National Collegiate Athletic Association v. Tarkanian: If NCAA Action is Not State Action, Can its Members Meaningfully Air Their Dissatisfaction?

INTRODUCTION

In the early fall of 1987, the inequities and inconsistencies of the National Collegiate Athletic Association's (NCAA) appellate procedures became vividly apparent. For example, a University of Pittsburgh offensive back who had lost his eligibility because he had accepted $2,500 from an agent, was, after appeal to the NCAA, restored to full eligibility.[1] A University of Auburn quarterback who was declared ineligible because he was bailed out of jail by his assistant coach, was, after appeal, restored to eligible status with a mere two game suspension.[2] A University of Minnesota quarterback who earlier had lost his eligibility because he had accepted a plane ticket from his assistant coach, was, after appeal, reinstated with only a two game suspension.[3] Although these decisions are consistent, they should be compared to an NCAA decision in another case. An Iowa State University volleyball player who was declared ineligible by the NCAA because she mistakenly took her college entrance exam on the wrong day[4] was denied an appeal altogether.[5] As of the time the football players were reinstated, she had yet to receive the chance to air her grievance.

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1. Wulf, *Spiked*, SPORTS ILLUSTRATED, Sept. 28, 1987, at 9.
2. *Id.*
3. *Id.*
4. *Id.* Tracy Graham took the ACT college entrance exam on a date not approved by the NCAA. She was a B student in high school, and took the ACT in July of 1986 because she was competing for her track team on the nationally approved testing date in April of 1986. The NCAA requires that prospective athletes take their entrance exams on national testing days so it can better monitor the results. *Id.* at 9-12.
5. *Id.* at 12. After a considerable amount of time had passed, and under much pressure due to great publicity, the NCAA Council finally agreed to review Ms. Graham's case. *See* Ballard, *Common Sense*, SPORTS ILLUSTRATED, Jan. 25, 1988, at 7. Of course, Ms. Graham had already lost a great deal of time in which she could have been playing for Iowa State.

These inconsistent and seemingly unfair results[6] are an example of the "inconsistencies inherent in the labyrinthine committee structure of the NCAA."[7] However, these procedures shall remain unchecked. In 1988, the United States Supreme Court held in *NCAA v. Tarkanian*[8] that the NCAA is not amenable to the constitutional restraints of the fourteenth amendment. Specifically, the Court found that the NCAA's action is not state action, a requirement necessary to invoke the fourteenth amendment.[9] Prior to the Court's decision, lower state and federal courts sharply differed in their treatment of whether the NCAA was a "state actor,"[10] and thus subject to the demands of the fourteenth amendment. The Supreme Court has finalized the debate with its decision in *NCAA v. Tarkanian.*

This Note will address the significance of the Court's finding that the NCAA is not a state actor within the fourteenth amendment. It argues that adherence to this rule may lead to an inequitable and inadequate procedure for student athletes and member schools. Section I examines the history of the state action doctrine as it has applied to the NCAA. Section II reviews the structure of the NCAA and introduces the facts of *NCAA v. Tarkanian.* Section III presents the Supreme Court's reasoning in reaching its decision that the

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6. One might wonder why students who take money from agents, get bailed out of jail by their coaches, or accept gifts from their coaches are treated much more leniently than those who make innocent or harmless mistakes. For another account of some questionable disciplinary actions by the NCAA, see Neff, *Judgment Calls*, SPORTS ILLUSTRATED, Sept. 15, 1986, at 21.

7. Wulf, *supra* note 1, at 9-12.

8. 109 S. Ct. 454 (1988).

9. The fourteenth amendment states, in pertinent part:

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

U.S. CONST. amend. XIV, § 1; *see also* Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Rendell-Baker v. Kohn, 457 U.S. 803 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelley v. Kramer, 334 U.S. 1 (1948); The Civil Rights Cases, 109 U.S. 3 (1883).

10. Until the *Tarkanian* decision, the Supreme Court had never addressed the issue of whether the NCAA was a state actor. However, lower federal courts had dealt with this question for many years. Initially, the courts of appeals held that the NCAA was a state actor for constitutional claims. *See, e.g.*, Regents of Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 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). The tide turned in the 1980s, and the courts of appeals have since consistently held to the contrary. *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986); Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984). However, the Supreme Court of Nevada held the NCAA to be a state actor in Tarkanian v. NCAA, 103 Nev. 331, 741 P.2d 1345 (1987), *rev'd*, 109 S. Ct. 454 (1988), thus giving the opportunity to the United States Supreme Court to review the issue, which resulted in the decision of NCAA v. Tarkanian, 109 S. Ct. 454 (1988).

NCAA is not a state actor. Section IV presents opposing arguments, and section V concludes this Note with a presentation of viable alternatives for those members seeking fair procedural treatment when involved with the NCAA.

I. HISTORY OF THE STATE ACTION DOCTRINE AS APPLIED TO THE NCAA IN LOWER STATE AND FEDERAL COURTS

A. *Development of the State Action Doctrine*

The constitutional restraints of the fourteenth amendment are applicable only to state action.[11] State action is usually governmental action, but it may also occur when a private actor acts in concert with a state. The United States Supreme Court has not set down a specific set of rules to determine when the degree of state involvement is sufficient to convert a private person's conduct into state action. Instead, each case is usually judged on its own facts on a case by case basis.[12]

The first significant set of decisions of the United States Supreme Court regarding the state action doctrine were *The Civil Rights Cases*,[13] in which the Court held that conduct which is exclusively private is not governed by the fourteenth amendment. The Court said the guarantees of equal protection and due process apply only to state action.[14] Acts *by* a state government are clearly state actions. However, less clear are those cases where a private entity acts *in concert with* a state government. The Supreme Court developed two theories to explain when particular private conduct that is closely linked to official conduct should be considered state action. The first theory is the *public function approach*,[15] in which the private activity is attributed to the government because the private actor fulfills a

11. *See supra* note 9 and accompanying text. By its express terms, the Constitution makes it clear that its equal protection and due process guarantees will only apply to governmental actions. However, as will be discussed in this section, the term "state" has been interpreted by courts to include organizations which are connected with state action, thereby making them amenable to the fourteenth amendment constraints.

12. The presence of state action in a particular case depends upon its unique facts and circumstances. As Justice Clark said, "[o]wing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present." Burton v. Wilmington Parking Auth., 365 U.S. 715, 725-26 (1961).

13. 109 U.S. 3 (1883).

14. *Id.* at 11.

15. *See infra* notes 17-20 and accompanying text.

public function. The second theory is the *nexus* or *entanglement approach*,[16] in which the connections between the state and the private actor are so great that the state can be said to be involved in (or even to have encouraged) the private activity which is claimed to be violative of the Constitution.

