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DOES THE NCAA'S FOOTBALL RULE 9-2 IMPEDE THE FREE EXERCISE OF RELIGION ON THE PLAYING FIELD?

Amanda N. Luftman

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DOES THE NCAA'S FOOTBALL RULE 9-2 IMPEDE THE FREE EXERCISE OF RELIGION ON THE PLAYING FIELD?

I. INTRODUCTION

"I feel it's my right and it's my opportunity to give thanks to God," said quarterback Antwan Chiles, who kneels in the end zone after running touchdowns. "I want the kids across America to look at me and know that I have a higher power, and that's God."¹

Unfortunately, the National Collegiate Athletic Association ("NCAA") does not agree with Mr. Chiles, a football player at the religiously based Liberty University in Virginia.

One of the purposes of the NCAA, as set forth in its constitution, is "[t]o legislate, through bylaws or by resolution of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics."² The NCAA decided that one subject worthy of discussion was the unsportsmanlike conduct occurring during college football games. In response to this concern, the NCAA drafted Football rule 9-2 ("rule 9-2").³ Although rule 9-2 was originally adopted in 1992,

1. David Reed, *Gridiron Celebration: NCAA Rules Post-TD Prayers OK*, PHOENIX GAZETTE, Sept. 2, 1995, at A-1, A-6.

2. NCAA CONST. art. 1, § 1.2(h), reprinted in 1995-96 NCAA MANUAL.

3. NCAA Football rule 9-2 provides:

Section 2. Noncontact Fouls

Unsportsmanlike Acts

ARTICLE 1: There shall be no unsportsmanlike conduct or any act that interferes with orderly game administration on the part of the players, substitutes, coaches, authorized attendants or any other persons subject to the rules, before the game, during the game or between periods.

a. Specifically prohibited acts and conduct include:

1. No player, substitute, coach or other person subject to the rules shall use obscene or vulgar language or gestures or engage in acts that provoke ill will or are demeaning to an opponent, to game officials or to the image of the game, including:
 - (a) Pointing the finger(s), hand(s), arm(s) or ball at an opponent.

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- (b) Baiting or insulting an opponent verbally.
 - (c) Inciting an opponent or spectators in any other way.
 - (d) Any delayed, excessive or prolonged act by which a player attempts to focus attention upon himself.
 - (e) Removal of a player's helmet before he is in the team area (**Exceptions:** Team, media or injury timeouts; equipment adjustment; through play; and between periods).
2. No person subject to the rules, except players, officials and eligible substitutes, shall be on the field of play or end zones during any period without permission from the referee. If a player is injured, attendants may come inbounds to attend him, but they must obtain recognition from an official.
 3. After a score or any other play, the player in possession immediately must return the ball to an official or leave it near the dead-ball spot. This prohibits:
 - (a) Kicking or throwing the ball any distance that requires an official to retrieve it.
 - (b) Spiking the ball to the ground [**Exception:** A forward pass to conserve time (rule 7-3-2-c)].
 - (c) Throwing the ball high into the air.
 - (d) Any other unsportsmanlike act or actions that delay the game.
 4. No substitutes may enter the field of play or end zones for purposes other than replacing a player(s) or to fill a player(s) vacancy(ies). This includes demonstrations after any play (A.R. 9-2-1-f).
 5. Persons subject to the rules, including bands, shall not create any noise that prohibits a team from hearing its signals.
- PENALTY—** 15 yards [S7, S27] from the succeeding spot. Penalize as a dead-ball foul. Flagrant offenders, if players or substitutes, shall be disqualified [S47]. If a player commits two unsportsmanlike fouls in the same game, he shall be disqualified.
- b. **Other prohibited acts include:**
 1. During the game, coaches, substitutes and authorized attendants in the team area shall not be on the field of play or outside the 25-yard lines without permission from the referee unless legally entering or leaving the field (**Exceptions:** Rules 1-2-4-g and 3-3-8-c).
 2. No disqualified player shall enter the field.
- PENALTY—** 15 yards [S7, S27] from the succeeding spot. Penalize as a dead-ball foul. Flagrant offenders, if players or

it was not until the 1995 season that the athletic organization decided to strictly enforce the rule. The heightened enforcement policy is an attempt to increase proper and acceptable conduct on the football field. The NCAA also created a videotape, which provides more detailed explanations of the appropriate interpretations of the rule.⁴ This video serves as a companion and a supplemental aid to understanding the rule, and was sent to all of the NCAA's member institutions as well as the organization officials.

The NCAA clearly overstepped its bounds by severely restricting religious practices with the adoption of rule 9-2. This rule, as interpreted by the Football Rules Committee and explained in the video, proscribes many religious expressions. The rule eliminates religious displays by players, including: crossing themselves, kneeling, and removing their helmet in the end zone following a touchdown.⁵ A demonstration of religious practices will result in a fifteen yard penalty against the offending team on the next play.⁶ In addition, the second violation by a player during a single game results in that player's ejection from the game.⁷

A college football player whose religious practices and beliefs form an integral part of his life has a right not to be penalized because of his religion.⁸ Under rule 9-2, religious players who openly or demonstratively give thanks or ask for help from a higher source are singled out and instructed how and when to pray.⁹ If these players fail to follow the NCAA guidelines as to when prayer is appropriate, they may find themselves sidelined for the duration of the game. Rule 9-2 clearly burdens a football player's right to the free exercise of religion under the First Amendment. The application of rule 9-2 should be re-examined because it not only violates the United States Constitution,¹⁰ but also the Religious Freedom Restoration Act of 1993,¹¹ as well as Title II of the 1964 Civil Rights Act.¹²

substitutes, shall be disqualified. [S47]

[hereinafter rule 9-2].

4. Videotape, *College Football: A Celebration of Teamwork* (NCAA Prod. 1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

5. Editorial, *Touchdowns and Prayer*, *TULSA WORLD*, Sept. 4, 1995.

6. *Id.*

7. Rule 9-2, *supra* note 3, at § (a) Penalty section.

8. *Liberty Univ. v. NCAA*, No. 95-0046-L, at 1-2, (W.D. Va. filed Aug. 31, 1995), (dismissed Sept. 1, 1995).

9. *Id.*

10. U.S. CONST. amend. XIV, § 2.

11. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (Supp. V 1993).

12. 42 U.S.C. §§ 2000a-2000h (1988 and Supp. V 1993).

This Comment addresses the impact of rule 9-2 on the freedom to practice religion. Part II summarizes the history and structure of the NCAA. Part III analyzes the implications of rule 9-2. Part IV presents an in-court challenge to the rule, and Part V considers the status of the NCAA as a state actor. Part VI discusses the proper standard of review for intrusions upon religious freedom, and Part VII examines the Religious Freedom Restoration Act of 1993. Part VIII concludes that the NCAA should modify its application of rule 9-2 so that it no longer interferes with religious freedom. The author argues that this rule is not only unconstitutional and illegal, but also exemplifies the NCAA's unwieldy power. Despite the Supreme Court's holding that the NCAA is not a state actor and therefore not subject to constitutional restraints, adherence to this holding is simply not equitable.

II. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND ITS ASCENSION TO POWER

The NCAA was founded in 1906 as the governing body of its member institutions and student athletes.¹³ At that time, the entire association consisted of sixty-two universities and colleges.¹⁴ It has since grown to include more than 1150 institutions, including public and private colleges and universities, athletic conferences, athletic associations, and other groups related to intercollegiate athletics.¹⁵ The NCAA has adopted rules which govern the conduct of each school's intercollegiate athletic program.¹⁶ Each member of the NCAA must comply with, and enforce, the rules and regulations of the NCAA.¹⁷

Although several of the NCAA's rules and procedures have been challenged in recent years, courts have consistently upheld the NCAA's right to develop and monitor its own program.¹⁸ According to Justice

13. Pamphlet, NCAA 10100, Nov. 1994, at 7.

14. *Id.*

15. *Id.* at 2; see also *NCAA v. Miller*, 795 F. Supp. 1476, 1479 (D. Nev. 1992), *aff'd*, 10 F.3d 633 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1543 (1994).

