Drug Testing in Intercollegiate Athletics—*Hill v. National Collegiate Athletic Association*, 26 Cal. Rptr.2d 834 (Cal. 1994).

I. INTRODUCTION

The random drug testing of intercollegiate athletes was initiated when the National Collegiate Athletic Association ("NCAA") approved a plan requiring mandatory urinanalysis testing of certain athletes participating in post-season competition.[1] The NCAA's plan was promulgated to protect intercollegiate athletics from the negative effects of performance enhancing drugs.[2] However, in *O'Halloran v. University of Washington*,[3] intercollegiate athletes affected by the NCAA's drug testing program challenged the testing on the grounds that the NCAA's program violated the athletes' right to privacy as guaranteed by the Fourth Amendment of the United States Constitution.[4]

The Fourth Amendment[5] protects individuals from "unreason-

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1. NCAA OPERATING BYLAWS art. 18.4.1.5, *reprinted in* National Collegiate Athletic Association, 1994-95 NCAA MANUAL (Laura Bollig ed., 1994)[hereinafter NCAA BYLAWS]. The NCAA's mandatory drug testing program provides:

> A student athlete who is found to have utilized a substance on the list of banned drugs, as set forth in 31.2.3.1, shall be declared ineligible for further participation in post-season and regular-season competition in accordance with the ineligibility provisions in 18.4.1.5.

Id.

The ineligibility provisions state that:

> loss of a minimum of one season of competition in all sports if the season of competition has not yet begun for that student athlete or a minimum of the equivalent of one full season of competition in all sports if the student-athlete tests positive during his or her season of competition. The student-athlete shall remain ineligible for all regular-season and post-season competition during the time period ending one calendar year after the student-athlete's positive drug test, and until the student-athlete retests negative and the student-athlete's eligibility is restored by the Eligibility Committee.

Id.

2. Charles F. Knapp, *Drug Testing and the Student-Athlete:Meeting the Constitutional Challenge*, 76 IOWA L. REV. 107, 108-109 (1990). Since the NCAA's 1973 enactment of a rule prohibiting student athletes from using illicit drugs, the NCAA has shown increasing concern with the threat posed by college athlete drug use. *Id.* Following the lead of the United States Olympic Committee's drug testing program, the NCAA, in 1983, sponsored a Michigan State University study of the prevalence of college athlete drug use. *Id.* at n.15. The Michigan State study's findings that drug use was "substantial" among college athletes led to the NCAA's 1986 approval of the drug testing program. *Id.*

3. 679 F. Supp. 997 (W.D. Wash. 1988).

4. *Id.*

5. U.S. CONST. amend. IV states:

> The right of the people to be secure in their persons, houses, papers, and effects

able" searches conducted by the government.[6] In applying this "reasonableness" standard to the drug testing of both employees[7] and athletic participants,[8] the courts have consistently upheld these government programs by balancing the program's intrusion into the affected party's right to privacy, while considering the affected party's reasonable expectations of privacy, against the government's interest in enacting the drug testing program.[9]

II. *HILL V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION*

Nevertheless, applying the foregoing analysis to the NCAA's drug testing program has been impeded by the Fourth Amendment's state action requirement.[10] The Supreme Court of the United States has held that the NCAA is not a state actor for the purposes of applying certain federal constitutional restraints.[11] Therefore, the *O'Halloran* court refused to find that the Fourth Amendment limitations on unreasonable searches applied to a private entity such as the NCAA.[12]

Without the supporting force of the Fourth Amendment, two intercollegiate athletes decided to take a different approach in *Hill v. National Collegiate Athletic Association*[13] by pursuing the first state constitutional challenge to the NCAA's drug testing program.[14] In *Hill*, the Supreme Court of California considered whether the NCAA's mandatory drug testing program[15] infringed upon the student athlete's right to privacy as protected by California's

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against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by an oath or affirmation, and particularly describing the place to be searched, and the persons to be seized.

Id.

6. *Id.* The Fourth Amendment also applies to state government action because the Supreme Court has held that the Fourth Amendment is incorporated by the states through the due process clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

7. *See, e.g.*, Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989); Treasury Employees v. Von Raab, 489 U.S. 656 (1989).

8. *See, e.g.*, Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991); Schaill By Kross v. Tippecanoe County Corp., 864 F.2d 1309 (7th Cir. 1988).

9. John C. Barker, *Constitutional Privacy Rights in the Private Workplace, Under the Federal and California Constitutions*, 19 HASTINGS CONST. L. Q. 1107, 1117-22(1992).

10. *Id.* at 1122-23. The Due Process Clause of the Fourteenth Amendment, which allows application of the Fourth Amendment to the states, only limits the actions of government, not private actors. *Id.* Therefore, a private actor cannot be sanctioned under the Fourth Amendment. *Id.*

11. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 197 (1988) (holding that plaintiff has no federal due process rights in regards to actions of NCAA because the NCAA is a private entity that enjoys no government powers).

12. *O'Halloran*, 679 F. Supp. at 1002.

13. 26 Cal. Rptr.2d 834 (Cal. 1994).

14. *Id.*

15. *Id. See supra* note 1 for text of regulation.

state constitution.[16] In his majority opinion, Justice Lucas first concluded that the standard for determining whether a party's privacy interest had been invaded should not always be decided based upon a strict test of whether the intruding party's actions could be justified by a compelling interest.[17] In denying the use of the compelling interest test, the court instead used a more flexible balancing analysis to hold that the NCAA's interest in preserving a fair and equitable competitive environment while protecting the health and safety of the student athletes outweighed the harm brought upon an individual's protected privacy interests.[18]

Respondent, Jennifer Hill, was a senior co-captain for the Stanford women's soccer team.[19] Respondent, J. Barry McKeever, was a football player at Stanford with one more year of athletic eligibility.[20] Both student athletes wanted to avoid the NCAA's mandatory drug testing program without losing any right to athletic eligibility.[21]

Respondents commenced suit in the Superior Court of California to enjoin enforcement of the NCAA's mandatory drug testing program.[22] The respondents alleged that the NCAA program violated their constitutionally protected right to privacy because (1) the right to privacy included the freedom to urinate without disruption or intrusion; (2) there was no evidence that the banned drugs had any positive effect on performance; and (3) the NCAA could show no compelling interest in violating the respondents' privacy interest.[23]

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16. *Id.*

17. *Id.* at 855, n. 11. The court found numerous cases where invasion of privacy actions were determined using a more flexible balancing test. *See, e.g.,* Schmidt v. Superior Court, 769 P.2d 932 (Cal. 1989). In *Schmidt*, the court held that plaintiff's right to familial privacy was not violated by a mobile home park's rule prohibiting persons under the age of twenty five from living in the park. *Id.* The court came to its conclusion by weighing the competing interests without mentioning a "compelling interest" requirement. *Id. See also* Doyle v. State Bar, 648 P.2d 942 (Cal. 1982) (holding that the "privacy interest is not absolute and must be balanced against the need for disclosure); Valley Bank of Nevada v. Superior Court, 542 P.2d 977 (Cal. 1975) (determining that although a bank customer has a protected privacy interest regarding personal bank records, this right of privacy must be balanced against a litigant's right to discovery).

18. *Hill*, 26 Cal.Rptr. at 871.