1. *Public Function Approach*

The public function approach posits that when a private entity is entrusted by the state with the performance of functions that are governmental in nature, it becomes an agent of the state and its acts constitute state action.[17] The Court has held that when a facility is built and operated primarily to benefit the public, and when its operation is essentially a public function, it is subject to state regulation.[18]

This approach, however, is restricted to those functions which belong *exclusively* to the state.[19] The application of the public function analysis is thus limited to those circumstances where the function performed is one which is traditionally the *exclusive* prerogative of the state, *and* where the state is actually *required* to perform the function.[20]

2. *Nexus or Entanglement Approach*

The nexus theory posits that if the government is sufficiently involved in the private actor's conduct, the private party's acts will be

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16. *See infra* notes 21-25 and accompanying text.

17. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946), in which the Court focused on the nature of the activity the private actor engaged in. In *Marsh*, the Court held that a state cannot "impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the management." *Id.* at 506. The nature of the company-owned town was no different from any municipal town; thus, it would also be subject to the antidiscriminatory restraints of the Constitution. *See id.* at 507.

18. *See id.* at 506.

19. In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the operation of a privately owned utility licensed and regulated by the state was held not to be performance of a public function. Justice Rehnquist noted that the Court has found state action present in the exercise by a private entity of "powers traditionally exclusively reserved to the State." *Id.* at 352. The Court found that providing utility services is not a traditional function of the state because the state is not obliged to provide such services; thus, the Court rejected the public function analysis as applied to utility companies. *Id.* at 353.

In later cases, the Supreme Court also rejected the public function analysis as applied to nursing homes. The activity must be one which the state is *required* to provide by statute or state constitution. *See* Blum v. Yaretsky, 457 U.S. 991 (1982). The Court also rejected this approach as applied to private schools. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982). Even though the private school's income came primarily from public grants, it was not held to be a state actor. The provision of education, while normally provided by the state out of public funds, was not found to be the exclusive function of the state. *Id.*

20. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

deemed state action and will thus be subject to constitutional review.[21]

In *Jackson v. Metropolitan Edison Co.*,[22] the Court addressed the nexus approach as applied to a state regulated utility. Justice Rehnquist stated:

> While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is "private," on the one hand, or "state action," on the other, frequently admits of no easy answer. . . . It may well be that acts of a heavily regulated activity with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a *sufficiently close nexus* between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.[23]

In *Jackson*, the Court found no sufficient relationship between the state and the utility to transform the utility's actions into state actions.

But in *Burton v. Wilmington Parking Authority*,[24] the Court found a sufficient involvement between the state and a private entity to enforce compliance with the constitutional mandates of the fourteenth amendment. In *Burton*, a private company ran a restaurant in a state owned and operated parking facility, and the restaurant refused to serve blacks. The Court held that sufficient involvement existed between the state and the restaurant as to demand compliance with the antidiscriminatory restraints of the fourteenth amendment. Justice Clark held that if the state "has so far insinuated itself into a position of interdependence. . .that it must be recognized as a joint participant in the challenged activity. . .[that activity] cannot be considered to be so purely private as to fall without the scope of the Fourteenth Amendment."[25] Thus, the test for the nexus analysis is whether a significant involvement exists between the state and the private actor; this will always turn on the facts of each individual

21. In Shelley v. Kraemer, 334 U.S. 1 (1948), the Supreme Court held that private, racially restrictive covenants in real estate sales do not violate the fourteenth amendment, but that state court enforcement of those restrictive covenants does violate the amendment. The state enforcement of the covenant was the nexus that connected the state to the discriminatory conduct. Enforcement of the restriction was a sufficient involvement to apply the constitutional guarantees. *Id.* at 13-14.

22. 419 U.S. 345 (1974).

23. *Id.* at 349-51 (emphasis added).

24. 365 U.S. 715 (1961).

25. *Id.* at 725. Some of the criteria the Court found convincing leading to this holding include that the land and building were publicly owned, and that public funds paid for the maintenance of the building. *Id.* at 723-24.

case.

B. Limiting of the State Action Doctrine in the 1980s: The 1982 State Action Trilogy

The scope of the state action doctrine was curtailed by three Supreme Court decisions in 1982: *Blum v. Yaretsky*,[26] *Rendell-Baker v. Kohn*,[27] and *Lugar v. Edmondson Oil Co.*[28] In *Blum*, the Court held that privately owned nursing homes reimbursed by the state were not state actors for purposes of fourteenth amendment claims. Justice Rehnquist wrote:

> [A] State normally can be held responsible for a private decision only when it has exercised a coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible [under the] Fourteenth Amendment.[29]

Thus, the mere receipt of state funds does not make the state action label attach.

In *Rendell-Baker*, the Court held that a private school funded primarily from public funds and regulated by public authorities could not be considered a state actor. The school's receipt of public funds did not make the school a state actor.[30] Further, the extensive regulation by the state was also insufficient to make the school a state actor.[31]

In *Lugar*, the Court found the state action requirement to be met when a private party *jointly participated* with state officials in the seizure of disputed property under a procedurally defective statute.[32]

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26. 457 U.S. 991 (1982). Medicaid patients "objected to the involuntary discharge or transfer. . .by their nursing homes without certain procedural safeguards." *Id.* at 1003.

27. 457 U.S. 830 (1982). Teachers in a private school brought suit claiming they had been fired in violation of their constitutional rights to free speech and procedural due process. *Id.* at 834-35.

28. 457 U.S. 922 (1982). Plaintiffs claimed that creditors took advantage of state enforcement of an unconstitutional statute to allow attachment of property without due process.

29. *Blum*, 457 U.S. at 1004-05.

30. *Rendell-Baker*, 457 U.S. at 840. These public funds were given to the school because it acted as a contractor for services, educating those students who were experiencing difficulties in the public school system. Chief Justice Burger noted that "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Id.* at 841.

31. *Id.* at 841-42. The public function approach was also inapplicable, because under *Jackson* it was mandated that the function must be the traditional *exclusive* function of the state. *See supra* note 19 and accompanying text. While education is an important function that the state usually provides, no state is required by the United States Constitution to provide education.

32. *Lugar*, 457 U.S. at 942. Justice White was careful to limit the holding to those contexts in which the state has created a system whereby state officials attach property on the *ex parte* application of one party to a private dispute. For the discussion of *Shel-*

Therefore, this trilogy of cases stands for the proposition that neither state funding nor state regulation, without more, is enough to command a state actor determination, and that *significant* joint participation between the state and the private party is essential for the state actor label to attach.

C. *The State Action Doctrine as Applied to the NCAA*

From 1974 through 1982, federal appellate courts unanimously held that NCAA action was state action and therefore subject to the standards of the fourteenth amendment.[33] However, with the limitations placed by the United States Supreme Court on the application of the public function and the nexus approaches in the 1982 state action trilogy,[34] the federal courts reexamined their approaches, and all circuits held that NCAA actions were not state actions. The Nevada Supreme Court, in *Tarkanian v. NCAA*,[35] was the first court in five years to declare the NCAA a state actor, thus ripening the issue for review by the United States Supreme Court.