16. 1995-96 NCAA MANUAL, *supra* note 2 (a bound book consisting of over 500 pages detailing the constitution, bylaws, and additional legislation).

17. NCAA CONST. art. 1, § 1.3.2, *reprinted in* 1995-96 NCAA MANUAL ("Member institutions shall be obligated to apply and enforce this legislation . . ."); NCAA CONST. art. 3, § 2.1.2, *reprinted in* 1995-96 NCAA MANUAL ("The institution shall administer its athletics programs in accordance with the constitution, bylaws and other legislation of the Association."); see also *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988).

18. Since 1982, courts have consistently held that the NCAA is not a state actor and, therefore, they have not afforded protection to those seeking to challenge the NCAA. See, e.g., *NCAA v. Tarkanian*, 488 U.S. 179 (1988); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988);

Wright, "[i]t is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules."¹⁹ Such judicial deference to the NCAA is untenable due to the sheer power of the NCAA. If courts lack authority to review NCAA decisions, then student athletes are left without recourse since they have no outside source to which they may appeal. Even the schools themselves are powerless because an intercollegiate athletic association is nearly impossible to maintain without membership in the NCAA.²⁰ Former University of Nevada, Las Vegas basketball coach Jerry Tarkanian²¹ commented, "[s]ometimes I feel the NCAA is the only organization that's above the law."²²

What rights will the NCAA be allowed to deny its members before either the government or the legislature steps in to limit the NCAA's ever-growing power?²³ The NCAA may have finally crossed the line with its rule 9-2, a rule which infringes upon student athletes' constitutional and statutory rights to practice their religion freely. Rule 9-2 provides a clear example of an athletic organization abusing its power.

Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986); Hawkins v. NCAA, 652 F. Supp. 602 (C.D. Ill. 1987).

19. Shelton v. NCAA, 539 F.2d 1197, 1198 (9th Cir. 1976).

20. "In order to operate a large-scale intercollegiate athletic program on an economically sound basis, membership in the NCAA may be a practical necessity." Susan Westover, Note, National Collegiate Athletic Association v. Tarkanian: *If NCAA Action Is Not State Action, Can Its Members Meaningfully Air Their Disatisfaction?*, 26 SAN DIEGO L. REV. 953, 966 n.78 (1989).

21. Tarkanian was involved in legal battles with the NCAA for well over a decade, winning in Nevada's Supreme Court only to ultimately lose to the NCAA in the United States Supreme Court. See Tarkanian v. NCAA, 741 P.2d 1345 (Nev. 1987), *rev'd*, 488 U.S. 179 (1988).

22. William F. Reed, *Rebel Reprieve: In a Turnaround, the NCAA Lets UNLV Defend Its Title*, SPORTS ILLUSTRATED, Dec. 10, 1990, at 46, 49.

23. Four states (Florida, Illinois, Nebraska, and Nevada) have enacted state statutes which purport to protect their citizens from the power of the NCAA. The United States Supreme Court struck down Nevada's statute holding that it violates the Commerce Clause. See Ronald J. Thompson, *Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?*, 41 UCLA L. REV. 1651, 1680-83 n.29 (1994).

III. NCAA FOOTBALL RULE 9-2 AND ITS IMPLICATIONS

A. *The Adoption of Rule 9-2 and Its Impact on Collegiate Football*

Although the NCAA adopted rule 9-2 in 1992,²⁴ the "no celebration in the end zone" rule (as it is informally known) was decidedly absent from the media until the 1995 football season. Prior to the 1995 season, football officials were tolerant of many forms of celebration. Why the sudden change?²⁵ The NCAA Football rules Committee recently decided to enforce the rule more strictly, in an effort to reduce "excessive celebrations" on the field.²⁶ Rule 9-2, entitled "Unsportsmanlike Conduct," focuses on the tenets of teamwork²⁷ and attempts to eliminate unsportsmanlike taunting and showboating.²⁸ The NCAA strives to prevent players from drawing individual attention to themselves through such actions as high-stepping across the end zone, dancing after a great play, contacting or interacting with the fans in any manner, and demeaning or taunting the opposing team.²⁹ By choosing not to release a comprehensive list of illegal conduct actionable under rule 9-2, the NCAA has left the rule unabashedly vulnerable to misinterpretations and misapplications.

In a pre-season attempt to explain the "gray area" of the rule, the Football Rules Committee and NCAA Productions created a video entitled *College Football: A Celebration of Teamwork*.³⁰ This video, as noted above, was distributed to all NCAA member schools as well as to the officials who promulgate and enforce the rules, so that every person participating in NCAA football games was adequately familiar with the rule. According to Vince Dooley, Chair of the Football Rules Committee, "the goal here [in the video] is to provide definitive rulings on specific

24. Editorial, *Touchdowns and Prayer*, TULSA WORLD, Sept. 4, 1995, available in 1995 WL 10040353.

25. An online search of computerized news databases at the beginning of the football season (Sept. 11, 1995) resulted in a list of well over two hundred newspaper articles written since July, 1995 discussing the NCAA football rule.

26. *Falwell Throws the Penalty Flag at NCAA Ban of On-Field Prayer*, SAN DIEGO UNION-TRIB., Sept. 1, 1995, at D2.

27. Rule 9-2, *supra* note 3. See also Videotape, *supra* note 4 (Vince Dooley, chair of the Football Rules Committee states, "The Football Rules Committee has written rules to decide what has a place in the game and what does not.").

28. *NCAA Lets 'Em Pray*, SALT LAKE TRIB., Sept. 3, 1995, available in 1995 WL 3155252.

29. Videotape, *supra* note 4.

30. *Id.*

actions so that everyone involved in the game—players, coaches, officials, and administrators—will have a clearer common understanding of what is legal and what is illegal.³¹ Unfortunately, this video does little to lessen the ambiguities created by rule 9-2. A particularly problematic section of rule 9-2 is part (a)(1)(d),³² which is deliberately broad and general “because the committee has concentrated on the *intent* of the actions, rather than trying to itemize all of the things players can possibly do.”³³ The Rules Committee uses subsection (a)(1)(d) as a catch-all provision, allowing the officials to throw a penalty flag for almost any noticeable conduct.³⁴

The punishment for illegal conduct under rule 9-2 is a fifteen yard penalty assessed on the next play.³⁵ If such conduct occurs either during a touchdown play or in celebration immediately following a score, the touchdown will still count.³⁶ However, the team in violation will be assessed a fifteen yard penalty on the ensuing play, which is an attempt for either one or two extra points, at the option of the team scoring the touchdown. This penalty forces the team to reconsider its strategy, as both plays, especially the two-point conversion, will become much more difficult. As games often turn on a single point, the ramifications of this penalty are significant. Should a team incur a penalty for “unsportsmanlike conduct” prior to the opening kickoff, the transgressing team will receive a fifteen yard penalty at the start of the game. If the illegal conduct occurs during any other play, the fifteen yards will be assessed from the place at which the ball is whistled dead. In addition to the fifteen yard penalty, any one player who is twice penalized for unsportsmanlike conduct in a single game will be disqualified from that game.³⁷ The penalty for violating rule 9-2 is extremely severe and may substantially affect the result of games.

31. *Id.*

32. Rule 9-2(a)(1)(d) states that an excessive or prolonged act by which a player attempts to focus attention upon himself or herself will earn that player's team a fifteen yard penalty. Rule 9-2, *supra* note 3.

