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NCAA v. Tarkanian: The State Action Doctrine Faces a Half-Court Press

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CASENOTE

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I. INTRODUCTION

The fourteenth amendment to the United States Constitution,[1] by its express language, reaches only the actions of states. Similarly, 42 U.S.C. § 1983, a statute enacted by Congress pursuant to its authority to enforce the provisions of the fourteenth amendment,[2] is available to plaintiffs only where the challenged interference with constitutional rights is carried out through the actions of a state.[3] This

1. The fourteenth amendment provides, in 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.

2. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

3. Section 1983 provides:

> 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.

42 U.S.C. § 1983 (1982).

textual limitation has led the courts to establish a dichotomy in fourteenth amendment jurisprudence between "state action," which is subject to the strictures of the amendment, "and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."[4] Despite the appealing simplicity of the labels "state action" and "private action," determining where to draw the line between these labels is one of the most difficult issues that the Supreme Court has faced over the last one hundred years.[5]

In particular, the state action issue has arisen in recent years regarding the activities of the National Collegiate Athletic Association (NCAA).[6] The issue of the NCAA's status as either a private or

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4. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974) (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948)). The concept of "state action" had its genesis in the Supreme Court's decision in the Civil Rights Cases, 109 U.S. 3 (1883). The Civil Rights Cases dealt with constitutional challenges to Sections 1 and 2 of the Civil Rights Act of 1875, which prohibited racial discrimination by private parties in various public accommodations. The Court declared both of these sections unconstitutional, based upon a determination that the fourteenth amendment imposed restrictions only against the states. *Id.* at 11-15. The Court stated:

> [C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual . . . .

Id. at 17.

5. If there is one point of agreement among commentators in the area of state action, it is that the field of state action is "a conceptual disaster area." Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967). Professor Black further stated that "eight decades of metaphysical writhing around the 'state action' doctrine have made it the paragon of unclarity." *Id.* at 89. The Supreme Court has stated that it "has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations." Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

Twenty years later, this characterization continues to be accurate. *See, e.g.*, Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (stating that Professor Black's characterization of state action doctrine appears to be "even more apt today"); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683 (1984) (explaining why contemporary state action doctrine possesses an incoherent character); Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1484 n.156 (1982) (describing the state action area as "now, more than ever, a shambles"). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688-1720 (2d ed. 1988) (explaining the incoherence of modern state action doctrine).

6. The NCAA is an unincorporated association comprised of approximately 960 members, including virtually every public and private university and four-year college which conducts a major athletic program in the United States. NCAA v. Tarkanian, 109 S. Ct. 454, 457 (1988). The NCAA was originally "founded by a small group of colleges and universities in 1906 . . . primarily to adopt civilized rules of play for intercollegiate sports." Brief for the Petitioner at 4, *Tarkanian* (No. 87-1061). The association is now primarily responsible for generating the rules and sanctions that regulate intercollegiate athletics. Note, *Judicial Review*

a state actor has been addressed by virtually every federal court of appeals.[7] The United States Supreme Court addressed this issue for the first time in *NCAA v. Tarkanian*.[8]

In 1977, Jerry Tarkanian became a tenured professor of physical education at the University of Nevada at Las Vegas (UNLV), while retaining his position as head basketball coach.[9] A branch of the University of Nevada, the UNLV is both an institution funded and operated by the state of Nevada[10] and a member of the NCAA.[11]

On November 28, 1972, the NCAA Committee on Infractions notified the UNLV's president that it was conducting an investigation to determine whether allegations that the UNLV had violated certain NCAA rules were true.[12] Three years later, and as a result of that

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of Disputes Between Athletes and the National Collegiate Athletic Association, 24 STAN. L. REV. 903, 904 (1972).

The constitution and bylaws of the NCAA grant the Association broad authority to act on any subject of general concern to its members. The NCAA holds annual conventions at which representatives of member institutions vote on the general policies and rules of the Association. Brief for the Petitioner at 4, *Tarkanian* (No. 87-1061). Each member institution contractually agrees to conduct its athletic programs "in accordance with NCAA 'legislation,' which includes the NCAA Constitution and Bylaws, official interpretations thereof, executive regulations, recommended policies and enforcement procedures." Brief for the Respondent at 2, *Tarkanian* (No. 87-1061) (citations omitted). The NCAA's constitution further provides that "member institutions shall be obligated to apply and enforce this legislation, and the enforcement programs of the Association shall be applied to an institution when it fails to fulfill this obligation." *Id.* at 3. The enforcement program is administered by a Committee on Infractions which "supervises an investigative staff, makes factual determinations concerning alleged rule violations, and is expressly authorized to 'impose appropriate penalties on a member found to be in violation, or recommend to the Council suspension or termination of membership.' " *Tarkanian,* 109 S. Ct. at 457. Specifically, upon discovering a violation, the NCAA Committee on Infractions or the NCAA Council may require the member to show cause why:

> (i) a penalty or an additional penalty should not be imposed if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against athletic department personnel involved in the infractions case, any other institutional employee if the circumstances warrant, or representatives of the institution's athletic interests, or
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> (ii) a recommendation should not be made to the membership that the institution's membership in the Association be suspended or terminated if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against the head coach of the sport involved, any other institutional employee if the circumstances warrant, or representatives of the institution's athletic interests.

Id. at 458 n.7 (citation omitted).

7. *See infra* notes 28-47 & 83-94 and accompanying text.

8. 109 S. Ct. 454 (1988). For a complete discussion of *Tarkanian*, see *infra* text accompanying notes 95-127.

9. Tarkanian v. NCAA, 103 Nev. 331, 335, 741 P.2d 1345, 1349 (1987).

10. NCAA v. Tarkanian, 109 S. Ct. at 457.

11. *Id.* at 456. For a general description of the NCAA, see *supra* note 6.

12. NCAA v. Tarkanian, 109 S. Ct. at 458.

inquiry, the Committee decided to launch an "Official Inquiry" concerning a series of detailed allegations charging recruitment violations, many of which implicated Tarkanian, who continued as head basketball coach.[13] At the request of the NCAA, the UNLV conducted its own investigation into the allegations. This resulted in a response denying the allegations and specifically concluding that Tarkanian was innocent of wrongdoing.[14]

After four days of hearings, the Committee issued findings in its "Confidential Report No. 123(47)" in which it proposed a series of sanctions, including a request that the UNLV "show cause why additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him completely from the University's intercollegiate athletic program during the probation period."[15] Shortly after receiving this report, the UNLV's vice president held a hearing to determine what action the UNLV should take; he concluded that "given the terms of our adherence to the NCAA we cannot substitute—biased as we must be—our own judgment on the credibility of witnesses for that of the infractions committee and the Council."[16] Adhering to the vice president's recommendation, the president notified Tarkanian that he was to be "completely severed of any and all relations, formal or informal," with the UNLV's intercollegiate athletic program during the NCAA probation period.[17]

The day before his suspension was to become effective, Tarkanian filed an action in the Eighth Judicial District Court of the State of Nevada, praying for declaratory and injunctive relief against his suspension.[18] The suit, which named as defendants the UNLV and certain of its officers, alleged that Tarkanian was deprived of property and liberty without due process of law in violation of 42

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13. *Id.*

14. *Id.*

15. *Id.* at 459.

16. *Id.* The vice president informed the president that the UNLV had three options with respect to the proposed sanctions:

> 1. Reject the sanction requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, *e.g.*, possible extra years of probation.
>
> 2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position—though tenured and without adequate notice—even while believing that the NCAA was wrong.
>
> 3. Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments.

Id.

17. *Id.*

18. Brief for the Respondent at 18, *Tarkanian* (No. 87-1061).

U.S.C. § 1983 and the fourteenth amendment to the United States Constitution.[19] The trial court held that Tarkanian had been denied procedural and substantive due process of law and enjoined the UNLV from suspending Tarkanian; the UNLV appealed this judgment to the Nevada Supreme Court.[20]

On the UNLV's appeal to the Nevada Supreme Court, the NCAA filed an amicus curiae brief requesting that Tarkanian's suit be dismissed on the ground that no actual controversy was presented between Tarkanian and the UNLV, and "alternatively that the NCAA 'was an indispensable party' because the injunction had 'the effect of invalidating NCAA proceedings and preventing their enforcement.' "[21] The Nevada Supreme Court held that an actual controversy did exist, but it reversed the trial court's judgment on the grounds "that the NCAA should have been joined" as a necessary party on the question of suspending Tarkanian.[22]

The case was remanded to the trial court, where the NCAA was added as a party defendant. After trial, the court concluded that the actions of both the NCAA and the UNLV constituted state action and that the NCAA and the UNLV had deprived Tarkanian of procedural and substantive due process.[23] The trial court reaffirmed its earlier injunction barring the UNLV from disciplining Tarkanian and, in addition, enjoined the NCAA both from enforcing its show cause order and from taking any other action against the UNLV that had been recommended in the report.[24]

On appeal by the NCAA, the Nevada Supreme Court affirmed, holding that the NCAA had engaged in state action and, together with the UNLV, had deprived Tarkanian of liberty and property interests without due process of law.[25] On certiorari, the United States Supreme Court, *held*, reversed and remanded: The NCAA did not engage in state action when it issued a show cause order to the UNLV asking why additional penalties should not be imposed against the UNLV if it refused to suspend Coach Tarkanian from the univer-

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

20. *Id.*

21. Brief for the Respondent at 19, *Tarkanian* (No. 87-1061) (citation omitted).

22. University of Nev. v. Tarkanian, 95 Nev. 389, 396-97, 594 P.2d 1159, 1163-64 (1979). The court concluded that if the NCAA were not allowed to participate in the litigation, it would be unable to protect its interests, specifically its claim of a "contractual right to bind the university to enforce the NCAA's decision by sanctions it deems appropriate." *Id.* at 396, 594 P.2d at 1164.

23. *See* Brief for the Respondent at 20, NCAA v. Tarkanian, 109 S. Ct. 454 (1988) (No. 87-1061).

24. *Tarkanian*, 109 S. Ct. at 460.