1. *NCAA Action as State Action*

Until 1982, the federal circuit courts relied on both the public function analysis and the nexus or entanglement analysis to determine that NCAA actions were state actions.[36] The public function

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ley v. Kraemer, in which state officials acted to enforce violations of the fourteenth amendment, see *supra* note 21.

33. *See supra* note 10.

34. *See supra* notes 26-32 and accompanying text.

35. 103 Nev. 331, 741 P.2d 1345 (1987), *rev'd*, 109 S. Ct. 454 (1988). This case could have had a major impact on the NCAA. A ruling backing Tarkanian's view that the university gave its sports-governing authority to the NCAA could have opened the door for a myriad of lawsuits by athletes, coaches, and universities who had been disciplined by the NCAA.

36. For an early, optimistic view that NCAA action would continue to be seen as state action, see Note, *The NCAA, Amateurism, and the Student-Athlete's Constitutional Rights Upon Ineligibility*, 15 NEW ENG. L. REV. 597, 600-07 (1980). "In general, the state action question is close, especially in light of the Burger Court's tendency to restrict the applicability of state action. Nevertheless, courts faced with the issue are decidedly finding state action on the part of the NCAA, and the weight of precedent will assuredly continue this trend." *Id.* at 607.

For a brief survey of various issues raised by litigation in college athletics, see Carrefiello, *Jocks Are People Too: The Constitution Comes To The Locker Room*, 13 CREIGHTON L. REV. 843 (1980). For a discussion of the inapplicability of the state action doctrine to the NCAA in the context of constitutionally challenging student-athlete academic standards, see Comment, *NCAA Eligibility Regulations And the Fourteenth Amendment - Where Is the State Action?*, 13 OHIO N.U.L. REV. 433 (1986). And for the opposing view, see Greene, *The New NCAA Rules Of The Game: Academic Integrity Or*

argument approach was based on the idea that the NCAA performs a traditional government function. The nexus or entanglement approach was based on the view that NCAA actions could be seen as state actions by virtue of the organization's public membership, which indicated a sufficiently close nexus between the state and the NCAA.[37]

The public function analysis was a popular approach. In the 1975 case of *Parish v. NCAA*,[38] the Fifth Circuit Court of Appeals used

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Racism?, 28 ST. LOUIS U.L.J. 101 (1984).

37. However, even when state action was found, it was common for the NCAA action to be upheld, usually as rationally related to a legitimate state objective. *See* Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974). In this case, the plaintiffs were student-athletes who gained admission to the university through alternative admissions qualifications, based on economic need, motivation, and maturity. *Id.* at 1252. They were not required to take either the SAT or the ACT. *Id.* Each of the plaintiffs were determined to have the potential to succeed academically, despite deficiencies in their educational background which would normally have prevented their admission under the regular standards. *Id.* One of the bylaws of the NCAA limited eligibility of first year students who had a predicted grade point average below a certain level under the NCAA prediction tables, and either an SAT score or ACT score (along with either high school grades or rank in class) was necessary to predict a student's grade point average. *Id.* at 1253. Since the plaintiffs were not required to take those standardized tests, those plaintiffs who did not take them did not receive high enough predictions. *Id.* Those plaintiffs who did take the tests also failed to reach high enough prediction levels. *Id.* at 1253-54. Due to some misunderstanding on the part of the university, each plaintiff was still certified as fully eligible to participate in athletics their freshman year. *Id.* at 1254. (Each plaintiff did in fact obtain at least the minimum grade point average his first year. *Id.*) When the NCAA found out that these players had erroneously been determined eligible, it demanded that the university declare the students as ineligible. *Id.* Rather than face stiff sanctions from the NCAA, the university did as it was told. *Id.* Plaintiffs brought suit and won a temporary restraining order; the NCAA appealed. *Id.* However, the NCAA's rule regarding eligibility was upheld because it was shown to bear a rational relationship to a legitimate purpose. *Id.* at 1255.

See also Regents of Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977). In this case, student athletes were charged with violating various provisions of the NCAA rules, including the sale of complimentary tickets, use of administrators' telephone lines for personal long-distance calls, use of coaches' automobiles for personal transportation, and use of free lodging during basketball camp. *Id.* at 359. The NCAA declared the students ineligible to play, and imposed sanctions on the university, including a probation period with no post-season play and no television coverage for any sports. *Id.* at 361. The students claimed that the NCAA had not afforded them due process before they were declared ineligible. *Id.* at 363. The court of appeals determined, however, that the investigations and hearings were fair, impartial, and complete, and that the evidence justified the NCAA's conclusions. *Id.* at 367.

38. 506 F.2d 1028 (5th Cir. 1975). In this case, the plaintiffs were basketball players who were granted eligibility by their college even though the students did not meet the minimum grade point averages required by the NCAA. *Id.* at 1030. When the NCAA found out, it imposed sanctions against the school. *Id.* at 1031. The students brought action against the NCAA under a claim of denial of due process and equal protection. *Id.* A temporary restraining order was issued, but it lapsed when the team failed to receive any post-season invitations. *Id.* The NCAA's motion to dismiss was granted, because the restriction on grades was minimally related to a legitimate state purpose, and thus was permissible. *Id.* at 1031-34. Other cases have used the public function analysis to put constitutional restraints on the NCAA. *See* Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Buckston v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973). "The N.C.A.A. in supervising and policing the majority of intercollegiate

this analysis to find the NCAA a state actor. The court noted that the state government had a traditional interest in all aspects of education, and that organized athletics were an important part of this educational system.[39] Once college athletics became national in scope, the NCAA undertook the task of coordinating and regulating the system, and thus, was performing a traditional government function.[40]

This approach, however, does not seem to fit with the United States Supreme Court decisions requiring that the state action label be affixed to private actors only when performing a function belonging exclusively to the state,[41] and only when the state is actually required to perform the function.[42] Education is not an exclusive government function, and its provision is not required from any state; therefore, the later cases contended that the public function approach was destined to fail in this context.

In addition to the public function approach, the federal courts of appeals also relied upon entanglement analysis. In the 1975 case of *Howard University v. NCAA*,[43] the District of Columbia Circuit

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athletics and athletes nationwide performs a public function, sovereign in nature, subject[ing] it to constitutional scrutiny." *Id.* at 1156.

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

40. *Id.* The court stated, "in light of the national. . .scope of collegiate athletics and the traditional governmental concern with the educational system, [if] the NCAA were to disappear tomorrow, government would soon step in to fill the void." *Id.* at 1033. The court emphasized that a state should not be allowed to sidestep constitutional restrictions by forming or supporting private organizations in which they have placed a part of their governmental power. *Id.*

41. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); *see also supra* notes 17-20 and accompanying text.