33. Videotape, *supra* note 4 (statement of John Adams, Secretary of the Rules Committee).

34. Videotape, *supra* note 4.

35. Rule 9-2, *supra* note 3.

36. Videotape, *supra* note 4.

37. Rule 9-2, *supra* note 3.

B. Rule 9-2 Infringes upon First Amendment Rights by Impinging on the Freedom to Exercise Religious Beliefs

One of the most debated controversies raised by rule 9-2 involves rights protected by the First Amendment. The rule acts as a ban on outward expressions of prayer and also imposes a limit on the free exercise of speech. Apparently, this rule encompasses kneeling in prayer, at least according to the NCAA's own video. A football player is shown kneeling on one knee in the end zone after scoring a touchdown.³⁸ Although the individual kneels for only a few seconds, this momentary time span is apparently significant enough to constitute a delay under the rule.³⁹ While the image of the kneeling player is flashed upon the screen, a voice intones, "[k]neeling, regardless of intent, is a form of posing and is a foul because it focuses attention on one person at the expense of the rest of the team. This action, or lack of action, is definitely delayed and prolonged."⁴⁰

The phrase "regardless of intent" indicates that the framers of the rule considered the possible reasons a football player might kneel, and determined that an all-inclusive rule was nonetheless appropriate. When a player kneels and bows his head, he is not likely to be doing anything but praying. By adopting and promulgating this rule, in effect, the NCAA has unequivocally stated that prayer is not acceptable on the football field. However, prayer and the freedom to practice one's religion may not be banned, at least according to the framers of another set of rules—those who created the United States Constitution. The Constitution expressly protects religious freedom, a right that the NCAA is currently invading.

According to the video,⁴¹ a football player may not commit any act, even one religious in nature, if such action draws individualized attention to the player.⁴² This rule inherently restricts a player's First Amendment rights, including the free exercise of speech, and most specifically the free exercise of religion.⁴³ The rule has a particularly chilling effect on religious activities, due to the harshness of the penalties and the vagueness of the rule. A player may choose to refrain from perfectly acceptable conduct for fear that the action risks sanctions. As previously discussed,

38. Videotape, *supra* note 4.

39. *Id.*

40. *Id.* (statement of John Adams, Secretary of the Rules Committee).

41. *Id.*

42. Rule 9-2, *supra* note 3.

43. Although there is a substantial claim that rule 9-2 presents a significant burden on the free exercise of speech, that argument is beyond the scope of this Comment.

when rule 9-2 is violated, the penalties are extremely significant.⁴⁴ For example, pursuant to the NCAA's videotaped interpretation of rule 9-2, if a player kneels at any point in the game and then later removes his helmet as a sign of humility before God, that player will shortly find himself sidelined—disqualified from the game for two counts of unsportsmanlike conduct in the same game.⁴⁵

Two members of the Rules Committee have gone so far as to publicly explain that the rule prohibits kneeling in prayer anywhere in the stadium except at the team bench area.⁴⁶ Kneeling is banned on the field of play as well as out of bounds.⁴⁷ Rule 9-2 essentially prohibits each of the following actions: kneeling to pray, genuflecting, pointing towards God or heavenward, bowing the head in prayer, and pausing to pray silently on the field or sidelines.⁴⁸

Rule 9-2, as interpreted and applied by the NCAA and its agents, invades a football player's constitutional right to the free exercise of religion and speech as protected by the First Amendment.⁴⁹ In addition, the rule constitutes religious discrimination which violates the 1993 Religious Freedom Restoration Act.⁵⁰ The rule is also an infraction of Title II of the 1964 Civil Rights Act.⁵¹ Finally, a football player affected by this rule may have a valid cause of action under 42 U.S.C. § 1983, since the player has been deprived of federal rights by a person or persons acting under color of state law.⁵²

44. Rule 9-2, *supra* note 3.

45. *Liberty Univ. v. NCAA*, No. 95-0046-L, at 9-11 (W.D. Va. filed Aug. 31, 1995) (dismissed Sept. 1, 1995).

46. *Id.* at 24.

47. *Id.*

48. *Id.* at 6.

49. U.S. CONST. amend. I, § 1 ("Congress shall make no law . . . prohibiting the free exercise [of religion]").

50. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (b)(2) (1993). "The purposes of this chapter are to provide a claim or defense to persons whose religious exercise is substantially burdened by the government." *Id.*

51. 42 U.S.C. § 2000a states:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin (emphasis added).

52. See *infra* part V for the status of the NCAA as a state actor.

IV. AN IN-COURT CHALLENGE TO RULE 9-2

A. *Liberty University v. NCAA: A Cause of Action Under Title II of the 1964 Civil Rights Act*

On August 31, 1995, Liberty University ("Liberty"), founded by television evangelist Jerry Falwell, filed suit in federal court in response to the NCAA's interpretation of rule 9-2.⁵³ Liberty football coach Sam Rutigliano and four of his football players "asked a United States District Court judge in Virginia to decide this question: Does the NCAA's new unsportsmanlike conduct code restrict freedom of religion by penalizing players who kneel in the end zone to celebrate a touchdown?"⁵⁴ Liberty sought a temporary restraining order, as well as a preliminary and permanent injunction to prevent the NCAA and its agents from enforcing rule 9-2 as it pertains to religious practices.⁵⁵ Liberty premised its claim upon violations of section 2000 of Title II of the 1964 Civil Rights Act, asserting that since the stadium was one of public accommodation, religious discrimination is not allowed under section 2000 of the Title.⁵⁶

Liberty argued that as the owner and operator of a football stadium (a place of public accommodation under section 2000a (b)(3) of Title II),⁵⁷ it cannot enforce NCAA rules which violate Title II.⁵⁸ Title II provides that all persons are entitled "to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of [that] place of public accommodation . . . without discrimination or segregation on the ground of . . . religion."⁵⁹ A person may neither be deprived of,

53. *Falwell Throws the Penalty Flag at NCAA Ban of On-Field Prayer*, SAN DIEGO UNION-TRIB., Sept. 1, 1995, at D2.

54. Andrew Bagnato, *NCAA Sued Over Ban on End Zone Prayers, Freedom of Religion Violated, Falwell Says*, CHI. TRIB., Sept. 1, 1995, § 4, at 7.

55. *Liberty Univ. v. NCAA*, No. 95-0046-L, at 17-18 (W.D.Va. filed Aug. 31, 1995) (dismissed Sept. 1, 1995).

56. *Id.*

57. Section 2000a (b)(3) states:

- (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:
 - (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment (emphasis added).

58. *Liberty Univ.*, No. 95-0046-L, at 1.

59. *Id.* at 9 (citing 42 U.S.C. § 2000a(a)).

nor threatened or coerced with, nor punished for exercising the rights set forth in section 2000a.⁶⁰ Hence, the NCAA, with its adoption of rule 9-2, has significantly interfered with Title II of the 1964 Civil Rights Act.

Liberty agreed to drop the lawsuit after the NCAA issued a "clarification."⁶¹ The memo, which was released to all NCAA member schools and officials, stated:

The committee is concerned about reports it has "banned prayer" from football. It is not the intent of the Football Rules Committee to prohibit prayer, on or off the playing field. The committee is emphasizing an existing rule against acts that by their timing or duration *draw attention to an individual* and ignore the contributions of the entire team.

Praying has always been and remains permissible under the rules. However, overt acts associated with prayer, such as kneeling, may not be done in a way that is delayed, excessive, or prolonged in an attempt to draw attention to oneself. Players may pray or cross themselves inconspicuously without drawing attention to themselves. It is also permissible for them to kneel momentarily at the conclusion of a play, if *in the judgment of the official* the act is spontaneous and not in the nature of a pose.

....

In considering this issue, the committee decided that it would be impracticable to construct an exclusion from the rule for prayer-related activities. Such an exclusion would open a window for a variety of attention-drawing displays under the guise of prayer. Thus, the committee has taken a position against the visible part of any action . . . that detracts from the team spirit of football.⁶²

A spokesperson for Liberty said that it decided to drop the suit because the school achieved its goals, even though some sections of the clarified rule "are still fairly subjective and leave some things up to interpretation."⁶³ On September 1, 1995, the United States District Court for the Western

60. 42 U.S.C. § 2000a-2.