19. Hill v. NCAA, 1 Cal. App. 4th 1398, 273 Cal. Rptr. 402, 406 (1990), *rev. granted*, 276 Cal. Rptr. 319 (1990).

20. *Id.* McKeever had signed the NCAA drug testing consent form prior to the 1986-87 football season and had been randomly selected for testing prior to the 1987 Gator Bowl. *Id.*

21. *Id.* McKeever and Hill found the drug testing program to be "degrading, humiliating, and embarrassing". *Id.*

22. *Id.* Stanford, an NCAA member institution, successfully intervened in the suit to seek declaratory and injunctive relief against enforcing the test so that it would not be sanctioned by the NCAA for a violation of the NCAA's drug testing program. *Id.* Additionally, the court noted that Stanford opposed the NCAA's program believing that the NCAA drug testing program unfairly singled out student-athletes. *Id.*, n.6.

23. *Id.* at 407.

The trial court granted a permanent injunction against the NCAA's program holding that the NCAA could not show a compelling interest in its imposition of the drug testing program.[24] The NCAA appealed the trial court's decision to the Court of Appeals which affirmed the lower court's decision and adopted that court's underlying reasoning.[25]

The Supreme Court of California granted review of the decision to determine whether the NCAA's drug testing program violated the respondents' constitutionally protected right to privacy.[26] The court rejected the lower courts' use of the compelling interest standard and held that the respondent student athletes' lessened expectations of privacy could be outweighed by the NCAA's regulatory objectives of (1) providing a fair competitive atmosphere unaffected by athletes benefitting from performance enhancing drugs; and (2) protecting the health and safety of the athletes.[27] The court concluded that these legitimate interests justified a set of drug testing rules that were reasonable in the furtherance of the NCAA's interests.[28]

Beginning with *Griswold v. Connecticut*,[29] the United States Supreme Court has long held that, emanating from the vague language of the Constitution,[30] is a limited right to conduct one's per-

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24. Hill v. NCAA, 1 Cal. App. 4th 1398, 273 Cal. Rptr. 402, 406 (1990), *rev. granted*, 276 Cal. Rptr. 319 (1990). The trial court concluded that the NCAA had not established that it had a "compelling interest" in the drug testing program. *Id.* Specifically, the court concluded that the evidence presented regarding actual use of the banned drugs was not enough to establish a "compelling interest." *Id.* Furthermore, the trial court held the NCAA failed to show that (1) each of the categories of banned substances had a "performance-enhancing effect"; or (2) there was not a less intrusive method for discovering drug use. *Id.*

25. *Id.* at 422.

26. *Hill*, 26 Cal. Rptr.2d at 834.

27. *Id.* at 861-64.

28. *Id.* at 862. The court held that the NCAA drug testing program must be "reasonably calculated to further its legitimate interest." *Id.*

29. 381 U.S. 479 (1965).

30. *Id.* The Court held that the various constitutional Amendments making up the Bill of Rights, taken together, create a general right to privacy. *Id.* at 514-15. Justice Goldberg explained that:

> the right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment it its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Id. at 515.

sonal life free from governmental intrusion.[31] In *Griswold*, appellants challenged a Connecticut statute which criminalized the use of contraceptives.[32] The Court reversed the lower courts in holding that the statute violated the constitutional right to privacy because the enforcement of the statute would cause an intrusion into the marriage relationship.[33]

More specifically, the Court explained that a state statute regulating the personal relationship of a husband and wife would bring about a higher standard of scrutiny than would a statute regulating the economic affairs of the state.[34] After determining that this particular statute would be reviewed under the strictest scrutiny, the Court pointed out that many of the rights protected by the Constitution do not have to be explicitly outlined in the Constitution's text.[35] Rather, many of the protected rights emanate from a combination of the specific Constitutional guarantees.[36] Consequently, the plurality concluded that one such emanation was the right of a married couple to control their ability to procreate by using contraceptives.[37]

The *Griswold* decision cleared the way for future courts to find other areas of personal privacy not explicitly outlined in the Constitutional text. Recently, in *Skinner v. Railway Labor Executives Ass'n*,[38] the United States Supreme Court upheld a federal regulation which provided for mandatory drug testing of the urine of certain workers involved in the transportation industry without any requirement that the employees exhibit behavior constituting rea-

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31. *Id.*

32. *Id.* at 480. The disputed statutes included the following: Section 53—32 provided: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." CONN. ANN. STAT. 53—32(1956).

Section 54—196 provided: "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.*(*citing* CONN. ANN. STAT. 54—196(1956)).

33. *Id.* at 515-16. The Court concluded that this right to marital privacy was a protected privacy right emanating from the Bill of Rights. *Id.*

34. 381 U.S. 479, 481-82 (1965). The Court explained that the relevant constitutional analysis of a State statute will impose less scrutiny when the disputed statute is regulating business affairs. *Id.*

35. *Id.* at 482. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (holding that freedom of speech and press as explicitly protected by the First Amendment includes the "right to distribute, the right to receive, the right to read"); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that all citizens have a constitutionally protected right to send their children to either private or public schools).

36. *Id.* at 515. *See* Boyd v. United States, 116 U.S. 616, 630 (1886) (using the Fourth and Fifth Amendments to hold that there is a protected privacy interest regarding a person's home life).

37. *Griswold*, 381 U.S. at 515-16.

38. 489 U.S. 602 (1989).

sonable suspicion of drug use.[39] Recognizing the employees' constitutionally protected privacy interest in controlling their excretory functions, the Court held that the government's "compelling interest" in protecting the transportation using public, which was reasonably advanced by the implementation of the drug testing program, outweighed the diminished privacy expectations of the tested employees.[40]

In *Skinner*, the Court established the rule that any government drug testing program which requires an employee to submit urine for examination will require a Fourth Amendment analysis because the testing acts as an intrusion on the expected privacy interests of the average citizen.[41] Additionally, the Court recognized that only unreasonable drug testing programs are proscribed by the Fourth Amendment.[42] Therefore, the Court declared that such an intrusion must be analyzed by balancing its intrusion on the protected interest against the "legitimate interests" of the government.[43]

In applying this balancing test, the Court first determined that the government had an interest in providing for the safety of both the railroad employees and the railroad riding public.[44] Furthermore, in examining the privacy expectations of the railroad employees, the Court opined that the employees' privacy expectations were diminished because they voluntarily participated in an industry that is highly regulated for valid health and safety concerns.[45]

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39. *Id.* at 619. 49 C.F.R. § 219.201 provides in part:

> (a) List of events. On and after March 10, 1986, . . post-accident toxilogical tests shall be conducted after any event that involves one or more of the circumstances described in paragraphs (a)(1) through (3) of this section:
>
> (1)Major train accident.
>
> (2)Impact accident.
>
> (3)Fatal train accident.

Id. at 619. 49 C.F.R. § 219.301 provides in part:

> (a) Authorization. A railroad may, under conditions specified in this subpart, require any covered employee, as a condition of employment in covered service, to cooperate in breath or urine testing. This authority is limited to testing after observations or events that occur during duty hours.

Id.

40. *Id.* at 633.

41. *Id.* at 617. The court stated that "because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment." *See, e.g.* Lovvorn v. Chattanooga, 846 F.2d 1539, 1542 (6th Cir. 1988); Copeland v. Philadelphia Police Dept., 840 F.2d 1139, 1143 (3rd Cir. 1988).

42. *Id.* at 619.

43. *Skinner*, 489 U.S. at 619.

44. *Id.* at 621.