42. Blum v. Yaretsky, 457 U.S. 991 (1982); *see also supra* notes 17-20 and accompanying text.

43. 510 F.2d 213 (D.C. Cir. 1975). In this case, a private university and one of its athletes sought injunctive and declaratory relief against the NCAA, alleging that their constitutional rights had been abridged. *Id.* at 214. Certain members of the university soccer team, including one plaintiff, had been found by the NCAA to have participated in intercollegiate competitions and NCAA championships while ineligible under NCAA rules. *Id.* The NCAA had conducted an investigation of the university, and found that two of its student-athletes had violated its foreign student rule, which reduces eligibility for each year a student played in a foreign country. *Id.* at 215. In addition, one student was found to have violated the five-year rule, which mandates that the student may only remain eligible for five years from the date of matriculation in the university. *Id.* Furthermore, some students were found to be receiving financial aid when their grade point averages were below the required minimum. *Id.* In addition to holding that the NCAA action could be classified as state action, the court held that the foreign student rule violated the equal protection clause. *Id.* at 222. The court, while enjoining further enforcement of the foreign student rule, upheld the NCAA sanctions imposed upon the school because both the five-year rule and the minimum grade point average rule had a fair and substantial relation to the object of the NCAA's legislation. *Id.*

Court of Appeals found state action by the NCAA based upon the state's involvement with the NCAA. The court relied upon the size, influence, and wealth of the NCAA to conclude that even private institutions following NCAA policies had engaged in the requisite degree of state action to require constitutional restraint.[44] Some of the factors the court found convincing were: that approximately one-half of the NCAA's members were state or federally supported; that public schools provided the vast majority of the NCAA's capital; and that the public schools were a dominant force in determining NCAA policy and in dictating NCAA actions.[45] The court noted that while a private university was not itself a governmental institution, its athletic and educational affairs were affected by the concerted action of the many state institutions that participate as NCAA members in the promulgation and enforcement of the NCAA rules.[46] Since this state involvement was pervasive, if injuries arose, they were in effect caused by these institutions.[47] This approach was doomed because it did not fit with the Supreme Court decisions requiring a sufficiently close nexus between the state and the challenged activity.[48]

2. NCAA Action as Private Action: The Public Function and Nexus Approaches Disapproved

The Supreme Court has steadily narrowed its definition of what is state action and who is a state actor. For example, in the state action trilogy of cases discussed above, private institutions, even when supported almost exclusively by public funds, did not meet the definition of a state actor.[49] In light of the Court's shift in the 1982 cases, the federal circuit courts followed suit and consistently found that actions by the NCAA do not constitute state action.

In the 1984 case of *Arlosoroff v. NCAA*,[50] the Fourth Circuit Court of Appeals, relying on the 1982 trilogy, was the first appellate court to hold that the NCAA was not a state actor. While recognizing the directly contrary holdings of many other circuits,[51] the court held that these earlier cases rested upon the theory that indirect involvement of state governments could convert what otherwise would

44. *Id.* at 218.
45. *Id.* at 219-20.
46. *Id.* at 216-17.
47. *Id.* at 217.
48. *E.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).
49. *See supra* notes 26-32 and accompanying text.
50. 746 F.2d 1019 (4th Cir. 1984).
51. Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974).

be considered private conduct into state action; a theory the Fourth Circuit believed the Supreme Court to have rejected in its 1982 decisions.[52] The court concluded that no state action was present.

> It is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not *order or cause* the action complained of, and the function is not one *traditionally reserved* to the state, there is no state action.[53]

After noting that no precise formula was available to determine whether state action exists, the court suggested that the proper inquiry should be whether the action is fairly attributable to the state.[54] The court considered the fact that the membership of the NCAA consisted of fifty percent state institutions, but noted that this fact did not change the NCAA's basic character as a private association.[55] Recognizing that the association served somewhat of a public function by introducing order into college athletics, the court quoted *Jackson v. Metropolitan Edison Co.*[56] to support its holding that state action must consist of a function which is exclusively reserved to the state.[57] Further support for the exclusivity requirement was offered by *Rendell-Baker v. Kohn*,[58] which held that simply performing a function that serves the public is not state action. All of the tests used by the Supreme Court for measuring state action seem to require a closer connection between the state and the NCAA.

The First Circuit soon followed suit in the 1985 case of *Ponce v. Basketball Federation of Comm. of P.R.*[59] That court concluded that the criteria established by the Supreme Court precluded a finding of state action where there was no evidence that the government encouraged or affirmatively induced the challenged conduct.[60] The Sixth Circuit also followed this trend in the 1986 case of *Graham v.*

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52. *Arlosoroff*, 746 F.2d at 1021.
53. *Id.* at 1022 (emphasis added).
54. *Id.* at 1021.
55. *Id.*
56. 419 U.S. 345 (1974); *see supra* notes 22-23 and accompanying text; *see also supra* note 19.
57. *Arlosoroff*, 746 F.2d at 1021.
58. 457 U.S. 830 (1982).
59. 760 F.2d 375 (1st Cir. 1985). Although *Ponce* did not involve the NCAA, a similar and thus analogous association was held not to be a state actor.
60. *Id.* at 378. The First Circuit had already moved in this direction in Spath v. NCAA, 728 F.2d 25 (1st Cir. 1984). In *Spath*, however, the court did not have to rule directly on the issue since the school involved was a publicly supported university, which was also named as a codefendant; the school itself was held to be responsible for the violation.

NCAA.[61] In *Graham*, the plaintiff failed to show either that the NCAA served a traditional government function or that the state in any way caused, controlled, or directed the NCAA's actions.[62] The Sixth Circuit again examined the issue in the 1987 case of *Karmanos v. Baker*.[63] In *Karmanos*, the court was convinced that no state action existed because the plaintiff failed to show that the state university either caused or procured the adoption of NCAA rules, and therefore, sufficient state involvement was not shown.

3. Nevada Supreme Court Holds NCAA Action is State Action

Contrary to the weight of the federal circuit court authority, the Nevada Supreme Court, in *Tarkanian v. NCAA*,[64] decided that the NCAA was indeed a state actor. The court recognized that the rationale underlying the early cases was that many NCAA member institutions were publicly supported.[65] However, the Nevada court disagreed with the federal courts' interpretation of the 1982 Supreme Court trilogy, and therefore propounded a different result.[66] The court acknowledged that cases subsequent to the state action trilogy[67] rejected the earlier line of cases holding that NCAA activity is state action.[68] However, the Nevada court argued that the Supreme Court trilogy did not require the results that occurred in subsequent cases.[69] While the later cases argued that education was not a traditional, exclusive government function (thus, not fitting the test posited by the Supreme Court), the Nevada court contended that the right to discipline public employees was the traditional, exclusive prerogative of the state.[70] Therefore, the court felt that a university could not escape responsibility for its disciplinary duties by delegating those tasks to a private entity, the NCAA.[71]

The Nevada Supreme Court distinguished the federal cases holding contrary on the grounds that many of them involved private universities.[72] As for the cases involving state universities, they were dis-