61. Memorandum from Vince J. Dooley, NCAA management, to the members of the NCAA [including Liberty University] (Sept. 1, 1995) (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

62. *Id.* (emphasis added).

63. David Reed, *Gridiron Celebration: NCAA Rules Post-TD Prayers OK*, PHOENIX GAZETTE, Sept. 2, 1995, at A-1, A-6.

District of Virginia entered a single sentence dismissal of *Liberty University v. NCAA*.⁶⁴

The clarification by the NCAA has done very little, if anything, to eliminate potential infringements of the First Amendment rights of a college football player. A spokeswoman for the NCAA said "[t]here is no change in the rule and there is no change in the enforcement. We [the NCAA] clarified the rule and explained to them [Liberty] what the interpretation has always been."⁶⁵ Despite the supposed clarification, which changed nothing according to the NCAA, the exact "interpretation" and application of the rule to religious practices remains unclear. The most that the clarifying memorandum has accomplished is to firmly place the decisions of what is and is not acceptable in the subjective hands of the officials.

The NCAA clarification has essentially cast the officials as "spiritual policemen."⁶⁶ In that role, the officials must ascertain not only the intent of the player, but also the spontaneity of the action. How exactly should an official determine the intent of the football player on one knee in the end zone? Does a devout expression on the player's face indicate a pure motive and spontaneous action? What standards are applicable in order for the official to make the call? If a player points heavenward in thanks, but the official believes that the player is pointing at an opponent in a taunting manner, is it appropriate for the official to throw a penalty flag? The answers to these questions will, of course, vary, depending upon who is officiating. The spontaneity of the action as well as the player's intent can only be determined subjectively by the official. What is spontaneous in the eyes of one official will be an excessive celebration according to another; undoubtedly someone will get it wrong. One journalist whimsically suggested that instant replay may be the answer.⁶⁷ One can only imagine the reaction of the official who sees a player pointing to God in slow motion. Even an attorney for the NCAA admitted that "[w]hen a person kneels in the end zone, nobody but that person and God knows whether he is praying or not. . . . [B]ut everyone is looking at him, and that is the

64. "In light of the attached submission from the NCAA, plaintiffs' pending TRO Motion is declared to be moot." *Liberty Univ. v. NCAA*, No. 95-0046-L (W.D.Va. Sept. 1, 1995) (order granting dismissal).

65. Reed, *supra* note 63.

66. David Casstevens, *Welcome to Church of Football*, ARIZ. REPUB., Sept. 3, 1995, at C1.

67. Geoffrey Arnold, *Irish Loss Will Be Story of 1995*, PORTLAND OREGONIAN, Sept. 4, 1995, at D2.

point."⁶⁸ Beyond merely discouraging religious expression, rule 9-2 is unconstitutional. For even if only one official unfairly misconstrues a player's intent, at that moment the NCAA should be flagged for violating the player's right to freely exercise his religion.

*B. Alternative Causes of Action Under Football
Rule 9-2, Despite the NCAA's "Clarification"*

Despite the dismissal of *Liberty University v. NCAA*, the legality of rule 9-2 remains unresolved. Notably, the rule may violate the constitutionally protected free exercise of religion and speech as guaranteed by the Bill of Rights.⁶⁹ Liberty, however, did not raise these arguments in its complaint because it wished to avoid the issue of whether the NCAA is a state actor.⁷⁰ In the well-known case *NCAA v. Tarkanian*,⁷¹ the Supreme Court held that the NCAA was not a state actor. Nevertheless, Liberty still had a reasonable chance to prevail, since the facts of Liberty's suit were entirely different from those of the *Tarkanian* case.

Unfortunately, the NCAA has "put itself in the business of deciding what kind [of demonstrations] of prayer [it is] going to allow."⁷² The NCAA remains in that same business, regardless of the "clarifying" memorandum. There are other causes of action under which a litigant could file a lawsuit. These include causes of action under the First Amendment to the Constitution, the Religious Freedom Restoration Act,⁷³ 42 U.S.C. § 1983 and Title II of the Civil Rights Act. The success of these claims depends upon whether the NCAA will be declared a state actor.⁷⁴

68. *Liberty Is Free to Pray as NCAA Clarifies Rule*, THE RECORD, N. NEW JERSEY, Sept. 2, 1995, available in 1995 WL 3478424.

69. Although a claim under the free speech clause of the First Amendment would provide an interesting argument, it is beyond the scope of this Comment.

70. Telephone Interview with Thomas S. Neuberger, lead counsel for Plaintiff, Liberty Univ. (Sept. 15, 1995).

71. 488 U.S. 179 (1988).

72. *Liberty Is Free to Pray as NCAA Clarifies Rule*, supra note 68 (Thomas Neuberger, speaking at the hearing before Judge Turk in the U.S. District Court for Western Virginia on Aug. 31, 1995).

73. 42 U.S.C. § 2000bb (Supp. V 1993).

74. Consider also that the plaintiff (Liberty) was a private school, which actually weakens the argument for state action, although it does not affect a claim brought under any of the Titles of the Civil Rights Act of 1964. A state-supported school is clearly a state actor, so it would seem that if a suit were to be filed against a state-supported school, the claim would succeed, assuming the rights of the football player were deemed to be substantially burdened.

V. STATE ACTION AND THE NCAA

A. Only a State Actor Is Liable for Violations of Constitutional Rights

The NCAA must be engaged in state action and not just private conduct to be held responsible for constitutional infringements.⁷⁵

In order to establish a violation of the free exercise clause of the first amendment, as applied to the states through the fourteenth amendment, a plaintiff must establish that the defendant was a state actor and that the challenged conduct resulted in impairment of the plaintiff's free exercise of genuinely held beliefs.⁷⁶

In other words, the NCAA must be acting under "color of" state law pursuant to section 1983.⁷⁷ Section 1983 was enacted by Congress as the statutory remedy for constitutional violations.⁷⁸ A cause of action under section 1983 requires that an actor deprive the plaintiff of a federal right under color of state law.⁷⁹ Those rights may be granted either statutorily, such as under Title II of the 1964 Civil Rights Act, or in the Constitution, such as the right to the free exercise of one's religion under the First Amendment.⁸⁰ Only a state actor is liable for any infringement upon the rights and liberties guaranteed by the Constitution.⁸¹ If the NCAA is deemed a private actor, rather than an agent of the state, constitutional challenges against it will fail.

As one might imagine, the NCAA has defended various lawsuits over the years. The line of case law involving state action and the NCAA culminated in the 1988 United States Supreme Court case, *NCAA v.*

75. *Hawkins v. NCAA*, 652 F. Supp. 602, 610 (C.D. Ill. 1987).

76. *St. Agnes Hosp. of Baltimore v. Riddick*, 748 F. Supp. 319, 324 (D. Md. 1990) (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987)).

77. 42 U.S.C. § 1983 (1988). Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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

79. *Id.*

80. *Id.*

81. *Id.* However, as for any private actor, the NCAA is subject to statutory restraints, such as the Title VII prohibition on gender discrimination.

Tarkanian.⁸² In a five-four decision, the Court held that the NCAA was not a state actor, reversing the decision of the Nevada State Supreme Court.⁸³ This decision was a departure from several court decisions holding that the NCAA is a state actor.

*B. The NCAA as a State Actor Prior to
NCAA v. Tarkanian*

During the 1970s, lower courts consistently held that the NCAA was a state actor under section 1983.⁸⁴ These cases contain persuasive arguments for upholding the NCAA's status as a state actor.⁸⁵ This line of decisions, however, is no longer followed in light of *Tarkanian*.