45. *Id.* at 627. The Court noted the long history of both federal and state regulation of the railroad industry. *Id. See, e.g.*, 45 U.S.C. § 437(a) (providing that the Secretary of Transportation may "test . railroad facilities, equipment, rolling stock, operations, or persons, as

Consequently, the government's "legitimate interests," pursued in a reasonable manner, outweighed the diminished expectations of the railroad employees.[46]

In *Treasury Employees v. Von Raab*,[47] the Court expanded upon the *Skinner* holding by giving its approval to a mandatory drug testing program directed at employees of a non-transportation related government agency.[48] The *Von Raab* Court rejected a Fourth Amendment challenge to a United States Custom Service's directive that mandated drug testing for certain employees[49] reasoning that the United States Customs Service had a "compelling interest" in protecting the public from the evils that might result from drug altered employees.[50] Moreover, this "compelling interest" in implementing the program outweighed the diminished privacy expectations of the employees.[51]

Following these landmark decisions of the Supreme Court, the United States Court of Appeals for the Seventh Circuit, in *Dimeo v. Griffin*,[52] decisively held that mandatory drug testing programs may be valid for the pursuit of governmental interests not soley related to public health and safety concerns.[53] More specifically, the Seventh Circuit analyzed an Illinois state regulatory agency's promulgation of a rule allowing for the random drug testing of all horse race participants.[54] The court upheld the regulation reason-

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he deems necessary to carry out the provisions."); ALA. CODE § 37-285(1977) (requiring that railroad workers be subjected to "thorough examination" regarding their ability to operate the rail cars); MASS. GEN. L. §§ 160:178-160:181(1979) (mandating eyesight examinations for conductors and engineers).

46. *Id.* at 633.

47. 489 U.S. 656 (1989).

48. *Id.* at 659. This case applied to employees of the United States Customs Service which is an agency of the federal government under the Department of Treasury. *Id.* The Customs Service is responsible for "processing persons, carriers, cargo, and mail into the United States, collecting revenue from imports, and enforcing customs and related laws." *Id. See* United States Customs Service, *Customs U.S.A., Fiscal Year 1985*, p. 4.

49. *Id.* at 660. The Court summarized the directive as mandating drug testing of all employees applying for jobs either (1) directly involved in the interdiction of illegal narcotics or (2) authorizing the carrying of a firearm. *Id.* at 660-61.

50. *Id.* at 679. Justice Kennedy explained that "the Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions." *Id.*

51. *Id.* at 672. Against these governmental interests, the Court weighed the privacy of the employees and found for the government, reasoning that the employees had diminished expectations of privacy because the employees reasonably expect an effective investigation into their ability to safely complete the dangerous demands of these two jobs. *Id.*

52. 943 F.2d 679 (7th Cir. 1991).

53. *Id.* at 685.

54. *Id.* at 680. The Illinois Racing Board enacted a rule allowing for random drug testing, which was not based on any reasonable suspicion or probable cause, of jockeys and other participants in horse racing contests Illinois. *Id.* A class action suit was brought by the affect-

ing that the government had a "substantial interest"[55] in (1) protecting athletic participants from drug induced injuries,[56] and (2)preserving the financial benefits derived from racing which were based on a public belief that races are fair contests unaffected by drug use.[57] The court found that these "substantial interests" outweighed the athletes' diminished expectations of privacy[58] arising from the general requirement that athletes be subjected to frequent medical examinations.[59]

Additionally, in *Schaill By Kross v. Tippecanoe County Corp.*,[60] the Seventh Circuit addressed the issue of whether interscholastic athletes could be submitted to mandatory drug testing.[61] In *Schaill*, the court rejected a Fourth Amendment challenge to an Indiana county's random urine drug testing of interscholastic athletes reasoning that interscholastic athletes' diminished privacy expectations[62] were outweighed by the government's interest in protecting the health and safety of the athletes.[63]

From the existing precedents, it is clear that both the federal and state governments may, under certain circumstances, promulgate mandatory drug testing rules for student athletes. However, in *O'Halloran v. University of Washington*,[64] the United States District Court for the Western District of Washington confronted the narrower issue of whether the NCAA's mandatory drug testing

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ed participants alleging a violation of their Fourth Amendment rights. *Id.* at 679-80.

55. *Id.* at 683. The court was clear to avoid using the words "compelling interest" when determining the level of government interest required to find a valid state statute. *Id.* The court explained that the burden of the state will be lessened according to the degree that a particular person's privacy right has been intruded upon. *Id.*

56. *Id.* at 681-82. The court found that drug use by race participants could cause the participants severe injury or death. *Id.*

57. 943 F.2d 679, 682 (7th Cir. 1991). Illinois gained large amounts of tax revenues from betting on horse racing. *Id.* The court declared that betting revenues might decrease if the public believed the "fairness of the races was being impaired because jockeys and other participants were using drugs." *Id.*

58. *Id.* at 685.

59. *Id.* at 682. The court explained that the more medical examinations a person is subjected to, the less sensitive they become to such examinations. *Id.* Therefore, because athletes are subject to frequent examinations, they are deemed to be less sensitive. *Id.*

60. 864 F.2d 1309 (7th Cir. 1988).

61. *Id.* In *Schaill*, an Indiana county promulgated the random drug testing of their high school athletes in response to concern over a high incidence of drug use among the athletes. *Id.* at 1310.

62. *Id.* at 1318-19. The court declared that athletes have diminished expectations regarding urinalysis because athletes are "quite distinguishable" from other high school students. *Id.* According to the court, athletic participation requires "communal undress" which reduces the athlete's expectations of privacy. *Id.* Additionally, the court noted that the student athletes' expectations of privacy were further diminished by their pre-season written consent to the possibility of future random drug tests. *Id.*

63. *Id.* at 1320-21.

64. 679 F. Supp. 997 (W.D. Wash. 1988).

program could be upheld under a Fourth Amendment analysis.[65] In *O'Halloran*, student athletes at the University of Washington challenged the NCAA's drug testing program as an illegal invasion of their Fourth Amendment privacy rights.[66] Although the court explained that the NCAA's rule would be validated under a Fourth Amendment analysis,[67] the court determined such analysis was unnecessary because the Fourth Amendment only applies to state actors[68] and the NCAA was a private actor.[69]

In an attempt to avoid the *O'Halloran* state actor requirement, the student-athlete respondents in *Hill* challenged the NCAA's mandatory drug testing regulation under California's state constitution which arguably provided protection against the actions of non-governmental entities.[70] Therefore, the Hill court first discussed whether an invasion of privacy action could be pursued under the California constitution.[71] Justice Lucas, writing for the majority, first looked to the explicit language of the California constitution[72] and found the language to be inconclusive on the question of what type of entities would come under constitutional scrutiny.[73]

The *Hill* majority continued this analysis by next examining the intent of the citizens of California when they created this right to privacy by voting to amend the constitution[74] to add the phrase "and privacy"(the Privacy Amendment).[75] According to the majori-

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65. *Id.* at 998-99.

66. *Id.*

67. *Id.* at 1002-07. The court followed a typical Fourth Amendment analysis by first determining that the drug testing was a search under the Fourth Amendment. *Id.* The court next addressed the issue of the reasonable expectations of the collegiate athletes and found diminished expectations because athletes are accustomed to being examined and viewed in the athletic setting. *Id.* Additionally, the court found that the NCAA had a "compelling interest" in promulgating the drug testing program for the purposes of protecting "the health and safety of the student athlete and the ideal of fair and equitable competitions." *Id.* at 1003. Therefore, the court concluded that the drug testing program's intrusion into a student-athlete's right of privacy was outweighed by the NCAA's "compelling interest." *Id.* at 1007.

68. *Id.* at 1001-02.

69. 679 F. Supp. 997, 1002 (W.D.Wash. 1988).

70. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834 (Cal. 1994).

71. *Id.* at 842.

