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# THE TARKANIAN DECISION: THE STATE OF COLLEGE ATHLETICS IS EVERYTHING BUT STATE ACTION

Kevin M. McKenna\*

## INTRODUCTION

Having gone to the Final Four twice before, University of Nevada Las Vegas ("UNLV")<sup>1</sup> Coach Jerry Tarkanian<sup>2</sup> took his case to the final nine as his twelve-year legal battle against the National Collegiate Athletic Association ("NCAA")<sup>3</sup> moved from the basketball court to the United States Su-

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1. UNLV is a public university existing by virtue of article 11, § 4 of the Nevada Constitution. *Tarkanian v. NCAA* ("Tarkanian II"), 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987), *rev'd*, 488 U.S. 179 (1988); *see also* NEV. CONST. art. 11, § 4 (providing that "[t]he Legislature shall provide for the establishment of a State University which shall embrace departments for Agriculture, Mechanic Arts, and Mining to be controlled by a Board of Regents whose duties shall be prescribed by Law").

2. Jerry Tarkanian has been a head basketball coach for nearly 30 years. *Tarkanian II*, 103 Nev. at 333, 741 P.2d at 1346. He has coached at UNLV since 1973. *Id.*

3. The district court briefly summarized the purpose of the NCAA:

[The NCAA] is a private non-profit association organized in 1905. [The] NCAA consists of approximately 900 members. Membership is open to four-year institutions which meet certain academic standards. Allied and Associate membership is open to athletic conferences. . . .

. . . .  
. . . [The] NCAA operates pursuant to a Constitution and Bylaws adopted by the membership and subject to amendment. . . . The general policies of [the] NCAA are established by the membership at annual conventions. When the annual convention is not in session, policy is established and directed by the NCAA Council of 22 members elected by the entire membership at the annual convention. [The] NCAA has a professional staff located at its headquarters in Shawnee Mission, Kansas. Some 80 employees execute NCAA policy under the supervision of [an executive director].

Board of Regents v. NCAA, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *aff'd in part, remanded in part*, 707 F.2d 1147 (10th Cir.), *stay granted*, 463 U.S. 1311 (1983), *aff'd*, 468 U.S. 85 (1984). The NCAA's constitution, bylaws, and procedures are set forth at length in its manual, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1990-91 NCAA MANUAL [hereinafter NCAA

preme Court.<sup>4</sup> Before the country's highest court, Tarkanian argued that the NCAA violated his due process rights during a 1976 NCAA investigation of rule violations at UNLV.<sup>5</sup> On the other side of the court was the NCAA, arguing that as a private, voluntary association, consisting of approximately 960 public and private education institutions, it had no obligation to comply with procedural safeguards when it ordered the university to suspend Tarkanian from coaching for two years.<sup>6</sup> In this case of first impression,<sup>7</sup> the Court held in a 5-4 decision that the NCAA's participation in events leading up to the suspension of Jerry Tarkanian did not violate his fourteenth amendment rights.<sup>8</sup>

After a two-and-one-half year investigation of UNLV's basketball program, the NCAA Committee on Infractions<sup>9</sup> issued an official inquiry to UNLV in late February of 1976.<sup>10</sup> The official inquiry outlined seventy-eight rule violations which allegedly occurred between 1970 and 1976.<sup>11</sup> The Committee requested UNLV to conduct its own investigation and respond within three months.<sup>12</sup> At the behest of UNLV, the Nevada State Attorney General's Office conducted an extensive investigation of the allegations.<sup>13</sup>

UNLV submitted a response to the Committee on Infractions denying that a violation had occurred.<sup>14</sup> The Committee on Infractions reviewed the allegations during approximately three days of hearings.<sup>15</sup> The Committee found that thirty-eight of the seventy-eight allegations were actual violations of NCAA rules.<sup>16</sup> Tarkanian was specifically named in ten violations.<sup>17</sup> The

MANUAL]. The NCAA Council is elected at annual conventions and has sole responsibility for implementing and interpreting NCAA policies. Tarkanian II, 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987), *rev'd*, 488 U.S. 179 (1988).

4. NCAA v. Tarkanian ("Tarkanian III"), 488 U.S. 179 (1988).

5. *Id.* at 181.

6. *Id.* at 183.

7. Prior to the Supreme Court decision in *Tarkanian III*, the Court had never been faced with the question of whether the NCAA was a state actor such that its actions were subject to the due process restrictions of the fourteenth amendment. Comment, *Constitutional Law—Due Process—National Collegiate Athletic Association Is Not Considered a State Actor Under the Fourteenth Amendment*, 21 RUTGERS L.J. 519, 522 (1990).

8. Tarkanian III, 488 U.S. at 182.

9. *Id.* The NCAA Committee on Infractions administers the NCAA enforcement program. *Id.*

10. *Id.*

11. *Id.* Originally, the official inquiry was 54 pages long, outlining 72 rule violations. *Id.* It was later supplemented with six additional allegations. *Id.*

12. *Id.* at 334, 741 P.2d at 1346.

13. *Id.*

14. *Id.* In denying any violations of NCAA rules, UNLV submitted two boxes of sworn statements, affidavits, and other documentary evidence to refute the NCAA allegations. *Id.*

15. *Id.* at 334, 741 P.2d at 1347. NCAA evidence of rule violations consisted solely of its investigator's oral recollection of interviews with sources. *Id.* The investigation relied on memoranda of the interviews, which were dictated after the interviews. *Id.* The interviewer never checked the accuracy of the memoranda. *Id.*

16. *Id.*

17. *Id.* UNLV affidavits and sworn statements directly controverted the testimony of the

Committee issued its findings in a confidential report which directed UNLV to show cause why additional penalties should not be imposed against the university if it did not suspend Tarkanian from involvement with the university's intercollegiate athletic program for two years.<sup>18</sup> In short, UNLV had a choice: fire their basketball coach or face sanctions by the NCAA.

After an unsuccessful appeal of the NCAA's ruling, UNLV's president accepted the hearing officer's recommendation.<sup>19</sup> In September, 1977, UNLV suspended Tarkanian, noting "the University is simply left without alternatives."<sup>20</sup>

Tarkanian chose to go outside the NCAA process and appeal his case in the courts. The coach and his future at UNLV were no longer center court. Now, if the very existence of the NCAA was not being threatened, certainly its investigation and enforcement methods were being questioned.

After twelve years of litigation, the United States Supreme Court put the question to rest. In *NCAA v. Tarkanian*,<sup>21</sup> the Court held that Tarkanian was not entitled to due process during the NCAA investigation which led to his eventual suspension.<sup>22</sup> The basis for the Court's ruling was that the NCAA is not a state actor and, therefore, its actions are not subject to fourteenth amendment due process requirements.<sup>23</sup>

The *Tarkanian* decision is a definitive answer to a long debated question: whether the NCAA is a state actor, thereby bringing its actions within the due process clause of the fourteenth amendment. Lower courts had wrestled with this question for well over a decade.<sup>24</sup> In upholding the NCAA's status as a private actor, the Court affirmed the NCAA's broad regulatory power, while taking away the individual's constitutional protections.

This Article will begin with a survey of Supreme Court and lower court decisions which have questioned whether the fourteenth amendment applies to institutional actions in the context of civil rights claims brought under section 1983<sup>25</sup> and the fourteenth amendment.<sup>26</sup> Next, the Nevada Supreme Court decision in the *Tarkanian* litigation will be discussed to provide a background to the United States Supreme Court decision. Following the Nevada decisions

NCAA enforcement staff with respect to the allegations against Tarkanian. *Id.*

18. *Id.* The Committee issued its findings in Confidential Report No. 123(47). *Id.*

19. *Id.*

20. *University of Nevada v. Tarkanian* ("Tarkanian I"), 95 Nev. 389, 393, 594 P.2d 1159, 1162 (1979), *later proceeding*, 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987), *rev'd*, 488 U.S. 179 (1988).

21. *Tarkanian III*, 488 U.S. 179 (1988).

22. *Id.* at 181-82.

23. *Id.* at 199.

24. *See infra* notes 48-62 and accompanying text.

25. 42 U.S.C. § 1983 (1988).

26. U.S. CONST. amend. XIV. Section 1983 and the fourteenth amendment are the two most often employed means of attacking the NCAA's authority. Note, *National Collegiate Athletic Association v. Tarkanian: Supreme Court Upholds NCAA's Private Status Under the Fourteenth Amendment, Repelling Shark's Attack on NCAA's Disciplinary Powers*, 17 PEPPERDINE L. REV. 217, 222 (1989).

is an analysis of the Supreme Court's majority and dissenting opinions. Finally, this Article argues that the Court's analysis is misguided in emphasizing the adversarial nature of the relationship between UNLV and the NCAA during the Tarkanian investigation. The Court should have considered, instead, the practical effect of the NCAA's investigation and subsequent recommendations to suspend Jerry Tarkanian. The Article concludes with a discussion of the practical impact of the *Tarkanian* decision and how some state legislatures have responded.

### I. CONSTITUTIONAL LIMITATIONS AND THE NCAA BYLAWS

Given the number of coaches and athletes who are sidelined by NCAA bylaws, it is surprising that more of them do not challenge the legality of the applicable bylaws in a court of law.<sup>27</sup> More than just a coach's job is at stake when the NCAA investigates a school's sports program for alleged violations. In reality, a university's athletic program is likely to be one of its most significant sources of funds.<sup>28</sup>

Upon further examination, however, it becomes evident that lawsuits challenging the legality of any NCAA bylaw are difficult to win.<sup>29</sup> Under the most typical scenario, any athlete or coach declared ineligible or suspended by an NCAA proceeding challenges the action as violative of their fourteenth amendment rights<sup>30</sup> by way of a civil rights claim brought under section 1983.<sup>31</sup>

27. However, it has been suggested that as many as 15% of all NCAA sports programs are involved in some type of illegal activity at any given moment. Note, *supra* note 26, at 219 n.12 (referring to statement by David Berst, the NCAA's Director of Enforcement) (citation omitted).

28. The amount of money involved is staggering. In 1983, the 52 schools participating in the NCAA basketball tournament were each awarded \$120,000. Comment, *NCAA Eligibility Regulations and the Fourteenth Amendment—Where Is the State Action?*, 13 OHIO N.U.L. REV. 433, 435 (1986). Those schools that were fortunate enough to continue on to the final 16 were rewarded with a \$290,000 check. *Id.* Those teams fortunate enough to go all the way to the coveted "Final Four" received \$520,000. *Id.*

It is estimated that more than 25 million people watched the 1988-89 NCAA basketball tournament. Gup, *Foull*, TIME, Apr. 3, 1989, at 54. Due to the continued expansion of television viewers, the pot continues to grow. By 1988, the tournament had gross receipts of over \$68.2 million. *Id.* In 1988, the four teams that made it to the "Final Four" each received \$1.2 million. *Id.*

29. For other analyses of lawsuits challenging regulations of the NCAA, see McKenna, *Age Limitations and the NCAA: Discrimination or Equating Competition?*, 31 ST. LOUIS U.L.J. 379, 384-86 (1987); McKenna, *A Proposition with a Powerful Punch: The Legality and Constitutionality of NCAA Proposition 48*, 26 DUQ. L. REV. 43 (1987).

30. The fourteenth amendment reads, in pertinent part:

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

U.S. CONST. amend. XIV, § 1.

31. The text of § 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 sub-

The NCAA enforcement process can be divided into two main phases—investigation and adjudication.<sup>32</sup> The NCAA enforcement staff oversees the investigation aspects, and the Committee on Infractions is responsible for the adjudication and penalty-fixing stage.<sup>33</sup> Tarkanian challenged both phases of the NCAA enforcement process under the premise that the NCAA failed to afford him the basic tenets of due process.<sup>34</sup> Before Tarkanian would have a chance to contend that his civil rights had indeed been violated, however, the coach first had to hurdle the threshold question of whether “state action” existed.<sup>35</sup>

A successful section 1983 claim must allege that the deprivation of the constitutional right is attributable to the state or a governmental agent.<sup>36</sup> This is known as the state action requirement.<sup>37</sup> A purely private action, for example, cannot violate the equal protection or due process clauses of the fourteenth amendment unless the private action is done under color of law.<sup>38</sup> The inquiry for determining whether state action exists is virtually identical for evaluating

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jected, 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 (1988).

The Supreme Court has recognized the close relationship between § 1983 and the fourteenth amendment. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961) (recognizing that a purpose of § 1983 is to enforce the provisions of the fourteenth amendment).

The distinction between the state action requirement of § 1983 and the fourteenth amendment has been described as merely semantic, having no substantive consequences. *Parish v. NCAA*, 506 F.2d 1028, 1031 n.6 (5th Cir. 1975). The “under color of state law” requirement of § 1983 is said to reflect merely the state action requirement of the fourteenth amendment. *Id.*; *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982) (“If the challenged conduct of respondents constitutes state action as delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983.”) (footnote omitted).

32. F. Remington, *NCAA Rule Enforcement Procedures*, in *LAW OF PROFESSIONAL & AMATEUR SPORTS* 12-2 (G. Uberstine ed. 1988).

33. *Id.* At the outset, the NCAA staff determines what investigative methods will be employed, when to issue an official inquiry, and how best to facilitate the investigation in conjunction with counsel for the institution and the coach. *Id.* During the second stage, the Committee on Infractions, after hearing the evidence, decides whether any violations occurred. *Id.* If violations are found, the Committee determines the appropriate penalty and argues possible appeals. *Id.*

34. *Tarkanian I*, 95 Nev. 389, 394, 594 P.2d 1159, 1162 (1979), *later proceeding*, 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987), *rev'd*, 488 U.S. 179 (1988).

35. *See Tarkanian II*, 103 Nev. 331, 335-37, 741 P.2d 1345, 1347-49 (1987), *rev'd*, 488 U.S. 179 (1988). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 497-99 (2d ed. 1983) (discussing the central theory behind the state action requirement).

36. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (“The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights ‘fairly attributable to the State?’”) (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

37. E. CHERMERINSKY, *FEDERAL JURISDICTION* § 8.3, at 380 (1989).

38. *See, e.g., Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978) (“Although a private person may cause a deprivation of such a right, he may be subjected to liability under § 1983 only when he does so under color of law.”).

whether an individual is acting under "color of law."<sup>39</sup> Consequently, for a successful action against the NCAA under section 1983, a plaintiff must initially surmount a difficult jurisdictional barrier. The litigant must establish that the actions of the NCAA were taken under color of state law within the meaning of 42 U.S.C. § 1983.<sup>40</sup>

The state action requirement draws a line between "private" and "public" conduct.<sup>41</sup> "Private" conduct is beyond the reach of constitutional restraint, whereas "public" conduct must meet the requirements of the Constitution.<sup>42</sup> "Public" conduct is the clearer of the two; when a governmental entity adopts rules pursuant to its own procedures and implements them without private involvement, there is clearly state action.<sup>43</sup>

On the other hand, when a private entity acts, the line of demarcation becomes less clear. In that instance, the existence of state action ultimately depends upon whether the circumstances fit one of several rationales for the application of constitutional restraint to private entities.<sup>44</sup> The considerations involved in determining whether a private institution's actions constitute state action include the following: (1) whether the private entity assumed a "public function";<sup>45</sup> (2) whether a "symbiotic relationship" or "nexus" exists between the private organization and the state that subjects the private action to the same restraints as the government;<sup>46</sup> and (3) whether the impact of the private entity's activity upon an individual's rights is so significant that restraint is necessary in order to preserve those rights.<sup>47</sup>

For many years, most of the courts considering the state action issue have held that actions by the NCAA constitute state action and are subject to the limitations of the fourteenth amendment. For instance, in *Buckton v. NCAA*,<sup>48</sup>

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39. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1981) (stating that the statutory mandate of action "under color of state law" and the "state action" prerequisite for invoking the fourteenth amendment are identical for purposes of a § 1983 action brought against a state official).

40. *Parish v. NCAA*, 506 F.2d 1028, 1031 (5th Cir. 1975).

41. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 35, at 497-513 (discussing the distinction between "private" and "public" conduct as it relates to state action).

42. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (reiterating the "essential dichotomy" set forth in the fourteenth amendment between a deprivation by the state which is subject to scrutiny and private conduct "against which the fourteenth amendment offers no shield").

43. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 35, at 497.

44. *Id.* at 497-99.

45. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974) (explaining that state action is present "in the exercise by a private entity of powers traditionally exclusively reserved to the state" and hence constitutes a "public function").

46. *See id.* at 351 ("[T]he inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.").

47. *See Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that enforcement of private agreements to exclude persons on the basis of race violates the equal protection clause of the fourteenth amendment).

48. 366 F. Supp. 1152 (D. Mass. 1973) (granting college hockey players, who were Canadian nationals, an injunction against the NCAA from declaring the players ineligible for intercollegiate

the district court found a substantial likelihood that challenged NCAA sanctions constituted state action, and thus the court enjoined enforcement of NCAA eligibility rules.<sup>49</sup> The court was impressed with the fact that the NCAA performed public functions and noted several factors which indicated the presence of state action.<sup>50</sup> Namely, the court was persuaded by the fact that approximately one-half of the NCAA's membership was comprised of state universities, that these public institutions pay dues to the NCAA, and that state involvement in the NCAA includes the use of state facilities for NCAA contests.<sup>51</sup>

The Ninth Circuit became the first federal appellate court to find that NCAA sanctions involved state action in *Associated Students, Inc. v. NCAA*.<sup>52</sup> Less than a year later, the Court of Appeals for the District of Columbia followed suit in *Howard University v. NCAA*.<sup>53</sup> In *Howard University*, the court considered the size, influence, and wealth of the NCAA as important factors indicating state action.<sup>54</sup> The court concluded that private institutions complying with the policies of the NCAA engage in the requisite degree of state action to subject the NCAA to the fourteenth amendment.<sup>55</sup>

Finally, in *Parish v. NCAA*,<sup>56</sup> the Fifth Circuit concluded that state action existed where the NCAA declared five players ineligible to compete in NCAA-sponsored tournaments under its 2.00 rule.<sup>57</sup> The players sought an

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sports due to their earlier participation in Canadian junior amateur hockey leagues).

49. *Id.* at 1156.

50. *Id.* at 1156-57.

51. *Id.* at 1157.

52. 493 F.2d 1251 (9th Cir. 1974). In *Associated Students*, a students' organization of California State University and individual students alleged that the NCAA's 1.600 grade point average requirement ("1.600 Rule") resulted in an unreasonable classification in violation of the equal protection clause of the fourteenth amendment. *Id.* at 1252. The Ninth Circuit referred to the district court's decision in *Parish v. NCAA*, 361 F. Supp. 1220, 1225 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975), and held that the NCAA's enforcement activities were "state action." *Associated Students*, 493 F.2d at 1254. Nonetheless, the court also found that the rule's classification was reasonably related to the purposes for which it had been enacted. *Id.* at 1255. According to evidence offered by the NCAA, the rule was adopted to reduce the possibility of exploiting young athletes by recruiting those who would not be representative of the student body and who probably would not graduate. *Id.*

53. 510 F.2d 213 (D.C. Cir. 1975).

54. *Id.* at 219-20.

55. *Id.* at 220.

56. 506 F.2d 1028 (5th Cir. 1975). In *Parish*, the NCAA's 1.600 Rule was challenged once again, this time by five college basketball players who played for a small private school in Shreveport, Louisiana, known as Centenary College. *Id.* at 1030. Interestingly, one of the appellants, Robert Parish, later starred on the Boston Celtics of the National Basketball Association. The Fifth Circuit upheld the rule because it passed constitutional muster under the traditional "minimum rationality" standard. *Id.* at 1034.

The Supreme Court has defined "minimum rationality" to mean that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

57. The NCAA repealed the 1.600 Rule and replaced it with the 2.00 Rule. *Parish*, 506 F.2d



injunction to prevent the NCAA from enforcing its ruling.<sup>58</sup> While the court denied the requested relief, the appellate court nonetheless held that the activities of the NCAA constituted action taken under color of state law.<sup>59</sup>

Initially, the decisions in *Howard University*, *Associated Students*, and *Parish* were considered solid precedent. For instance, the First Circuit relied heavily on these three cases involving the NCAA and found governmental action in *Rivas Tenorio v. Liga Atletica Interuniversitaria*.<sup>60</sup> The *Rivas* court found that the NCAA's actions, at issue in the earlier *Howard University* line of cases, were analogous to those before the court.<sup>61</sup> The addition of the *Rivas Tenoria* decision only strengthened the foundation for finding state action, a fact reflected when the Eight Circuit cited with approval all four cases in *Regents of University of Minnesota v. NCAA*.<sup>62</sup>

However, a trilogy of Supreme Court cases, all decided on June 25, 1982, narrowed the reach of the state action doctrine.<sup>63</sup> After this date, lower courts began to reverse the trend toward finding the NCAA to be a public actor.

In *Blum v. Yaretsky*,<sup>64</sup> the Court decided that a private nursing home's discharge or transfer of Medicaid patients did not satisfy the state action requirement of the fourteenth amendment.<sup>65</sup> The Court held that the patients failed to establish "state action" in the facility-initiated discharges and transfers to lower levels of care, and thus, failed to prove a violation of their fourteenth amendment rights.<sup>66</sup> The *Blum* Court reviewed its prior state action

at 1030 n.1. The new rule is more demanding in that it requires an entering college freshman to have acquired an overall grade point average of 2.00 in high school to be eligible to participate in collegiate sports. *Id.*

58. *Id.* at 1031.

59. *Id.* at 1032. The court concluded that the NCAA, by taking upon itself the role of coordinator and overseer of college athletics, performs a "traditional governmental function." *Id.* at 1032-33.

60. 554 F.2d 492 (1st Cir. 1977); see *infra* note 101.

61. The *Rivas* court concluded that the differences between the NCAA and the Liga Athletic Association were inconsequential and, therefore, the activities at issue were within the ambit of commonwealth action. *Id.* at 495. Specifically, the court enumerated five factors: (1) the large number of schools participating in the NCAA which are state or federally supported; (2) the fact that public institutions provide a vast majority of the NCAA's funds; (3) the large degree of influence state-supported institutions exerted in fabricating NCAA policy; (4) the large amount of supervisory power the NCAA exercised over its member's athletic programs; and, finally, (5) the fact that the NCAA was the sole negotiator of television contracts on behalf of its members, the proceeds of which, \$13,000,000 annually, flow directly back to the participating public schools. *Id.* (citing *Howard Univ. v. NCAA*, 510 F.2d 213, 219-20 (D.C. Cir. 1975)).

62. 560 F.2d 352, 364-65 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977). *Regents of Univ. of Minn.* involved a challenge to the NCAA act of placing the university's athletic teams on indefinite probation for refusing to find three Minnesota student athletes ineligible. *Id.* at 354.

63. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982).

64. 457 U.S. 991 (1982).

65. *Id.* at 998. The respondents, representing a class of medical patients, challenged the discharge and transfer decisions of the nursing homes in which they resided, on the grounds that they were denied notice or an opportunity for a hearing. *Id.* at 993.

66. *Id.* at 1012. In short, the court found that the extensive governmental funding and regula-

decisions and articulated three principles for analyzing the presence of state action. First, the Court stated:

[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes for the Fourteenth Amendment. . . . 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.<sup>67</sup>

Second, a state will not normally be held responsible for a private decision unless it has "exercised coercive power" or significantly encouraged the decision, either overtly or covertly, such that the decision must be deemed to be that of the state.<sup>68</sup> "Mere approval of or acquiescence in" the private decision will not be sufficient to hold the state responsible.<sup>69</sup> Third, the required nexus between the state and the regulated entity "may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the state.'"<sup>70</sup>

On the same day that the Court decided *Blum*, the Court held, in *Rendell-Baker v. Kohn*,<sup>71</sup> that a private school, which was substantially supported through state funds and regulated by public authorities, did not act under color of law in discharging certain employees.<sup>72</sup> Consequently, the school was not subject to liability for alleged constitutional violations under section 1983.<sup>73</sup> The Court compared the private school setting to the Medicaid-funded nursing homes at issue in *Blum v. Yaretsky*<sup>74</sup> and held that the school's dependence on public funds did not convert the discharge decisions into acts of the state.<sup>75</sup> The Court also analogized the school to many private corporations whose business is largely dependent on government contracts.<sup>76</sup> The Court reasoned that acts by such private entities do not become attributable to the gov-

tion of nursing homes did not make the transfer decisions "state action." *Id.* at 1005-12.

67. *Id.* at 1004 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 354, 351 (1974)).

68. *Id.* (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 166 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)).

69. *Id.* The Court went on to explain that "the purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the state is *responsible* for the specific conduct of which the plaintiff complains." *Id.* (emphasis in original).

70. *Id.* at 1005 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

71. 457 U.S. 830 (1982).

72. *Id.* at 840. In *Rendell-Baker*, petitioners, a former vocational counselor and five teachers, were employed at a privately operated school for high school students with behavioral or substance abuse problems. *Id.* at 832. The petitioners brought separate actions in district court under 42 U.S.C. § 1983 claiming that they had been discharged in violation of their first, fifth, and fourteenth amendment rights. *Id.* at 834-35. Public funds accounted for 90% of the school's operating budget, and the school had to meet certain state regulations to receive the funds. *Id.* at 832-33.

73. *Id.* at 843.

74. 457 U.S. 991 (1982).

75. *Rendell-Baker*, 457 U.S. at 840.

76. *Id.* at 840-841.

ernment merely because they receive significant or even total financial support from the state.<sup>77</sup> Ultimately, the Court held that the petitioners failed to state a claim for relief under 42 U.S.C. § 1983, since the discharge decisions were not made under color of state law.<sup>78</sup>

The Court further refined the boundaries of when private actions may constitute state action in *Lugar v. Edmondson Oil Co.*<sup>79</sup> In *Lugar*, the plaintiff succeeded in a section 1983 action against a private party.<sup>80</sup> The plaintiff alleged that the state had acted jointly with the defendants in depriving him of property without due process of law through an *ex parte* attachment proceeding executed pursuant to state law.<sup>81</sup> The Supreme Court stated that the statutory scheme was the product of state action, and a private party's joint participation with state officials in the seizure of disputed property was sufficient to characterize that party as a state actor for purposes of the fourteenth amendment.<sup>82</sup> The *Lugar* Court developed a two-part test to determine when such action may be deemed state action, thereby allowing suit under section 1983.<sup>83</sup> This two-part test requires:

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.<sup>84</sup>

Applying this test, the Court held that the joint participation on the part of state officials and a private party in appropriating the plaintiff's property con-

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77. *Id.* at 841. Furthermore, the Court recognized that the decisions to discharge the petitioners were not mandated or even motivated by any state regulation, unlike the extensive regulation evidenced in *Blum. Id.*

The Court was similarly unpersuaded by the argument that the school performs a "public function." *Id.* at 842. The Court framed the issue as whether the function performed by the private entity is "'traditionally the exclusive prerogative of the State,'" not simply whether a private organization is serving some public function. *Id.* (emphasis in the original) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)).

Finally, the Court did not find a "symbiotic relationship" between the school and the state. *Id.* at 842-43. Unlike the case of *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), the state did not profit from the school's allegedly discriminatory conduct. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982).

78. *Id.* at 843.

79. 457 U.S. 922 (1982).

80. *Id.* at 925-42.