25. Tarkanian v. NCAA, 103 Nev. 331, 741 P.2d 1345 (1987).

sity's intercollegiate athletic program during the NCAA probation period. Although the UNLV's action in suspending Tarkanian was undeniably state action, the NCAA's action in bringing about the suspension could not fairly be attributed to the state; therefore, the NCAA could not be held liable under 42 U.S.C. § 1983 for the violation of Tarkanian's civil rights. *NCAA v. Tarkanian*, 109 S. Ct. 454 (1988).

This Note examines the *Tarkanian* Court's holding that the NCAA did not engage in state action through its participation in the procedures that violated Coach Tarkanian's due process rights. Section II examines how lower courts treated the issue of whether the NCAA was a state or private actor prior to the *Tarkanian* decision. Section III presents the Court's holding and reasoning in *Tarkanian*. Section IV analyzes the Court's decision and argues that the result is problematic on two levels: First, the Court's decision that the NCAA was not a state actor is inconsistent with prior state action decisions; second, the decision fails to clarify how and when the two-pronged state action test first announced in *Lugar v. Edmondson Oil Co.*[26] is to be applied. Finally, Section V concludes that the *Tarkanian* Court's decision fails to hold the NCAA accountable for its actions, a result which does little to deter the NCAA from continuing to exert pressure on public universities to take constitutionally impermissible actions. Furthermore, Section V argues that the Court's failure to clarify the role of the *Lugar* framework in the analysis of state action issues adds unnecessary confusion to an already muddled area of constitutional law.

II. PERSPECTIVE

Beginning in the early 1970's, the NCAA has been under continuing attack from student-athletes challenging the Association's student eligibility requirements.[27] Because these plaintiffs have sought to assert rights protected under the due process and equal protection clauses of the fourteenth amendment, a critical issue has been whether the NCAA is within the rubric of "state action" when it performs its regulatory activities as the major overseer of intercollegiate athletics. This Section will trace the development of the case law addressing this issue, a development which has proceeded in two distinct segments and which can most aptly be described by using the metaphor of a swinging pendulum.

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26. 457 U.S. 922 (1982).

27. *See* Note, *supra* note 6, at 903-04, 929; *infra* notes 28-47 & 83-94 and accompanying text.

A. *Early Decisions: Setting the Pendulum in Motion*

In *Associated Students, Inc. v. NCAA*,[28] the United States Court of Appeals for the Ninth Circuit became the first federal court of appeals to consider the issue of the NCAA's constitutional status as a state actor. The court concluded that the NCAA's enforcement of a rule pertaining to the eligibility of college athletes and the imposition of sanctions against a university and the athletes involved was state action for constitutional and jurisdictional purposes.[29] In so finding, the Ninth Circuit did not elaborate on its reasoning beyond quoting from an earlier district court case, *Parish v. NCAA*,[30] in which the issue of state action on the part of the NCAA was raised. The *Parish* court had stated: "Therefore, we must and do conclude that there definitely is State action here, in the constitutional sense, when [the] NCAA regulates schools and universities at least half of which are public."[31]

Less than one year later, the United States Court of Appeals for the Fifth Circuit affirmed *Parish v. NCAA*, holding that the NCAA's activities constituted state action.[32] Like the court in *Associated Students*, the *Parish* court of appeals relied to a great extent on the lower court's decision when it affirmed that the NCAA was a state actor. The court placed equal weight on two basic theories: the "nexus" concept and the "public function" concept.[33]

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28. 493 F.2d 1251 (9th Cir. 1974).

29. *Id.* at 1254-55. This decision implicitly overruled the reasoning in McDonald v. NCAA, 370 F. Supp. 625 (C.D. Cal. 1974). *See* Parish v. NCAA, 506 F.2d 1028, 1032 n.9 (5th Cir. 1975). In *McDonald*, the district court judge held that the NCAA's imposition of penalties upon a university for infractions of its bylaws—resulting in the university declaring the athletes ineligible to participate in athletics—did not involve state action. 370 F. Supp. at 631. Thus, the athletes had no due process right to a hearing before the NCAA. The court stated that "[w]hat must appear is that the state must be so inextricably involved in the 'private' action or must be able to so control the 'private' action that this activity necessarily becomes the functional equivalent of an act of the sovereign." *Id.* at 630. The court concluded that this standard was not met because "the NCAA has an existence separate and apart from the educational system of any state" and because, "[c]onversely, a state's intercollegiate athletic program does not depend for its recognition, existence or maintenance upon any sufferance of the NCAA." *Id.* at 631.

At the time of the *McDonald* decision, other federal district courts that had considered this issue had found the NCAA to be a state actor. *See* Howard Univ. v. NCAA, 367 F. Supp. 926 (D.D.C. 1973), *aff'd*, 510 F.2d 213 (D.C. Cir. 1975); Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973); Parish v. NCAA, 361 F. Supp. 1214 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975). *But see* Samara v. NCAA, No. 104-73-A (E.D. Va. May 1, 1973) (WESTLAW, Allfeds database) (stating that arguments that the NCAA is a state actor were "tenuous").

30. 361 F. Supp. 1214 (W.D. La. 1973).

31. *Id.* (citation omitted), *quoted in Associated Students*, 493 F.2d at 1254-55.

32. *Parish*, 506 F.2d at 1034.

33. *Id.* at 1032-33. In the 1940's, the Supreme Court began to modify the strict stance

The first basis that the *Parish* court used to find state action was the "nexus" theory.[34] After referring to the numerous contacts and the degree of participation of the various states—through their colleges and universities—with the NCAA,[35] the court indicated that "state-supported educational institutions and their members and officers play a substantial, although admittedly not pervasive, role in the NCAA's program."[36] The court then stated that "[s]tate participation in or support of nominally private activity is a well recognized basis for a finding of state action"[37] and concluded that the NCAA

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toward state action that it adopted in the Civil Rights Cases, 109 U.S. 3 (1883), finding violations of the fourteenth amendment even though the activities complained of were not formally linked to any action by state officials. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 501 (2d ed. 1983). In the *Civil Rights Cases*, the Court has developed a series of theories or tests by which it may be established that a private person's activities constitute state action. Although there is some variation in the precise categorization of these tests, three principal approaches may be identified: (1) whether the private actor performs a traditionally exclusive public function; *see, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (resolution of private disputes between debtors and creditors is not a traditionally exclusive state function); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (furnishing of utility services did not satisfy the public function requirement for a finding of state action because the public function must be exclusive and not merely traditional); Marsh v. Alabama, 326 U.S. 501 (1946) (operating a company-town is a public function); (2) whether the state has been a joint participant in the private action or has otherwise commanded or encouraged the private action; *see, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (a private party involved in a conspiracy with a state official becomes a state actor and may be found liable in a Section 1983 action); Shelley v. Kraemer, 334 U.S. 1 (1948) (a court order which would enjoin a sale of property in order to enforce a racially restrictive covenant would violate the fourteenth amendment); and (3) whether there is a sufficiently close nexus or "symbiotic relationship" between the state and the private actor; *see, e.g.*, Blum v. Yaretzky, 457 U.S. 991 (1982) (state regulation of private nursing home facilities was not sufficient in itself to transform private decisions concerning transfer of patients into state action); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (personnel discharge decisions were not state action although a private school derived virtually all of its income from government funding and was extensively regulated by the state); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (extensive regulation and state licensing of a private utility did not involve sufficient state action to subject the utility to the constitutional restraints of due process); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (despite lack of direct government aid, a restaurant which benefited from its location within a government facility was in a "position of interdependence" with the state and hence liable for racial discrimination).

For an in-depth discussion of these and other cases that are representative of the various state action theories, see generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, at 502-25. For an excellent historical discussion of the Supreme Court's development of the state action theories, see Schneider, *State Action—Making Sense Out of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737 (1985).

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

35. Although the *Parish* court did not enumerate these contacts in its opinion, the court pointed to several lower court opinions which had listed these contacts exhaustively. *Id.* at 1032 n.10; *see also* text accompanying note 43.

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

37. *Id.*

was a state actor.[38]

The court also relied on the "public function" theory as a basis for finding the NCAA to be a state actor.[39] After recognizing that organized college athletics had grown to the point where it was now beyond the effective reach of any one state, the court concluded that "[i]n a real sense, . . . the NCAA by taking upon itself the role of coordinator and overseer of college athletics . . . is performing a traditional governmental function."[40]

In *Howard University v. NCAA*,[41] the United States Court of Appeals for the District of Columbia Circuit also concluded that the NCAA's activities met the necessary state action requirement. Like the *Parish* court, the court in *Howard* found state action under the "nexus" theory, noting that the degree of public participation or entanglement between Howard University and the NCAA was "substantial and pervasive."[42] Specifically, the court found the following facts to be significant in applying the "nexus" theory: (1) approximately half of the NCAA's institutional members are state-supported institutions; (2) these state institutions provide the vast majority of the NCAA's capital; (3) the principal power of the NCAA lies in its convention, at which state instrumentalities are a dominant force; (4) state instrumentalities traditionally provide the majority of the members of the governing council and the various committees; (5) the NCAA's regulations and supervision over intercollegiate athletics is extensive and represents an immeasurably valuable service for its member institutions; and (6) the NCAA negotiates television contracts, the proceeds of which flow directly to participating schools.[43] The court concluded: "[T]he NCAA and its member public instrumentalities are joined in a mutually beneficial relationship, and in fact may be fairly said to form the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny."[44]

Thus, with each case that considered the issue, it became more firmly established that the NCAA's activities in regulating intercollegiate athletics constituted state action and were subject to the stric-

38. *Id.* at 1032-33.

39. *Id.*

40. *Id.*

41. 510 F.2d 213 (D.C. Cir. 1975).

42. *Id.* at 220. The court noted that "governmental action may be found even though the government's participation was peripheral, or its action 'was only one of several co-operative forces leading to the constitutional violation.' " *Id.* at 217 (quoting United States v. Guest, 383 U.S. 745, 755-56 (1966)).

43. *Id.* at 219.