72. *Id.* at 842. Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." *Id.*

73. *Id.* at 842-43. The court noted that the explicit language of the California Constitution gave no guidance in addressing the question of whether this right to privacy applied to actions of non-governmental entities. *Id.*

74. *Id.* The word "privacy" was added to the above clause when the voters of California approved the amendment on November 7, 1992. *Id.*

75. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834 (1994). In California, the particular meaning of an ambiguous law must be derived from the "probable intent of the body enacting it: the voters of the State of California." Id. (*citing* Legislature v.

ty, the voter's intent could be found by examining the ballot pamphlet that was given to California voters prior to their approval of this constitutional amendment.[76] In analyzing the ballot pamphlet,[77] the court found that the amendment was aimed at protecting California citizens against the intrusive activities of both "government" and "business" entities.[78]

After determining that California voters intended to grant a right of action against both government and "business" entities, the *Hill* court then addressed the judicial precedent interpreting the issue.[79] Although the Court had not previously interpreted the issue, the majority did find that lower courts examining this question consistently agreed with the majority's reasoning and conclusion.[80]

The NCAA responded to this premise by citing numerous previous court decisions where it was held that other causes of action pursued under the state constitution required a determination that the defendant was a state actor.[81] The *Hill* court answered this

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Eu, 816 P.2d 1309 (Cal. 1991)).

76. *Id.*

77. *Id.* at 843-44. The court outlined the relevant text of the official ballot pamphlet for the Privacy Amendment. The court provided the following text for analysis:

> At present there are no effective restraints on the information activities of government and business. This amendment . . . the right of privacy . . . prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us . . . Even if the existence of this information is known, few government agencies or private businesses permit individuals to review files and correct errors.

Id.(citing BALLOT PAMP., PROPOSED AMENDS. TO CAL. CONST. WITH ARGUMENTS TO VOTERS, GEN. ELEC.(NOV. 7, 1992), 26-27)[hereinafter "Ballot Argument"].

78. *Id.* From the language of the Ballot Argument, the majority concluded that "the repeated emphasis in the competing ballot arguments on private party relationships and transactions, as well as individual encounters with government, underscores the efforts of the Privacy Initiative's framers to create enforceable privacy rights against both government agencies and private entities." *Id.*

79. *Id.* at 844.

80. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 844 (Cal. 1994). *See, e.g.*, Porten v. University of San Francisco, 64 Cal.App.3d 825, 134 Cal.Rptr. 839 (1976). In *Porten*, the plaintiff college student sued the University of San Francisco for invasion of privacy under the California constitution when the University disclosed his academic transcript without the plaintiff's permission. *Id.* at 827. The Court of Appeals allowed the action reasoning that the right to privacy created by the passage of the Privacy Amendment applies to actions of both state and private entities. *Id.* at 829-30. *See also* Wilkinson v. Times Mirror Corp., 215 Cal.App.3d. 1034, 1040-44, 264 Cal.Rptr. 194 (1989) (upholding an invasion of privacy action against a private employer reasoning that the Privacy Amendment was intended to apply to actions of both governmental and nongovernmental actors).

81. *Hill*, 26 Cal. Rptr.2d at 845. *See, e.g.*, People v. Zelinski, 594 P.2d 1000 (Cal. 1979) (holding that the Fourth Amendment prohibition against illegal searches of criminal defendants was "primarily intended as a protection of the people against such governmentally initiated or governmentally directed intrusions"); Kruger v. Wells Fargo Bank, 521 P.2d 441 (Cal. 1974) (concluding that the Fourteenth Amendment due process clause requires state

argument by clearly stating that each separate constitutional provision must be examined according to that provision's unique language and history in making a determination regarding a state actor requirement.[82] Consequently, the majority held that the respondents could bring a privacy action against the private actor NCAA under the state constitution.[83]

The *Hill* court next addressed the standard under which the NCAA's drug testing program would be judged.[84] The majority's discussion centered on the correctness of the trial court and Court of Appeal's conclusion that a "compelling state interest"[85] test should be applied to both governmental and private entities.[86] The analysis again began with an examination of the Ballot Argument to determine a discernible standard.[87]

The majority had no difficulty in finding that the ballot pamphlet clearly stated its main objective as preventing both governmental and private entities from gathering and disseminating private information about individual citizens.[88] However, the court did not find a clear purpose to require that the private entity's actions must pass a "compelling state interest" test to avoid sanction.[89] More specifically, the court concluded that the Ballot Ar-

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action).

82. *Hill*, 26 Cal. Rptr.2d at 845. The majority explained that "those decisions were not premised on the mere location of the respective provisions in the constitutional text, but on their distinct languages and histories." *Id.*

83. *Id.* The majority made this determination based on the intent of the voters approving the Privacy Amendment as interpreted from (1) the language of the Ballot argument, and (2) the relevant rulings decided by the Court of Appeals. *Id.* at 843-45.

84. *Id.*

85. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 845 (1994). Under the earlier rulings, the NCAA failed to meet its burden of proving both: "(1) a "compelling state interest" in support of drug testing; and (2) the absence of any alternative means of accomplishing that interest." Id. (*citing* Long Beach City Emf. v. City of Long Beach, 719 P.2d 660 (Cal. 1986) (holding that where the analysis of a public employees' constitutional challenge to a statute allowing for the use of polygraphic testing was based on whether the government had a "compelling state interest" in enacting the statute)).

86. *Id.*

87. *Id.* The majority sought to determine whether the Ballot Argument might show if the Privacy Amendment was intended to impose a "compelling state interest" burden against both government and private actors. *Id.*

88. *Id.* The court stated that:

> The principal focus of the Privacy Initiative is readily discernible. The Ballot Argument warns of unnecessary information gathering, use, and dissemination by public and private entities—images of "government snooping," computer stored and generated "dossiers" and "'cradle-to-grave' profiles on every American dominate framers' appeal to the voters.

Id.(*citing* Ballot Argument, *supra* note 75 at 26).

89. *Id.* at 846-47. The court first noted that the Ballot Argument did give a "cryptic reference" to a "compelling public need" requirement. *Id.* The Ballot Argument provided in part that "this right should be abridged only when there is compelling public need. Some information may remain as designated public records but only when the availability of such

gument's vague references to a "compelling state interest" were narrowed in their application by references to a lesser requirement of "legitimate need."[90] Therefore, the court concluded that the backers of the privacy amendment never intended to have a strict "compelling state interest" standard apply to private entities.[91]

Furthermore, the *Hill* court recognized the defaults that would arise if the courts were to apply a "compelling state interest" standard to private entities.[92] The majority questioned whether private entities pursuing private interests and objectives could ever meet a standard which required those same private entities to pursue the "compelling interests" of the government.[93] For the foregoing reasons, the court concluded that the ballot pamphlet did not provide the necessary information to determine the standard under which to evaluate the NCAA's mandatory drug testing program.[94]

Unable to discover a clear definition of a privacy standard from the ballot pamphlet, the *Hill* court next considered the judicial development of a "right to privacy" standard according to (1) common law, (2) federal constitutional law, and (3) prior interpretation by the California courts.[95] First, the court's analysis traced the common law right from its emergence in the late nineteenth century as a general theory[96] to the modern tort law of today.[97] From

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information is clearly in the public interest." *Id.*, *(citing* Ballot Argument, *supra* note 77 at 27). However, the court declared that these few references to a "compelling public need" were "not intended to supply a single, all-encompassing legal test for privacy rights." *Id.*

90. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 846 (1994). The majority came to this conclusion from their reading of a rebuttal argument contained in the Ballot Argument. *Id.* The relevant part of the rebuttal stated:

> The right to privacy will not destroy welfare nor undermine any important government program. It is limited by "compelling public necessity" and the public's need to know. The Privacy Initiative will not prevent the government from collecting any information it "legitimately needs".

Id.(*citing* Ballot Argument, *supra* note 75 at 27).

91. *Id.* The majority concluded that "a more flexible and pragmatic approach to the privacy right than the isolated term 'compelling public interest' appears to be in demand." *Id.*

92. *Id.* at 847.