Two leading cases from the 1970s that determined the NCAA is a state actor are *Parish v. NCAA*⁸⁶ and *Howard University v. NCAA*.⁸⁷ In *Parish*, the Fifth Circuit found the NCAA to be a state actor based on two premises.⁸⁸ First, the court elaborated upon the notion that state-supported institutions play a substantial role in the NCAA.⁸⁹ The court concluded that the substantial role of public universities merits a finding of state action under an entanglement theory.⁹⁰ In other words, the actions of the NCAA and the public school were so entangled as to be deemed inseparable. Second, the court reasoned that "the NCAA, by taking upon itself the role of coordinator and overseer of collegiate athletics, . . . is

82. *Id.*

83. *Tarkanian*, 488 U.S. 179. This decision has been severely criticized. See, e.g., N.E. Paolini, *NCAA v. Tarkanian: State Action in Collegiate Athletics*, 63 TUL. L. REV. 1703 (1989); Bill McManus, Note, *NCAA v. Tarkanian: May a Student-Athlete Receive Constitutional Protection from the NCAA's Actions or Has the Final Door Been Closed?*, 57 UMKC L. REV. 949 (1989); Susan Westover, Note, *National Collegiate Athletic Association v. Tarkanian: If NCAA Action Is Not State Action, Can Its Members Meaningfully Air Their Dissatisfaction?*, 26 SAN DIEGO L. REV. 953 (1989); Michael G. Dawson, Note, *National Collegiate Athletic Association v. Tarkanian: Supreme Court Upholds NCAA's Private Status Under the Fourteenth Amendment, Repelling Shark's Attack on NCAA's Disciplinary Powers*, 17 PEPP. L. REV. 217 (1989).

84. See, e.g., *Regents of the Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir. 1977), cert. denied, 434 U.S. 978 (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); *Buckton v. NCAA*, 366 F. Supp. 1152 (D. Mass. 1973).

85. Dawson, *supra* note 83, at 227.

86. 506 F.2d 1028 (5th Cir. 1975).

87. 510 F.2d 213 (D.C. Cir. 1975).

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

89. *Id.* at 1032.

90. *Id.*

performing a traditional government function."⁹¹ Subsequent to the *Parish* decision, courts used either an entanglement theory or the traditional government function theory to support a finding of the NCAA as a state actor. These rationales are still meritorious today, despite contrary legal trends.

Parish was followed three months later by *Howard*.⁹² Although the *Howard* court primarily relied on the entanglement theory used in *Parish*, it also articulated another factor used to determine state action.⁹³ The *Howard* court employed the rationale that at least half of the NCAA member institutions were either public or otherwise supported by the government.⁹⁴ As such, a substantial and pervasive entanglement existed between the NCAA and its member schools who were supported by the states—rendering the NCAA a state actor.⁹⁵ Since the NCAA and its members are engaged in a mutually beneficial relationship, the court found that this relationship is "the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny."⁹⁶ Prior to 1982, courts found that the NCAA was a state actor based on the level of entanglement, its traditional government function, or the symbiotic relationship theories espoused by *Parish*, *Howard*, and other similar cases.⁹⁷ Courts have since reversed their determination that the NCAA is a state actor, yet there has been no change whatsoever in the structure of the athletic association. No new facts about the NCAA and its organization justify the turnaround in the judicial system. Rather, courts have arbitrarily decided that it is no longer appropriate for the NCAA to be held as a state actor. However, since NCAA power over member institutions has increased, these theories have not been convincingly discarded.

The reversal of the state action issue by the lower courts was triggered by a 1982 trilogy of Supreme Court cases: *Rendall-Baker v. Kohn*,⁹⁸ *Lugar v. Edmonson Oil Company*,⁹⁹ and *Blum v. Yaretsky*.¹⁰⁰ The Court

91. *Id.* at 1032-33.

92. *Howard Univ. v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975).

93. *Id.* at 219.

94. *Id.* See also *Tarkanian v. NCAA*, 741 P.2d at 1345, 1347 (Nev. 1987), *rev'd*, 488 U.S. 179 (1988) (citing *Rivas Tenorio v. Liga Atletica Interuniversitaria*, 544 F.2d 492, 495 (1st Cir. 1977)).

95. *Howard*, 510 F.2d at 220.

96. *Id.* (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

97. See cases cited *supra* note 84.

98. 457 U.S. 830 (1982).

99. 457 U.S. 922 (1982).

100. 457 U.S. 991 (1982).

discussed three distinct tests to determine whether a private organization is a state actor. First, the complaining party must show a sufficient nexus between the state and the private entity, such as a partner-like relationship.¹⁰¹ Second, the state must have exercised significant encouragement or coercive power over the private entity.¹⁰² Finally, the state may delegate its authority to a private party, thereby rendering the private party a state actor.¹⁰³ After these three cases, lower courts held that the NCAA was merely a private actor.

An action arising under rule 9-2 meets the standard by which a private party should be deemed a state actor as stated in *Lugar v. Edmonson Oil*.¹⁰⁴ The first prong of the two-part test requires that "the 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 responsible."¹⁰⁵ The deprivation of the free exercise of religion and the freedom of speech are caused by the exercise of a rule of conduct (the football rule) imposed by the state (the school),¹⁰⁶ thereby satisfying the first prong of the *Lugar* test.¹⁰⁷ The second prong of *Lugar* requires that the party charged with the deprivation be a state actor.¹⁰⁸ If the party charged is a state-supported school, then the second prong is easily fulfilled.¹⁰⁹ Even if the party charged is the NCAA, the second prong has still been met because the NCAA has acted in conjunction with an absolute state actor—the school.¹¹⁰ This notion of the NCAA acting

101. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); see also *Lugar*, 457 U.S. at 937 (degree to which the activities of the state entity and the arguably private entity are intertwined is also pertinent).

102. Alan Fecteau, *NCAA State Action: Not Present When Regulating Intercollegiate Athletics—But Does That Include Drug Testing Student Athletes?*, 5 SETON HALL J. SPORT L. 291, 295 (1995).

103. *NCAA v. Tarkanian*, 488 U.S. 179, 195 (1988).

104. 457 U.S. 922 (1982).

105. *Id.* at 937.

106. This particular argument is dependent upon the school being state-supported, which equates the school to the state itself. See *supra* note 74 and accompanying text. As previously mentioned, at least half of the NCAA member schools will satisfy this requirement. See *infra* note 94 and accompanying text.

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

108. *Id.* The second prong of the *Lugar* test is:

the party charged with the deprivation must be a person who may fairly said to be a state actor. This may be because he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id.

109. *Id.*

110. *Id.*

in conjunction with the university is appropriate under the entanglement and symbiotic relationship theories postulated by *Parish* and *Howard*. Thus, the NCAA should be considered a state actor.

C. NCAA v. Tarkanian: *Do Constitutional Claims
Against the NCAA Necessarily Fail?*

Jerry Tarkanian became the head coach of the men's basketball program at the University of Nevada, Las Vegas ("UNLV") in 1973.¹¹¹ In 1987, UNLV informed Tarkanian that he was going to be suspended because of an NCAA report which detailed ten violations of NCAA rules committed by the coach.¹¹² UNLV was forced to either sever all ties with Jerry Tarkanian or face further penalties imposed by the NCAA. UNLV, however, was not dissatisfied with Tarkanian as coach and appealed to the NCAA Council, questioning the factual basis of the charges.¹¹³ Ultimately, UNLV's President felt that he had no choice other than to "[r]ecognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position—though tenured and without adequate notice—even while believing that the NCAA was wrong."¹¹⁴

According to the majority decision in *Tarkanian*, any claims against the NCAA alleging a violation of constitutionally guaranteed rights will fail in court because the NCAA is not a state actor. However, *Tarkanian* does not necessarily preclude a college football player from successfully challenging the NCAA's Football rule 9-2 as unconstitutional.

Although it may be difficult to label the NCAA a state actor following *Tarkanian*, a state-supported college or university is unquestionably a state actor. When a school enforces the rules of the NCAA, as it must do to maintain intercollegiate athletics, that institution adopts the rules as its own. Therefore, when incorporated into the athletic program of a public school, rule 9-2 becomes part of state law. There is decidedly state action once the school enforces the rule in any manner. The school may now properly be sued for violating constitutionally guaranteed rights. The NCAA is, in effect, coercing schools "to permit and sanction a discriminatory regime of rules"¹¹⁵ which violates the Constitution. The NCAA cannot and should

111. *NCAA v. Tarkanian*, 488 U.S. 179, 180 (1988).