44. *Id.* at 220. For a description of the various theories utilized to extend the concept of state action to nominally private parties, see *supra* note 33.

tures of the fourteenth amendment.[45] The theories applied in those cases where state action was found to exist were the "nexus" theory[46] and the "public function" theory.[47]

B. *The Supreme Court's 1982 Term: A Trilogy of State Action Cases*

On the same day in June of 1982, the United States Supreme Court announced its decision in three cases dealing with the issue of state action. In *Rendell-Baker v. Kohn*[48] and *Blum v. Yaretzky*,[49] the Court found no state action on the part of nominally private parties, thereby severely limiting the viability of the "nexus" theory as a basis for finding state action. These two decisions had an enormous impact on the lower courts' treatment of the constitutional status of the NCAA as either a private or state actor. In the third case, *Lugar v. Edmondson Oil Co.*,[50] the Court held that state action did exist, finding it through what appeared to be a synthesis of the various state action tests—an analytical framework to be utilized in future cases that require a state action analysis. Section IV of this Note will consider whether *Lugar* has in fact become the determinative test for state action. In order to set the stage for that discussion, the holdings in *Rendell-Baker*, *Blum*, and *Lugar* will now be discussed briefly.

In *Rendell-Baker*, the Court rejected the due process claims of several teachers who had been discharged from a "private" school, finding that the school's activities did not constitute state action.[51] The Court first rejected an argument that state action should be found on the basis of the nexus between the school and the state.[52] Unlike

45. Subsequent cases also followed the reasoning utilized in Howard University v. NCAA, 510 F.2d 213 (D.C. Cir. 1975). *See, e.g.*, Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 364-65 (8th Cir. 1977) (The court adopted the analysis used in *Howard* and held that the NCAA is a state actor.); Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492, 494-96 (1st Cir. 1977) (The court adopted the reasoning used in *Howard* in finding that a Puerto Rican intercollegiate athletic association—analogous to the NCAA—was a state actor even though the degree of public participation in the Liga Atletica was not as pervasive as in the NCAA context.); Colorado Seminary v. NCAA, 417 F. Supp. 885, 894 n.4 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978) (There was "sufficient state entanglement" to find the NCAA to be a state actor.).

46. *See Howard*, 510 F.2d at 217-19; Parish v. NCAA, 506 F.2d 1028, 1032 (5th Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1254-55 (9th Cir. 1974); *see also supra* note 45.

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

48. 457 U.S. 830 (1982).

49. 457 U.S. 991 (1982).

50. 457 U.S. 922 (1982).

51. *Rendell-Baker*, 457 U.S. at 840-43.

52. *Id.* at 840-41.

the court of appeals,[53] the Supreme Court did not attribute great significance to the fact that the school derived virtually all of its income from government funding and was extensively regulated by the state.[54] As to the extensive public funding, the Court held that this factor alone was not sufficient to make the discharge decisions acts of the state, analogizing the situation to that of "many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships or submarines for the government" and whose acts do not become acts of the government by reason of this engagement in public contracts.[55] Addressing the extensive regulation, the *Rendell-Baker* Court pointed to its decision in *Jackson v. Metropolitan Edison Co.*,[56] in which it held that state regulation, even if extensive and detailed, did not convert a utility's actions into state action.[57] The *Rendell-Baker* Court further noted that the decisions to discharge the teachers were not compelled or even influenced by any state regulation and that, in contrast to the generally extensive regulation of the school, the regulations had relatively little to do with personnel matters.[58]

The *Rendell-Baker* Court also rejected an argument that the school was a state actor because it performed a "public function." The Court stated that the relevant question was not simply whether a private group was serving a "public function," but rather whether the function had been " 'traditionally the *exclusive* prerogative of the State.' "[59] Although the Court recognized that the school's function in educating maladjusted high school students was undoubtedly a public function, the Court held that the provision of these services was "in no way . . . the exclusive province of the State" and hence there was no state action on that basis.[60] Finally, the Court rejected an argument that there was a "symbiotic relationship" between the school and the state which made the school a state actor.[61] The Court distinguished the case at bar from the situation in *Burton v. Wilmington Parking Authority*,[62] a case in which the Court concluded that the

53. *See* Rendell-Baker v. Kohn, 641 F.2d 14, 24-25 (1st Cir. 1981) (the fact that the school was almost completely funded by the government provided significant evidence of state control).

54. Rendell-Baker v. Kohn, 457 U.S. at 840-41.

55. *Id.*

56. 419 U.S. 345 (1974).

57. *Rendell-Baker*, 457 U.S. at 841 (citing *Jackson*, 419 U.S. at 350).

58. *Id.*

59. *Id.* at 842 (quoting *Jackson*, 419 U.S. at 353).

60. *Id.*

61. *Id.*

62. 365 U.S. 715 (1961).

relationship between the state and the private restaurant was such that the state profited from the restaurant's discriminatory conduct.[63] The *Rendell-Baker* Court held that the school's fiscal relationship with the state was not different from that of many contractors performing services for the government.[64]

In *Blum v. Yaretzky*,[65] the Supreme Court also found that state action was lacking, and it thus rejected the due process claims of nursing home patients who had been involuntarily transferred from one nursing home to another facility that provided a lower level of health care.[66] The *Blum* Court also considered an argument that the "nexus" theory was a possible basis for finding state action.[67] As in *Rendell-Baker*, the *Blum* Court stated that mere regulation did not by itself convert private action into that of the state; rather, the complaining party must also show that " '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.' "[68] The Court went on to note that this nexus requirement could normally be satisfied only when the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State"[69] or when the private entity "has exercised powers that are 'traditionally the exclusive prerogative of the state.' "[70]

Applying those principles, the *Blum* Court held that the nexus requirement was not satisfied.[71] The state's response to private decisions to discharge or transfer patients to lower levels of care without adequate notice or hearings did not "render [the state] *responsible* for those actions."[72] The Court held that, without a showing that the state compelled or influenced those private decisions, there could be no finding of state action.[73] The Court next rejected an argument, similar to that made in *Rendell-Baker*, that the actions of the nursing homes became state action by virtue of the extensive regulation and

63. *Id.* at 723-24, *construed in Rendell-Baker*, 457 U.S. at 842.

64. *Rendell-Baker*, 457 U.S. at 843.

65. 457 U.S. 991 (1982).

66. *Id.* at 1012.

67. *Id.* at 1004.

68. *Id.* (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

69. *Id.*

70. *Id.* at 1005 (quoting *Jackson*, 419 U.S. at 357).

71. *Id.*

72. *Id.* The Court emphasized that decisions to discharge or transfer particular patients "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 1008.

73. *Id.*

subsidization that they received from the state.[74] Finally, the Court held that the nursing homes did not perform a function that had been traditionally the exclusive prerogative of the state and hence concluded that there was no proper basis for finding state action.[75]

In *Lugar v. Edmondson Oil Co.*,[76] unlike the other state action cases decided that day, the Supreme Court concluded that state action was present.[77] The Court held that the constitutional requirements of due process apply to garnishment and prejudgment attachment procedures instituted by private creditors whenever state officers act jointly with those private creditors in securing the property in dispute.[78] The aspect of the *Lugar* case most relevant to the NCAA cases, however, was not the decision itself but the manner in which the Court reached its conclusion. The *Lugar* Court noted that its cases have "insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State."[79] The Court formulated a two-pronged approach to determine "fair attribution," stating:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.[80]

Applying this newly created test to the case at bar, the *Lugar* Court held that both prongs were satisfied. First, the state was responsible for the procedural scheme of the statute.[81] Second, the sheriff—a state actor—was a joint participant in executing the writ.[82] Hence, the state action requirement of the fourteenth amendment was satisfied and the private party could be held liable for violating the plaintiff's due process rights.

C. Arlosoroff *and Its Progeny: The Pendulum Swings Back*

Two years after the Supreme Court's pronouncements in the 1982 trilogy of state action cases, the United States Court of Appeals

74. *Id.* at 1011.
75. *Id.*
76. 457 U.S. 922 (1982).
77. *Id.* at 942.
78. *Id.* at 927 n.6.
79. *Id.* at 937.
80. *Id.*
81. *Id.* at 941.
82. *Id.* at 942.

for the Fourth Circuit became the first federal appellate court to find state action lacking in the operation of the NCAA with its decision in *Arlosoroff v. NCAA*.[83] The Fourth Circuit commenced its analysis of whether the NCAA had engaged in state action by recognizing that most of the courts considering the matter had held that the NCAA's activities did constitute state action.[84]

The Fourth Circuit announced its departure from that majority view, stating: "These earlier cases rested upon the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action. That notion has now been rejected by the Supreme Court, however, and its decisions require a different conclusion."[85] After concluding that "[i]t is not enough that an institution is highly regulated and subsidized by a state,"[86] the court provided the following test to determine whether state action was present: "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."[87]

The *Arlosoroff* court held that the first prong of the test was not met because there was no indication that the representatives of state institutions joined together to vote as a bloc in order to adopt the

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83. 746 F.2d 1019, 1022 (4th Cir. 1984). The holding in *Arlosoroff* was perhaps foreshadowed by the decision of the First Circuit in Spath v. NCAA, 728 F.2d 25 (1st Cir. 1984). Although the *Spath* court explicitly refused to reach the issue of state action, the court stated: "While hitherto the weight of authority would support plaintiff that NCAA is sufficiently state connected to incur 42 U.S.C. § 1983 liability, . . . recent trends have limited that concept." *Id.* at 28 (citations omitted).

84. *Arlosoroff*, 746 F.2d at 1021 (citing Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974)). The court noted that these cases had found state action based on the "nexus" and "public function" theories. *Id.*; *see also supra* notes 46-47 and accompanying text.

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

86. *Id.* at 1022.