93. *Id.* The court argues that private entities organize for the purpose of pursuing private interests. *Id.* Many times the pursuit of these private interests will not result in furthering a "compelling public need." *Id.* Therefore, it seems unlikely that the Privacy Amendment could have required private entities to act in accordance with a "compelling public need". *Id.*

94. *Id.* The court declared that "as the ballot arguments reveal, the framers of the Privacy Initiative preferred, at least in responding to the arguments of their opponents, a more flexible and pragmatic approach to the privacy right than the isolated term 'compelling public interest' appears to demand." *Id.*

95. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 847 (Cal. 1994).

96. *Id.* at 848-49. The majority traced the common law right of personal privacy to a nineteenth century law review article where the authors described the right as "'inviolate personality'—'the right of determining, ordinarily, to what extent [a person's] thoughts, sentiments, and emotions shall be communicated to others.'" *Id.(quoting* Warren & Brandeis, *The*

this analysis, the majority explained that the foundations for this development have consistently emanated from (1) the idea that society reveres and protects a belief that certain parts of each individual's private life should be protected from outside invasion;[98] and (2) a psychological foundation relating to the human desire to keep certain self-identifying beliefs and qualities free from disclosure.[99] However, the court emphasized that this nebulous common law right to privacy was not without limiting principles such as (1) a requirement that the invasion be highly offensive to the objectively reasonable person; and, (2) that the plaintiff did not consent to the invasion.[100] The court explained that these limiting principles must be balanced against the foundational concerns in making an invasion of privacy determination.[101]

The court next addressed the federal constitutional right of privacy as the second source of judicial interpretation.[102] Noting that the passage of the Privacy Amendment was strongly influenced by federal constitutional law,[103] the *Hill* majority first traced the major Supreme Court decisions from the landmark ruling in *Griswold*[104] to the more recent cases[105] which, taken together,

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Right to Privacy 4 HARV.L.REV. 193, 205, 198 (1890)). Additionally, nearly forty years after his above mentioned article, Justice Brandeis, writing for the Supreme Court, declared that this "right to be left alone" had its roots in the federal Constitution. *Id.*(*citing* Olmstead v. United States, 277 U.S. 438, 478 (1928)).

97. *Id.* The majority then traced this right of privacy to the modern action for invasion of privacy as summarized by Dean William L. Prosser in his seminal law review article entitled *Privacy*. *Id.*(*citing* Prosser, *Privacy*, 48 CAL.L.REV. 381, 389 (1960)). In his article, Prosser stated the modern requirements for an invasion of privacy tort, which have subsequently been adopted by the Restatement Second of Torts, as "(1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness." *Id.*

98. *Id. See e.g.*, Miller v. National Broadcasting Co., 232 Cal.Rptr. 668 (Cal. Ct. App. 2 Dist. 1986) (holding that an invasion of privacy action claim will be satisfied when the plaintiff alleges that defendants interfered with the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity); Noble v. Sears, Roebuck and Co., 33 Cal.App.3d 654 (Cal. Ct. App. 1973) (holding that an invasion of privacy claim was satisfied where defendant entered plaintiff's hospital room to obtain information about the plaintiff's injuries for purposes of a possible personal injury suit).

99. *Hill*, 26 Cal.Rptr.2d at 848. The court explained that: "[p]rivacy rights also have psychological foundations emanating from personal needs to establish and maintain identity and self-esteem by controlling self-disclosure." *Id.*(*citing* Briscoe v. Reader's Digest Assoc., Inc., 483 P.2d 34 (Cal. 1971)).

100. Hill v. National Collegiate Athletic Association, 26 Cal.Rptr.2d 834, 848 (Cal. 1994). *See* RESTATEMENT(SECOND) OF TORTS, section 652B, cmt. d.(stating an intrusion must be "highly offensive to reasonable person").

101. *Id.*

102. *Id.* at 851(*citing* Ballot Argument, *supra* note 75 at 27).

103. *Id. See* Brian Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L.REV. 327, 468-477 (1992) (reporting relevant legislative history surrounding the enactment of the Privacy Amendment based on federal right to privacy as established by the *Griswold* court).

104. *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965). The *Griswold* Court's dicta estab-

appear only to protect a certain zone of privacy regarding sexual and reproductive matters.[106] Therefore, the court concluded that this line of cases did not provide any protection against a mandatory drug testing program.[107]

The court found more guidance in a series of Fourth Amendment cases defining proscribed searches and seizures.[108] Relying on the recent holdings in *Skinner* and *Von Raab* which upheld mandatory drug testing programs, the court explained that the Constitution only prohibits unreasonable searches and seizures.[109] More specifically, the court reasoned that the Fourth Amendment's protection against the collecting and dissemination of personal information was analyzed using a balancing test which did not require the application of a strict "compelling state interest" test.[110] Therefore, the court concluded that the federal analysis shows that the issue of privacy rights is "best viewed flexibly and in context".[111]

Finally, the courts examined the prior California courts' inter-

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lished an explicit right to privacy regarding "personal decisions made by married persons regarding the use of birth control devices." *Id.* The *Hill* majority found no all encompassing right to privacy. *Hill,* 26 Cal.Rptr.2d at 851.

105. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 851 (Cal. 1994). The personal right to privacy espoused by the Griswold Court has been narrowly defined by post-Griswold interpretation. *Id. See, e.g.,* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (upholding Georgia law against consensual homosexual sodomy law, reasoning that "any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is insupportable"); Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (allowing certain state restrictions on a woman's right to abortion).

106. *Hill,* 26 Cal. Rptr.2d at 851.

107. *Id.* The court concluded that "outside the separate context of the Fourth Amendment searches and seizures, the 'penumbral' federal constitutional right to privacy has generally applied to intrusions by the government into a narrow and defined class of personal autonomy interests in contraceptive and reproductive decisions." *Id.*

108. *Id.* at 853-54.

109. See Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 853 (Cal. 1994). *See also* In Ingersoll v. Palmer, 743 P.2d 1299 (Cal. 1987). In *Palmer,* the court, in upholding a state law allowing for sobriety check points, outlined California's balancing test for the reasonableness of a particular search as "weighing the gravity of the governmental interest or public concern served and the degree which the program advances that concern against the intrusiveness of the interference with individual liberty."

110. *Hill,* 26 Cal.Rptr.2d at 852. *See, e.g.,* Whalen v. Roe, 429 U.S. 589 (1977) (upholding a state statute requiring that physicians disclose the names of patients who have been prescribed potentially abusive drugs); Doe v. Attorney General of U.S., 941 F.2d 780, 796 (9th Cir. 1991) (using a flexible balancing test requiring that "the government may seek and use information covered by the right to privacy if it can show that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest"); Plante v. Gonzalez, 575 F.2d 1119, 1130 (5th Cir. 1978), *cert. den.* 439 U.S. 1129 (1979) (applying a balancing test applied to public financial disclosure law reasoning that strictest scrutiny applied only to intrusions into areas of specific privacy protection).