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61. 804 F.2d 953 (6th Cir. 1986).
62. *Id.* at 958.
63. 816 F.2d. 258 (6th Cir. 1987).
64. 103 Nev. 331, 741 P.2d 1345 (1987), *rev'd*, 109 S. Ct. 454 (1988).
65. *Id.* at 333, 741 P.2d at 1347.
66. *Id.*
67. *See supra* notes 26-32 and accompanying text.
68. *Tarkanian*, 103 Nev. at 335, 741 P.2d at 1348.
69. *Id.* at 336, 741 P.2d at 1348.
70. *Id.* Deciding which governmental function the court was actually looking at seems to be the key issue here. The Nevada court never tried to assert that education was an exclusive government function.
71. *Tarkanian*, 103 Nev. at 336, 741 P.2d at 1348.
72. *Id.* at 337, 741 P.2d at 1349. Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984), involved the applicability of eligibility requirements to a Duke University tennis

tinguished on the grounds that the plaintiffs were students rather than state employees, such as Coach Tarkanian.[73]

II. THE NCAA AND COACH TARKANIAN'S SUIT

A. The Structure of the NCAA

The NCAA is an unincorporated association of approximately 960 members, including virtually all of the public and private universities and colleges in the United States with major athletic programs.[74] The NCAA has a constitution longer than the United States Constitution.[75] The NCAA's Constitution gives to the NCAA the power to

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player.

73. Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986), involved students who claimed that the NCAA transfer regulations violated their constitutional rights. *Graham* did not deal with the enforcement of NCAA rules against a state employee, as did *Tarkanian*, and thus, *Graham* is clearly distinguishable.

74. *Tarkanian*, 109 S. Ct. at 457. For a general understanding of the operation of the NCAA, see Martin, *The NCAA and the Fourteenth Amendment*, 11 NEW ENG. L. REV. 383, 389-92 (1976).

75. The NCAA Constitution lists its purposes:

> (a) To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, sports participation as a recreational pursuit and athletic excellence;
> (b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association;
> (c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;
> (d) To formulate, copyright and publish rules of play governing intercollegiate sports;
> (e) To preserve intercollegiate athletics records;
> (f) To supervise the conduct of, and to establish eligibility standards for, regional and national athletics events under the auspices of this Association;
> (g) To cooperate with other amateur athletics organizations in promoting and conducting national and international athletics events;
> (h) To legislate, through bylaws or by a resolution of a Convention, upon any subject of general concern to the members in the administration of intercollegiate athletics; and
> (i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletics activities on a high level.

NCAA CONST. art. 2, § 1, *reprinted in* 1988-89 NCAA MANUAL 7. The fundamental policies of the NCAA are also set out in its constitution as follows:

> (a) The competitive athletics programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and, by so doing, retain a clear line of demarcation between college athletics and professional sports.
> (b) Legislation governing the conduct of intercollegiate athletics programs of

create "legislation" to govern all intercollegiate sports of member institutions.[76] Approximately one-half of these member institutions are state funded schools, which pay dues to the NCAA.[77] Since it has a monopoly over college athletics, any college or university that wants to be a "big name" sports school is, for all practical purposes, forced to join the NCAA.[78] According to the NCAA Constitution, these schools must enforce the rules and regulations of the NCAA.[79] This presents a problem for state funded schools: if the NCAA's acts are not considered to be state actions when it engages in the regulation of state school athletics, it will not be held accountable if it commits what otherwise would be a violation of the fourteenth amendment. Every athlete's claim must cross the state action threshold in order to have his or her grievance considered by the courts.[80]

B. *Background and Facts of* NCAA v. Tarkanian

The University of Nevada is a public institution of higher learning which is financed by the state of Nevada.[81] The University of Nevada, Las Vegas (UNLV) is one branch of the state funded University of Nevada.[82] The University is organized and operated according to the Nevada Constitution, statutes, and regulations.[83] Official functions of the executives of UNLV are, of course, state actions.[84]

UNLV is a member of the NCAA.[85] As a member of the NCAA, it contractually agrees to administer its athletic program in accordance with NCAA legislation.[86] The responsibility for administering

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> member institutions shall apply to basic athletics issues such as admissions, financial aid, eligibility and recruiting; member institutions shall be obligated to apply and enforce this legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation.

NCAA CONST. art. 2, § 2, *reprinted in* 1988-89 NCAA MANUAL 7-8.

76. NCAA CONST. art. 2, § 1(h), *reprinted in* 1988-89 NCAA MANUAL 7; *see supra* note 75.

77. Buckton v. NCAA, 366 F. Supp. 1152, 1157 (D. Mass. 1973).

78. In order to operate a large-scale intercollegiate athletic program on an economically sound basis, membership in the NCAA may be a practical necessity.

79. NCAA CONST. art. 2, § 2(b), *reprinted in* 1988-89 NCAA MANUAL #8. See *supra* note 75 for the applicable enforcement provisions.

80. *See infra* notes 117-26 and accompanying text.

81. NCAA v. Tarkanian, 109 S. Ct. 454, 457 (1988).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* The NCAA Constitution provides:

> Legislation governing the conduct of intercollegiate athletics programs of member institutions shall apply to basic athletics issues such as admissions, financial aid, eligibility and recruiting; *member institutions shall be obligated to apply and enforce this legislation*, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation.

NCAA CONST. art. 2, § 2(b), *reprinted in* 1988-89 NCAA MANUAL 8 (emphasis added).

the NCAA enforcement program is delegated to the NCAA Committee on Infractions.[87] It supervises an investigative staff and makes factual determinations concerning alleged rule violations.[88] If it finds a violation, this committee is authorized to impose an appropriate penalty, or recommend suspension or termination of the school's membership in the NCAA.[89] If the violation is serious, the NCAA may apply several severe sanctions.[90]

Jerry Tarkanian became the head basketball coach at UNLV in 1973.[91] Prior to his joining the staff, the team had a losing record.[92] Four years later, the team placed third in the NCAA national championship.[93] However, in 1977, officials at UNLV notified Tarkanian that they were going to suspend him.[94] The NCAA had questioned UNLV's athletic program, and subsequent to its investigation, the NCAA alleged that UNLV had infracted thirty-eight NCAA rules.[95] Ten of these infractions allegedly involved Tarkanian.[96]

The Committee on Infractions proposed sanctions against UNLV, including a two year probation period during which its basketball team could not participate in post-season tournaments or appear on television.[97] The Committee also requested UNLV to discipline

87. *Tarkanian*, 109 S. Ct. at 457; *see also* NCAA CONST. art. 4, § 6, *reprinted in* 1988-89 NCAA MANUAL 34-35.

88. Official Procedure Governing The NCAA Enforcement Program, §§ 2-4, NCAA MANUAL 238-43 (1988).

89. *Id.*; *see* § 4(b)(3).