87. *Id.* Although not explicitly stated, the test formulated by the court of appeals in this case seems to follow the two-pronged test articulated in Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). The *Arlosoroff* test, however, imposes an even stricter standard for finding state action. First, the requirement that the state "order or cause the action complained of" seems to require more on the part of the state than what *Lugar*'s first prong contemplated. *See id.* In *Lugar*, for instance, the first prong was met merely by virtue of the state's creation of a procedure which a private party was free to use. In *Lugar*, there was no suggestion that the state had "ordered" a private party to use that procedure, as the *Arlosoroff* test would seem to require. Second, the *Lugar* test apparently recognizes that all of the traditional theories for finding state action (nexus, public function, state encouragement, etc.) are available for satisfying the second prong. *See id.* The second prong of *Arlosoroff*, on the other hand, would only find state action if a public function was involved. 746 F.2d at 1021.

challenged conduct over the objection of private institutions.[88] The court also held that the second prong was not met because the regulation of intercollegiate athletics was not a function " 'traditionally exclusively reserved to the state.' "[89]

Since the Fourth Circuit's decision in *Arlosoroff*, virtually every court to consider the issue of the NCAA's constitutional status has adopted the reasoning suggested by *Arlosoroff* and has concluded that the NCAA is not a state actor.[90] The sole exception to this recent

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

89. *Id.* at 1021 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1975)). The *Arlosoroff* court's interpretation of the public function requirement with respect to the regulation of intercollegiate athletics is more consistent with the United States Supreme Court's recent pronouncements on that issue, where the trend has been to restrict the number of activities that will qualify as a traditional exclusive state function. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (the operation of a school is not a public function); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1975) (distribution of electricity by a regulated utility is not a public function).

90. *See* McCormack v. NCAA, 845 F.2d 1338, 1346 (5th Cir. 1988); Karmanos v. Baker, 816 F.2d 258, 260-61 (6th Cir. 1987); Graham v. NCAA, 804 F.2d 953, 957-58 (6th Cir. 1986); O'Halloran v. University of Wash., 679 F. Supp. 997, 1001-02 (W.D. Wash. 1988); Hawkins v. NCAA, 652 F. Supp. 602, 605-09 (C.D. Ill. 1987); Barbay v. NCAA, No. 86-5697 (E.D. La. Jan. 20, 1987) (WESTLAW, Allfeds database); Kneeland v. NCAA, 650 F. Supp. 1047, 1054-55 (W.D. Tex. 1986); McHale v. Cornell Univ., 620 F. Supp. 67, 69-70 (N.D.N.Y. 1985); *see also* Ponce v. Basketball Fed'n, 760 F.2d 375 (1st Cir. 1985) (The court applied the *Rendell-Baker* and *Blum* decisions in finding that the actions of the Basketball Federation of the Commonwealth of Puerto Rico, a private sporting organization which discriminated on the basis of citizenship, did not constitute state action under either the nexus, public function, or symbiotic relationship theories.); Johnson v. Educational Testing Serv., 754 F.2d 20, 24-25 (1st Cir. 1984) (The court, citing *Arlosoroff*'s application of the *Blum* and *Rendell-Baker* decisions, found that the actions of the Educational Testing Service, a private entity, did not constitute state action.).

Commentators, on the other hand, have not been as receptive to *Arlosoroff*'s interpretation of *Blum* and *Rendell-Baker* in the context of the NCAA. One commentator has stated: "Although recent decisions of the United States Supreme Court seem to have narrowed the reach of the state action doctrine, that arguable narrowing would not foreclose the application of the state action principle to the NCAA." Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U.L.J. 101, 124 (1984) (citation omitted). First, "[a] careful reading of . . . [recent decisions] reinforces the view that findings of state action are likely to be based on factual idiosyncracies rather than clear principles." *Id.* at 125. Second, even in light of the "tentatively emerging requirement that the state must explicitly approve of private rules and cooperate in their implementation, it is nonetheless appropriate to subject the NCAA to the constitutional limitations." *Id.* at 127. This is because the NCAA adopts rules through a process in which representatives from both public and private institutions participate and the rules, once adopted, are adhered to by all member institutions, both public and private. *Id.* The members of the current Court "have voiced their approval of the application of the [state action] doctrine when escape from the private rules complained of is virtually impossible because of state adherence to the rules, or when state activity encourages the private rules." *Id.* at 126.

Another commentator has also expressed his disapproval of the *Arlosoroff* decision, accusing those which have followed *Arlosoroff* of boarding a "judicial bandwagon." Martin, *The NCAA and Its Student-Athletes: Is There Still State Action?*, 21 NEW ENG. 49, 70 (1986). Arguing that the applicability of *Rendell-Baker* and *Blum* to the NCAA is dubious, Judge

trend has been the decision of the Nevada Supreme Court in *Tarkanian v. NCAA*.[91] The Nevada Supreme Court based its finding that the NCAA was a state actor on two grounds. First, the court stated that the NCAA, in disciplining a public employee, was performing a function that is "traditionally the exclusive prerogative of the state."[92] Second, the court declared that the two-part approach articulated in *Lugar v. Edmondson Oil Co.*[93] required a conclusion that state action was present:

> The first prong is met because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.[94]

III. *NCAA V. TARKANIAN*: THE NCAA'S ISSUANCE OF A "SHOW CAUSE" ORDER DID NOT CONSTITUTE STATE ACTION

In *NCAA v. Tarkanian*,[95] the Supreme Court addressed the issue of the status of the NCAA as either a private or a state actor for the first time. In an opinion written by Justice Stevens, the Court held that the NCAA did not engage in state action when it requested that the UNLV, one of the NCAA's public member institutions, show cause why additional penalties should not be imposed against it if the UNLV failed to remove Tarkanian from the university's intercollegiate athletic program during its probation period.[96] Because state action was absent, the NCAA could not be held liable under 42 U.S.C. § 1983 for the violation of Coach Tarkanian's civil rights.[97]

The Court commenced its discussion by indicating that this case "uniquely mirror[ed] the traditional state action case"[98] and that it

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Martin states that the NCAA "receives from its member institutions delegated powers of a breadth and scope unknown to one small urban school or physician's committee, important though their work be." *Id.* at 71. Judge Martin argues that by delegating those powers to a private party, a state institution transforms the private action into state action. *Id.* at 73-75.

91. 103 Nev. 331, 741 P.2d 1345 (1987).

92. *Id.* at 337, 741 P.2d at 1348. The court pointed out that both *Blum* and *Rendell-Baker* had recognized this as a basis for finding state action. *Id.*

93. 457 U.S. 922, 937 (1982), *cited in Tarkanian*, 103 Nev. at 337, 741 P.2d at 1349.

94. *Tarkanian*, 103 Nev. at 337, 741 P.2d at 1349.

95. 109 S. Ct. 454 (1988).

96. *Id.* at 465-66.

97. *Id.* at 465.

98. *Id.* at 462.

would have to "step through an analytical looking glass to resolve it."[99] The Court distinguished the state action issue in the case at bar from more conventional cases, stating:

> In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action . . . .
>
> . . . Here the final act challenged by Tarkanian—his suspension—was committed by UNLV . . . .
>
> . . . Thus the question is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action.[100]

Despite indicating that it considered the circumstances of this case to be unique, the Court did not indicate that a correspondingly unique mode of analysis was required.[101] The Court instead proceeded to examine the relationship between the UNLV and the NCAA in its rulemaking capacity.[102]

Although the Court acknowledged that the UNLV must have had some impact on the NCAA's policy determinations, the Court pointed out that the remaining several hundred public and private institutions which were members of the NCAA each similarly affected those policies. The Court therefore concluded that "[i]t necessarily follows that the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular State."[103] The Court further found that the UNLV's embracement of the NCAA's rules did not transform those rules into "state" rules nor the NCAA into a "state" actor.[104] The Court observed that the UNLV retained its authority both to withdraw from the NCAA and establish its own standards or, alternatively, to stay in the NCAA and work through its procedures to amend unfair rules or standards.[105]

Tarkanian asserted that "the NCAA's investigation, enforcement proceedings, and consequent recommendations constituted state

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99. *Id.*

100. *Id.*

101. *Id.* The Court, in fact, resorted to the traditional tests that it had developed over the years to determine whether state action exists in a particular case. *Id.*

102. *Id.* Although not explicitly stated, the Court's analysis of the state action issue in this case appears to be an application of the two-pronged test announced in *Lugar*. *See infra* note 202.

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

104. *Id.* at 463.

105. *Id.*

action because they resulted from a delegation of power" by the state of Nevada through the UNLV.[106] Although the Court accepted the proposition that a state may delegate authority to a private party and thereby make that party a state actor, the Court rejected that argument as applied to the facts of this case on two grounds. First, the Court noted that the "UNLV delegated no power to the NCAA to take specific action against any University employee," but rather "[t]he commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself."[107] The Court observed that the Confidential Report issued by the NCAA's Committee on Infractions did not expressly demand Tarkanian's unconditional suspension, but rather requested that the UNLV " 'show cause' why the NCAA should not impose additional penalties if UNLV declines to suspend Tarkanian."[108] The Court was not persuaded by Tarkanian's argument that the power of the NCAA is so great that the UNLV had no reasonable alternative but to comply with its demands. The Court stated that, even assuming "that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law."[109]

Tarkanian's second theory—that the UNLV's delegation of power to the NCAA transformed the latter into a state actor—was also rejected. The Court reasoned that "[d]uring the several years that the NCAA investigated the alleged violations, the NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth."[110] The Court further stated that "[i]t would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV—sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings—[were] fairly attributable to the State of Nevada."[111]

The Court also rejected Tarkanian's third argument—that the

106. *Id.*

107. *Id.* at 464.

108. *Id.* at 465; *see supra* text accompanying note 15.

109. *Tarkanian*, 109 S. Ct. at 465.

110. *Id.* at 464.

111. *Id.* at 465. The Court cited *Polk County v. Dodson*, which held that "a state-compensated public defender acts in a private capacity when she represents a private client in a conflict against the State." 454 U.S. 312, 320 (1981). Analogizing from *Dodson*, the *Tarkanian* Court concluded that "the 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." *Tarkanian*, 109 S. Ct. at 464.