111. *Hill,* 26 Cal. Rptr.2d at 853.

pretation of the Privacy Amendment.[112] The court directed its analysis toward the landmark decision in *White v. Davis*[113] where the court held that the plaintiff's First Amendment privacy interest could only be abridged if the regulation was (1) furthering a "compelling state interest" and (2) that such interests could not be pursued by "less intrusive" means.[114] Accepting the validity of the *White* court's reasoning in the context of the facts of that case, the court differentiated the *White* holding from the instant case explaining that the *White* decision did not establish a rule that all Privacy Amendment challenges should be analyzed under this "compelling state interest" test.[115] In the *White* case, the plaintiffs alleged a governmental intrusion into their First Amendment rights of "freedom of expression" and "freedom of association".[116] Therefore, the *Hill* court concluded that the *White* court's holding only applied to this distinct set of rights protected by the First Amendment.[117] Therefore, other privacy interests will be judged based on a more flexible balancing of competing and countervailing interests.[118]

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112. *Id.*

113. 533 P.2d 222 (Cal. 1975). The *White* court ruled on a citizen's privacy challenge to a police department's "covert intelligence gathering activities" at University of California at Los Angeles (hereinafter "UCLA"). *Id.* The plaintiff's claim stated that the surveillance activities effectively stifled the students federal and state constitutional rights to "free speech" as defined by the First Amendment. *Id.*

114. *Id.* Concluding that the police surveillance posed a "substantial restraint upon the exercise of the First Amendment," the court declared that to uphold their surveillance activities the police must demonstrate a "'compelling' state interest which justifies the resultant deterrence of First Amendment rights which cannot be served by alternative means less intrusive on fundamental rights." *Id.*

115. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 854 (Cal. 1994).

116. *Id.*

117. *Id.* at 854-55. The *White* court's holding did not mention how a privacy action should be analyzed. *Id.* Additionally, the three cases the court cited for its holding do not support applying a "compelling state interest" test to invasion of privacy challenges. *Id., See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 497(1965) (applying "compelling interest" test to limited areas involving personal privacy); County of Nevada v. MacMillen, 522 P.2d 1345 (Cal. 1974) (revising a financial disclosure statute to satisfy City of Carmel holding); City of Carmel-by-the Sea v. Young, 466 P.2d 225 (Cal. 1970) (applying compelling state purpose test to statute requiring certain financial disclosure for political candidates where court reasoned that political expression requires the strictest protection).

118. *Hill,* 26 Cal. Rptr.2d at 855. Justice Lucas explained:

> The particular context, i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationships, a "compelling interest" must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed.

Id.

After examining the foregoing precedent, the *Hill* majority outlined the standard under which the respondents' claim of invasion of privacy should be judged.[119] The court listed the three required elements that a plaintiff's claim must include: (1) a "legally protected privacy interest"[120], (2) reasonable expectation of privacy on part of the plaintiff[121], and (3) a serious invasion[122] of the protected privacy interest.[123] Assuming a plaintiff can establish these three requirements, the court explained that the defendant will have the opportunity to present competing or countervailing "legitimate interests" which may outweigh privacy concerns.[124] Additionally, in response to the presentation of these "legitimate interests", the plaintiff may respond with evidence demonstrating that the defendant could have used additional or different means in pursuing these "legitimate interests."[125]

Before applying the above described standard to the respondents' case, the court recognized that the actions of the private NCAA must be judged on a different scale than would the actions of a government actor.[126] The *Hill* court explained that the govern-

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119. *Id.* at 856-59.

120. Hill v. National Collegiate Athletic Association, 26 Cal.Rptr.2d 834, 856 (Cal. 1994). The first element essentially requires that the allegedly protected privacy interest emanate from an objective standard based on widely accepted societal norms. *Id.* Society taken as a whole must believe that a particular privacy interest is worthy of constitutional protection. *Id.*

121. *Id.* The second element requires that the complaining party must have reasonably expected that his protected privacy interest would not be violated. *Id.* In defining this second element, the *Hill* court explained that an analysis of the following three factors will determine whether the particular plaintiff satisfied this element: (1) whether the plaintiff was given advance notice of an intrusion into the privacy interest; (2) whether the plaintiff had an "objective entitlement" to have such an expectation considering the current customs and beliefs defining the reasonable contextual expectation; and (3) whether the plaintiff consented to the intrusion. *Id.*

122. *Hill,* 26 Cal. Rptr.2d at 856. The serious invasion requirement again focuses on the idea that the community should determine how much a particular privacy interest can be invaded before the invasion becomes a constitutional violation. *Id.* at 857. *See* RESTATEMENT (SECOND) OF TORTS, § 652D, cmt. c.

123. *Hill,* 26 Cal. Rptr.2d at 856.

124. *Id.* at 857. Justice Lucas explained:

> Legitimate interests derive from the legal authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.

Id.

125. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 857 (Cal. 1994). After the defendant has made this initial showing, the burden shifts to the plaintiff to demonstrate the "availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion on privacy interests." *Id.* at 857-58.

126. *Id.* at 688. *See* Scott E. Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?*, 17 HASTINGS CONST. L.Q. 139, 142-143 (1989) (reporting that consequences of private and public action have distinct effects on the citizenry and therefore require different

ment has much greater coercive power in regulating the private aspects of a person's life because no citizen can escape the control of the government.[127] Additionally, in contrast to this coercive power, the private organization usually cannot exert effective control over the private citizen because competing private organizations offer equivalent services and opportunities that the private citizen seeks.[128] Moreover, each private citizen has an inherent constitutionally protected right to freely associate with a group[129] that imposes requirements that might offend the privacy interests of the average citizen.[130]

Based on the *Hill* court's standard of analysis, the majority first made a determination that the NCAA's drug testing program impacted two protected privacy interests.[131] First, citing the *Skinner* holding, the court stated that respondents had protected "autonomy privacy" interests in controlling their excretory functions without the interference of the NCAA's monitors.[132] Second, the court reasoned that the respondents had protected "informational privacy" interest in preventing disclosure of confidential information[133] regarding their use of particular chemical substances.[134]

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judicial analysis).

127. *See Hill,* 26 Cal. Rptr.2d 834 at 858; *See also,* Sundby, *supra* note 126, at 142. This commentator states that "the government not only has the ability to affect more than a limited sector of the populace through its actions, it has both economic power, in the form of taxes, grants, and control over social welfare programs, and physical power, through law enforcement agencies, which are capable of coercion far beyond that of the most powerful private actors." *Id.*

128. *See Hill,* 26 Cal. Rptr.2d 834 at 858; *See also,* Sundby, *supra* note 126, at 143 (explaining that individuals may leave a private organization if their rights are being violated).

129. *Hill,* 26 Cal. Rptr.2d at 858. The First Amendment of the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. CONST. AMEND. I.

130. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 858 (Cal. 1994). *See* Britt v. Superior Court, 143 Cal.Rptr. 695 (1978) (holding that the First Amendment applies to all organizations regardless of the public popularity of the particular organization).

131. *Hill,* 26 Cal. Rptr.2d at 856. Protected privacy interests must be based on either "autonomy privacy" or "informational privacy." *Id.* The majority explained "informational privacy" as protecting "a particular class of information" that is private because "established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." *Id.* "Autonomy privacy" relates to a person's right to make certain personal decisions without "observation, intrusion, or interference." *Id.*

132. *Hill,* 26 Cal. Rptr.2d at 859. The monitoring of the athletes as they gave urine samples, as required by the NCCA's program, violated a protected interest because the program "intrudes on a human bodily function that by law and social custom is generally performed in private and without observers." *Id.*

133. *See* Board of Medical Quality Assurance v. Gherardini (1979), 156 Cal. Rptr. 55 (Cal.App. 4 Dist. 1979)(holding that a person's medical profile is one of the most highly protected privacy interests).

134. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 859 (Cal. 1994).

The *Hill* court next addressed the crucial question of whether the respondent student athletes had "reasonable expectations" that their protected privacy interests would not be impacted.[135] The court first explained that the "reasonable expectations" analysis must take into consideration the particular context in which the complaining party's interests were allegedly violated.[136] In *Hill*, the student athletes were tested in the context of an intercollegiate athletic program which was a highly regulated and closely scrutinized activity.[137] Therefore, because of these frequent regulatory intrusions, society imposes upon respondents a "diminished expectation"[138] regarding the athlete's affected privacy interests.[139] Moreover, in *Hill*, the diminution is greater because the respondents had advanced notice of the drug testing[140] and they effectively consented[141] to the testing program.[142]

The NCAA's inquiry into chemical substances ingested by the athletes is considered an intrusion into the athlete's "medical profile." *Id.*

135. *Id.* at 860-61.