90. Among these disciplinary measures are reprimands and censures, probation for one year or more, ineligibility for NCAA championship events, ineligibility for post-season play, ineligibility for television coverage, prohibitions against intercollegiate competition, prohibitions against recruitment, and reductions in financial aid awards allowed. *Id.*; *see* § 7, at 245. Some of these measures are unquestionably harsh, but surely sometimes deserved.

91. *Tarkanian*, 109 S. Ct. at 456. For an interesting account of the trials and tribulations of Coach Tarkanian, see Dexter, *Rebel With a Cause*, SPORTS ILLUSTRATED, Dec. 8, 1986, at 80; *see also* Callahan, *Making Its Points The Hard Way; Dealt a Difficult Hand, Las Vegas Draws From the Discards*, TIME, Mar. 2, 1987, at 59.

92. *Tarkanian*, 109 S. Ct. at 456.

93. *Id.*

94. *Id.* They were very happy with his performance as head coach. He was described as the "winningest active basketball coach." *Id.*

95. *Id.*

96. *Id.* UNLV, with the help of both private counsel and the Nevada Attorney General, conducted an investigation and denied all of the allegations, and specifically determined that Tarkanian had committed no violations. They presented their conclusions during hearings with the NCAA's Committee on Infractions. The Committee decided that indeed, many of its allegations could not be supported by the evidence, but it did find 38 violations of NCAA rules, with 10 violations supposedly committed by Tarkanian. *Id.* at 456-59.

97. *Id.* at 459.

Coach Tarkanian by removing him completely from the University's athletic program during the probation; more sanctions were threatened if UNLV did not do so.[98] UNLV appealed the Committee's proposed sanctions to the NCAA Council.[99] After hearing arguments from all sides, the Council approved the Committee's findings and adopted all of its recommended sanctions.[100]

Subsequent to the Council's approval, the executives of UNLV were forced to decide whether they would apply the recommended sanctions.[101] The school officials had three options: first, they could reject the sanction requiring the severance of Tarkanian from the athletic program, and take the risk of even heavier sanctions; second, even though they thought the NCAA was incorrect in its ruling, they could reassign Tarkanian, even though he was tenured, to a different position for the duration of the probation; and finally, they could pull out of the NCAA completely.[102] Although they expressed doubts concerning the sufficiency of the evidence on which the recommendations were formed,[103] they concluded that, given the mandatory adherence to NCAA regulations, they could not substitute their findings for those of the NCAA.[104] The president of the University chose the second option, and notified Tarkanian that he was completely severed from all relations with the intercollegiate program during its probation period.[105]

Rather than accept his threatened demotion and drastic salary cut, Tarkanian brought suit in Nevada, claiming that he had been deprived of his fourteenth amendment due process rights.[106] Tarkanian obtained injunctive relief and an award of attorney's

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. The university was critical of the procedures used by the NCAA and attacked the credibility of the NCAA investigators. University of Nev. v. Tarkanian, 95 Nev. 389, 393, 594 P.2d 1159, 1161 (1979).

104. *Tarkanian*, 109 S. Ct. at 459.

105. *Id.*

106. For the pertinent part of the fourteenth amendment, see *supra* note 9. Tarkanian sued under the Civil Rights Act. This civil rights statute states:

> 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 or other person within the jurisdiction thereof 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1982).

fees[107] against both the NCAA and UNLV.[108] The trial court enjoined UNLV from suspending Tarkanian on the grounds that he had been deprived of his procedural and substantive due process, and UNLV appealed.[109] After a four year delay, the trial judge finally resolved the case in Tarkanian's favor.[110] The NCAA appealed to the Nevada Supreme Court, which affirmed the lower court's holding that Tarkanian had been deprived of due process prior to his suspension.[111] The basis for the Nevada Supreme Court's decision was that the NCAA was a state actor, and thus subject to the restrictions of the fourteenth amendment.[112] The case was appealed by the NCAA to the United States Supreme Court, which reversed the lower court holding in a five-to-four decision.[113]

III. THE SUPREME COURT OPINION IN *NCAA V. TARKANIAN*

The Nevada State Supreme Court held the NCAA to have engaged in state action.[114] In reversing this holding, the United States Supreme Court contended that the Nevada court made three incorrect assumptions. First, the court assumed that it was reviewing the penalties imposed on Tarkanian, rather than proposed sanctions against UNLV.[115] Second, the court incorrectly termed the NCAA a

107. Tarkanian filed for attorney's fees and was awarded almost $196,000, 90% of which was to be paid by the NCAA. The attorney's fees were awarded according to the Civil Rights Attorney's Fees Award Act, which states in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title. . .the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982).

108. *Tarkanian*, 103 Nev. 331, 741 P.2d 1345 (1987), *rev'd*, 109 S. Ct. 454 (1988).

109. *Tarkanian*, 109 S. Ct. at 459.

110. *Id.* at 460. The court concluded that the NCAA's conduct constituted state action for jurisdictional and constitutional purposes, and that the NCAA's decision was arbitrary and capricious. The court reaffirmed the earlier injunction barring UNLV from disciplining Tarkanian, and it also enjoined the NCAA from conducting further proceedings against UNLV and from taking other actions that had been recommended by the NCAA Council. *Id.*

111. *Tarkanian*, 103 Nev. at 333, 741 P.2d at 1346. It confirmed the injunction, but narrowed its scope only to forbid penalties from being imposed upon Tarkanian himself. The court also reduced the award of attorney's fees. *Id.* at 340, 741 P.2d at 1352.

112. *Id.* at 337, 741 P.2d at 1349.

113. Justice Stevens wrote the majority opinion; the dissenters were Justices White, Brennan, Marshall, and O'Connor. For an example of the great amount of publicity prior to this litigation, see CHRON. HIGHER EDUC., Mar. 2, 1988, at A31; *see also* CHRON. HIGHER EDUC., Oct. 12, 1988, at A35.

114. *Tarkanian*, 103 Nev. 331, 741 P.2d 1345 (1987), *rev'd*, 109 S. Ct. 454 (1988).