81. *Id.* at 942. The controversy in *Lugar* began when the respondents filed suit in Virginia state court on a debt owed by petitioner and sought prejudgment attachment of certain property belonging to petitioner. *Id.* at 924. An *ex parte* writ of attachment was issued and executed by the sheriff. *Id.* Thirty-four days later, the trial judge dismissed the attachment for respondent's failure to establish the statutory grounds for attachment. *Id.* at 925. Petitioner then brought a § 1983 claim in the federal district court alleging that, in attaching his property, respondents had acted jointly with the state to deprive him of his property without due process of law. *Id.*

82. *Id.* at 941-42.

83. *Id.* at 937.

84. *Id.* (citations omitted).

stituted action under color of state law.<sup>85</sup>

Some scholars have argued that the Supreme Court's narrowing of "state action" under section 1983 would not foreclose the application of the state action principle to the NCAA.<sup>86</sup> For instance, Professor Greene has argued that the recent state action trilogy of *Blum*, *Rendell-Baker*, and *Lugar* could be distinguished from the earlier NCAA decisions on the facts alone.<sup>87</sup> Professor Greene further states that "if the state explicitly approves the rules complained of and cooperated in their implementation, then sufficient state action may exist to impose constitutional restraint."<sup>88</sup>

It is against this background that appellate courts sought to determine whether NCAA actions fell within the new boundaries of "state action."<sup>89</sup> In applying the Supreme Court decisions involving state action to the NCAA, the courts of appeals reached different results. In *Arlosoroff v. NCAA*,<sup>90</sup> the Fourth Circuit held that adoption of NCAA bylaws under which a college tennis player was declared ineligible to play in NCAA tournaments did not involve "state action."<sup>91</sup> The *Arlosoroff* court noted that although the

85. *Id.* at 942.

86. See Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 St. Louis U.L.J. 101, 123-27 (1984).

87. *Id.* at 125. Professor Greene stated:

The Court's recent decisions involved the application of the state action doctrine to varied fact situations: (1) to a private school that was both state regulated and funded; (2) to a private nursing home that was both state regulated and funded; and (3) to a corporation that utilized state law attachment procedures to seize property for the payment of an overdue debt. None of the recent decisions was unanimous. A careful reading of the various majority, plurality, concurring, and dissenting opinions merely reinforces the view that findings of state action are likely to be based on factual idiosyncrasies rather than clear principles.

*Id.* at 125 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("factual setting of each case will be significant")) (other citations omitted).

88. *Id.* (footnote omitted). Professor Greene suggested that this principle seemed responsible for the finding of state action in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and for the absence of it in *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). Greene, *supra* note 86, at 125 n.122.

89. In finding state action with regard to NCAA action, most courts have based their decisions on the state support received by the public universities of the NCAA. See *Spath v. NCAA*, 728 F.2d 25, 28 (1st Cir. 1984); *Associated Students, Inc. v. NCAA*, 493 F.2d 1251, 1254-55 (9th Cir. 1974) (quoting *Parish v. NCAA*, 361 F. Supp. 1214, 1219 (W.D. La. 1973)). Thus, if the decision in *Blum v. Yaretsky*, 457 U.S. 991 (1982) (finding that mere receipt of public funding does not constitute state action) is extended to cases involving the NCAA, then any state action argument will have to be similar to those theories accepted in *Parish v. NCAA*, 506 F.2d 1028, 1032-33 (5th Cir. 1975) (finding that the NCAA performs a traditional public function); see also *Howard Univ. v. NCAA*, 510 F.2d 213, 216-20 (D.C. Cir. 1975) (finding state action based on the size, wealth, and influence of NCAA).

90. 746 F.2d 1019 (4th Cir. 1984).

91. *Id.* at 1021-22. Arlosoroff was an Israeli citizen. *Id.* at 1020. After his discharge from the Israeli Army in March of 1979 at age 22, he participated in 17 amateur tennis tournaments. *Id.* He was also a member of the Israeli Davis Cup team. *Id.* In August of 1981, Arlosoroff enrolled at Duke University. *Id.* During his freshman year, Arlosoroff became the team's number one singles player while leading the Blue Devils to the Atlantic Coast Conference championship. *Id.*

NCAA's function of regulating intercollegiate athletics may involve some public service, this alone was insufficient to find the existence of state action.<sup>92</sup> Similarly, the court stated that it was not enough that an institution was subsidized and highly regulated by the state.<sup>93</sup> According to the court, "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, then there is no state action."<sup>94</sup> In reaching its decision, the Fourth Circuit found that the notion of state action fostered in *Howard University*<sup>95</sup> and *Parish*<sup>96</sup> had been rejected by the Supreme Court in *Rendell-Baker*<sup>97</sup> and *Blum*.<sup>98</sup>

In *Spath v. NCAA*,<sup>99</sup> the United States Court of Appeals for the First Circuit chose not to pursue the question of whether "state action" existed.<sup>100</sup> Instead, the court noted that while the weight of authority would support the plaintiff's position that the NCAA is sufficiently state-connected to incur liability under 42 U.S.C. § 1983,<sup>101</sup> "recent trends have limited that concept."<sup>102</sup>

He was later selected to the All-American Tennis Team. *Id.* After his freshman year, however, the NCAA declared him ineligible for further competition on the basis of NCAA bylaws. *Id.*

92. *Id.* at 1021. The court explained that there exists no precise formula for determining whether private conduct constitutes state action. *Id.* The primary inquiry in each case, the court noted, is simply "whether the conduct is fairly attributable to the state." *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). The court, in *Arlosoroff*, noted that none of the NCAA's functions constituted state action. *Id.*

93. *Id.* at 1022. The court noted that there was no suggestion that the representatives of the state institutions joined together to vote as a block to effect adoption of the bylaw over the objection of private institutions. *Id.*

94. *Id.* The court further stated:

The NCAA serves the common need of member institutions for regulation of athletics while correlating their diverse interests. Through the representatives of all of the members[,] Bylaw 5-1-(d)-(3) was adopted, not as a result of governmental compulsion, but in the service of the common interests of the members. The adoption of the Bylaw was private conduct, not state action.

*Id.*

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

96. *Parish v. NCAA*, 361 F. Supp. 1220 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975).

97. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

98. *Blum v. Yaretsky*, 457 U.S. 991 (1982). In no uncertain terms, the *Arlosoroff* court stated: "*Rendell-Baker*, *Blum* and *Jackson v. Metropolitan Edison Co.*, not *Lugar*, control here." *Arlosoroff v. NCAA*, 746 F.2d 1019, 1022 (4th Cir. 1984).

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the petitioner alleged that termination of her electricity constituted state action. *Id.* at 347-48. The Court noted that it had found state action where a private entity exercised powers traditionally reserved exclusively to the state. *Id.* at 352. Nevertheless, the Court held that Pennsylvania was not sufficiently connected with the challenged termination of electricity by merely granting the power company a monopoly. *Id.* at 358. As such, the power company's conduct was not attributable to the state for the purposes of the fourteenth amendment. *Id.* at 358-59.

99. 728 F.2d 25 (1st Cir. 1984).

100. See *id.* at 28.

101. *Id.* (citing *Rivas Tenorio v. Liga Atletica Interuniversitaria*, 554 F.2d 492 (1st Cir. 1977)). In *Rivas Tenorio*, Colombian citizens brought an action against a Puerto Rican athletic

The court then skirted the issue by reasoning that since the University of Lowell was a "state funded" university, it *might* be a state actor.<sup>103</sup> The First Circuit went straight to the particular merits of the case, without definitively answering the question of whether state action existed.<sup>104</sup>

In *Butts v. NCAA*,<sup>105</sup> the Court of Appeals for the Third Circuit failed to discuss the issue of "state action."<sup>106</sup> This was particularly surprising since the Court of Appeals was familiar with, and in fact cited, Professor Greene's article.<sup>107</sup>

In *Barbay v. NCAA*,<sup>108</sup> a member of the Louisiana State University ("LSU") football team brought suit against LSU and the NCAA.<sup>109</sup> The plaintiff had been declared ineligible for the January 1, 1987 Sugar Bowl be-

association, contending that they were deprived of equal protection by virtue of one of the association's rules. *Rivas Tenorio*, 554 F.2d at 493. The rule in question prohibited non-Puerto Rican student-athletes from participating in annual competitions if they entered member institutions after their 21st birthday. *Id.* After the district court dismissed the complaint, the First Circuit reversed, holding that the association's regulations represented action under color of Commonwealth law. *Id.* at 496. Therefore, the regulation in question should have been subjected to strict constitutional scrutiny because the regulation on its face discriminated against aliens. *Id.* at 497.

102. *Spath*, 728 F.2d at 28 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982)).

103. *Id.* (emphasis added).

104. *See id.*

105. 751 F.2d 609 (3d Cir. 1984).

106. *See id.* at 612. Despite the Third Circuit's failure to discuss the issue of state action, the district court, in an opinion written by Judge Fullam, found the First Circuit's opinion in *Spath* very persuasive. *See Butts v. NCAA*, 600 F. Supp. 73, 74 (E.D. Pa. 1984). Judge Fullam concluded:

Virtually every contention advanced by plaintiff in this action has been considered, and firmly rejected, by the First Circuit Court of Appeals in *Spath v. NCAA*, 728 F.2d 25 (1st Cir. 1984). In light of this precedent, plaintiff's burden of showing a likelihood of success on the merits is indeed a heavy one. The First Circuit's opinion is persuasive, and I have no reason to suppose that the Court of Appeals for the Third Circuit would reach a different conclusion.

*Id.*

Thus, one can assume one of two things. Either Judge Fullam sidestepped the issue as did his colleagues in the First Circuit, or he believed state action existed. The fact that he reached the merits of the case only strengthens these two assumptions.

107. In the opinion, Judge Higginbotham quoted at length from Professor Greene's article. *See Butts*, 751 F.2d at 612 (quoting Green, *supra* note 86, at 137). Greene's article seems to represent the most pragmatic viewpoint. As Green emphasized:

Subjecting the NCAA to the reach of the Constitution would not be inconsistent with recent Supreme Court decisions. Those decisions have not undermined the principle that closely intertwined joint ventures between private and public entities must abide by constitutional principles. Even if the foregoing principle is limited by 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.

Greene, *supra* note 86, at 127.

108. No. 86-5697 (E.D. La. Jan. 20, 1987) (WESTLAW, Dct database).

109. *Id.*; *see also* Neff, *Bosworth Faces the Music*, SPORTS ILLUSTRATED, Jan. 5, 1987, at 20, 21.

cause he had tested positive for anabolic steroids.<sup>110</sup> Despite conceding that he had used steroids, Barbay brought suit under 42 U.S.C. § 1983,<sup>111</sup> seeking to enjoin the NCAA and LSU from declaring him ineligible to play in the Sugar Bowl.<sup>112</sup> Barbay did not claim that he would be denied a fundamental right if he were not allowed to play in that game.<sup>113</sup> Rather, he claimed that he had a property right in his reputation and that his reputation would be damaged by the actions of the NCAA and LSU if he were not permitted to play in the Sugar Bowl.<sup>114</sup>

The District Court for the Eastern District of Louisiana dismissed Barbay's section 1983 claims against the NCAA for lack of state action.<sup>115</sup> Although the court concluded that LSU's action constituted state action,<sup>116</sup> it dismissed Barbay's claims against LSU, concluding that Barbay had not shown by a preponderance of the evidence that the denial of a chance to play in the Sugar Bowl would result in his being defamed or that his reputation would be damaged.<sup>117</sup> The court denied Barbay's requests for equitable relief, finding that Barbay's inability to display his skills during the 1987 Sugar Bowl to professional scouts attending that game did not constitute irreparable injury.<sup>118</sup>

110. *Barbay*, No. 86-5697 (E.D. La. Jan. 20, 1987) (WESTLAW, Dct database).

111. For the text of 42 U.S.C. § 1983, see *supra* note 31.

112. *Barbay*, No. 86-5697 (E.D. La. Jan 20, 1987) (WESTLAW, Dct database).

113. *Id.*

114. *Id.*

115. *Id.* The court ruled that the NCAA's adoption, implementation, and enforcement of its drug testing program did not meet § 1983's state action requirement. *Id.* The court stated: state regulation or subsidization of an institution will not create a Section 1983 cause of action without further evidence. There must be a further showing that the state university caused or procured the adoption of the NCAA regulations in question. Barbay has never alleged nor sought to prove that LSU caused, directed, or controlled the implementation of these NCAA regulations.

*Id.* (citations omitted).

116. *Id.*

117. *Id.* *But see* *Buckton v. NCAA*, 366 F. Supp. 1152 (D. Mass. 1973). In *Buckton*, the court stated:

Even the most blasé and hardened campus observer would recognize the obvious stigma that attaches to a declaration of athletic ineligibility, particularly when such ineligibility is based on alleged professionalism, as opposed to more routine academic insufficiency. A reasonable if not necessary implication would be that plaintiffs lacked moral fiber because they took money under improper circumstances. Such an implication would scar their reputations, not only on their own campus but in athletic circles throughout the county, in a way that no subsequent finding of eligibility would ever fully erase.

*Id.* at 1159. The same reasoning undoubtedly applies to ineligibility due to drug use.

118. *Barbay v. NCAA*, No. 86-5697 (E.D. La. Jan. 20, 1987) (WESTLAW, Dct database). The court reasoned that professional scouts do not predicate their "assessments and recommendations concerning a player solely on the basis of his performance in a post-season competition. Rather, such scouts normally form their opinions on the basis of regular season games and practice sessions they have attended, along with game films and interviews." *Id.* *But see* *Buckton v. NCAA*, 366 F. Supp. 1152, 1159-60 (D. Mass. 1973) (discussing the issue of irreparable harm). Moreover, the *Buckton* court stated, "the players would have only one sophomore year in college and a later finding in their favor could not restore the precious months that would have been lost

## II. THE BACKGROUND OF THE TARKANIAN LITIGATION

UNLV is a public institution of higher learning funded by the State of Nevada.<sup>119</sup> The athletic program at UNLV, like most major institutions of higher learning,<sup>120</sup> is subject to the NCAA's rules and regulations.<sup>121</sup> As a prerequisite for membership in the NCAA, all members contractually agree to conduct their athletic program in conformity with NCAA rules and regulations.<sup>122</sup> The Committee on Infractions is the NCAA body responsible for administering the NCAA enforcement program.<sup>123</sup>

to them." *Id.* at 1159-60. The same reasoning could apply to a missed chance to play in the Sugar Bowl.