112. *Id.* at 181.

113. *Tarkanian v. NCAA*, 741 P.2d 1345, 1347 (Nev. 1987), *rev'd*, 488 U.S. 179 (1988).

114. *NCAA v. Tarkanian*, 488 U.S. at 187.

115. *Liberty Univ. v. NCAA*, No. 95-0046-L, at 1 (W.D. Va. filed Aug. 31, 1995) (*dismissed* Sept. 1, 1995).

not expect colleges and universities to infringe upon constitutionally guaranteed rights.¹¹⁶

In determining whether a constitutional claim against the NCAA and a university will succeed, the first issue to be resolved is whether the university is a state actor. In *Tarkanian*, the Supreme Court first examined UNLV as a state actor before any analysis of the NCAA's status.¹¹⁷ "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action."¹¹⁸ Undoubtedly, UNLV, a state university supported by the state of Nevada, is a state actor.¹¹⁹ The second and key issue is whether the NCAA was also rendered a state actor due to UNLV's compliance with rules and regulations established by the athletic organization.¹²⁰ According to the Court, a private party may be deemed a state actor if it is found that (1) the state delegated its power to the private party,¹²¹ or (2) the two parties are joint participants.¹²²

A state's delegation of power or authority to a private actor converts the private party into a state actor.¹²³ In *Tarkanian*, the Court found that "UNLV delegated no power to the NCAA to take specific action."¹²⁴ However, a potential lawsuit involving rule 9-2 would mandate an opposite result. Clearly, the NCAA's member institutions have delegated their authority to the NCAA in the regulation of football games. In addition, the NCAA could only enforce its decision to suspend Coach Tarkanian by imposing sanctions on UNLV.¹²⁵ The NCAA could not directly discipline Coach Tarkanian.¹²⁶ The NCAA is abusing its power over member schools by forcing these schools to violate the rights of players. The NCAA, via its officials, directly disciplines football players. Rule 9-2 dictates that the NCAA can impose sanctions on a football player through

116. Granted, this same line of reasoning is not applicable to a private school, but since the NCAA is comprised of both public and private schools, the rules must be uniform for all involved parties.

117. *NCAA v. Tarkanian*, 488 U.S. at 192.

118. *Id.*

119. *Id.*

120. *Id.* at 193.

121. *Id.* at 192.

122. *NCAA v. Tarkanian*, 488 U.S. at 196 n.16.

123. *Id.* at 195.

124. *Id.* at 195-96.

125. *Id.* at 196.

126. *Id.* at 197.

its delegation of power to the state university in order to govern the football games. Therefore, *Tarkanian* can be distinguished.

The *Tarkanian* Court also relied heavily upon the argument that the NCAA and UNLV were not acting as joint participants, but rather as adversaries.¹²⁷ In fact, "the NCAA contended that [UNLV] should be realigned as plaintiffs because they actually wanted *Tarkanian* to prevail."¹²⁸ If the two actors were joint participants, then it is likely that the NCAA would be considered a state actor under an entanglement theory, as both parties stand to gain a "variety of mutual benefits."¹²⁹ In regulating college football games, the university and the NCAA both derive benefits. As such, the NCAA should be deemed a state actor under an entanglement theory and thus be liable if constitutional rights have been violated.

The *Tarkanian* decision provides a difficult, though not insurmountable, obstacle to determining that the NCAA is a state actor. The NCAA does not have complete immunity from the finding that it is indeed a state actor. Each lawsuit will continue to be addressed on a case-by-case basis, depending not only on the differing facts, but also on the various legal issues presented.¹³⁰ The NCAA's infringement on religious freedom is a case of first impression. Because the state school has delegated power to the NCAA, the state and the school are certainly joint participants, not adversaries as in *Tarkanian*. In an action challenging rule 9-2, it is entirely probable that a court will deem the NCAA a state actor liable for the purposes of the lawsuit and will allow the substantive violations to be litigated.

D. Justice White's Dissent in *NCAA v. Tarkanian*

In *Tarkanian*, Justice White premised his dissent on the entanglement theory.¹³¹ He relied upon *Dennis v. Sparks*,¹³² which held that private parties could be found to be state actors if they were "jointly engaged with state officials in the challenged action."¹³³ White believed that the NCAA and UNLV were clearly joint actors, which necessarily deemed the

127. *NCAA v. Tarkanian*, 488 U.S. at 196.

128. *Id.* at 189.

129. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

130. See generally Aidan Middlemiss McCormack, *Seeking Procedural Due Process in NCAA Infraction Procedures: States Take Action*, 2 MARQ. SPORTS L.J. 261 (1992).

131. *NCAA v. Tarkanian*, 488 U.S. at 202.

132. 449 U.S. 24 (1980).

133. *Id.* at 27-28.

NCAA a state actor.¹³⁴ White also disagreed with the majority rationale that since the NCAA and UNLV were adversaries, they could not be acting jointly.¹³⁵ In his disagreement, White continued to rely on the premise of *Dennis*, which is simply that the joint agreement of the two parties to take action is sufficient to render the private actor an actor of the state.¹³⁶

The line of demarcation as to what constitutes state action is far from clear. White's dissent demonstrates the ease with which facts can be used to support either side of the argument.

The Court's rejection of *Dennis*, apparently a controlling opinion, appears to indicate that the Court is indecisive as to where the line is to be drawn between private conduct and state action. As a result, the Court may be shifting toward deciding state action cases on an ad hoc basis.¹³⁷

*E. Rationales for Determining That the NCAA Is a State Actor:
The Decision of the Nevada State Supreme Court*

The Nevada Supreme Court, in *Tarkanian v. NCAA*, found that the actions of the NCAA were sufficient to merit state action.¹³⁸ The NCAA became a state actor through its joint participation with UNLV.¹³⁹ "By delegating authority to the NCAA over athletic personnel decisions and by imposing NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA."¹⁴⁰ The Nevada court also held that the deprivation of the right alleged by Tarkanian was in fact one created by the state.¹⁴¹ Because the NCAA was acting under color of Nevada law, the NCAA was required to grant due process to coach Tarkanian before engaging in any disciplinary action.¹⁴² To determine that the NCAA was a state actor, the Nevada Supreme Court relied upon the delegation of authority from UNLV to the NCAA.¹⁴³ This rationale supports an action based on rule 9-2, since

134. *NCAA v. Tarkanian*, 488 U.S. at 202.

135. *Id.* at 203.

136. *Id.*

137. Bill McManus, Note, *NCAA v. Tarkanian: May a Student-Athlete Receive Constitutional Protection from the NCAA's Actions or Has the Final Door Been Closed?*, 57 UMKC L. REV. 949, 961 (1989).

138. 741 P.2d at 1345, 1349 (Nev. 1987), *rev'd*, 488 U.S. 179 (1988).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1350.

143. *Tarkanian v. NCAA*, 741 P.2d at 1348-49.

universities have clearly delegated their power to regulate football games to the NCAA.

VI. THE PROPER STANDARD OF REVIEW FOR A CHALLENGE TO RULE 9-2

Until recently, all free exercise claims arising under the First Amendment were subject to strict scrutiny.¹⁴⁴ Under this standard of review, the plaintiff must prove that the state rule or regulation burdens religious practice.¹⁴⁵ The state must then demonstrate a compelling interest, and further justify the infringement by showing that the rule is the least restrictive means of achieving its interest.¹⁴⁶ If the state meets this burden, the rule or regulation will be upheld.