115. *Tarkanian*, 109 S. Ct. at 461.

state actor due to the public financial support it received.[116] Third, it assumed that the right to discipline a public employee was traditionally the exclusive prerogative of the state, thus assuming that the state (acting through UNLV) may not escape its responsibility for such disciplinary action by delegating that task to a private entity.[117]

Tarkanian argued that UNLV (obviously a state actor) had delegated its own functions and authority to the NCAA, and the Nevada Supreme Court reasoned that both of the entities acted jointly to deprive Tarkanian of his rights, thus making them both state actors.[118] However, the United States Supreme Court construed the scheme in a different way. The Court noted that in a typical state action case, a private party has caused harm to a plaintiff, and the question is whether the state was sufficiently involved to treat that conduct as state action.[119] But in this case, it was UNLV—the official state actor—which actually performed the suspension challenged by Tarkanian.[120] The Court felt the critical question was whether UNLV's actions in compliance with the NCAA recommendations turned the NCAA's conduct into state action.[121]

Justice Stevens, writing for the majority, indicated that the relationship between UNLV and the NCAA was not sufficient to confer the state actor title upon the NCAA. Stevens gave several reasons for this holding. First, since hundreds of schools in the NCAA have a major impact on NCAA policies, it is the *collective* membership, independent of any particular state, that determines the policies to be implemented; UNLV only played a minor role in the formulation of NCAA policy.[122] Second, the mere adoption of the NCAA rules by UNLV did not transform the NCAA into a state actor; UNLV could have promulgated its own rules and withdrawn from the NCAA, or it could have remained a member of the NCAA and worked through its legislative process to change those rules it deemed unfair.[123]

In response to Tarkanian's "delegation" argument,[124] the Court

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116. *Id.* Over one-half of the NCAA member institutions are state supported schools. *See supra* note 77 and accompanying text.

117. *Tarkanian*, 109 S. Ct. at 461.

118. *Id.* at 462.

119. *Id.*

120. When a state imposes a disciplinary sanction upon one of its employees, it must comply with the terms of the fourteenth amendment. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Board of Regents v. Roth, 408 U.S. 564 (1972).

121. *Tarkanian*, 109 S. Ct. at 462.

122. *Id.*

123. *Id.* at 463.

124. Tarkanian asserted that the NCAA's investigation, enforcement proceedings, and punitive recommendations were state actions because UNLV had delegated its power to perform such duties to the NCAA. *Id.* at 463-64. The Supreme Court has previously held that a state may delegate authority to a private party and thereby make him a state actor. West v. Atkins, 487 U.S. 42 (1988).

noted that UNLV had actually delegated no power to the NCAA to take any action against a state employee. The NCAA could only impose sanctions on the school itself, not on any one particular individual.[125] The Court also took special note of the adversary relationship between the NCAA and UNLV during the course of the litigation. Since it would be unusual for a state entity to delegate its powers to its own opponent, the Court felt that the NCAA was not an agent of UNLV. Justice Stevens wrote: "[T]he NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university."[126]

An essential element of the Court's holding that the NCAA was not responsible for due process violations was that the NCAA employs no special governmental powers in its investigations and recommendations of alleged rules violations.[127] The Court noted that it would be hard to hold the NCAA to constitutional restraints of due process when it has no power to subpoena witnesses, to impose contempt sanctions, or to impose its authority over any particular individual.[128]

As additional support for his contention that the NCAA is a state actor, Tarkanian argued that the NCAA is so powerful that schools have no practical alternative to compliance with its demands.[129] The Court said there was no merit in that argument. A private monopoly is not necessarily a state actor.[130] Justice Stevens recognized UNLV's desire to rank among the top college basketball teams; obviously nonmembership in the NCAA would hinder the achievement of that goal.[131] But just because UNLV's options were not the most positive options possible did not mean that they were nonexistent.[132]

The Court concluded that it would be more appropriate to say

125. *Tarkanian*, 109 S. Ct at 464.
126. *Id.*
127. *Id.* at 464-65.
128. *Id.* at 465.
129. When this case was argued before the Supreme Court, Tarkanian's attorney said that pulling UNLV's membership from the NCAA would be a severe downfall for the university. "The NCAA is the only game in town," the attorney said. Justice Scalia asked, "Are you saying that the world comes to an end if you can't belong to the NCAA?" "As a university with any kind of an athletic program it does," answered the lawyer. "A lot of educators would be surprised to hear that," retorted Scalia. CHRON. HIGHER EDUC., Oct. 12, 1988, at A36, cols. 4-5.
130. A state's conferral of a monopoly status does not convert a private party into a state actor. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-52 (1974).
131. *Tarkanian*, 109 S. Ct. at 465.
132. *Id.*

that UNLV conducted its program under NCAA policies, rather than to say that NCAA policies were developed and conducted under Nevada law.[133] Therefore, the Court gave "the final word": the NCAA is not a state actor for constitutional purposes.

IV. Arguments Supporting State Actor Status for the NCAA

A. *The Dissenting Opinion in* Tarkanian

The holding in *NCAA v. Tarkanian* was prompted by a narrow majority.[134] The dissenting justices would have held the NCAA to fourteenth amendment restraints. Justice White, in writing the dissenting opinion, relied upon two earlier Supreme Court cases, *Adickes v. S.H. Kress & Co.*[135] and *Dennis v. Sparks*,[136] in asserting that private parties could be held to be state actors even in cases where the questioned act was eventually carried out by state officials. In *Adickes* and *Dennis*, the Court held that private parties could be found to be state actors if they jointly engaged with state officials in the challenged action.[137] White believed that the facts clearly lead to a conclusion that the NCAA acted jointly with UNLV in the suspension of Coach Tarkanian. He stated: "[I]t was the NCAA's findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Tarkanian's suspension by UNLV."[138]

Justice White indicated that the holding in *Dennis* would not preclude the Court from holding that the NCAA was a state actor, despite the fact that the NCAA did not have any power to take direct action against Tarkanian.[139] In *Dennis*, the private parties did not have any power against the plaintiff, but the Court still held the defendants to be state actors.[140] Next, White pointed out that UNLV suspended Tarkanian because it embraced the NCAA rules governing the conduct of its athletic program and adopted the conclu-

133. *Id.*

134. It was a five-to-four decision. The dissenting Justices were White, Brennan, Marshall, and O'Connor.

135. 398 U.S. 144 (1970).

136. 449 U.S. 24 (1980).

137. *Dennis*, 449 U.S. at 27-28; *Adickes*, 398 U.S. at 152.

138. *Tarkanian*, 109 S. Ct. at 467 (White, J., dissenting).

139. *Id.*

140. In *Dennis*, a state trial judge enjoined the production of minerals from oil leases owned by the plaintiff. The injunction was later nullified on appeal as having been illegally issued. The plaintiff sued both the judge and the defendant (a private corporation), alleging conspiracy to deprive him of due process. The Court held the corporation to be a state actor because it willfully participated in joint action with the state's agents. *Dennis*, 449 U.S. at 27.

sions of the NCAA's hearings, as UNLV had agreed under its NCAA membership contract. This was all Justice White felt was necessary to show that the NCAA acted jointly with UNLV and therefore was a state actor.[141]

B. Fulfilling the Policies Behind the State Action Doctrine

There are two situations where the state action problem crops up: first, when a plaintiff wants to go after the "deep pockets," and therefore tries to hold the state responsible for the actions of a private party; and second, when a plaintiff wants to right a wrong committed by a "relation" of the state. In this second situation, the plaintiff only seeks a remedy from that private party, but needs the state action doctrine to hold that party amenable to constitutional restraints. These two situations have corresponding public policies which apply depending on which party the plaintiff seeks to hold responsible. As Justice White wrote in *Lugar v. Edmondson Oil Co.*:[142]