As to the potential harm to the NCAA, the *Buckton* court stated: "It certainly suffers no harm to its reputation or authority by not punishing a member institution for obeying a court order." *Id.* at 1160. Much of the reasoning in *Buckton* logically applies in the drug testing context. *Barbay* highlights the difficulty amateur athletes, who are not protected by collective bargaining agreements, may face when challenging drug testing programs of nongovernmental entities that are not restricted by the fourth or fourteenth amendments or by § 1983. Also, the court's almost summary rejection of *Barbay's* claim that his property right in his reputation had been damaged suggests a likely lack of success of similar challenges based on private tort law.

119. *Tarkanian I*, 95 Nev. 389, 391, 594 P.2d 1159, 1160 (1979), *later proceeding*, 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987), *rev'd*, 488 U.S. 179 (1988).

120. The large majority, approximately 960, of all four-year colleges and universities in the United States having major athletic programs are affiliated with the NCAA. Note, *NCAA v. Tarkanian: The State Action Doctrine Faces a Half-Court Press*, 44 U. MIAMI L. REV. 197, 198 n.6 (1989).

121. See *Tarkanian III*, 488 U.S. 179, 183 (1988). The United States Supreme Court noted, "One of the NCAA's fundamental policies 'is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clean line of demarcation between college athletics and professional sports.'" *Id.* (citation omitted).

122. *Tarkanian I*, 95 Nev. at 391, 594 P.2d at 1160. The NCAA Constitution provides: Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility, and recruiting; member institutions shall be obligated to apply and enforce this legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation.

*Id.* (citation omitted).

123. *Id.* Among the sanctions that the Committee may impose against an institution are:

- (1) Reprimand and censure;
- (2) Probation for one year;
- (3) Probation for more than one year;
- (4) Ineligibility for one or more National Collegiate Championship events;
- (5) Ineligibility for invitational and postseason meets and tournaments;
- (6) Ineligibility for any television programs subject to the Association's control or administration;
- (7) Ineligibility of the member to vote or its personnel to serve on committees of the Association, or both;
- (8) Prohibition against an intercollegiate sports team or teams participating against outside competition for a specified period;
- (9) Prohibition against the recruitment of prospective student-athletes for a sport or sports for a specified period . . . .

*Tarkanian III*, 488 U.S. at 183 (citation omitted).



In late February of 1976, the NCAA Committee on Infractions began enforcement proceedings against UNLV by submitting an "official inquiry"<sup>124</sup> to its president, Dr. Baepler.<sup>125</sup> The official inquiry was the result of a preliminary investigation conducted by the NCAA over a three-year period,<sup>126</sup> and it included alarming allegations that Tarkanian had purposefully violated NCAA regulations.<sup>127</sup>

In October of 1976, after conducting an independent investigation, UNLV responded to the NCAA's official inquiry.<sup>128</sup> The university denied all of the allegations and concluded that Tarkanian was completely innocent of any wrongdoing.<sup>129</sup>

Four days of hearings followed<sup>130</sup> in which the NCAA denied the requests of UNLV for prior disclosure of the factual bases or sources of the allegations contained in the letter of inquiry.<sup>131</sup> Although Tarkanian was present at all of the hearings, he was represented by counsel at only the second and third hearings.<sup>132</sup> According to the hearing record, "the charges and allegations against

124. The purpose of an official inquiry is to aid the university in developing a full and independent investigation of the information developed by the NCAA staff. Brief for Petitioner at 9, Tarkanian III, 488 U.S. 179 (1988) (No. 87-1061).

125. Tarkanian I, 95 Nev. 389, 391-92, 594 P.2d 1159, 1160 (1979), *later proceeding*, 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987), *rev'd*, 488 U.S. 179 (1988).

126. *Id.* During its investigation of UNLV, the Committee on Infractions included three law professors, a mathematics professor, and the dean of a graduate school. Tarkanian III, 488 U.S. 179, 185 (1988). Four of them were on the faculties of state institutions; one represented a private university. *Id.*

127. The most significant violation charged against Tarkanian was that he attempted to impede the NCAA investigation against him by recruiting people to change their story or fabricate countervailing evidence. Tarkanian III, 488 U.S. at 186 n.9.

128. *Id.* at 185. UNLV enlisted the aid of the Attorney General of the State of Nevada and private counsel to conduct a "cooperative investigation" upon receipt of the letter of inquiry. *Id.*

129. *Id.* The record contains the following description of the nature of these proceedings by an NCAA official:

Once the institution has collected all available information, it then meets with the Committee on Infractions to discuss the information which it has obtained and previously submitted to the Committee in writing. The purpose of this hearing before the Committee on Infractions is for both the institution and the NCAA investigative staff, for the first time, to present specific information to the Committee concerning alleged violations of NCAA legislation. This procedure provides an adequate opportunity for the institutional representatives to debate any of the information presented to the Committee by the investigative staff or the institution, and to be advised of the source of the information upon which each allegation is based. Both the Committee on Infractions and the University will be informed at the hearing of the identity of the source of evidence upon which an allegation is based as well as any actual details or evidence reported by individuals interviewed.

Tarkanian I, 95 Nev. at 391-92, 594 P.2d at 1160.

130. *Id.* at 391, 594 P.2d at 1160. "Hearings before the Committee on Infractions were conducted on November 14, 1976; December 13, and 14, 1976; and March 13, 1977." *Id.*

131. *Id.* at 392, 594 P.2d at 1161.

132. *Id.* "Shortly before the first hearing was scheduled, the NCAA notified the university that it had changed its prior position and would allow counsel representing university employees named in the allegations to be present." *Id.*

Jerry Tarkanian were presented by the sole means of having either of two NCAA staff investigators . . . orally relate what each of them recalled of conversations he purportedly had with certain individuals concerning their knowledge of purported violations of NCAA legislation by Jerry Tarkanian."<sup>133</sup> The witnesses who reported information to the NCAA investigators were not present to give testimony or to be cross-examined.<sup>134</sup> Although the NCAA recorded the proceedings,<sup>135</sup> the tapes were not later transcribed by the NCAA.<sup>136</sup>

In April of 1977, the Committee on Infractions issued a confidential report containing the Committee's findings of violations of NCAA regulations. The report recommended imposing penalties on UNLV for such violations.<sup>137</sup> Among the Committee's findings was the charge that Tarkanian had influenced individuals testifying in the infractions investigation in an attempt to frustrate the investigation.<sup>138</sup> The report included an order directing UNLV to either take disciplinary action against Tarkanian or to show cause why additional penalties should not be imposed if it failed to take action.<sup>139</sup> The confidential report concluded by drawing the university's attention to the "responsibilities of the institution" under NCAA legislation "to provide due notice and hearing to the involved individual before taking any disciplinary or corrective action."<sup>140</sup>

In its appeal to the NCAA Council, UNLV criticized the procedures employed by the NCAA.<sup>141</sup> The university challenged the basis of twenty-seven reported violations uncovered by the Committee.<sup>142</sup> Specifically, UNLV dis-

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133. *Id.*

134. *Id.*

135. *Id.* No other reporting was allowed. *Id.*

136. *Id.* However, UNLV attorneys were allowed to travel to Kansas City to listen to them. *Id.*

137. *Id.*

138. *Id.* Specifically, Tarkanian was allegedly involved in discouraging others from reporting violations to the NCAA or to cause them to give untruthful information to the university's investigators. *Id.* At a university hearing for Tarkanian, UNLV's vice president stated:

Most serious is the charge that Coach Tarkanian attempted to frustrate the NCAA's application of the rules by getting people to 'change their story' or to fabricate bodies of countervailing evidence. I am not convinced that the NCAA investigation adequately supports this charge and yet we must remember that the NCAA Infractions Committee and the NCAA Council, both composed of distinguished scholars, administrators, and lawyers, believed otherwise.

Tarkanian III, 488 U.S. 179, 186 n.9 (1988) (citation omitted).

139. Tarkanian I, 95 Nev. 389, 392, 594 P.2d 1159, 1161 (1979), *later proceeding*, 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987), *rev'd*, 488 U.S. 179 (1988). Under the Committee's view, such disciplinary action meant that Tarkanian must sever all of his relations, formal or informal, with the university's intercollegiate athletic program during the university's probation, "including, but not limited to, activities associated with administration, supervision, coaching, recruiting, athletic booster groups, and public relations or fund-raising activities related to the University's athletic program." *Id.* at 392-93, 594 P.2d at 1161.

140. *Id.* at 393, 594 P.2d at 1161.

141. *Id.*

142. *Id.*

puted all twenty allegations that directly or indirectly involved Tarkanian, based on evidence obtained through the independent investigation ordered by the university.<sup>143</sup> The university questioned the credibility of the NCAA investigators who had provided information to the Committee on Infractions.<sup>144</sup> Tarkanian and UNLV were allowed twenty and thirty minutes, respectively, to present information to the council.<sup>145</sup> However, their efforts were to no avail. In August of 1977, the NCAA Council accepted the Committee on Infractions's findings and the recommended penalties.<sup>146</sup>

In September, UNLV granted Tarkanian a hearing on the charges specified in the NCAA confidential report.<sup>147</sup> The university advised Tarkanian of his rights to counsel, to call witnesses on his behalf, and to be provided with a transcript of the hearing.<sup>148</sup> No witnesses testified for the university concerning the NCAA charges, although the evidence was discussed.<sup>149</sup> In his defense, Tarkanian argued that the university's independent investigation established that no violations had occurred.<sup>150</sup> Counsel for the university argued that, nonetheless, the university was bound by the findings of the NCAA.<sup>151</sup> The hearing officer agreed with the university.<sup>152</sup> The written decision stated:

[B]y joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations, but this is in no way a substitute for the investigative functions of the NCAA itself. . . . We must accept their findings of fact as in some way superior to our own.<sup>153</sup>

Notably, the hearing officer also found that "in this instance the NCAA's

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* The hearing was pursuant to notice and was held before an officer appointed by the university. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* The hearing officer advised President Baepler that the university 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.

Tarkanian III, 488 U.S. 179, 187 (1988). President Baepler adopted the second recommendation. *Id.*

153. Tarkanian I, 95 Nev. 389, 393, 594 P.2d 1159, 1162 (1979), *later proceeding*, 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987), *rev'd*, 488 U.S. 179 (1988).

standards of proof and due process were inferior to what we might reasonably expect."<sup>154</sup> Dr. Baepler followed the hearing officer's recommendation to suspend Coach Tarkanian, noting that "the University is simply left without alternatives."<sup>155</sup> Obviously, Tarkanian was not left without recourse; he chose to go to court.

### A. *History of the Litigation*

Within two days, Tarkanian filed suit against UNLV, President Baepler, and the university's regents.<sup>156</sup> Tarkanian sought injunctive relief to restrain the university from enforcing the NCAA-mandated suspension.<sup>157</sup> Additionally, Tarkanian sought a declaration that his procedural and substantive due process rights were denied.<sup>158</sup> UNLV's answer highlighted Tarkanian's concern over the NCAA's activities and procedures employed in the investigation.<sup>159</sup> As an affirmative defense, the university also alleged that it was "a mere extension of the NCAA."<sup>160</sup> UNLV argued, therefore, that Tarkanian was "afforded not only the due process hearing provided by the University of Nevada, Las Vegas, but also prior hearings conducted by the NCAA, all in compliance with the traditional notions of due process of law."<sup>161</sup>

At trial, Tarkanian focused upon the detrimental effect the suspension would have upon his reputation and career.<sup>162</sup> Furthermore, the attorneys who conducted the independent investigation testified about their problems with the NCAA staff and procedure.<sup>163</sup> Only one witness, the deputy attorney general who headed the independent investigation, testified concerning the evidence for the underlying charges against Tarkanian.<sup>164</sup> He testified that his investigation into the matter had produced no evidence to substantiate the charges.<sup>165</sup> Notably, the defense did not present witnesses.<sup>166</sup>

The trial court granted Tarkanian injunctive relief.<sup>167</sup> The Nevada Supreme Court reversed the trial court for Tarkanian's failure to join the NCAA as a

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154. *Id.*

155. *Id.*

156. *Id.* at 394, 594 P.2d at 1162.

157. *Id.*

158. *Id.*

159. *Id.* The parties filed an extensive "Stipulation of Facts" before the trial. *Id.* The vast majority of these stipulations pertained to the NCAA's structure and procedures. *Id.* In addition, correspondence between the university's investigator and the NCAA was filed as exhibits to emphasize the problems the university encountered regarding NCAA procedures. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Tarkanian I, 95 Nev. 389, 594 P.2d 1159 (1979), *later proceeding*, 103 Nev. 331, 741 P.2d 1345 (1987), *rev'd*, 488 U.S. 179 (1988).

necessary party.<sup>168</sup> In July of 1979, Tarkanian filed a second suit, this time naming both UNLV and the NCAA as defendants.<sup>169</sup> Tarkanian once again prevailed in obtaining injunctive relief from the trial court.<sup>170</sup>

### B. Nevada Supreme Court Opinion

#### 1. State Action

On appeal before the Nevada Supreme Court, the NCAA contended that the penalties it imposed against Tarkanian did not constitute state action.<sup>171</sup> The Nevada Supreme Court stated that the well-established requisite of state action must be present before due process restrictions apply.<sup>172</sup> The court noted early decisions which had found NCAA regulatory activities to constitute state action.<sup>173</sup> The court explained that the rationale underlying these cases was the large amount of public funding the institutions enjoyed.<sup>174</sup> In holding for Tarkanian, the court was unpersuaded by the NCAA's argument that the 1982 trilogy of Supreme Court decisions mandated the finding of an

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168. Tarkanian II, 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987), *rev'd*, 488 U.S. 179 (1988).