NCAA had disciplined a state employee and thereby engaged in state action by performing a function traditionally reserved exclusively to the state when it issued its order to show cause.[112] Again, the Court reasoned that the NCAA's own legislation prohibited it from taking any direct action against Tarkanian and further noted that Tarkanian's suspension was but one of many recommendations in the NCAA's Confidential Report.[113] Finally, the Court rejected the argument that the NCAA was a state actor by virtue of its joint participation in Tarkanian's suspension.[114] The Court distinguished the present case from *Dennis v. Sparks*[115] and *Adickes v. S.H. Kress & Co.*,[116] on which Tarkanian relied, on the ground that the joint participation in those cases was founded on a corrupt agreement between the private party and the state actor, whereas in the present case no such corrupt agreement existed.[117]

The Court concluded by stating that "[i]n the final analysis the question is whether 'the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State.' "[118] The Court answered in the negative, holding that the UNLV had conducted its athletic program under color of the policies adopted by the NCAA, rather than the NCAA developing and enforcing those policies under color of Nevada law.[119]

Justice White, in a dissenting opinion joined by Justices Brennan, Marshall, and O'Connor, argued that the NCAA acted jointly with the UNLV in suspending Tarkanian and thereby became a state actor.[120] Although Justice White agreed with the majority of the Court that this case was different on its facts from many of the Court's prior state action decisions, he stated that this situation was not unknown or unique.[121] Specifically, Justice White observed that in both *Adickes*[122] and *Dennis*,[123] the Court faced the question of whether private parties could be held to be state actors in cases in which the final or decisive act was carried out by a state official.[124] In

112. *Id.* at 465 n.18.
113. *Id.*
114. *Id.* at 464 n.16.
115. 449 U.S. 24 (1980); *see infra* notes 179-83 and accompanying text.
116. 398 U.S. 144 (1970); *see infra* notes 175-78 and accompanying text.
117. *Tarkanian*, 109 S. Ct. at 464 n.17.
118. *Id.* at 465 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).
119. *Id.*
120. *Id.* at 466 (White, J., dissenting).
121. *Id.*
122. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).
123. Dennis v. Sparks, 449 U.S. 24, 27 (1980).
124. *See Tarkanian*, 109 S. Ct. at 466 (White, J., dissenting).

both of those cases, the Court held that private parties could be found to be state actors if they were " 'jointly engaged with state officials in the challenged action.' "[125] In this case, Justice White argued, "it 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."[126] Justice White concluded: "On these facts, the NCAA was 'jointly engaged with [UNLV] officials in the challenged action.' "[127]

IV. COMMENT

A. Tarkanian *Is Inconsistent with Prior State Action Doctrine*

Prior to *Tarkanian*, most of the federal circuit courts had addressed the issue of the NCAA's status as a private or state actor,[128] with a clear trend developing among these courts toward a finding that the NCAA is a private actor. Indeed, several of the courts that had previously found the NCAA to be a state actor have subsequently reversed their positions and found no state action present.[129] Despite this apparent lack of conflict among the circuits, however, the United States Supreme Court decided to hear *Tarkanian*.[130] The Supreme Court held that the NCAA was not a state actor. In reaching this decision, the Court rejected arguments that the NCAA should be held to be a state actor under either the "delegation" theory or the "joint action" theory. The Court's reasoning, however, is inconsistent with prior decisions and reflects a rigid, formalistic attitude toward the resolution of state action issues.

1. THE DELEGATION THEORY

The first ground relied upon by the Court in finding that the

125. *Id.* (quoting *Dennis*, 449 U.S. at 27-28).

126. *Id.* at 467.

127. *Id.* (quoting *Dennis*, 449 U.S. at 27-28).

128. *See supra* notes 28-47 & 83-94 and accompanying text.

129. *Compare* McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (NCAA is a private actor) *and* Ponce v. Basketball Fed'n, 760 F.2d 375 (1st Cir. 1985) (basketball federation is a private actor) *with* Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492 (1st Cir. 1977) (intercollegiate athletic league is a state actor) *and* Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975) (NCAA is a state actor).

130. One possible explanation for the Court's interest in this particular case is that it presented several arguments that had not been extensively considered in the earlier NCAA state action cases. In this case, Tarkanian argued that the NCAA should be held to be a state actor under the "delegation" theory and the "joint action" theory. The *Tarkanian* Court may have felt that these theories might persuade some of those courts following the new tide of decisions to break from the growing trend, thereby creating a split among the circuits.

NCAA did not engage in state action was that the NCAA's activities were not carried out under color of Nevada law. According to the Court, "the source of the legislation adopted by the NCAA is not Nevada [law] but rather the collective membership speaking through an organization that is independent of any particular State."[131] Although the NCAA's legislation could not be considered Nevada law, the Court nonetheless recognized that it was possible that the state of Nevada could—through its actions—transform the NCAA legislation into Nevada law.[132]

One theory that has been advocated by several commentators,[133] but that has not received a great deal of attention from the courts, is that a state institution, by delegating a particular decision to a private party and agreeing to abide by it, transforms the private decision into state action.[134] Weistart and Lowell, in their prominent textbook on sports law, have articulated the delegation argument as follows:

> [T]he important underlying issue [in the NCAA cases] 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 duty 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 con-

131. *Tarkanian*, 109 S. Ct. at 462. Similar reasoning appears in the Fourth Circuit's decision in *Arlosoroff*, which held that absent a showing that the representatives of state institutions belonging to the NCAA had joined together to vote as a bloc to effect a particular result over the objection of private institutions, there could be "no showing that the state institutions controlled or directed the result"; hence, there was no state action. Arlosoroff v. NCAA, 746 F.2d 1019, 1022 (4th Cir. 1984).

132. *Tarkanian*, 109 S. Ct. at 462-63.

133. *See* J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 1.14, at 8 (Supp. 1985); Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U.L.J. 101, 126-27 (1984); Martin, *supra* note 90, at 73-75.

134. In *Parish v. NCAA*, the court of appeals noted that although one could not point to one state or governmental body that controls or directs the NCAA, "[n]evertheless, it would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a 'private' organization to which they have relinquished some portion of their governmental power." 506 F.2d 1028, 1033 (5th Cir. 1975). Only one subsequent NCAA case dealing with the state action issue has considered this delegation theory as a possible basis for finding state action. *See* Howard Univ. v. NCAA, 510 F.2d 213, 219 n.10 (D.C. Cir. 1975) (The theory of state action through the delegation of a public function was not helpful in resolving the question of "entanglement through dominant membership and participation.").

> fine 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.[135]

This reasoning is equally applicable to the situation in *Tarkanian*, in which one of the conditions that the state accepted in becoming a member of the NCAA was its delegation to the NCAA of the authority to discipline a state employee.[136] The Supreme Court in *Tarkanian* clearly accepted the view that a state institution cannot shield itself from liability for constitutional violations based on its affiliation with a nominally private organization, such as the NCAA.[137] The Court refused, however, to move from this conclusion to the idea that the NCAA itself should be liable as a state actor.[138]

Although the Court implicitly acknowledged the theoretical validity of this argument, it rejected the application of this argument to the facts of the case at bar. First, the Court emphasized that the UNLV had not delegated to the NCAA the power to exercise any direct action against Tarkanian.[139] Second, the Court stated that the UNLV and the NCAA had been adversaries throughout the proceedings in this case.[140] The Court concluded, therefore, that the NCAA could not be considered the UNLV's agent.[141] The Court's rejection of the delegation argument exemplifies the strict approach that the Court has taken in recent years in an apparent attempt to limit the scope of the state action doctrine.[142]

The Court's first reason for rejecting the application of the dele-

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135. J. WEISTART & C. LOWELL, *supra* note 133, § 1.14, at 8 (Supp. 1985).

136. The UNLV, in becoming a member of the NCAA, contractually agreed to administer its athletic programs in accordance with NCAA "legislation," which includes the NCAA's enforcement procedures. *See supra* note 6. The NCAA enforcement procedures, in turn, called for the suspension—hence disciplining—of Tarkanian, a state employee.

137. NCAA v. Tarkanian, 109 S. Ct. 454, 462 (1988). The Court stated: "A state university without question is a state actor. When it decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution." *Id.*

138. *Id.* at 465.

139. *Id.* at 464.

140. *Id.*

141. *Id.*

142. One commentator has argued that despite the Supreme Court's inability to articulate a consistent state action doctrine, the cases can "be understood by examining changes in the relative importance which the Court has attributed to either of two objectives which underlie the state action doctrine: federalism and satisfaction of public expectations." Schneider, *supra* note 33, at 737. Professor Schneider identifies three broad movements in the evolution of the state action doctrine: (1) in the nineteenth and early twentieth century, the state action concept was grounded on federalism principles and was very limited; (2) during the Vinson and Warren Court era, the state action concept was expanded when the focus shifted from federalism to fulfilling public expectations; and (3) during the Burger Court era, the Court has

gation theory for finding state action (that the NCAA did not have the power to take any direct action against Tarkanian)[143] is based upon the naive assumption that the UNLV acted voluntarily in suspending Tarkanian. This assumption is naive because the NCAA, as the premier intercollegiate athletic association in the United States, exercises a great deal of influence over its member institutions. As one commentator has recognized:

> There is no alternative for the institution seeking any real form of athletic prominence. Televised football appearances provide not only network money but alumni contributions and easier recruiting for future teams. In the high pressure sport of major intercollegiate basketball, there is no substitute for the season end NCAA tournament. To varying degrees, this holds true in the other intercollegiate sports.[144]

If the UNLV sought to maintain its athletic prominence, it had little practical alternative to complying with the NCAA's recommendation that it suspend Tarkanian. Hence, it was not surprising when the UNLV's vice president recommended that the university exercise its "option" to suspend Tarkanian rather than face additional penalties, including expulsion from the NCAA.[145] The Court summarily dismissed Tarkanian's argument that the UNLV had no practical alternative to the NCAA's demands, stating: "The University's desire to remain a powerhouse among the nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent."[146]

The summary disposal of this issue is certainly a striking contrast to the Court's attitude toward state action issues in earlier years. For instance, the Court's decision in *Terry v. Adams*[147] exemplifies an earlier era in state action doctrine in which the Court was far more willing to consider the dynamics of a situation in analyzing the state

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retreated to a narrow concept of state action in an effort to restrain federal judicial power. *Id.* at 738.

Another commentator has also written on the Burger Court's impact on the state action doctrine. *See* Phillips, *supra* note 5, at 700. Professor Phillips stated:

> After more than ten years of Burger Court activity . . . it is evident that the reach of state action has been substantially curtailed. Although few of the earlier landmarks have been expressly overruled, and litigants can still invoke their support, the Supreme Court now appears disinclined to give them a wide reading.