Courts also apply a strict scrutiny standard to laws of general applicability that either indirectly affect or directly burden the exercise of religion.¹⁴⁷ Rule 9-2 may, at first, appear to be a law of general applicability—a rule not targeted at religion but rather one that has the effect of burdening religious practices—but upon closer inspection, and following the example set forth in *Church of Lukumi Babalu Aye v. City of Hialeah*,¹⁴⁸ rule 9-2 no longer seems even facially neutral. According to *Church of Lukumi Babalu Aye*, if the object of a law is to restrict practices because of their religious motivation, then the law is simply not neutral.¹⁴⁹ Rule 9-2 expressly prohibits kneeling on the football field “regardless of intent.”¹⁵⁰ A player on bended knee in the end zone is clearly praying, and yet the rule bans this activity. Rule 9-2 thus forbids a common religious practice.

The Football Rules Committee apparently debated at length whether prayer in the end zone should be allowed. The Committee chair said, “[w]e decided that in the final analysis that that would fall under any delayed, excessive or prolonged act in which a player attempts to focus attention on himself.”¹⁵¹ Obviously, the NCAA was well aware of the impending ban on religious freedom when drafting the rule. When a law

144. *Wisconsin v. Yoder*, 406 U.S. 205, 213-15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

145. *St. Agnes Hosp. of Baltimore v. Riddick*, 748 F. Supp. 319, 329 (D. Md. 1990).

146. *Yoder*, 406 U.S. at 213.

147. *Yoder*, 406 U.S. at 214; *Sherbert*, 374 U.S. at 403.

148. 113 S. Ct. 2217, 2227 (1993).

149. *Id.*

150. Videotape, *supra* note 4.

151. Andrew Bagnato, *NCAA Sued Over Ban on End Zone Prayers, Freedom of Religion Violated*, *Falwell Says*, CHI. TRIB., Sept. 1, 1995, § 4, at 7.

regulates or prohibits conduct motivated by religious reasons, then the protections of the Free Exercise Clause are triggered.¹⁵² The NCAA is explicitly prohibiting religiously motivated conduct with a rule that is discriminatory on its face. As such, judicial scrutiny of the NCAA's football rule must be strict.

If, on the other hand, rule 9-2 is deemed even facially neutral, then it presents a case comparable to *Sherbert v. Verner*.¹⁵³ In *Sherbert*, the Supreme Court employed strict scrutiny to overturn a facially neutral unemployment law even though it applied to all citizens equally.¹⁵⁴ The plaintiff was fired after refusing to work on Saturdays, her Sabbath. Because she "chose" not to work on those days, the law prevented the plaintiff from receiving unemployment benefits.¹⁵⁵ Although the law was not intended to discriminate against her religion, or any other religion, the Court found that this law substantially and unlawfully burdened the plaintiff's practice of religion.¹⁵⁶ Since the state did not prove a compelling state interest, the statute was overturned.¹⁵⁷ Likewise, rule 9-2 clearly restricts a player's right to freely exercise his or her religion. Even if this discrimination is not explicitly written on the face of the statute, rule 9-2 burdens religious practices. When adjudicating this issue, the rationale of *Sherbert* invalidates the NCAA application of rule 9-2.

Similarly, in *Wisconsin v. Yoder*,¹⁵⁸ despite the state's compulsory education laws requiring all children to attend high school, Amish parents were granted a special privilege to withdraw their children from school after the completion of eighth grade.¹⁵⁹ According to Amish beliefs, mandatory secular education would undermine the religious values and salvation of the Amish community.¹⁶⁰ The Court examined the state's compelling interest in universal compulsory education, and decided that the interest was not substantially thwarted, which was therefore insufficient to justify burdening the religious practices of the Amish.¹⁶¹ Although the state law was one of general applicability and no particular religion was targeted, the Court again applied strict scrutiny, and the law was rendered

152. *Church of Lukumi Babalu Aye*, 113 S. Ct. at 2226.

153. 374 U.S. 398 (1963).

154. *Id.* at 410.

155. *Id.* at 404.

156. *Id.*

157. *Id.* at 410.

158. 406 U.S. 205 (1972).

159. *Id.* at 234.

160. *Id.* at 234-35.

161. *Id.* at 228-29.

unconstitutional.¹⁶² The NCAA's goal of reducing unsportsmanlike conduct does not rise to the level of importance of maintaining the sanctity of the First Amendment. Much like the statute in *Yoder*, rule 9-2 must be re-examined.

Prior to *Employment Division v. Smith*,¹⁶³ the Court applied the strictest judicial scrutiny and granted extensive protection to religious freedoms.¹⁶⁴ Laws were not upheld unless they were the least restrictive means of attaining a compelling state interest.¹⁶⁵ With the five-four decision of *Smith*, the Court dramatically reduced free exercise protections by advocating a less severe rational basis test to claims under the Free Exercise Clause of the First Amendment when such claims involve generally applicable laws.¹⁶⁶ In *Smith*, the United States Supreme Court denied an exemption from Oregon's drug laws for the religious use of peyote by two members of the Native American Church.¹⁶⁷ The Court decided that the strict scrutiny standard would no longer be used in most cases to examine the constitutionality of a law of general applicability under the Free Exercise Clause, regardless of that law's impact on religious practices.¹⁶⁸

Smith held that the Free Exercise Clause did not afford religiously motivated actors any special exemptions from the reach of laws of general applicability.¹⁶⁹ Under *Smith*, if prohibiting the exercise of religion is not the object of the law in question but merely the incidental effect of a generally applicable provision, no violation of the First Amendment occurs.¹⁷⁰ According to the Court, laws of general applicability that adversely affect religiously motivated conduct are "subject to neither more nor less judicial scrutiny than laws that adversely affect conduct of a nonreligious nature."¹⁷¹ The rational basis test, the least stringent level of scrutiny, requires only that a law be rationally related to a legitimate state interest.¹⁷² States need only demonstrate a rational basis for the

162. *Id.* at 234.

163. 494 U.S. 872 (1990).

164. *Yoder*, 406 U.S. at 215; *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

165. *Yoder*, 406 U.S. at 215; *Sherbert*, 374 U.S. at 406.

166. *Smith*, 494 U.S. at 890.

167. *Id.*

168. *Id.* at 884-85.

169. *Id.* at 878-79.

170. *Id.*

171. Allan Ides, *The Text of the Free Exercise Clause as a Measure of Employment Division v. Smith and The Religious Freedom Restoration Act*, 51 WASH. & LEE L. REV. 135 (1994).

172. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 183 (1980) (holding that a legislative classification will be upheld if it bears a rational relationship to a legitimate state

challenged law, rather than a compelling state interest, as required under the rigorous strict scrutiny standard. *Smith* thus destroyed the doctrine of strict scrutiny as the appropriate standard of review for laws of general applicability, allowing a much looser standard of rational basis to prevail.¹⁷³

Much like the reaction to the *Tarkanian* decision, the response to *Smith* has been highly critical and extremely negative.¹⁷⁴ The decision embodied the sentiment that every American has a right to believe in any religion, but no right to practice it.¹⁷⁵ A large number of law professors, as well as many religious and other public interest groups, collectively petitioned the Supreme Court for a rehearing.¹⁷⁶ When the petition was denied, a legislative approach was initiated. Congressman Stephen Solarz introduced a bill in the House of Representatives purporting to restore religious liberty.¹⁷⁷ Congress ultimately adopted H.R. 5377, the Religious Freedom Restoration Act of 1993.¹⁷⁸ Interestingly, the *Smith* Court tacitly suggested that the proper place to seek protection for religious beliefs is in the legislature.¹⁷⁹

purpose).

173. *Smith*, 494 U.S. at 872.

174. See, e.g., Edward M. Gaffney, Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 B.Y.U. L. REV. 189 (1993); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221 (1993); John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567 (1992); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Alfred J. Sciarrino, *The Rehnquist Court's Free Exercise Collision on the Peyote Road*, 23 COLUM. L. REV. 315 (1993); Randy T. Austin, Note, *Employment Division v. Smith: A Giant Step Backwards in Free Exercise Jurisprudence*, 1991 B.Y.U. L. REV. 1331 (1991); Rashed Perry, Note, *Employment Division v. Smith: A Hallucinogenic Treatment of the Free Exercise Clause*, 17 J. CONTEMP. L. 359 (1991).