169. Tarkanian II, 103 Nev. 331, 334, 741 P.2d 1345, 1347 (1987), *rev'd*, 488 U.S. 179 (1988).

170. *See id.* The lower court denied Tarkanian attorney's fees as costs under state law, but did grant his attorney's fees as costs pursuant to 42 U.S.C. § 1988. *Id.* The NCAA sought removal to federal district court on the ground that this was the first time Tarkanian had claimed relief under § 1988 and consequently the litigation had changed substantially. Tarkanian III, 488 U.S. 179, 189 (1988). UNLV and the other university defendants declined to join the removal petition, prompting NCAA to contend that the university defendants should be realigned as plaintiffs because they actually wanted Tarkanian to prevail. *Id.* The district court denied the removal petition and the Ninth Circuit agreed. *Id.* In the meantime, the Nevada trial court had awarded Tarkanian almost \$196,000 in attorney's fees, 90% of which was to be paid by the NCAA. *Id.* The NCAA appealed both the injunction to prevent the enforcement of sanctions and the fee order. *Id.* "Not surprisingly, UNLV, which had scored a total victory except for its obligation to pay a fraction of Tarkanian's fees, did not appeal." *Id.*

171. Tarkanian II, 103 Nev. at 335, 741 P.2d at 1347.

172. *Id.* The Nevada Supreme Court noted that the under color of law requirement of 42 U.S.C. § 1983 is identical to the state action requirement of the fourteenth amendment. *Id.* at 335 n.1, 741 P.2d at 1347 n.1 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)). After noting that the parties had used both "under color" and "state action" synonymously, the court decided to refer only to state action out of convenience. *Id.*

173. *Id.* at 335, 741 P.2d at 1347; *see, e.g., Regents of Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir.) (finding the NCAA's action of placing the University of Minnesota's athletic program on indefinite probation for refusing to find three student athletes ineligible constituted government action for purposes of § 1983), *cert. dismissed*, 434 U.S. 978 (1977); *Howard Univ. v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975) (finding that the degree and involvement of NCAA regulation of public universities' athletic programs sufficiently renders the activities of the NCAA state action); *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975) (finding that the activities of the NCAA constitute action taken under color of state law where public universities play a substantial role in the association); *Associated Students, Inc. v. NCAA*, 493 F.2d 1251 (9th Cir. 1974) (finding that state action exists when the NCAA regulates schools and universities that are publicly supported).

174. Tarkanian II, 103 Nev. 331, 335, 741 P.2d 1345, 1348 (1987) (citing *Rivas Tenorio v. Liga Atletica Interuniversitaria*, 554 F.2d 492, 495 (1st Cir. 1977)).

absence of state action.<sup>175</sup>

In fact, the Nevada Supreme Court relied on the *Blum* trilogy<sup>176</sup> and cases subsequently interpreting it<sup>177</sup> to support its finding of state action.<sup>178</sup> Accord-

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175. *Id.* at 335-37, 741 P.2d at 1347-49. The Supreme Court cases on which the NCAA relied were *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982). *Tarkanian II*, 103 Nev. at 335, 741 P.2d at 1347.

176. In *Blum*, the Supreme Court held that Medicaid patients in private nursing homes were not entitled to due process in challenging the decision of physicians who transferred them to lower levels of care. *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982). The Court noted that such decisions were made by a private doctor. *Id.* at 1005. It reasoned, therefore, that the transfer was not the result of any governmental policy or regulation making it necessary for due process to apply. *Id.* The *Blum* Court stated, "a State normally can be held responsible for a private decision *only* when it has exercised coercive power or had provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 1004. (emphasis added) (citations omitted).

Relying on its decision in *Blum*, the Court in *Rendell-Baker* held that a private high school for maladjusted students did not act under color of state law when it discharged five teachers and a guidance counselor. *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-42 (1982). The school in question was governmentally regulated and supported and received most of its students by referral from public schools. *Id.* at 840. However, the Court stated that this was insufficient to turn a private decision into state action. *Id.*

The *Rendell-Baker* Court distinguished the situation at hand from the one posed in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). In *Lugar*, the Court determined that a private party's action constituted state action where a creditor jointly participated with state officials in obtaining and executing an ex parte writ of attachment of petitioner's property. *Id.* at 942. The Court interpreted its cases to require "that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Id.* at 937. The *Lugar* decision developed a two-part approach to determine state action:

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 acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

*Id.*

The *Rendell-Baker* court distinguished *Lugar* on the ground that the role of the public officials in the discharge of the plaintiff was much more limited than the role of the sheriff in *Lugar*. *Rendell-Baker*, 457 U.S. at 839 n.6. Specifically, the public officials in *Rendell-Baker* only had the authority to review the qualifications of the petitioners; they had no authority to hire or discharge. *Id.*

177. *E.g.*, *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984); *see also* *Graham v. NCAA*, 804 F.2d 953 (6th Cir. 1986) (finding that state university's adoption of NCAA rules limiting a transfer student's ability to participate in intercollegiate athletics is not state action absent a showing the university directed or controlled the implementation of said rules); *Ponce v. Basketball Fed'n of Puerto Rico*, 760 F.2d 375 (1st Cir. 1985) (concluding that the considerations set out in the *Blum* trilogy precluded a finding of state action where there is no evidence that the government encouraged or affirmatively induced the conduct); *McHale v. Cornell Univ.*, 620 F. Supp. 67 (N.D.N.Y. 1985) (declining injunctive relief against enforcement of NCAA eligibility requirements since private university's compliance with NCAA rules does not constitute state action absent the requisite level of state-private cooperation).

In *Arlosoroff*, a Duke University tennis player challenged NCAA eligibility requirements.

ing to the court, both *Blum*<sup>179</sup> and *Rendell-Baker*<sup>180</sup> determined that state action exists when "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the state.'" <sup>181</sup> The court stated:

UNLV is a public institution, existing by virtue of Article 11, Section 4 of the Nevada Constitution. Tarkanian is therefore a public employee. In our view, the right to discipline public employees is traditionally the exclusive prerogative of the state. UNLV cannot escape responsibility for disciplinary action against employees by delegating that duty to a private entity.<sup>182</sup>

Consequently, the Tarkanian court viewed the issue differently than the *Arlosoroff* court, which held that "the regulation of intercollegiate athletics is not a function traditionally reserved exclusively to the state."<sup>183</sup> The Nevada court also noted that the facts of the instant case were distinguishable from *Arlosoroff* and other cases cited by the NCAA "in that those cases concerned private schools."<sup>184</sup> The Nevada Supreme Court also discounted *Graham v. NCAA*,<sup>185</sup> upon which the NCAA relied.<sup>186</sup> The court emphasized the different facts under which the *Graham* case was decided.<sup>187</sup> *Graham*, the court explained, did not concern the enforcement of NCAA rules against a state

*Arlosoroff*, 746 F.2d at 1020. The *Arlosoroff* court outlined the two instances in which the NCAA's conduct would be considered state action. The plaintiff must establish either: (1) that the NCAA was serving a function traditionally and exclusively within the state's prerogative; or (2) that the state or its agency caused, controlled, or directed the NCAA's action. *Id.* at 1022. Examining the facts, the *Arlosoroff* court determined that the state action requirement was not met. *Id.* The court based its decision on the fact that the plaintiffs could not show that the state schools joined as a bloc to cause the bylaw in question to be adopted. *Id.*

178. The Tarkanian II court noted that "*Arlosoroff* specifically rejected the earlier line of cases which held that NCAA regulatory activity is state action." Tarkanian II, 103 Nev. 331, 336, 741 P.2d 1345, 1348 (1987), *rev'd*, 488 U.S. 179 (1988).

179. *Blum v. Yaretsky*, 457 U.S. 991 (1982).

180. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

181. Tarkanian II, 103 Nev. at 336, 741 P.2d at 1348 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (citation omitted)).

182. *Id.* at 336-37, 741 P.2d at 1348.

183. *See id.* at 337, 741 P.2d at 1348-49.

184. *Id.* 741 P.2d at 1349.

185. 804 F.2d 953 (6th Cir. 1986). In *Graham*, two students who transferred from the University of Louisville were prevented from playing football at Western Kentucky University under NCAA regulations. *Id.* at 955. The students filed an action against the University of Louisville and the NCAA under 42 U.S.C. § 1983. *Id.* at 957. In affirming the lower court's decision, the Sixth Circuit held that the NCAA regulations which prevented the plaintiffs from participating in another NCAA football program did not constitute state action. *Id.* at 957-58. Relying on the *Blum* trilogy, the court stated that the latest Supreme Court decisions required a different conclusion than earlier decisions which found NCAA regulations to be state action. *Id.* at 958. In order for NCAA conduct to constitute state action, the court held, the plaintiff must establish either that (1) the NCAA was serving a function traditionally reserved to the state; or (2) the state either directly or indirectly caused the action. *Id.* (citing *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021-22 (4th Cir. 1984)).

186. Tarkanian II, 103 Nev. 331, 337, 741 P.2d 1345, 1349 (1987), *rev'd*, 488 U.S. 179 (1988).

187. *Id.*

employee, unlike the facts in the *Tarkanian* case.<sup>188</sup>

Under this reasoning, the Nevada high court found state action present under the two-part approach developed in *Lugar*.<sup>189</sup> The court stated:

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.<sup>190</sup>

The Nevada Supreme Court found both UNLV and the NCAA to be state actors.<sup>191</sup> The court reasoned that UNLV's cooperation in imposing NCAA sanctions against Tarkanian implicated the NCAA as a state actor.<sup>192</sup>

## 2. *Property or Liberty Interest*

The Nevada Supreme Court rejected the NCAA's assertion that Tarkanian's sanction did not constitute a deprivation of property or liberty interests.<sup>193</sup> The court found it significant that Tarkanian and UNLV had executed a series of one-year employment contracts since the beginning of their association.<sup>194</sup> However, his 1977-1978 contract was entitled "Tenured Professional Employment Document."<sup>195</sup> This contract, the court determined, granted Tarkanian tenure status and was binding when UNLV suspended Tarkanian in September of 1977.<sup>196</sup> In the court's view, Tarkanian's contractual relationship with UNLV established a property interest in continued employment.<sup>197</sup>

The NCAA unsuccessfully argued before the Nevada court that Tarkanian was not deprived of a property interest because the suspension affected only

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188. *Id.*

189. *Id.* For a discussion of the two-part test established in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), see *supra* notes 79-85 and accompanying text.

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

191. *Id.*

192. *Id.*

193. *Id.* "The protections of due process attach only to deprivations involving a property or liberty interest." *Id.* (citing *Sullivan v. Brown*, 544 F.2d 279, 282 (6th Cir. 1976)).

194. *Id.* at 338, 741 P.2d at 1348.

195. *Id.* Tarkanian's contract, which was dated June 20, 1977, and went for a term running from July 1, 1977, through June of 1978, continued an established practice between the parties. *Id.*

196. *Id.* This confirmed Tarkanian's testimony that upon arrival at UNLV he was promised that tenure would be given at some time in the future. *Id.*

197. *Id.* In reaching such a decision, the court relied on *Board of Regents v. Roth*, 408 U.S. 564 (1972). In *Roth*, the Supreme Court stated that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Therefore, the *Tarkanian II* court reasoned that an employment contract can constitute a property right. *Tarkanian II*, 103 Nev. 331, 337, 741 P.2d 1347, 1349 (1987) (citing *Stewart v. Bailey*, 556 F.2d 281, 285 (5th Cir. 1977)).



his duties as head coach.<sup>198</sup> The court noted that Tarkanian's 1977-1978 employment contract conferred the dual positions of head basketball coach and professor of physical education.<sup>199</sup> The NCAA contended that since the suspension had no effect on Tarkanian's position as professor he had not been deprived of a property interest.<sup>200</sup> The NCAA's argument relied upon precedent holding that employees do not have a property interest in a particular employment position.<sup>201</sup> In rejecting this argument, the court noted the effect of the suspension on Tarkanian's career.<sup>202</sup> At the time the sanctions were imposed, Tarkanian had held a position as head basketball coach for twenty years, four of these at UNLV.<sup>203</sup> Therefore, the court reasoned, taking away his position as head basketball coach would mean a drastic decline in his prominence.<sup>204</sup>

The Nevada Supreme Court also found that Tarkanian possessed a liberty interest protected by the due process clause, as defined by the "stigma-plus" test enunciated in *Paul v. Davis*.<sup>205</sup> Under the "stigma-plus" test, the "stigma" is the injury to one's reputation.<sup>206</sup> The "plus" is the decrease in status as a result of the stigma.<sup>207</sup> The court ruled against the NCAA in finding that Tarkanian's suspension met both prongs of the test.<sup>208</sup> The Nevada Supreme Court noted that the "stigma-plus" in the employment context must be severe enough to foreclose an individual's opportunity to seek alternative employment opportunities.<sup>209</sup> According to the court, dismissal from employ-

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198. Tarkanian II, 103 Nev. at 338, 741 P.2d at 1349.

199. *Id.*

200. *Id.*

201. *Id.* (citing *Childers v. Independent School Dist. No. 1*, 676 F.2d 1338, 1341 (10th Cir. 1982); *Sullivan v. Brown*, 544 F.2d 279, 282 (6th Cir. 1976)).