136. *Id.* at 860. The majority concludes that although urination is an absolutely protected privacy interest in most settings, such protection may not be absolute in "all conceivable settings." *Id.*, *See* Dimeo v. Griffin, 943 F.2d 679, 682 (7th Cir. 1988) (explaining that men are accustomed to urinating in view of each other).

137. *Hill*, 26 Cal. Rptr.2d at 860. The court explained that intercollegiate athletes are regularly submitted to "routine" inquiries regarding their physical condition including frequent physical examinations. *See Id.* Additionally, athletes often exchange personal medical information regarding their physical condition and medical treatment. *Id. See also* Schaill By Kross v. Tippecanoe County Corp., 864 F.2d. 1309, 1311 (7th Cir. 1991) (explaining that random drug testing program will be upheld where court explains that interscholastic athletics requires participants to (1) undress in front of others; and, (2) submit to regular physical examinations.).

138. *Hill*, 26 Cal. Rptr.2d at 861. A student athlete's reasonable expectation of privacy is based on how the "social convention" defines those expectations. *Id.* This objective analysis does not consider whether a particular student athlete subjectively expected to have his or her privacy rights protected. *Id.*

139. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 860 (Cal. 1994). The majority reasons that the respondents' expectations of privacy regarding the NCAA's drug testing program were lessened because the respondents were accustomed to being examined and tested under the normal process of intercollegiate athletic participation. *Id.*

140. *Id.* The contents of the NCAA drug testing program is disclosed to all athletes prior to the start of the season. *Id.* The NCAA drug testing program comes as no "unwelcome surprise at the end of the postseason match." *Id.*

141. *Id.* Following disclosure, each participant must give written consent to being tested under the NCAA program before they can participate in their athletic season. *Id.* If an athlete refuses to consent to the drug testing, such athlete is ineligible for athletic competition. *Id.*

142. *Hill*, 26 Cal. Rptr.2d at 861 (Cal. 1994). There is no absolute right to participate in intercollegiate athletics. *Id.* In response to the severity of the NCAA's rule disqualifying athletes who refuse to consent, the majority explained that:

> Athletic participation is not a government benefit or an economic necessity that society has decreed must be open to all. One aspect of the state constitutional right to privacy is "our freedom to associate with the people we choose." Participation in any organized activity carried on by a private, nongovernment organization necessarily entails a willingness to forego assertion of individual rights one might other-

The court next applied the serious invasion requirement by dividing its analysis into a separate discussion about each of the two protected privacy interests.[143] Regarding the respondent's "autonomy interest" in privately controlling their excretory functions,[144] the court expressed significant concerns about the NCAA's direct monitoring of the athlete's urination.[145] However, regarding the respondents' "informational interest" in not revealing certain information about the ingestion of chemical substances,[146] the court appeared to be much less wary of the NCAA gathering this type of information as long as the NCAA had a legitimate reason.[147]

Finally, the *Hill* court discussed the question of whether the NCAA's countervailing interests in implementing the drug testing program might outweigh the diminished expectations of the respondents in regards to the two relevant protected privacy interests.[148] As to the NCAA's first countervailing interest in "safeguarding the integrity of intercollegiate athletic competition," the court presumed that this interest was a legitimate one because of the NCAA's strong presence in intercollegiate athletics.[149] Additionally, the court explained that the NCAA's drug testing program was reasonably calculated to further this legitimate interest because of the severe effects that might arise from drug use among student athletes.[150] Therefore, the court concluded that the NCAA prog-

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wise have in order to receive the benefits of communal association. *Id.*

143. *Id.* at 861.

144. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 861 (Cal. 1994).

145. *Id.* The NCAA program's direct observation of urination greatly increases the intrusiveness of the drug testing program. Id. More specifically, other cases upholding drug testing in the athletic context did not directly observe the parties being tested. *Id.* For less intrusive methods, *see, e.g.,* Dimeo v. Griffin, 943 F.2d 679, 682 (7th Cir. 1988) (holding no direct observation). Schaill By Kross v. Tippecanoe County Corp., 864 F.2d. 1309, 1311 (7th Cir. 1991)(same).

146. *Hill,* 26 Cal. Rptr.2d at 868.

147. *Id.* at 869. Based on the theory, questions regarding an athlete's physical condition are routinely asked in the athletic context. *Id.*

148. *Id.* at 861.

149. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 861 (Cal. 1994). The respondents did not challenge the drug testing program on the grounds that the NCAA's objectives in enacting the program were either "contrary to law or public policy." *Id.* Furthermore, the respondents did not challenge the NCAA's role as "'the guardian of [the] important American tradition' of intercollegiate athletic competition." *Id.* (*quoting* NCAA v. Board of Regents of Univ. of Okla., 486 U.S. 85, 101 (1984)). Consequently, the NCAA's motives or purposes were viewed with a "respectful presumption of validity." *Id.*

150. *Hill,* 26 Cal. Rptr.2d 834 at 862. The majority traced the history of the NCAA drug testing program and discovered that the mandatory drug testing program was enacted to combat the pervasive use of performance enhancing drugs among intercollegiate athletes. *Id.* Noting the pressure among athletes to use performance enhancing drugs to compete at the

ram's effective deterrence of drug use among student athletes[151] supported the NCAA's position that its legitimate interests outweighed the diminished privacy expectations of the respondents.[152]

As to the NCAA's claim that the NCAA has a legitimate interest in protecting the health and safety of the student athletes, the court again agreed with the NCAA.[153] The *Hill* court first reasoned that the NCAA regulates and sponsors the games and matches during which athletes are exposed to injuries.[154] Because the NCAA creates this forum for competition, the majority concluded that the NCAA has a legitimate interest in preventing drug related injuries from arising.[155]

For the foregoing reasons, the *Hill* majority held that the respondents' state constitutionally protected right to privacy was not breached because the NCAA's legitimate interests outweighed the respondents' diminished expectations of privacy.[156] Therefore, the court reversed the judgment of the Court of Appeals and ended the permanent injunction against the NCAA's drug testing program.[157]

In a brief concurrence, Justice Kennard declared his disagreement with the majority in its decision not to have the case remanded to the trial court for a determination based upon the majority's new standard for analysis.[158] Nevertheless, concurring in the majority's basic legal analysis, the Justice expressed his agreement with the majority's decision recognizing that an invasion of privacy action against a private entity must be analyzed under a different standard than an action against a governmental entity.[159]

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teracting this pressure through deterrence. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 863.

154. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 863 (Cal. 1994)

155. *Id.* By sponsoring and regulating intercollegiate athletics, the NCAA "effectively creates occasions for potential injury to athletes, spectators, and others." *Id.* Therefore, the NCAA has a legitimate interest in protecting the participants. *Id.*

156. *Id.* at 864.