175. Douglas Laycock, *New Directions in Religious Liberty, The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221 (1993); see also *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (holding that while religious beliefs and opinions are free from governmental interference, religious conduct is not within the protection of the First Amendment; the *Smith* Court relies on this decision, notwithstanding *Cantwell*); see also *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (abandoning the *Reynolds* holding that religious conduct lacks First Amendment protection).

176. *Employment Div. v. Smith*, 494 U.S. 872, *reh'g denied*, 496 U.S. 913 (1990).

177. H.R. 5377, 101st Cong., 2d Sess. (1990).

178. 42 U.S.C. § 2000bb (1994).

179. *Smith*, 494 U.S. at 890.

VII. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

A. *The Enactment of the Religious Freedom Restoration Act*

The Religious Freedom Restoration Act ("RFRA") was signed into law on November 16, 1993, by President Clinton.¹⁸⁰ RFRA was enacted specifically to restore the protection that the Supreme Court eliminated with the *Smith* decision.¹⁸¹ "The RFRA was expressly designed to return free exercise claims to their perceived legal status prior to *Smith*, that is, to affirm the doctrinal legitimacy of *Sherbert* and *Yoder* . . ."¹⁸²

RFRA purports to re-establish religious liberty in the United States by extending greater protections to the exercise of religion. In passing RFRA, Congress asserts that both laws of general applicability as well as those which directly discriminate can burden the practice of religion.¹⁸³ RFRA reaffirms the rationale of the framers of the Constitution who recognized that the free exercise of religion is an unalienable right.¹⁸⁴ In an effort to restore the constitutional safeguard surrounding people's rights to freely practice their religion, RFRA establishes a statutory version of the Free Exercise Clause.¹⁸⁵ RFRA does not favor one religion over another, nor does it advantage minority religions.¹⁸⁶ Rather, RFRA enacts a universal standard by restoring the compelling interest test.

Congress, in passing this bill, became a clear proponent of applying strict scrutiny.¹⁸⁷ Under RFRA, government action that "substantially

180. Leon F. Sztetpycki & Jean B. Arnold, *Religious Freedom Restoration Act*, 88 EDUC. L. REP. 907 (1994).

181. 42 U.S.C. § 2000bb. RFRA provides:

The purposes of this Chapter are to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id.

182. Allan Ides, *The Text of the Free Exercise Clause as a Measure of Employment Division v. Smith and The Religious Freedom Restoration Act*, 51 WASH. & LEE L. REV. 135, 136-37 (1994).

183. 42 U.S.C. § 2000bb(a)(2).

184. 42 U.S.C. § 2000bb(a)(1).

185. Laycock, *supra* note 175, at 235.

186. *Id.*

187. Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 897 (1994).

burdens religious exercise" is forbidden in the absence of a compelling state interest.¹⁸⁸ Even if a compelling state interest exists, the burden shifts to the state to prove that the challenged law is the least restrictive means of furthering that interest. RFRA restores the standard promulgated in *Sherbert*, with one important difference. In *Sherbert*, any burden on the exercise of religion, even one that was incidental, was sufficient to trigger strict scrutiny. Under RFRA, a "substantial" burden is required, which obviously presents a more difficult criterion to satisfy. There is no way to predict exactly what will survive the standard established by the "substantial burden" requirement. For now, the assessment will proceed on a case-by-case basis.

*B. Asserting a Claim Opposing Rule 9-2 Under
the Religious Freedom Restoration Act for Violations
of the First Amendment's Free Exercise Clause*

A simultaneous examination of *Smith* and RFRA leads to the conclusion that litigation premised upon infringements of religious liberty will no longer be asserted under the Constitution. Rather, the principal federal claim will be statutory.¹⁸⁹ RFRA creates an independent statutory right preserving the free exercise of religion that is broader than the *Smith* Court's interpretation of the same right in the Constitution.¹⁹⁰ Strict scrutiny will no longer apply to cases brought under the Free Exercise Clause, except in certain circumstances.¹⁹¹ This standard applies only to claims premised on the Religious Freedom Restoration Act.¹⁹² RFRA provides a claim or defense in a judicial proceeding to a person whose practice of a religion has been burdened, and allows that person to obtain appropriate relief against the government.¹⁹³ "Government" is broadly defined to include any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State."¹⁹⁴ Clearly, a football player has a right to practice his religion as he sees fit, and notwithstanding the NCAA,

188. 42 U.S.C. § 2000bb.

189. *Id.* See also Laycock, *supra* note 187.

190. Sztetpycki and Arnold, *supra* note 180, at 912.

191. *Id.*

192. *Id.*

193. John W. Whitehead & Alexis I. Crow, *The Religious Freedom Restoration Act: Implications for Religiously-Based Civil Disobedience and Free Exercise Claims*, 33 WASHBURN L.J. 383, 391 (1994).

194. 42 U.S.C. § 2000bb (2)(1).

will have a valid claim under RFRA. Rule 9-2, whether a rule of general applicability or one specifically targeting religious practices, is imposed by the NCAA, acting under color of state law, and clearly burdens the free exercise of religion. Those individuals who wish to pray following a great football play may be prevented from doing so if, in the eyes of the official, the act is delayed, prolonged or intended to call attention to the player.¹⁹⁵ The rule bans a player from removing his helmet at any time, even if such removal is done in deference to God or a higher being.¹⁹⁶ Although the unsportsmanlike conduct rule may not be construed as targeting religion, by preventing a player from kneeling in thanks, the rule has unduly burdened the free exercise of religion.

So, in the hypothetical action by the football player, if the case were brought under the text of the Free Exercise Clause, the *Smith* precedent would have to be followed. The player would likely claim that rule 9-2 unduly burdens the practice of his religion. Under *Smith*, the state and the NCAA would only have to show a rational basis to uphold the rule, even if the rule is found to be one of general applicability. The state and the NCAA would merely have to prove that the Football Rules Committee could reasonably have believed that rule 9-2 would eliminate unsportsmanlike conduct. This standard, of course, essentially means that rule 9-2 will most likely be upheld and the player's claim will fail.

If, on the other hand, the player sues under the Religious Freedom Restoration Act, the same rule, even if it is one of general applicability, will be subjected to different standards. The football player will have to prove that the burden on his religious practices is a substantial one under the language of the statute. Due to the very recent enactment of RFRA, there is no precedent that might shed light on a judicial interpretation of this requirement. Thus, the player may be able to establish that being precluded from kneeling in the end zone or removing his helmet is a substantial burden on the exercise of religion. If the player satisfies this requirement, the burden will then shift to the state and the NCAA to demonstrate a compelling interest in retaining the rule. If the state and the NCAA cannot demonstrate a compelling interest, or fail to show that this rule is the least restrictive means by which that interest can be achieved and that no neutral rule could accomplish the same objective, the rule will be invalidated; the player will win.

195. Rule 9-2, *supra* note 3, § 2(a)(1)(d).

196. *Id.* § 2(a)(1)(e).

VIII. CONCLUSION

Rule 9-2 will most certainly cause not only a fairness debate among football aficionados, but also a legitimacy discussion throughout the legal community. More than at any other time in its history, the NCAA will be on trial. The legal battles and judicial decisions will provide a framework upon which future NCAA regulations and other laws affecting religion will be based. A plaintiff interested in overturning rule 9-2 should premise his or her claim on Title II of the 1964 Civil Rights Act, the Religious Freedom Restoration Act, and the First Amendment of the Constitution. However, even if the action relies on the precedent of *Smith*, the way rule 9-2 is written, has been interpreted, and the subjectivity involved in those interpretations will lead to its inevitable destruction. Certainly this time the NCAA has exceeded its mandate and will face constitutional ramifications.

*Amanda N. Luftman**

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