Id. at 718-19 (footnotes omitted).

143. *Tarkanian*, 109 S. Ct. at 465.

144. Martin, *The NCAA and the Fourteenth Amendment*, 11 NEW ENG. 383, 392 (1976).

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

146. *Id.* at 465 n.19.

147. 345 U.S. 461 (1953).

action issue. In *Terry*, qualified black voters of a Texas county brought suit against the Jaybird Democratic Association, a "self-governing voluntary club" composed exclusively of white Texas Democrats, in order to challenge that group's practice of excluding blacks from voting in the pre-primary elections held by the Association prior to the state primary elections.[148] In order to succeed on their fifteenth amendment[149] challenge, the petitioners had to show that the Jaybird Democratic Association's activities constituted state action.[150] In their attempt to defeat the petitioners' constitutional claim, the Jaybird Democratic Association argued, as did the NCAA in *Tarkanian*, that the Association was a "mere private group."[151]

The *Terry* Court held that the Jaybird Democratic Association's "private" elections constituted state action because the state primary and general elections had "become no more than the perfunctory ratifiers of the choice that [had] already been made in Jaybird elections from which Negroes [had] been excluded."[152] The Court further declared that it was "immaterial that the state [did] not control that part of [the] elective process" that the Jaybirds managed because the Jaybird primary had become, in effect, an integral part of the elective process that determined who would govern the county.[153] The Court attributed great significance to the fact that for more than fifty years, the Association's county-wide candidates had invariably been nominated in the Democratic primaries and elected to office.[154]

Although the Jaybird Democratic Association could not directly, without official state elections, place its candidates in public office, the *Terry* Court focused on the reality of the situation before it and found that the Association had engaged in state action.[155] The *Tarkanian* Court took the opposite position, however, partly basing its finding of no state action on the NCAA's inability to directly discipline an employee at a state university.[156] As Justice Marshall remarked in

148. *Id.* at 463.

149. The amendment provides, in relevant part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

150. *Terry*, 345 U.S. at 473.

151. *Id.* at 466.

152. *Id.* at 469.

153. *Id.*

154. *Id.* at 463.

155. *Id.* at 469. Tarkanian had advanced this same kind of argument in support of his proposition that the NCAA was a state actor. Brief for the Respondent at 35-37, NCAA v. Tarkanian, 109 S. Ct. 454 (1988) (No. 87-1061). The Court, however, rejected this argument in the majority opinion.

156. NCAA v. Tarkanian, 109 S. Ct. 454, 465 (1988).

Rendell-Baker v. Kohn,[157] the "decision in this case marks a return to empty formalism in state action doctrine."[158]

The *Tarkanian* Court's second reason for not finding the delegation argument persuasive was that the UNLV and the NCAA were adversaries throughout the proceedings. This reasoning is problematic because the relationship between the parties was, at least on a formal basis, one of cooperation. By virtue of its membership in the NCAA, the UNLV became contractually bound to abide by the NCAA's enforcement penalties in compliance with the NCAA's fundamental policy that member institutions are obligated to apply and enforce NCAA legislation and enforcement programs.[159]

Further evidence of the cooperative enterprise contemplated by the UNLV and the NCAA may be found in the correspondence from the NCAA to the UNLV at the time that the NCAA first alleged that the UNLV may have committed violations. As part of its investigation, the NCAA asked the UNLV to conduct its own investigation of the alleged misconduct.[160] The NCAA Assistant Executive Director stated that the enforcement program of the NCAA was a cooperative undertaking involving the NCAA and member institutions and that " 'the responsibility of the University is to objectively, rather than defensively, investigate the allegations to determine the facts, regardless of the results.' "[161] The Director further stated: "Accordingly,

157. 457 U.S. 830, 852 (1982) (Marshall, J., dissenting).

158. *Id.* The *Tarkanian* Court also rejected the argument that the NCAA, in disciplining Tarkanian, had performed a "public function" and had hence become a state actor, pointing out that the NCAA's own legislation prohibited it from taking any direct action against Tarkanian. *Tarkanian*, 109 S. Ct. at 465 n.18. The Court further noted that Tarkanian's suspension was but "one of many" recommendations in the NCAA's confidential report. *Id.*

The *Tarkanian* Court's rejection of the "public function" argument based on a requirement of direct action is subject to the same criticisms mentioned above with regard to the Court's rejection of the delegation argument. *See supra* note 131-67 and accompanying text. The Court overlooked the fact that, given the relative power of the NCAA and the UNLV, the NCAA's request that the UNLV suspend Tarkanian was for all practical purposes the equivalent of the NCAA directly disciplining him. Ironically, this was one of the rare instances in which there was indeed a function "traditionally exclusively reserved to the state." *See Tarkanian*, 109 S. Ct. at 465 n.18. The Supreme Court has in recent years severely limited the scope of what may be considered a public function for state action purposes. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (The Court required, for the first time, that a function be one that has not only been traditionally, but also exclusively performed by the state in order to constitute state action.).

159. The NCAA's Official Procedure Governing the NCAA Enforcement Program provides: " 'All representatives of educational institutions are expected to cooperate fully with the NCAA investigative staff, Committee on Infractions and Council to further the objectives of the Association and its enforcement program.' " Brief for the Respondent at 3, NCAA v. Tarkanian, 109 S. Ct. 454 (1988) (No. 87-1061) (citation omitted).

160. *Tarkanian*, 109 S. Ct. at 458.

161. Brief for the Respondent at 8, *Tarkanian* (No. 87-1061) (quoting from trial exhibit).

the 'burden of proof' is shared jointly by both the NCAA enforcement staff and the institution. It is not a prosecutor-defense legal proceeding; rather, it is a cooperative administrative effort . . . designed to place the responsibility for determining facts on both the institution and the enforcement staff . . . ."[162]

The Court concluded, however, that the UNLV could not be considered an agent of the NCAA for purposes of the enforcement proceedings.[163] Rather than holding that the NCAA and the UNLV acted jointly pursuant to their contractual relationship in suspending Tarkanian, the Court looked beyond the parties' formal relationship and focused on what really occurred. The Court stated that "[d]uring the several years that the NCAA investigated the alleged violations, the NCAA and the UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth."[164]

The Court, however, was not sufficiently thorough in applying this substance-over-form approach. For while it is true that the UNLV "used its best efforts to retain its winning coach,"[165] the fact remains that the UNLV, faced with the threat of severe sanctions against the university, ultimately carried out the NCAA's wishes when it notified Tarkanian that he was to be " 'completely severed of any and all relations, formal or informal, with the University's Intercollegiate athletic program during the period of the University's NCAA probation.' "[166] As Justice White's dissent concluded, "[t]he key . . . is that ultimately the parties agreed to take the action."[167]

2. THE JOINT ACTION THEORY

The *Tarkanian* Court also rejected the argument that the NCAA became a state actor by becoming a joint participant with the UNLV in suspending Tarkanian.[168] This joint action theory, the vitality of which was reaffirmed by the Supreme Court's decision in *Lugar v. Edmondson Oil Co.*,[169] does not appear in the discussion of any of the reported NCAA cases dealing with the issue of state action. Despite this lack of precedent, the joint action theory was central to Tarkanian's argument before the Supreme Court.[170] The *Tarkanian*

162. *Id.* at 9.
163. *Tarkanian*, 109 S. Ct. at 464.
164. *Id.*
165. *Id.*
166. *Id.* at 459 (quoting Joint Appendix at 70, *Tarkanian* (No. 87-1061)).
167. *Id.* at 468 (White, J., dissenting).
168. *Id.* at 464 n.16.
169. 457 U.S. 922 (1982). For a discussion of *Lugar*, see *supra* notes 76-82 and accompanying text.
170. Brief for the Respondent at 24-46, *Tarkanian* (No. 87-1061).

Court's cursory treatment of this theory—which alone should have been sufficient to support a finding of state action[171]—rested on its distinction of *Adickes v. S.H. Kress & Co.*[172] and *Dennis v. Sparks*,[173] two prior Supreme Court decisions that found state action based on the joint participation by a private individual and the state in prohibited activity. The *Tarkanian* Court distinguished those cases on the ground that the joint participation in those cases was founded on a corrupt agreement between the private party and the state actor; no such corrupt agreement existed in *Tarkanian*.[174]

In *Adickes*, a white school teacher was refused service in a private restaurant when she was accompanied by six black students; she was thereafter arrested for vagrancy upon leaving the premises.[175] She filed a claim under 42 U.S.C. § 1983 to recover damages, alleging that she was discriminated against solely on the basis of race in violation of the equal protection clause of the fourteenth amendment to the United States Constitution.[176] In order to succeed on her Section 1983 claim, the petitioner had to establish that the deprivation was somehow caused by state action. The Supreme Court stated that the petitioner could establish the requisite state action "if she [could] prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes."[177] The Court then stated:

> The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful . . . . *Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983.*[178]

The reasoning of the *Adickes* case was again applied by the

171. *See infra* notes 205-16 and accompanying text.

172. 398 U.S. 144 (1970).

173. 449 U.S. 24 (1980).

174. *Tarkanian*, 109 S. Ct. at 464 n.17.

175. *Adickes*, 398 U.S. at 146.

176. *Id.* The petitioner's complaint had two counts, each based on Section 1983 and each alleging that the respondent, a private entity, had deprived petitioner of the right "not to be discriminated against on the basis of race." *Id.* at 147. The first count stated that she had been refused service because she was a "Caucasian in the company of Negroes"; she sought to prove that the refusal to serve her was pursuant to a custom of the community to segregate races in public eating places. The second count stated that the refusal of service and the arrest were the product of a conspiracy between the respondent and the police. *Id.* at 148.

177. *Id.* at 152.

178. *Id.* (emphasis added) (citations omitted).

