Each entity aided the other by supplying its needs, thus creating a dependency by each on the other. Filling these needs gave rise to a mutually beneficial relationship.[77] Hence, the *Arlosoroff* court missed the mark in summarily rejecting the earlier cases which found the NCAA to be a state actor.

Even after the court summarily dismissed the prior NCAA cases, it could still have found state action by applying an appropriate test. The court has great latitude in setting up the test for state action. The *Arlosoroff* court itself acknowledged that "[t]here is no precise formula,"[78] but that the test was whether the conduct is "fairly attributable to the state."[79] Thus, the question becomes: what is "fairly attributable"? The *Arlosoroff* court declared that a high degree of regulation and subsidy by a state was not enough.[80] Rather, they stated the test for "fairly attributable" was: (1) the state in its regulatory or subsidizing function must order or cause the action complained of; or, (2) the function must be one traditionally reserved to the state.[81] The court cited no authority for this test. The test, however, closely parallels the two historical theories (nexus and public function) for finding state action.

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73. *Blum*, 457 U.S. at 1004-05; *Rendell-Baker*, 457 U.S. at 840-41.

74. When the state and a private entity have a substantial interdependence, state action may result with each being responsible for the other's acts.

75. *See supra* note 58 and accompanying text.

76. 510 F.2d 213 (D.C. Cir. 1975).

77. *Id.* at 220. The court also noted that the NCAA negotiated $13,000,000 in television contracts, which went "primarily to the public institutions." *Id.*

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

79. *Id.* (citing *Lugar*, 457 U.S. at 937).

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

81. *Id.*

Recall, though, that the problem lay in giving substance to the test. In attempting to give substance to the test, the *Arlosoroff* court stated "extensively regulated and highly subsidized by the state" was not enough to create state action, where the state's involvement did not cause the challenged act.[82] The NCAA was likened to the *Rendell-Baker* and *Blum* cases because, despite the states' substantial involvement, there was "no suggestion . . . the state institutions joined together to vote as a bloc to effect adoption of the Bylaw over the objection of private institutions."[83] Such a motivation would be very hard to prove for any entity composed of both public and private members. Thus, the larger entity would be free from constitutional restrictions.

The court, in order to protect the student-athletes, could have found some middle ground between the "highly regulated and subsidized" test which it rejected as insufficient involvement, and the "ordered or caused" test which it actually used. For example, the court could have devised a test which required the defendant to be "highly regulated and *influenced* by the state in causing the act complained of."[84]

The NCAA would have met this more appropriate test for state actor because of the public institutions' substantial influence over the NCAA. The public institutions comprise about half the NCAA's membership and contribute more than half of the NCAA's revenues. Additionally, the member public institutions are a dominant force in determining NCAA policy and in dictating NCAA actions because they have traditionally provided the majority of members on the governing council and the various committees, who wield most of the power in the NCAA.[85]

Alternatively, the *Arlosoroff* court could have followed the two-part test for "fair attribution" set out in the *Lugar* case. The first part requires the party charged with the deprivation be fairly said to be a state actor.[86] As noted earlier, the NCAA could be said to be a state actor under the public function,[87] concerted action,[88] or symbiotic relation-

82. *Id.* The court cited *Rendell-Baker,* 457 U.S. at 840, and *Blum,* 457 U.S. at 1004 for this proposition. Similarly, the autonomous decisions of a public official were not caused by the state. *Arlosoroff,* 746 F.2d at 1022 (citing Polk County v. Dodson, 454 U.S. 312, 318 (1981)).

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

84. The Court in *Rendell-Baker* held that a state can be responsible for a private decision when it has provided such significant encouragement that the choice must be deemed to be that of the State. 457 U.S. at 940. *See also Blum,* 457 U.S. at 1004.

85. *Howard Univ.,* 510 F.2d at 219. *See also Parish,* 506 F.2d at 1032.

86. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

87. *See supra* notes 65-69 and accompanying text.

88. *See supra* notes 70-72 and accompanying text.

ship[89] theories. Thus, the NCAA could fairly be said to be a state actor in satisfaction of the first part of the test.