202. Tarkanian II, 103 Nev. 331, 338 741 P.2d 1345, 1349 (1987), *rev'd*, 488 U.S. 179 (1988).

203. *Id.*

204. *Id.*

205. 424 U.S. 693 (1976). In *Paul v. Davis*, the plaintiff filed a § 1983 action against the local chief of police, alleging a deprivation of liberty and property interests without due process of law. *Id.* at 696. The police department had circulated a flyer of "active shoplifters" which included the name and photograph of the plaintiff. *Id.* at 695. After shoplifting charges against the plaintiff were dismissed, the plaintiff filed suit in federal court. *Id.* at 695-96. The Court held that defamation by a state official alone does not implicate the due process clause. *Id.* at 710. Nor was the plaintiff extended any guarantee of present enjoyment of reputation, such that due process protections were required before that interest may be altered or revoked. *Id.* at 711-12. The *Davis* Court stated that the plaintiff must show that a "right or status previously recognized by state law was distinctly altered or extinguished" injuring his reputation. *Id.* at 711.

206. Tarkanian II, 103 Nev. 331, 338, 741 P.2d 1345, 1350 (1987), *rev'd*, 488 U.S. 179 (1988).

207. *Id.*

208. *Id.* at 338-39, 741 P.2d at 1350.

209. *Id.* at 338, 741 P.2d at 1350 (citing *Altman v. Hurst*, 734 F.2d 1240, 1243 (7th Cir.) (demoting, firing, or otherwise disciplining an employee does not amount to a deprivation of liberty where the individual remains free to pursue alternative employment opportunities), *cert. denied*, 469 U.S. 982 (1984); *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1101 (9th Cir. 1981) (unpublicized accusations fail to infringe constitutional liberty interests because they cannot harm an individual's reputation), *cert. denied*, 455 U.S. 948 (1982)).

ment on grounds involving immorality or dishonesty satisfies the stigma prong of the stigma-plus test.<sup>210</sup> Looking to the circumstances surrounding Tarkanian's dismissal, the court found that the grounds for the suspension were sufficient to satisfy this standard.<sup>211</sup>

Similarly, the court also found the "plus" prong was satisfied.<sup>212</sup> The court rejected the NCAA's contention that Tarkanian failed to establish he suffered a sufficient change of status.<sup>213</sup> The court concluded that even though Tarkanian would have retained employment as a professor, the NCAA's disciplinary action would have drastically diminished his position.<sup>214</sup> "Absent judicial intervention," the court stated, "Tarkanian's suspension might well have ended his college coaching career."<sup>215</sup>

### 3. *Due Process*

The NCAA had also contested the trial court's finding that the suspension failed to afford Tarkanian due process of law.<sup>216</sup> Once again Nevada's highest court disagreed with the NCAA,<sup>217</sup> stating:

In the hearings before the Committee on Infractions, the NCAA enforcement staff presented orally the NCAA's case. The investigators' presentation consisted of their recollections of interviews with sources. The investigators relied upon notes of the interviews, sometimes dictated after the fact. Tarkanian and UNLV hotly contested virtually all of the testimony which allegedly established rule violations by Tarkanian, and they presented evidence directly contradicting the investigators' testimony, generally consisting of signed affidavits and statements from persons whom the NCAA had interviewed. In the circumstances of this case, this procedure does not comport with due process requirements.<sup>218</sup>

The Nevada Supreme Court recognized the flexibility of procedural due process requirements.<sup>219</sup> However, the court maintained that three competing interests must be considered in determining the level of process due:

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210. *Id.* at 338-39, 741 P.2d at 1350; *see also* Stretten v. Wadsworth Veterans Hosp., 537 F.2d 361, 366 n.13 (9th Cir. 1976) (stating that a stigma so severe that it completely prevents an individual from practicing in her chosen profession infringes constitutional liberty).

211. Tarkanian II, 103 Nev. 331, 339, 741 P.2d 1345, 1350 (1987), *rev'd*, 488 U.S. 179 (1988). The court noted the negative implications brought upon the moral character of Tarkanian by these allegations. *Id.* at 339 n.2, 741 P.2d at 1350 n.2. Specifically, the NCAA's findings against Tarkanian charged that he arranged for a student to get an undeserved grade in a class, he falsely attested to the compliance by UNLV to the NCAA rules, and that he impeded the NCAA's investigation of him by encouraging individuals to provide false information. *Id.*

212. *Id.* at 339, 741 P.2d at 1350.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>220</sup>

For support, the Nevada Supreme Court relied on *Stanley v. Big Eight Conference*.<sup>221</sup> In *Stanley*, the plaintiff sought to enjoin the Big Eight Conference, which was working in cooperation with the NCAA, from conducting a hearing to determine if Oklahoma State University athletic personnel had violated rules of the conference and the NCAA.<sup>222</sup> The *Stanley* court granted injunctive relief,<sup>223</sup> noting the severe impact on coaching personnel when they are found to have violated the rules governing their activities.<sup>224</sup> Having already discussed this point in the context of Tarkanian's liberty or property interest, the *Tarkanian* court declined to repeat itself, stating: "We only reiterate our view that Tarkanian's suspension likely would have ended his near thirty-year career as a head coach and permanently tarnished his reputation. He no doubt possessed a significant interest in the outcome of the NCAA proceedings, an interest which cannot be taken lightly."<sup>225</sup>

The Nevada Supreme Court then examined the fact-finding procedures employed by the NCAA and compared them to the procedures in *Stanley*.<sup>226</sup> In *Stanley*, the fact-finding body intended to rely upon an investigator's report as evidence of wrongdoing, even though the report, which detailed interviews with approximately seventy-five people, was only eighteen pages long.<sup>227</sup> The *Stanley* court found the procedures unconstitutional.<sup>228</sup> The *Tarkanian* court noted that there were significant similarities between Tarkanian's case and *Stanley*.<sup>229</sup> Persuaded by the *Stanley* reasoning, the Nevada court wrote:

220. *Id.* at 339-40, 741 P.2d at 1350-51 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

221. 463 F. Supp. 920 (W.D. Mo. 1978).

222. *Id.* at 921-22.

223. *Id.* at 933-34.

224. *Id.* at 926-27, 930.

225. *Tarkanian II*, 103 Nev. 331, 340, 741 P.2d 1345, 1351 (1987), *rev'd*, 488 U.S. 179 (1988).

226.. *See id.*

227. *Stanley v. Big Eight Conference*, 463 F. Supp. 920, 924 (W.D. Mo. 1978).

228. *Id.* at 931. The *Stanley* court stated:

Of greatest concern to the Court is that the author of the investigative report is free to draw certain inferences beyond those statements of fact made to him in his interviews. . . . Furthermore, the author of the report presents statements made to him in a fashion that may not necessarily be prejudicial or biased but may certainly be classified as not completely neutral. It is this unconscious subjective coloring of the statements that troubles the Court. Accurate findings of fact should not be made upon predigested information.

*Id.*

229. *Tarkanian II*, 103 Nev. at 340-41, 741 P.2d at 1351. For example, *Stanley* involved a

In these circumstances, basing findings of fact upon pre-digested information creates serious due process problems. The lengthy and far-reaching scope of the NCAA's investigation in this case creates the danger that the enforcement staff may not remember the precise nature of interviews. This increases the likelihood that investigators, no matter how pure their intentions, will gloss their testimony with an "unconscious subjective coloring."<sup>230</sup>

The court also noted that "despite the NCAA's desire to make the investigation a cooperative effort, the proceedings obviously became adversarial."<sup>231</sup> Again the court warned that this enhances the likelihood that predigested information will be presented in a fashion favorable to the investigator-witness' position.<sup>232</sup>

The Nevada court pointed out that alternative procedures for protecting Tarkanian's interest were available.<sup>233</sup> At a minimum, the court wrote, "the NCAA should be required to produce written affidavits of persons interviewed by the enforcement staff."<sup>234</sup> In summary, the Nevada Supreme Court found that the NCAA's mandate to UNLV to suspend Tarkanian constituted state action, depriving Tarkanian of both property and liberty protected by the Constitution, and that he was not afforded due process before the deprivation.<sup>235</sup>

### III. NCAA v. TARKANIAN

#### A. The Majority Opinion

The United States Supreme Court reversed the ruling of the Nevada Su-

substantial investigation, with 75 people interviewed. *Stanley*, 463 F. Supp. at 924. The NCAA's investigation of Tarkanian and UNLV spanned approximately two and one-half years, and resulted in 58 pages of typed material, detailing 78 allegations of infractions. Tarkanian II, 103 Nev. at 340-41, 741 P.2d at 1351. Also, in *Stanley*, the plaintiff denied the allegations pertaining to him. *Stanley*, 463 F. Supp. at 924. Tarkanian not only denied the allegations, he produced numerous sworn statements directly contradicting the testimony of the NCAA's investigators. Tarkanian II, 103 Nev. at 341, 741 P.2d at 1351.

230. Tarkanian II, 103 Nev. 331, 341, 741 P.2d 1345, 1351 (1987), *rev'd*, 488 U.S. 179 (1988).

231. *Id.*

232. *Id.* In *Stanley*, the court stated: "Few investigative reports can be written in a totally objective manner void of the author's subjective attitudes." *Stanley v. Big Eight Conference*, 463 F. Supp. 920, 931 n.4 (W.D. Mo. 1978).

233. Tarkanian II, 103 Nev. at 341, 741 P.2d at 1351.

234. *Id.* The court also stated that "this would attenuate the problem of a 'subjective coloring' of the facts." *Id.* On appeal, the NCAA also argued that the trial court erred in refusing to grant a continuance in order to allow Charles Allan Wright to testify and that the trial court should have admitted a transcript of Mr. Wright's prior testimony before a congressional subcommittee. *Id.* at 343, 741 P.2d at 1352. Mr. Wright, a noted law professor, was a member of the Committee on Infractions. *Id.* The NCAA argued that the trial court's failure to allow his testimony warranted reversal. *Id.* at 343, 741 P.2d at 1352-53. The court rejected the NCAA's argument, noting that three members of the Committee on Infractions testified at trial, two of whom were law professors. *Id.* at 343, 741 P.2d at 1353. "In these circumstances," the court wrote, "even if the trial court did err, we fail to see how the NCAA was prejudiced." *Id.*

235. *Id.* at 331, 741 P.2d at 1345.

preme Court, finding that the NCAA's actions were not taken under color of state law and thus not subject to the strictures of the fourteenth amendment.<sup>236</sup> The Supreme Court began its state action analysis by reaffirming precedent holding that the protections of due process do not turn on the type of conduct, but focus rather on whether the conduct is caused by a state actor.<sup>237</sup> The Court then noted the general rule that the fourteenth amendment does not extend to "private conduct abridging individual rights," no matter how unjust the deprivation may be.<sup>238</sup> A litigant may invoke the protections guaranteed under due process only when the conduct is a result of state action.<sup>239</sup>

The Court explained the necessity to adhere closely to the state action requirement.<sup>240</sup> Such adherence, it advised, seeks to balance two ends.<sup>241</sup> First, it attempts to limit the reach of individual federal law to maintain individual freedom.<sup>242</sup> Second, it seeks to avoid imposing responsibility on a state for conduct over which it has no control.<sup>243</sup> The *Tarkanian* Court noted that Congress clearly specified that as a prerequisite for all section 1983 claims, the questionable conduct must have been a result of state action.<sup>244</sup>

The Supreme Court summarized *Tarkanian's* position generally as contending "that the NCAA was a state actor because it misused power that it possessed by virtue of state law."<sup>245</sup> *Tarkanian* claimed that UNLV delegated the power of regulating its athletic program to the NCAA.<sup>246</sup> This delegation, *Tarkanian* reasoned, clothed the NCAA with state authority to adopt rules governing UNLV's athletic programs and to enforce those rules on behalf of UNLV.<sup>247</sup> In holding for *Tarkanian*, the Nevada Supreme Court held that the

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236. *Tarkanian III*, 488 U.S. 179, 191-99 (1988).

237. *Id.* at 191. The Court stated: "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *Id.* (citing *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

238. *Id.* (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

239. *Id.*

240. *Id.*

241. *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)).

242. *Id.*

243. *Id.*

244. *Tarkanian III*, 488 U.S. 179, 191 (1988).

[W]hen Congress enacted Section 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred under color of state law; thus, liability attaches only to those wrongdoers "who carry a badge of authority" of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.

*Id.* (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)); see also *United States v. Classic*, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state, is action taken 'under color of' state law.").

245. *Tarkanian III*, 488 U.S. at 191-92.

246. *Id.* at 192.

247. *Id.* (noting that "[s]imilarly, the Nevada Supreme Court held that UNLV had delegated its authority over personnel decisions to the NCAA.").

two entities acted jointly to deprive Tarkanian of liberty and property interest, making the NCAA, as well as UNLV, a state actor.<sup>248</sup>

The Court, speaking through Justice Stevens, declared this reasoning to be a fundamental distortion of the facts of the case.<sup>249</sup> The Court reviewed the typical state action claim.<sup>250</sup> The standard question, it noted, is whether the state sufficiently participated in causing the conduct such that the action may properly be considered state action.<sup>251</sup> Justice Stevens' majority opinion outlined three scenarios under which this may occur.<sup>252</sup> The first is where the state creates the legal framework under which the conduct legitimately may occur.<sup>253</sup> The second situation is where the state delegates its authority to a private actor.<sup>254</sup> Finally, state action may arise if the state knowingly accepts the benefits derived from unconstitutional behavior.<sup>255</sup> Thus, the Court concluded that it should be concerned with whether the state facilitated the harm by granting power to an individual actor.<sup>256</sup>

The Court found that Tarkanian's case "uniquely" mirrored the traditional state action case.<sup>257</sup> The Court noted that Tarkanian's suspension was ultimately the result of UNLV's conduct.<sup>258</sup> UNLV, a state university, the Court stated, was indisputably a state actor.<sup>259</sup> Thus, when UNLV notified Tarkanian that he was being separated from all relations with the university's basketball program, it acted under color of state law within the meaning of 42 U.S.C. § 1983.<sup>260</sup>

Despite finding the case to mirror traditional state action cases, the Court found it necessary to step through "an analytical looking glass" to resolve the controversy.<sup>261</sup> The Court examined the peculiar problems posed by the facts at hand.<sup>262</sup> The NCAA, a private party, played an influential role in determining the sanctions imposed.<sup>263</sup> However, UNLV, a state entity, ultimately im-

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248. *Tarkanian II*, 103 Nev. 331, 337, 741 P.2d 1345, 1349 (1987), *rev'd*, 488 U.S. 179 (1988).