Supreme Court in *Dennis v. Sparks*.[179] In *Dennis*, a state trial judge enjoined the production of minerals from oil leases owned by the plaintiff.[180] On appeal, the injunction was dissolved as having been illegally issued. The plaintiff then filed an action under 42 U.S.C. § 1983, naming as defendants the Duval County Ranch Co. (the party that obtained the injunction against the plaintiff), the sole owner of the corporation, the judge who entered the injunction, and the two individual sureties on the injunction bond.[181] The plaintiff's primary claim was that the injunction had been "corruptly issued as the result of a conspiracy between the judge and the other defendants" and that this joint activity constituted a deprivation of his property without due process of law.[182] The Court accepted the plaintiff's argument and stated: "It is enough that [a private defendant] is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions."[183]

The Court distinguished the situations in *Adickes* and *Dennis* from the situation in *Tarkanian* based on the fact that those cases involved corrupt agreements between the private party and the state. The Court stated:

> In this case there is no suggestion of any impropriety respecting the agreement between the NCAA and UNLV. Indeed the dissent seems to assume that the NCAA's liability as a state actor depended not on its initial agreement with UNLV, but on whether UNLV ultimately accepted the NCAA's recommended discipline of Tarkanian. In contrast, the conspirators in *Dennis* became state actors when they formed the corrupt bargain with the judge, and remained so through completion of the conspiracy's objectives.[184]

The distinction is truly without merit. Although the Court was correct in pointing out that the agreement between the UNLV and the NCAA was not invalid from the time of its inception, the Court failed to indicate *why* this distinction should make any difference. *Dennis* and *Adickes* did not require the corrupt agreement between the state and the private party to have existed for any specified period of time before the challenged action took place.[185] Rather, those cases

179. 449 U.S. 24 (1980).
180. *Id.* at 25.
181. *Id.* at 25-26.
182. *Id.* at 26.
183. *Id.* at 27-28 (citations omitted).
184. *Tarkanian*, 109 S. Ct. at 464 n.17 (citation omitted).
185. *Dennis*, 449 U.S. at 27-29; Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-52 (1970). Neither of those cases required that the agreement between the state and the private party be "corrupt." Apparently, the *Tarkanian* Court did not believe that the agreement itself had to

focused on the more germane issue of whether the constitutional violation *resulted* from the agreement. The latter approach is the more straightforward of the two as it goes to the heart of the issue, that is, whether the challenged conduct was the result of joint participation between state and private actors, such that the actions of those private actors could fairly be attributed to the state.[186] Hence, the Court's rejection of the joint action theory is based on yet another formalistic argument that overlooks the realities of the situation.

The *Tarkanian* decision clearly reflects the restrictive approach toward state action that the Supreme Court has followed in recent years. This Note has argued that the *Tarkanian* Court's reasoning—which rejected the "delegation," "public function," and "joint action" arguments for finding the NCAA to be a state actor—contained doctrinal flaws. The decision, however, is not only inconsistent with prior state action decisions, but it is also flawed as a matter of policy.

Implicit in the Court's discussion is the notion that Tarkanian's remedy should come from the UNLV and not from the NCAA. The Court's decision that the NCAA is not a state actor, however, fails to penalize the party that is most responsible for the asserted constitutional violations—the NCAA. In a situation such as that presented in this case, a state university's bargaining strength is substantially weaker than the NCAA's. The state is thus forced to decide whether it will respect the constitutional rights of one of its citizens, at the risk of incurring significant NCAA sanctions, or whether it will carry out the wishes of the NCAA, thereby risking liability under Section 1983. In the meantime, the NCAA—which has created this dilemma for the state—is immunized from any liability for violating fourteenth amendment rights by virtue of its status as a "private" organization. The *Tarkanian* Court's decision, in failing to hold the NCAA accountable for its actions, does little to deter the NCAA from continuing to exert pressure on public universities, such as the UNLV, to take constitutionally impermissible actions.

B. Tarkanian *Fails to Clarify the Application of the* Lugar *Framework*

The Supreme Court's decision in *Tarkanian* is problematic in its result and in its application of state action doctrine.[187] The case is

be corrupt, as it based its distinction on the time when the cooperative activity took place rather than on whether the agreement was prima facie invalid. *Tarkanian*, 109 S. Ct. at 464 n.17.

186. *See, e.g., Adickes*, 398 U.S. at 152.

187. *See supra* notes 128-86 and accompanying text.

also problematic, however, on a broader level; it fails to clarify when and how the two-pronged test announced in *Lugar v. Edmondson Oil Co.*[188] is to be applied. This Section analyzes the *Tarkanian* Court's application of the *Lugar* test[189] and questions whether the *Lugar* test, as applied in *Tarkanian*, imposes greater requirements for a finding of state action than traditional state action tests.[190]

There is a general consensus of authority that the state action doctrine is significantly muddled.[191] The Supreme Court itself recognized the difficulty surrounding this area of law when it declared the formulation of "an infallible test" to be an "impossible task."[192] Thus, rather than developing a unitary test, the Court has adopted a number of approaches that may be applied depending on the particular facts of each case.[193]

In *Lugar*, the Supreme Court purported for the first time to develop a unifying framework under which state action issues can be analyzed. The two-pronged analytical framework announced by the *Lugar* Court was not presented as a new state action "test," but rather was said to emerge from the pattern of earlier state action decisions.[194] The two-part approach announced by the Court, which contained elements of the traditional state action theories, bore out this idea that the new framework was a synthesis. The Court stated the two-pronged test as follows:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.[195]

The Court further declared that these two principles, although related, are not the same:

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188. 457 U.S. 932, 937 (1982).

189. *Tarkanian*, 109 S. Ct. at 461-65.

190. *See supra* note 33 (describing the various theories utilized to extend concept of state action to nominally private parties).

191. *See supra* note 5 and accompanying text.

192. Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

193. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961); *see supra* note 33 (discussing the various state action tests).

194. The Court stated that its "cases reflect a two-part approach to this question of 'fair attribution.'" Lugar v. Edmondson Oil Co., 457 U.S. 932, 937 (1982).

195. *Id.*

> They collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions. The two principles diverge when the constitutional claim is directed against a party without such apparent authority, *i.e.*, against a private party.[196]

Almost immediately following the emergence of this new analytical framework for state action issues, the question arose whether the *Lugar* analysis would "prove a genuine synthesis or just another test on the state action list."[197] A review of the state action cases decided by the federal courts of appeals since the Supreme Court's decision in *Lugar* reveals that the framework announced in *Lugar* has not received uniform application—even within each circuit—with some cases applying *Lugar*'s two-pronged framework[198] and other cases ignoring the *Lugar* framework completely as they apply the traditional state action tests.[199] Moreover, the Supreme Court's post-*Lugar* state action decisions have also been inconsistent in their application of the *Lugar* framework.[200] With this lack of agreement as to

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196. *Id.*

197. *See* Cobb, *State Action Under the Fifth and Fourteenth Amendments: A Brief Review of Recent Developments*, 17 CLEARINGHOUSE REV. 533, 535 (1983).

198. *See* Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544, 554 (5th Cir. 1988); Tarabishi v. McAlester Regional Hosp., 827 F.2d 648, 651-52 (10th Cir. 1987); Albert v. Carovano, 824 F.2d 1333, 1338-39 (2d Cir. 1987); Roudybush v. Zabel, 813 F.2d 173 (8th Cir. 1987); Thomas S. v. Morrow, 781 F.2d 367, 377-78 (4th Cir. 1986); Duncan v. Peck, 752 F.2d 1135, 1140-41 (6th Cir. 1985); Cruz v. Donnelly, 727 F.2d 79, 81-82 (3d Cir. 1984); Scott v. Dixon, 720 F.2d 1542, 1545 (11th Cir. 1983); Kolinske v. Lubbers, 712 F.2d 471, 477 (D.C. Cir. 1983); Gerena v. Puerto Rico Legal Servs., Inc., 697 F.2d 447, 449 (1st Cir. 1983).

199. *See* Robison v. Canterbury Village, Inc., 848 F.2d 424, 427-30 (3d Cir. 1988); McCormack v. NCAA, 845 F.2d 1338, 1346 (5th Cir. 1988); Sinn v. Daily Nebraskan, 829 F.2d 662, 664-65 (8th Cir. 1987); Vincent v. Trend W. Technical Corp., 828 F.2d 563, 567-69 (9th Cir. 1987); Carey v. Continental Airlines, Inc., 823 F.2d 1402, 1404 (10th Cir. 1987); Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352, 1357-58 (11th Cir. 1986); Hooks v. Hooks, 771 F.2d 935, 943 (6th Cir. 1985); Mark v. Furay, 769 F.2d 1266, 1272-73 (7th Cir. 1985); Ponce v. Basketball Fed'n, 760 F.2d 375, 377-82 (1st Cir. 1985); Calvert v. Sharp, 748 F.2d 861, 862-64 (4th Cir. 1984); Franz v. United States, 707 F.2d 582, 590-94 (D.C. Cir. 1983).

200. The Court's decisions in Blum v. Yaretzky, 457 U.S. 991 (1988), and Rendell-Baker v. Kohn, 457 U.S. 830 (1982), announced the same day as the *Lugar* decision, seem to confirm the notion that the issue of state action is not to be determined solely by the specific criteria enunciated in *Lugar*. Although the *Rendell-Baker* Court cited *Lugar* in characterizing the ultimate issue as to whether the challenged action was "fairly attributable to the State," *Rendell-Baker*, 457 U.S. at 838, the Court decided the issue without following the two-pronged framework of *Lugar*. Similarly, the specific framework enunciated in *Lugar* was absent from the Court's analysis of the state action issue in *Blum*. 457 U.S. at 1002-12.

Subsequent state action decisions handed down by the Court have been equally inconsistent in their application of the *Lugar* framework. *Compare* West v. Atkins, 108 S. Ct. 2250, 2255 (1988) (The Court cited and applied the *Lugar* framework in holding that a physician who is under contract with the state to provide medical services to inmates at a state

the proper role of the *Lugar* analysis in considering the question of state action—which was reflected in the arguments of counsel in the *Tarkanian* case[201]—it would have been helpful if the *Tarkanian* Court had offered some guidance on how the *Lugar* framework should be applied.