The second part requires that the deprivation 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 responsible."[90] The NCAA would satisfy this requirement in either of two ways. Primarily, Arlosoroff's deprivation was caused by a "rule of conduct imposed by a person for whom the State is responsible." Here, the states are responsible for the acts of their institutions. These institutions, which make up a substantial part of the NCAA, enacted the rule which prohibited Arlosoroff from playing. Thus, the rule of conduct was imposed by the NCAA, for whom the states are responsible. This state affiliation is what separates this case from the public defender case.[91] The public defender acted pursuant to rules of the American Bar Association, which is not affiliated with any state.[92]

Furthermore, Arlosoroff's deprivation could be considered to have been caused "by the exercise of some . . . privilege created by the State." The states gave their colleges and universities the privilege of joining the NCAA. After so doing, the institutions voted in rules, one of which caused Arlosoroff's deprivation. Hence, a state created privilege ultimately led to the deprivation. Either way, the NCAA also satisfied the second part of the test, so its acts would be considered state action pursuant to the *Lugar* Court's analysis.

Finally, if the court were still to find no state action by the more traditional means, it could have applied some completely different standard which recognized that the NCAA is a unique organization. There is no individual state involved to create a question of "state action"; rather, the involvement is by a group of states acting in concert.[93] This could be a crucial distinction. In all other cases involving conversion of a private entity's conduct into state action, the private entity did its business entirely within one state. Thus, the home state's laws controlled its actions, and there was one state to interject itself into the private entity's

89. *See supra* notes 74-77 and accompanying text.

90. *Lugar*, 457 U.S. at 937.

91. Polk County v. Dodson, 454 U.S. 312 (1981).

92. *See supra* note 61 and accompanying text.

93. The *Arlosoroff* court only assumed for purposes of its discussion that the traditional state action concept applied to states acting in concert, commenting that there was no proof of concerted action in the facts before them. 746 F.2d at 1021 n.4. Nowhere did they consider the possibility that some alternate standard could apply.

business.[94] For the NCAA, on the other hand, there can be no true "home state," because it does business across the nation.[95] Consequently, no single state can dictate the NCAA's acts sufficiently to create state action under the court's traditional formulation of the rule.

A different standard should apply for the states acting in concert, such as the NCAA, to ensure the Fourteenth Amendment guarantees are not denied to the student-athlete. After all, state schools have been held to be state actors in the past and "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."[96] In this instance, a "national action" test could be created so that an entity would be subject to Fourteenth Amendment guarantees when states band together to perform some portion of the states' functions. The NCAA would be subject to this test because this is exactly how the NCAA was formed. Such a test would ensure that the students will be provided with the individual guarantees which they would be deprived of by the *Arlosoroff* decision.

Therefore, the appellate court in *Arlosoroff* distinguished the earlier cases too readily and failed to create an appropriate test to meet the unique facts of this case. It thus reached the wrong conclusion on state action and, consequently, failed to reach the merits of the rule involved in the case.[97] This decision leaves the NCAA with substantial practical control over the lives of thousands of young students without placing constitutional limits on its authority. This plenary power, with no opportunity for judicial redress, has already caused one student-athlete to characterize the NCAA as the "National Communists Against Ath-

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94. *See, e.g., Lugar,* 457 U.S. 922 (*Virginia* state officials were used to attach property) and *Burton,* 365 U.S. 715 (*Delaware* parking authority acted with private entity to discriminate).

95. Though its corporate headquarters are in Mission, Kansas, the NCAA has member institutions all across the nation. McCallum, *In the Kingdom of the Solitary Man,* SPORTS ILLUSTRATED, Oct. 6, 1986, at 66.

96. *Parish,* 506 F.2d at 1033.

97. The predecessor to NCAA Bylaw 5-1-(d)-(3) was invalidated in *Howard Univ.,* 510 F.2d at 222. It read in part:

> *The "Foreign-Student" Rule.* Any participant in a National Collegiate Athletic Association event must meet all of the following requirements for eligibility . . . .
>
> Participation as an individual or as a representative of any team whatever in a foreign country by an alien student-athlete in each twelve-month period after his nineteenth birthday and prior to his matriculation at a member institution shall count as one year of varsity competition.

The rule was found unconstitutional for its violation of equal protection by discriminating against foreign students. *Id.* Although now facially neutral, the rule may still operate to discriminate against foreign students.

letes."[98] After the *Arlosoroff* decision, perhaps his statement was not too far-fetched.

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98. THE SPORTING NEWS, Jan. 12, 1987, at 14, col. 1.