249. *Tarkanian III*, 488 U.S. 179, 192 (1988).

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)).

254. *Id.* (citing *West v. Atkins*, 487 U.S. 42 (1988)).

255. *Id.* (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

256. *Id.* As an example, the court cited *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) ("[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself."). *Tarkanian III*, 488 U.S. 177, 192 n.12 (1988).

257. *Id.* at 192.

258. *Id.*

259. *Id.* (providing that when a state university 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 Constitution).

260. *Id.* at 193.

261. *Id.*

262. *Id.*

263. *Id.*

posed the suspension.<sup>264</sup> Thus, the Supreme Court framed the question as whether UNLV's cooperation with the NCAA rules and recommendations turned the NCAA's conduct into state action.<sup>265</sup>

The Court first examined the relationship between UNLV and the NCAA regarding the NCAA's rulemaking.<sup>266</sup> The Court reasoned that since UNLV was among the NCAA's members and participated in promulgating the association's rules, the state had some impact on the NCAA's policy determinations.<sup>267</sup> However, the Court noted, UNLV is just one of several hundred other public and private institutions which participate in formulating the policies and procedures of the NCAA.<sup>268</sup> The Court found, therefore, that NCAA policy was the result of a "collective membership," rather than the sole influence of the state of Nevada.<sup>269</sup>

In dicta, the Court recognized that a different outcome would result if the entire NCAA membership consisted of institutions located within the same state.<sup>270</sup> Furthermore, the Court conceded that state action might lie if Nevada had incorporated the NCAA's rules into state law.<sup>271</sup> The Court determined that this would be sufficient to transform the NCAA into a state actor.<sup>272</sup> On this point, the Court noted that UNLV engaged in state action in adopting the NCAA's rules to govern its own behavior.<sup>273</sup> But, according to the Court, "that would be true even if UNLV had taken no part in the promulgation of those rules."<sup>274</sup> The Court warned, however, that the NCAA's formulation of those disciplinary rules did not implicate state action.<sup>275</sup> To draw an analogy, the Court relied on its decision in *Bates v. State Bar*.<sup>276</sup> The *Bates* decision concerned Arizona's complete adoption of the American Bar Association Code of Professional Responsibility.<sup>277</sup> In *Bates*, the district court held that state action existed in the Arizona Supreme Court's enforcement of

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* The Court took note of the fact that the vast majority of these institutions were located in states other than Nevada. *Id.* The NCAA, therefore, could not be said to act under color of Nevada law. *Id.*

269. *Id.* at 193-94 (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) ("Whatever *de facto* authority the [private standard-setting] Association enjoys, no official authority has been conferred on it by any government . . .")).

270. *Id.* at 193 n.13 (citing *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1969)). The majority noted that even the dissent does not dispute the fact that the NCAA does not act under color of state law in its relationships with private universities, which constitute the bulk of its membership. *Id.*

271. *Id.* at 194.

272. *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1983)).

273. *Id.*

274. *Id.*

275. *Id.*

276. 433 U.S. 350 (1977).

277. *Id.* at 360 n.12.

disciplinary rules against members of its own bar.<sup>278</sup> The Supreme Court found that no state action existed because the state supreme court retained the power to review and reject those standards it opposed.<sup>279</sup> The *Tarkanian* Court reasoned that the same important considerations were present in *Tarkanian*; the university, noted the Court, had several available alternatives.<sup>280</sup> First, UNLV retained the authority to review and reject NCAA rules by withdrawing from NCAA membership.<sup>281</sup> Second, the university could have continued participating in the association and lobbied to amend the rules or standards it deemed unfair.<sup>282</sup>

The Court was unpersuaded by Tarkanian's argument that the NCAA's investigation, enforcement proceedings, and consequent recommendations were the result of state action via the state's delegation of such power to the NCAA.<sup>283</sup> The Court acknowledged that a state may transform a private party into a state actor by delegating its authority to that private party.<sup>284</sup> However, it found that UNLV had not delegated any power to the NCAA to discipline persons employed by UNLV.<sup>285</sup> In fact, the NCAA's power was limited to disciplining only UNLV itself, not any individual directly.<sup>286</sup>

The Supreme Court flatly rejected the notion that UNLV's cooperation with

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278. *Id.* at 359-63.

279. *Id.* at 362.

280. *Tarkanian III*, 488 U.S. 179, 194-95 (1988).

UNLV retained the authority to withdraw from the NCAA and establish its own standards. The University alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair, or unwieldy. Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility and academic performance.

*Id.*

281. *Id.*

282. *Id.*

283. *Id.* "UNLV, as an NCAA member, subscribed to the statement in the Association's by-laws that NCAA enforcement procedures are an essential part of the intercollegiate athletic program of each member institution." *Id.*

284. *Id.* (citing *West v. Atkins* 487 U.S. 42 (1988)). In *West*, the Court held that a private physician who had contracted with a state prison to attend to the inmates' medical needs was a state actor. *West*, 487 U.S. at 48-57.

285. *Tarkanian III*, 488 U.S. 179, 195-96 (1988).

286. *Id.* at 196. The Court noted that the NCAA possessed no governmental powers to facilitate the investigation. *Id.* at 197. Specifically, it possessed no authority to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual. *Id.* According to the Court, the Nevada Supreme Court erred in its determination that the NCAA could directly discipline Tarkanian or any other state university employee. *Id.* In support of this finding, the Court looked to the express terms of the confidential report. *Id.* at 197-98. It noted that the NCAA did not unconditionally demand Tarkanian's suspension. *Id.* at 198. It merely requested "the University . . . to show cause" why the NCAA should not impose additional penalties if UNLV refused to discipline its coach. *Id.* As further support, the Court stated that even UNLV's vice president acknowledged the alternatives available to the university, other than suspending Tarkanian. *Id.*



the NCAA enforcement proceedings constituted a partnership agreement or the transfer of UNLV's powers to the NCAA.<sup>287</sup> The Court noted that UNLV had in fact endeavored to work against the NCAA's sanctioning its winning coach.<sup>288</sup> The NCAA and UNLV acted more like opponents rather than teammates cooperating in a dispassionate search for the truth.<sup>289</sup> Thus, the NCAA could not be regarded as an agent of UNLV for purposes of the enforcement proceeding.<sup>290</sup> Instead, the association must be considered as an agent of its remaining members that, as competitors of UNLV, had an interest in the effective and evenhanded enforcement of the NCAA's recruitment standards.<sup>291</sup> The Court concluded that the NCAA was properly viewed as a private actor.<sup>292</sup> The majority was persuaded by the NCAA's argument that its priority is to represent the interests of the collective membership, rather than to achieve the goals of any one particular member.<sup>293</sup>

Relying on *Burton v. Wilmington Parking Authority*,<sup>294</sup> Tarkanian argued that UNLV and the NCAA were "joint participants" in state action.<sup>295</sup> The *Burton* decision involved a lease relationship between a restaurant and a parking structure which resulted in "an incidental variety of mutual benefits."<sup>296</sup> The *Burton* Court held that the private restaurant and public parking authority acted jointly in violation of the fourteenth amendment when the restaurant discriminated against patrons on the basis of race.<sup>297</sup> The *Tarkanian* Court, however, distinguished *Burton*.<sup>298</sup> The Court based the distinction on the fact that *Tarkanian* involved a situation where the state and private parties' relevant interests were inapposite.<sup>299</sup> In fact, the Court noted, UNLV and the NCAA were antagonists, not joint participants.<sup>300</sup> Under such a scenario, the Court reasoned, the NCAA may not be deemed a state actor.<sup>301</sup>

Tarkanian also argued that the NCAA had assumed the state's traditional and exclusive power to discipline its employees.<sup>302</sup> The Court rejected this ar-

287. *Id.* at 196 (noting this idea was simply "belied by the history of this case").

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* Similarly, a public defender employed by the state acts in a private capacity when she represents a private client in a conflict against the state. *Polk County v. Dodson*, 454 U.S. 312, 320 (1981).

294. 365 U.S. 715 (1961).

295. *Tarkanian III*, 488 U.S. 179, 196 n.16 (1988).

296. *Burton*, 365 U.S. at 724. The mutual benefits included tax exemptions for the restaurant, rent payments for the parking authority, and increased business for both. *Id.*

297. *Id.* at 725.

298. *Tarkanian III*, 488 U.S. at 196 n.16.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 197-98 n.18. Tarkanian argued, "the NCAA requires that its standards, procedures and determinations become the State's standards, procedures and determinations for disciplining state employees . . . . The State is *obligated* to impose NCAA standards, procedures and determi-

gument, reasoning that the contention overlooked the fact that the NCAA's own legislation prohibits it from taking any direct action against Tarkanian.<sup>303</sup> Suspending Tarkanian, the Court continued, was only one alternative addressed in the confidential report.<sup>304</sup> These recommendations were intended to assist UNLV in correcting past infractions and allowing it to begin compliance with NCAA rules.<sup>305</sup>

Finally, the Court rebuked Tarkanian's contention that the influence of the NCAA is so expansive that its recommendations have the practical effect of a mandate.<sup>306</sup> The Court stated that a private party does not act under state law by merely threatening to refuse to deal with a state agency.<sup>307</sup> The question the Court ultimately answered was whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State."<sup>308</sup> The Court answered with a resounding "no."<sup>309</sup> It stated that it would be illogical to conclude that the NCAA sanctions recommended against Tarkanian, and vehemently opposed by UNLV and its counsel, were fairly attributable to the State of Nevada.<sup>310</sup> Instead, the Court interpreted these facts as indicia that UNLV conducted its athletic program in conformity with the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law.<sup>311</sup>

### B. *The Dissent*

The dissent concurred with the majority's holding that the public university's suspension of a public employee constituted state action.<sup>312</sup> However, Justice White, writing for the dissenters, framed the issue as whether the NCAA's participation with UNLV in suspending Tarkanian implicated the NCAA as a state actor.<sup>313</sup> The dissenters concluded that it did.<sup>314</sup> Justice

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nations making the NCAA a joint participant in the State's suspension . . . ." *Id.* at 198 n.18 (citing Brief for Respondent at 34-35) (emphases in original).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 198. The majority was not at all sure this was true. The Court stated that UNLV'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." *Id.* at 198 n.19.

307. *Id.* at 199 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-52 (1974) (granting of monopoly status by the state to a private entity does not convert the private party into a state actor)).

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

309. *Id.* ("It would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV . . . is fairly attributable to the State of Nevada.")

310. *Id.*

311. *Id.* Consequently, the judgment of the Nevada Supreme Court's decision was reversed, and the case was remanded to that court for further proceedings not inconsistent with the Supreme Court's opinion. *Id.*

312. *Id.* Justice White wrote the dissent, joined by Justices Brennan, Marshall, and O'Connor.

313. *Id.* (White, J., dissenting) (unanimously finding that UNLV, a public university, was a state actor, and that the suspension of Jerry Tarkanian, a public employee, was state action).

314. *Id.*

White recognized that the facts in the *Tarkanian* case were different from the typical prior state action cases addressed by the Court.<sup>315</sup> He questioned the majority's application of precedent in this case, stating that the facts presented in *Tarkanian* did not neatly fit within the traditional state action case.<sup>316</sup> Here, Justice White noted, the suspension implemented against Tarkanian was committed by a state actor.<sup>317</sup>

He argued that the situation presented by the Tarkanian case was neither unknown nor unique to the Court.<sup>318</sup> In both *Adickes v. S.H. Kress & Co.*,<sup>319</sup> and *Dennis v. Sparks*,<sup>320</sup> Justice White recalled, the Court considered the question of whether private parties could be state actors in a situation where the decisive act was carried out by the state.<sup>321</sup> The dissent noted that in both cases the Court held that private parties may be deemed state actors if the action was a result of the parties' joint cooperation.<sup>322</sup>

Justice White found that the facts of the Tarkanian case indicated that the NCAA played an integral role in UNLV's suspension of Tarkanian.<sup>323</sup> Several factors led the dissent to this conclusion. First, Tarkanian was suspended under NCAA rules which UNLV adopted via its membership in the NCAA.<sup>324</sup> Second, UNLV delegated to the NCAA the responsibility to conduct the hearings concerning violations of NCAA rules.<sup>325</sup> Justice White em-

315. *Id.* Justice White noted that the facts in *Tarkanian* did not consist of the typical state action issue where "a private party has taken the decisive step that caused the harm to the plaintiff." *Id.* at 199-200. (White, J., dissenting).

316. *Id.*

317. *Id.* at 200. (White, J., dissenting).

318. *Id.*

319. 398 U.S. 144 (1970) (concluding that plaintiff was entitled to relief under § 1983 against private party if she could prove that private party and police officer "reached an understanding" to cause her arrest on impermissible grounds).

320. 449 U.S. 24 (1980). The *Dennis* decision involved a § 1983 cause of action against a private party and state judge who illegally conspired to enjoin the plaintiff from producing minerals from certain oil leases. The plaintiff challenged the injunction, alleging that it had been issued as the result of a corrupt conspiracy between the judge and the other defendants. *Id.* at 26. The district court held for the plaintiff and dissolved the injunction as having been illegally issued. *Id.* at 25. Nonetheless, the court held that the defendants were immune from § 1983 liability under the doctrine of judicial immunity. *Id.* at 26. The court of appeals affirmed the lower court's ruling which immunized the judge from suit, but reversed the decision to dismiss the claims against the other conspiring defendants. *Id.* at 27. The Supreme Court unanimously affirmed the court of appeals, noting that the judge's absolute immunity from § 1983 claims does not extend to private individuals who corruptly conspire with the state or its agents. *Id.* at 28-29.