157. *Id.* It is important to note that the *Hill* court did not have the case remanded to the trial court for further consideration based on the majority's new standard of analysis. *Id.* Instead, the court reversed the judgment of the Court of Appeals reasoning that "uncontradicted evidence in the record demonstrates as a matter of law the constitutional validity of the NCAA's program." *Id.*

158. *Id.* at 874 (Kennard, J., concurring). Justice Kennard declared that the trial court and Court of Appeals made their rulings on a standard that differed greatly from the standard espoused in *Hill*. *Id.* More specifically, Justice Kennard explained that the respondents should have been given the opportunity to submit evidence in regards to their reasonable expectations of privacy. *Id.*

159. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 872 (Cal. 1994). (Kennard, J., concurring). Justice Kennard stated that: "the majority properly insists that the

In both a concurring and dissenting opinion Justice George declared his support for the majority's decision to strike down the injunction against the NCAA's drug testing program.[160] Dissenting from the majority's method used in achieving its result,[161] Justice George explained that the invasion of privacy standard should not differ between public and governmental entities.[162]

The Justice argued that the majority incorrectly interpreted the *White* holding as allowing for the application of two distinct invasion of privacy analyses.[163] Justice George admonished the court for not applying the "compelling state interest" test to the case[164] and declared that this decision would make it more difficult for a future plaintiff to successfully bring an invasion of privacy action.[165] Nevertheless, if the majority had correctly applied the "compelling state interest" test[166] to this case, the Justice would have found the NCAA to have had the necessary interests to overcome the invasion of the respondents' privacy rights.[167]

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courts of this state, in assessing alleged invasions of privacy, be guided above all by the context of the particular case. This necessarily means that the correct legal analysis will differ depending in part on the governmental or nongovernmental status of the defendant." *Id.*

160. *Id.* at 874 (George, J., concurring and dissenting in part).

161. *Id.* (George, J., concurring and dissenting in part). Justice George declared that the Privacy Amendment was enacted with a clear intent to apply the long established "compelling state interest" analysis to invasion of privacy claims. *Id.* (George, J., concurring and dissenting in part).

162. *Id.* at 875 (George, J., concurring and dissenting in part). The Justice explained that the Privacy Amendment should not impose a less stringent standard on nongovernmental actors. *Id.* (George, J., concurring and dissenting in part). Justice George declared that "significant consideration is not whether the actor is a private or public entity, but rather the nature and extent of the intrusion upon privacy resulting from the challenged conduct and the nature and strength of the justifications supporting that conduct." *Id.* (George, J., concurring and dissenting in part).

163. *Id.* at 875-876 (George, J., concurring and dissenting in part). Justice George interpreted the *White* court's decision to apply a "compelling interest" test as applying to all constitutional challenges made under the Privacy Amendment. *See, e.g.*, Long Beach City Employees Assn. v. City of Long Beach, 719 P.2d 660 (Cal. 1986); People v. Stritzanger, 668 P.2d 738 (Cal. 1983); Loder v. Municipal Court, 553 P.2d 624 (Cal. 1976).

164. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 875 (Cal. 1994). (George, J., concurring and dissenting in part).

165. *Id.* at 879 (George, J., concurring and dissenting in part). The *Hill* test effectively increases the plaintiff's burden of establishing a case and reduces the defendant's burden in overcoming the plaintiff's case. *Id.* (George, J., concurring and dissenting in part).

166. *Id.* (George, J., concurring and dissenting in part). The "compelling interest" test first considers the extent of intrusion into the plaintiff's protected privacy interest and then balances such intrusion against the defendant's compelling interests. *Id.* (George, J., concurring and dissenting in part). Additionally, the reviewing court should consider whether the plaintiff could have used any less intrusive means to accomplish its objectives. *Id.* (George, J., concurring and dissenting in part).

167. *Id.* at 881 (George, J., concurring and dissenting in part). Justice George first determined that the respondents had stated a case for invasion of privacy because their protected privacy interests were "significantly" intruded upon by the NCAA's drug testing program. *Id.* (George, J., concurring and dissenting in part). The Justice next argued that the NCAA's

In a stinging dissent, Justice Mosk assailed the majority's decision as doing "equal violence to both the law and the facts".[168] Justice Mosk vigorously argued against the majority's determination that student athletes generally have lesser expectations of privacy because they are involved in highly regulated activity.[169] Therefore, according to Justice Mosk, the NCAA's drug testing program should be analyzed as if it applied to any other private citizen.[170] Applying the "compelling public need" standard to the facts of the *Hill* case, the Justice declared that there was no "compelling public need" for the NCAA's drug testing program.[171] Therefore, Justice Mosk declared that the majority had effectively taken away the a large portion of the respondents' constitutionally protected right to privacy.[172]

III. CONCLUSION

The *Hill* majority's decision on the question of whether the NCAA's program violated California's state constitution serves as a model for future state courts seeking to allow a challenge to the NCAA's drug testing program. The first problem that a state court must overcome is the difficulty of obtaining evidence that the particular state constitution allows for actions against private entities.

"compelling interests" in preserving "fairness of competition" and the health and safety of the athletes were sufficient to outweigh the diminished privacy expectations of the student athletes. *Id.* (George, J., concurring and dissenting in part). Finally, the Justice addressed the program's requirement of visual monitoring and concluded that any "equally effective" monitor method would not have lessened the intrusion into the respondents' protected privacy interests. *Id.* (George, J., concurring and dissenting in part).

168. *Id.* at 903 (Mosk, J., dissenting).

169. Hill v. National Collegiate Athletic Association, 26 Cal. Rptr.2d 834, 897 (Cal. 1994). (Mosk, dissenting). Justice Mosk stated in part:

> It goes without saying that the abridgment of the right of privacy of Stanford student athletes by the NCAA drug testing program is not nullified as a result of their status as athletes. As noted above, the fact that student athletes are regulated and supervised and function in a communal environment does not open them to urinalysis and questioning covering much of the pharmacopoeia; does not withdraw their authority to control their own medical treatment with lawful drugs and other substances; and does not prepare them to be watched by a stranger as they urinate. That same fact does not remove or even reduce the substantial adverse effect of the program.

Id.

170. *Id.* (Mosk, J., dissenting).

171. *Id.* (Mosk, J., dissenting). In regards to the NCAA's interest in "fair and equitable competition," the Justice declares that this can not be a compelling interest because it would provide a defense to "every actor in making or doing whatever it happens to make or do." *Id.* (Mosk, dissenting). In regards to the NCAA's interest in the "health and safety of the student-athletes," Justice Mosk sees this as a "compelling public need," reasoning that "all people" would be tested if the court actually allowed full application of this rule. *Id.* (Mosk, dissenting).

172. *Id.* at 903 (Mosk, J., dissenting).

In *Hill*, the majority, through interpretation of somewhat vague and conflicting language contained in the case law and Ballot Argument, was able to find that the California constitution's right to privacy applied to actions taken by private entities. Nevertheless, some state constitutions may not have the legislative history or case law that point to a privacy action against private actors. Therefore, the particular state constitution may not allow a privacy action to be brought against the NCAA.

Assuming that the state constitution provides for a right of action against a private actor, the *Hill* majority provides an appropriate standard for analyzing such cases. The *Hill* majority was correct in limiting the "compelling state interest" standard to government actor cases and applying a less stringent standard to private actors. The *Hill* majority's ruling prevented the negative far-reaching effects that would have resulted from the application of a "compelling state interest" standard to the NCAA and all other private organizations. Private organizations like the NCAA form because of each member's common set of beliefs and goals. In order to effectively pursue these private objectives, private organizations must have wide discretion in setting policies. Because a particular policy, like the NCAA drug testing program, may not be a "compelling state interest" should not automatically void it.

Finally, as pointed out by Justice Kennard in his concurring and dissenting opinion, the *Hill* majority did falter on the question of whether the case should have been remanded to the lower court for the application of this new standard. After the majority spent much effort developing a new standard for the trier of fact to analyze invasion of privacy claims against private actors, the majority decided that they should decide how society views privacy rights in the context of the private NCAA's regulation of intercollegiate athletics. Although I agree with the court's application of the facts to the standard of analysis, a jury should have been given the opportunity to apply this newly developed standard.

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