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.[143]

Thus, the question remaining to be asked is whether holding the NCAA to constitutional restraints would fulfill the policies behind the state action doctrine. The NCAA cases fall into the second type of situation described above, because the plaintiffs seek redress from the NCAA itself and not from the state. The policy thus applicable to this situation is the preservation of individual freedom. As a voluntary private association, the NCAA arguably should be able to choose whatever standards it desires.[144] Since its members vote when

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141. *Tarkanian*, 109 S. Ct. at 468 (White, J., dissenting).
142. 457 U.S. 922 (1982).
143. *Id.* at 936-37.
144. The foundation for this argument may be changing, as private clubs have been forced to open their doors to "unwanted members," at least in the context of "men's clubs" which have expanded to allow women. These clubs have been found in many ways to be business settings; thus, the courts have given women access to these "networking clubs." However, the private country clubs which restrict access to minorities have been allowed to remained segregated, as these clubs claim to involve purely social settings, in which they claim the right to free association. For further discussion of this issue, see Note, *Private Club Discrimination Can Be Outlawed: Roberts v. United States Jaycees*, 19 U.S.F. L. REV. 413-29 (1985); *see also* Roberts v. United States Jaycees, 468 U.S.

selecting its standards and procedures, the majority view will prevail, ensuring a representative voice. By limiting the reach of the courts, the NCAA will be able to further its goals and policies in the manner that its members select. Therefore, the policy of individual freedom may not be a favorable argument for those asserting that the NCAA is a state actor.

C. *The Possibility of Improper Delegation*

In a critique of *Arlosoroff*,[145] the authors of one of the leading texts in the area of sports law have defined an important issue:

> The court's perspective on the state action issue is drawn very narrowly and seems not to consider the most compelling claims that an athlete might raise. The real problem in the NCAA cases may not be whether the NCAA performs a traditional state institutional function or whether the state controls the details of the NCAA's operations. Rather, the important underlying issue may be one of delegation. State educational institutions present the clearest examples. At a state school, the state has a close and continuing relationship with its student-athletes. That relationship imposes certain prerogatives and responsibilities, including a right to define eligibility. If the state executes these itself, there should be no question that there is state action present and that constitutional norms must be satisfied. The critical question to be examined is whether the state's constitutional responsibility ends when the state agrees to have standards of conduct and eligibility defined in a collective venture in which it participates. It is likely that there are limits on the extent to which the state can use the delegation device to confine its obligations. The prospect of a continuing constitutional duty seems especially strong in those situations in which the state agrees to have the NCAA apply to its athletes standards devised by the latter group.[146]

The state should not be allowed to avoid its constitutional requirements by delegating difficult or unpleasant tasks to outside private entities. As the court in *Parish v. NCAA*[147] said, it is a "strange doctrine indeed to hold that the state could avoid the restrictions placed upon them by the Constitution by banding together to form or support a 'private' organization to which they have relinquished some portion of their governmental power."[148] In addition, as Professor Greene so concisely puts it:

> An organization that eliminates choice for private as well as state institutions should be subjected to constitutional restraint. Whatever the rationale, such a result makes sense because it recognizes an indisputable fact of ath-

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609 (1984).

145. Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984).

146. J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 1.14 (1979 & Supp. 1985). Without constitutional restraint, the potential for evasion of important duties might otherwise be too appealing. Drug testing is a good example. If the state undertakes to test its students itself, it must comply with constitutional mandates. Avoidance of those duties should not be as simple as appointing the NCAA as the testing entity. *Id.* § 1.14, at 8 (Supp. 1985).

147. 506 F.2d 1028 (5th Cir. 1975); *see also* supra notes 38-40 and accompanying text.

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

letic life; in the world of inter-collegiate athletics, there is but one well-kept playing field open to colleges and universities, private or public, and the NCAA is the groundskeeper.[149]

V. VIABLE ALTERNATIVES TO FOURTEENTH AMENDMENT PROTECTION

What happens when the NCAA is not held responsible for its possible constitutional violations? Is the plaintiff denied access to the courts? One might wonder if the plaintiff has other available forums for relief. One remedy may be to file suit against the school itself. However, this presents problems if the university is a state institution, since damage claims against a state university and its officials are barred by the eleventh amendment.[150] The Sixth Circuit Court of Appeals, in the 1986 case *Graham v. NCAA*,[151] determined that claims against a university are barred by our Constitution. The court held that the eleventh amendment precludes not only actions in which the state is directly named as a party, but also actions brought against a state agency or state officer where the action is essentially one for recovery of money from the state treasury.[152] The court relied upon the 1974 Supreme Court case *Edelman v. Jordan*,[153] which barred any retroactive award which requires payment of funds from the state treasury. The court in *Edelman* limited the federal courts to providing only prospective injunctive relief against state officials sued in their official capacity.[154] The eleventh amendment, however, does not prevent plaintiffs from bringing suits against state officials in their individual or personal capacities.[155] Thus, since the governmental immunity is not extended either to requests for injunctive relief or to personal suits against the school officials, the trend of the litigation will no doubt turn in those directions.

Another available option to ensure fair treatment is to act from within. Much of the past litigation arose regarding disputes over enacted rules and regulations. Member schools have the power of vot-

149. Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U.L.J. 101, 127 (1984).

150. The eleventh amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." U.S. CONST. amend. XI.

151. 804 F.2d 953 (6th Cir. 1986).

152. *Id.* at 959.

153. 415 U.S. 651 (1974).

154. *Id.* at 677.

155. Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974).

ing, with which they can change the rules and regulations of the NCAA to a fair degree. However, when a dispute arises from a lack of procedural fairness (such as Coach Tarkanian's claim) and unfair investigatory tactics, no change in NCAA legislation can affect the results. The plaintiff must resort to the legal process, but can only look to the school for relief.

CONCLUSION

The NCAA has breathed a sigh of relief now that the United States Supreme Court has held that the NCAA is not a state actor. However, the need for continuing close scrutiny of the NCAA remains. The theme of the litigation may be changing, as plaintiffs can no longer rely on the fourteenth amendment for protection from the NCAA's decisions. Injunctive relief and personal suits are still available as remedies, but these remedies must now be directed at the schools that implement the decisions of the NCAA. The student-athletes, coaches, and others under the reigns of the NCAA still have a forum to air their dissatisfaction from the arbitrary decisions propounded by the NCAA. Limitations on the pursuit of justice may exist, but they may be overcome.[156]

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156. NCAA attorney Jack Kitchen has indicated that the NCAA's legal battle with UNLV's Coach Tarkanian may soon be settled out of court. The alleged deal requires Tarkanian to pay a judgment of $21,000 and to assume responsibility for his own legal fees. This settlement, however, does not mean that the NCAA will refrain from placing the UNLV athletic program under sanctions. The San Diego Union, Jan. 21, 1990, at H12, col. 1.