Unfortunately, the *Tarkanian* Court did nothing to clarify the application of the *Lugar* framework in the analysis of state action issues. Although it recognized that the Nevada Supreme Court had applied the *Lugar* test as one of the bases for finding the NCAA to be a state actor, the United States Supreme Court did not expressly cite or follow the *Lugar* test in its state action analysis.[202] Given this lack of consistency in the courts' application of the *Lugar* framework, an important question arises as to whether the result achieved by apply-

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prison hospital on a part-time basis is a state actor.) *with* San Francisco Arts & Athletics v. Olypmic Comm., 107 S. Ct. 2971, 2985-86 (1987) (The Court did not mention or apply the *Lugar* framework, but instead went through each of the traditional state action tests—public function, joint action or significant encouragement, and nexus—in holding that the United States Olympic Committee was not a state actor.).

201. The petitioner stated that in *Lugar* the "Court provided an analytical framework within which the 'facts and circumstances' of each case may be evaluated." Brief for the Petitioner at 24, NCAA v. Tarkanian, 109 S. Ct. 454 (1988) (No. 87-1061). Thus, the petitioner's argument for not finding state action was centered upon the criteria enunciated in *Lugar*. *Id.* at 26-48. The respondent, on the other hand, argued that state action is not determined solely by the specific criteria enunciated in *Lugar*. The respondent argued that the *Lugar* framework, which did support a finding of state action in this case, is but one of the criteria which may be employed in the state action analysis. Brief for the Respondent at 25 n.20, *Tarkanian*.

202. NCAA v. Tarkanian, 109 S. Ct. 454, 461-65 (1988). It could be argued that the *Tarkanian* Court applied the first prong of the *Lugar* test when it sought to determine whether the source of the challenged conduct—the NCAA's rules and procedures—was the state of Nevada, that is, whether "the deprivation [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937, *quoted in Tarkanian*, 109 S. Ct. at 463 n.14. The *Tarkanian* Court held that this requirement was not satisfied and hence concluded that the NCAA did not engage in state action. *Tarkanian*, 109 S. Ct. at 465. After that, however, the Court departed from the *Lugar* framework when it considered and rejected Tarkanian's arguments that the NCAA should be found to be a state actor based on the "public function" and "joint action" tests. *Id.* at 464-65 nn.16-18. If the *Tarkanian* Court had applied the *Lugar* framework, after finding that the first prong of *Lugar* was not met, it would not have been necessary to consider two later arguments that the NCAA was a state actor based on the "public function" and "joint action" tests—which are directed toward satisfying the second prong of *Lugar*—because *Lugar* requires that both prongs be met in order to find state action. The four dissenting justices took an approach that seemingly ignored the *Lugar* framework altogether, adding further to the confusion as to the applicable mode of analysis. Without considering whether *Lugar*'s first prong was met, the dissent declared that "private parties could be found to be state actors if they were 'jointly engaged with state officials in the challenged action.' " *Id.* at 466 (White, J., dissenting) (citing Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)). Having found that the NCAA was jointly engaged with the UNLV officials in the challenged action, the dissent reasoned that the NCAA should have been found to be a state actor. *Id.* at 467.

ing the *Lugar* framework is different from the result that would be achieved by applying traditional state action tests. If the *Lugar* framework is only an amalgamation of prior state action cases, then the application of *Lugar* should not have a significant impact on the outcome of the state action issue. If, however, the *Lugar* framework imposes a new requirement in the state action calculus, then its application or non-application becomes a critical issue.

Tarkanian presents a situation in which the *Lugar* framework could be viewed as imposing an additional requirement to the traditional state action tests. Under the *Lugar* framework, the inquiry under the first and second prongs "diverge[s] when the constitutional claim is directed against a . . . private party."[203] The NCAA is a private party; hence, the state action inquiry presumably "diverges," requiring that both prongs of *Lugar* be satisfied for a finding of state action. Without reference to *Lugar*, however, the NCAA could be found to be a state actor under the arguably less stringent "joint action" test if it was a joint participant with the UNLV in suspending Tarkanian. Applying the *Lugar* framework, on the other hand, it appears that there is an additional requirement that the deprivation have been caused by the exercise of some state-created right or privilege or by a rule of conduct imposed by the state.[204]

Upon further examination, however, one need not necessarily view the *Lugar* framework as imposing an additional requirement in the state action analysis. As an illustration, if the basis for satisfying the second prong of *Lugar*—that the person charged with the deprivation be a person who may fairly be said to be a state actor—is a claim that the state was a joint participant in the challenged activity, then it could be argued that satisfaction of the second prong will implicitly satisfy the first prong, thereby imposing no additional requirement. The Fourth Circuit recently took this position in *Jackson v. Pantazes*.[205]

In *Pantazes*, a homeowner brought a Section 1983 action against a bail bondsman and a police officer to recover damages for personal injuries and property damage that she sustained from the bondsman's attempt to apprehend her son.[206] The court stated that the threshold issue was whether the bondsman was a state actor.[207] Noting that the *Lugar* framework "delineated the appropriate method for analyzing

203. Lugar v. Edmondson Oil Co., 457 U.S. 932, 937 (1982).

204. *See id.* at 937-39.

205. 810 F.2d 426 (4th Cir. 1987).

206. *Id.* at 427.

207. *Id.* at 428. The court stated that with respect to the police officer, it was readily apparent that he was a state actor. *Id.*

the issue of whether a party is a state actor so as to be subject to suit under § 1983,"[208] the court held that both prongs were met and concluded that the bondsman was a state actor.[209] The first prong was met because, in seeking to apprehend the plaintiff's son, who was a fugitive from justice, the bondsman "was exercising powers conferred on him by state law."[210] The second prong articulated by *Lugar* was also satisfied because the bondsman "obtained significant aid from . . . the police officer, who was unquestionably exercising state authority."[211]

The court then stated: "Indeed, in cases where a private party and a public official act jointly to produce the constitutional violation, both parts of the *Lugar* test are *simultaneously satisfied* . . . ."[212] The Fourth Circuit further noted that in *Lugar*, the Supreme Court recognized its earlier holding in *Adickes v. S.H. Kress & Co.*[213] that a private party's joint participation with a state official in a conspiracy to discriminate would constitute state action.[214] Finally, the Fourth Circuit stated: "[A]s in *Adickes*, even in the absence of any state statute, custom or policy which authorizes the private party's conduct; joint activity, alone, is sufficient [for a finding of state action]."[215] In support of this interpretation, the court referred to the following statement by the *Lugar* Court:

> It was with respect to this [conspiracy] count, which did not allege any unconstitutional statute or custom, that the Court [in *Adickes*] held that joint action of the private party and the police officer was sufficient to support a § 1983 suit against that party . . . . [T]he joint action count of Adickes did not involve a state law, whether "plainly unconstitutional" or not.[216]

Lending further support to this view of the joint action test, the dissent in *Tarkanian* declared that "private parties could be found to be state actors, if they were 'jointly engaged with state officials in the

208. *Id.*

209. *Id.* at 430.

210. *Id.* at 429. Under Maryland law, the bondsman "was 'subrogated to the rights and means possessed by the State' to apprehend [the fugitive] and subject him to trial, and 'to the extent necessary to accomplish this . . . [to] restrain him of his liberty.' " *Id.* (citations omitted).

211. *Id.*

212. *Id.* (emphasis added).

213. 398 U.S. 144 (1970).

214. *Id.* at 152.

215. *Pantazes*, 810 F.2d at 429.

216. Lugar v. Edmondson Oil Co., 457 U.S. 932, 932 n.15 (1982), *quoted in Pantazes*, 810 F.2d at 429 n.3.

challenged action.' "[217] In doing so, the dissent ignored the *Lugar* framework altogether and did not inquire whether the first prong of *Lugar* had been met.

Thus, if the Fourth Circuit's interpretation of the application of the *Lugar* framework is followed, then it is clear that *Lugar*'s application will not change the outcome of the state action inquiry because *Lugar* imposes no additional requirement for finding state action. That being the case, it appears that the *Lugar* framework adds very little to the analysis of state action issues; it merely "suggests [another path] into, if not through, the thicket"[218] of state action analysis. In fact, the *Lugar* framework may do more than simply fail to add anything useful to the state action inquiry; it is possible that the *Lugar* framework will add further confusion to this already chaotic area of law if courts continue to interpret and apply the test in an inconsistent manner. Given this potential for further confusion in the analysis of state action issues, the Supreme Court should seize a future opportunity to announce clearly whether the *Lugar* framework should be uniformly applied in the consideration of state action issues, and if so, whether satisfaction of the traditional state action tests will simultaneously satisfy both prongs of *Lugar*.

V. CONCLUSION

In *Tarkanian*, the United States Supreme Court for the first time tackled the issue of the status of the NCAA as either a private or a state actor. The Court held that the NCAA did not engage in state action when it requested that the UNLV "show cause" why additional penalties should not be imposed against it if the UNLV failed to discipline Coach Tarkanian by removing him completely from the university's intercollegiate athletic program during the probation period.[219] In so holding, the Court rejected several legitimate arguments demonstrating that the NCAA did engage in state action. This result reinforces the Court's recent formalistic approach to state action issues[220] and will certainly strengthen the existing trend in the lower courts toward finding that the NCAA is not a state actor and hence is not subject to the strictures of the fourteenth amendment. Unfortunately, this finding also enables the NCAA to continue to commit "indirect" violations of constitutional rights.

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217. NCAA v. Tarkanian, 109 S. Ct. 454, 466 (1988) (quoting Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)).

218. Cobb, *supra* note 197, at 537.

219. *Tarkanian*, 109 S. Ct. at 465.

220. *See supra* notes 131-86 and accompanying text.

The reasoning in *Tarkanian* is also problematic because the Court did not clarify the status of the two-pronged framework announced in *Lugar v. Edmondson Oil Co.*[221] for the analysis of state action issues. The *Lugar* test has been inconsistently applied in both the lower courts and the Supreme Court.[222] Thus, it remains uncertain whether *Lugar* is indeed the definitive framework for the analysis of state action issues. The *Tarkanian* Court's silence as to the proper role of the *Lugar* framework in the analysis of state action issues adds unnecessary confusion to an already muddled area of law.

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221. 457 U.S. 922 (1982); *see supra* notes 194-96 and accompanying text.
222. *See supra* notes 198-200 and accompanying text.