321. *Tarkanian III*, 488 U.S. 179, 200 (1988) (White, J., dissenting).

322. *Id.* (citing *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980)).

323. *Id.* at 200-01 (White, J., dissenting).

324. *Id.* "[A]s a member of the NCAA, UNLV contractually agrees to administer its athletic program in accordance with NCAA legislation." *Id.* In fact, Justice White noted, NCAA rules provide that NCAA "enforcement procedures are an essential part of the intercollegiate athletic program of each member institution." *Id.*

325. *Id.* at 201 (White, J., dissenting).

phasized the fact that the NCAA conducted the hearings that led to the lawsuit.<sup>326</sup>

Finally, the NCAA and UNLV had agreed to give binding effect to the findings of fact made by the NCAA at the hearings it conducted.<sup>327</sup> Justice White reasoned that UNLV's membership meant more than a promise to cooperate.<sup>328</sup> He noted that UNLV's membership in the NCAA was contingent upon UNLV's agreement to accept the NCAA's findings of fact as final and not subject to further review by any other body.<sup>329</sup> The NCAA, the dissent concluded, had forced UNLV's hand.<sup>330</sup> On these facts, the dissenters declared that the NCAA was jointly engaged with UNLV officials and therefore should be deemed a state actor.<sup>331</sup>

Justice White acknowledged that since the Supreme Court's decisions in *Rendell-Baker v. Kohn*,<sup>332</sup> *Lugar v. Edmondson Oil Co.*,<sup>333</sup> and *Blum v. Yaretsky*,<sup>334</sup> appellate courts have been unanimous in determining that the NCAA was not a state actor.<sup>335</sup> However, he stressed, none of those cases dealt with the theory advanced in *Tarkanian*.<sup>336</sup>

In closing, Justice White agreed that if UNLV refused to suspend Tarkanian, and the NCAA responded by imposing sanctions against UNLV, there would be no state action that harmed Tarkanian.<sup>337</sup> However, according to Justice White, such a situation was not present here because UNLV did, in fact, suspend Tarkanian.<sup>338</sup> The university did so only because its membership in the NCAA required it to adopt the NCAA rules and accept the results of the hearings conducted by the NCAA.<sup>339</sup> Under these circumstances, Justice White concluded that the NCAA acted jointly with UNLV and therefore was

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326. Although the university conducted its own investigation into the matter, the NCAA Committee on Infractions made the final decisions regarding factual determinations. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* (stating that the terms of UNLV's membership forced the university to suspend Tarkanian even though it adamantly disputed the NCAA's findings).

330. *Id.* Justice White stated, "In short, it was the NCAA's finding 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." *Id.* at 202 (White, J., dissenting) (footnote and citation omitted).

331. *Id.* (citing *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980)).

332. 457 U.S. 830 (1982).

333. 457 U.S. 922 (1982).

334. 457 U.S. 991 (1982).

335. *Tarkanian III*, 488 U.S. 179, 202 n.2 (1988) (White, J., dissenting) (citing *McCormack v. NCAA*, 845 F.2d 1338, 1346 (5th Cir. 1988); *Karmanos v. Baker*, 816 F.2d 258, 261 (6th Cir. 1987); *Graham v. NCAA*, 804 F.2d 953, 958 (6th Cir. 1986); *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021-1022 (4th Cir. 1984)).

336. Justice White's dissenting opinion noted that the case most often cited, *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984), failed to address the possibility of joint action between the NCAA and a public university. *Tarkanian III*, 488 U.S. at 203 (White, J., dissenting).

337. *Id.*

338. *Id.*

339. *Id.*

a state actor.<sup>340</sup>

#### IV. DISCUSSION

The analysis of the *Tarkanian* majority is full of inconsistencies. Rather than lay an analytical framework to guide practitioners as to when and where state action exists, the Court chose instead to wrangle with the reasoning of the dissent and the arguments put forth on behalf of *Tarkanian*.

The United States Supreme Court began its analysis by noting that as a predicate for its disposition, the Nevada court had held that the NCAA engaged in state action.<sup>341</sup> The Court also acknowledged that several strands of the argument supported this holding.<sup>342</sup> Given the Court's ultimate holding however, these acknowledgements are a strange way for the Court to begin its analysis. In essence, the Court builds its case by tearing down arguments in favor of state action, rather than laying the groundwork for a finding that it does not exist.

The majority spent a considerable amount of effort attacking the dissent's reliance on *Dennis v. Sparks*<sup>343</sup> as a means of justifying its own position.<sup>344</sup> The *Tarkanian* majority did not find the facts involved in *Dennis* to be analogous to the facts at hand.<sup>345</sup> *Dennis* involved a situation where both parties, a corporation and a judge, explicitly entered into a conspiracy to perform an illegal act.<sup>346</sup> According to the *Dennis* Court, the private parties who conspired with the judge were acting under color of state law.<sup>347</sup>

The Court distinguished *Dennis* from *Tarkanian* because it found no suggestion of any impropriety respecting the agreement between the NCAA and UNLV.<sup>348</sup> The majority criticized the dissent's assumption that the NCAA's liability as a state actor depended on whether UNLV ultimately accepted the

340. *Id.* at 203 (White, J., dissenting).

341. *Id.* at 190.

342. *Id.*

343. 449 U.S. 24 (1980).

344. *Tarkanian III*, 488 U.S. 179, 197 n.17 (1988). The Court's split is ultimately based on the differing interpretations by the majority and the dissent of *Dennis v. Sparks*, 449 U.S. 24 (1980). In *Dennis*, a state trial judge enjoined the production of minerals from oil leases owned by the plaintiff. *Id.* at 25. The injunction was later dissolved on appeal as having been issued illegally. *Id.* The plaintiff then filed suit under 42 U.S.C. § 1983. In his complaint, the plaintiff alleged that the judge had conspired with the party seeking the original injunction (a private corporation) the sole owner of the corporation, and the two sureties on the injunction bond to deprive the plaintiff of due process by corruptly issuing the injunction. *Id.* at 24-25. The Supreme Court held *unanimously* that under the facts as alleged, the private parties were state actors because they were "willful participant[s] in joint action with the State or its agents." *Id.* at 27.

345. *Tarkanian III*, 488 U.S. at 197.

346. *Dennis*, 449 U.S. at 25-26.

347. *Id.* at 27-28. The *Tarkanian* Court reiterated that it was inconsequential that the judge in *Dennis* was immune from damages liability. *Tarkanian III*, 488 U.S. at 197 n.17 (citation omitted). Immunity, the *Tarkanian* majority stated, did not legitimize the judge's or his co-conspirators' actions. *Id.* Furthermore, one must act within legal guidelines to invoke immunity. *Id.*

348. *Id.*

NCAA's recommended discipline of Tarkanian instead of the initial agreement between UNLV and the NCAA.<sup>349</sup> *Dennis* was found to be distinguishable because the conspirators became state actors as soon as they formed the corrupt bargain with the judge.<sup>350</sup>

However, the dissent noted that the majority's objections to finding state action in this case were implicitly rejected by the *Dennis* decision.<sup>351</sup> According to the dissenters, the *Tarkanian* majority had relied on the fact that the NCAA did not have any power to take action directly against Tarkanian as support for its finding that the NCAA was not a state actor.<sup>352</sup> But as the dissent noted, the private parties in *Dennis* likewise did not have any power to take action directly against the plaintiff.<sup>353</sup> Only the trial judge could impose the injunction.<sup>354</sup>

The distinction the majority attempts to make is certainly one without consequence. In the majority's final analysis, only the triggerman is liable. While determination of "impropriety" may offer a bright line distinction, the lines of demarcation are not that clear. As with any participant, whether willing or unwilling, the key is whether the participant ultimately takes the desired action. Here, the bottom falls out of the majority's reasoning when a willing participant is substituted for the allegedly unwilling UNLV. Had UNLV cooperated with the NCAA, Tarkanian still would have ended up in the same position.<sup>355</sup> As the dissent noted, the majority's extensive reliance on the fact that the NCAA and UNLV were adversaries throughout the proceedings before the NCAA was misplaced.<sup>356</sup> The fact that UNLV and the NCAA were adversaries should not have been determinative. Rather, the controlling factor was that ultimately UNLV, a state actor, agreed to take the action the NCAA wanted: to suspend Tarkanian.<sup>357</sup>

In support of its impractical conclusion, the Court also noted that the

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349. *Id.*

350. *Id.*

351. *Id.* at 202 (White, J., dissenting).

352. *Id.*

353. *Id.*

354. *Id.*

355. In another recent NCAA investigation, the University of Illinois cooperated in the proceedings only to be assessed severe penalties for self-reported violations. Sherman, *NCAA Dunks Illini Program*, Chicago Tribune, Nov. 7, 1990, § 4, at 1, col. 2.

356. *Tarkanian III*, 488 U.S. 179, 203 (1988) (White, J., dissenting).

357. *Id.* According to Justice White:

The majority provides a detailed description of UNLV's attempts to avoid the imposition of sanctions by the NCAA. But this opportunity for opposition, provided for by the terms of the membership agreement between UNLV and the NCAA, does not understand the agreement itself. Surely our decision in *Dennis* would not have been different had the private parties permitted the trial judge to seek to persuade them that he should not grant the injunction before finally holding the judge to his agreement with them to do so. The key there, as with any conspiracy, is that ultimately parties agreed to take the action.

*Id.* (White, J., dissenting).

NCAA's bylaws permit review of penalties, even after they are imposed, "upon a showing of newly discovered evidence which is directly related to the findings in the case, or that there was a prejudicial error in the procedure which was followed in the processing of the case by the Committee."<sup>358</sup> Thus, the Court suggested that UNLV could have sought review of the penalties, perhaps based on the Nevada trial court's finding that the NCAA's investigator was biased against Tarkanian.<sup>359</sup> This suggestion is simply naive. Why should the NCAA, when it has been perceived as biased during the entire investigation, be perceived any differently during a review of that investigation? The Court's suggestion is akin to asking a card dealer to reshuffle a stacked deck. He would be more than glad to do so because the cards are already stacked in his favor. Now, however, the Court has said that the dealer—here, the NCAA—does not even have to reshuffle the deck. Once again, the "house" wins.

The majority also targeted Tarkanian's argument that the NCAA, by its rules and enforcement procedures, had usurped a traditional, essential state function.<sup>360</sup> The Court tossed Tarkanian a free throw when it noted that Tarkanian had been correct in not pointing to the NCAA's overriding function of promoting amateur athletics at the college level.<sup>361</sup> Although the Court had previously conceded this function as "critical,"<sup>362</sup> it reasserted that "by no means is it a traditional, let alone an exclusive, state function."<sup>363</sup> Instead, Tarkanian argued that the NCAA assumed the state's traditional and exclusive power to discipline its employees.<sup>364</sup> The Court rejected this argument in a footnote, simply because the NCAA's own legislation prohibits it from taking any direct action against Tarkanian.<sup>365</sup> Moreover, the Court continued, "suspension of Tarkanian is one of many recommendations in the Confidential Report. Those recommendations as a whole were intended to bring UNLV's basketball program into compliance with NCAA rules. Suspension of Tarkanian was but one means toward achieving that goal."<sup>366</sup>

The Court's rationale is simply one of semantics. Of course, the Court fails to recall that the NCAA has the power to sanction member institutions. In essence, what the Court is saying is that it is all right to sink a ship as a means of disciplining an individual sailor. However, in the Court's eyes, such an action is not a direct action against the sailor, but rather one against his ship. If the sailor drowns in the process of the ship sinking, so be it.

Of course, in the majority's final analysis, one might suggest that the ship

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358. *Id.* at 195 n.15 (citations omitted).

359. *Id.*

360. *Id.* at 197 n.19. The Nevada Supreme Court reached this decision. *See* Tarkanian II, 103 Nev. 331, 337, 741 P.2d 1345, 1348-49 (1987), *rev'd*, 488 U.S. 179 (1988).

361. Tarkanian III, 488 U.S. 179, 198 n.18 (1988).

362. *Id.* (citing NCAA v. Board of Regents, 468 U.S. 85, 120 (1984)).

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

abandon the fleet. Surely this is what the majority suggested when it stated that UNLV was free to withdraw from the NCAA at any time.<sup>367</sup> Granted, withdrawal is another alternative, but the sailor is left aboard a ship sentenced to a dry dock. Ultimately, the desired result is achieved—a type of suspension. This is why the dissent criticized as irrelevant the majority's viewpoint that UNLV was free to withdraw from the NCAA at any time.<sup>368</sup> In an almost mocking tone, the dissent stated that UNLV did have the option "to [p]ull out of the NCAA completely."<sup>369</sup> Similarly, the dissent pointed out that the trial judge in *Dennis* could have withdrawn from his agreement at any time as well.<sup>370</sup> Justice White reasoned, however, that the option to withdraw was irrelevant in light of his entering into an agreement.<sup>371</sup> The key point in *Dennis* was not that the judge could have withdrawn from the conspiracy, but rather that he did not withdraw.<sup>372</sup>

#### V. CONCLUSION

The NCAA should not escape judicial review simply by a finding that the institution involved is an unwilling participant in an NCAA proceeding. Until recently, most universities and colleges were unwilling participants in any investigation, vigorously contesting the NCAA when it came to enforcement matters for one simple reason: money.<sup>373</sup> In an attempt to avoid violations, some institutions have even sought the advice of outside counsel.<sup>374</sup> Recently, some schools have decided to cooperate fully with any NCAA investigations in the hope that such compliance would be rewarded with a "lighter sentence."<sup>375</sup> This trend began after Southern Methodist University received the death penalty in 1981.<sup>376</sup> The approach evidently backfired on the University of Illinois when it was recently slapped with relatively stiff penalties, despite being cleared of all major allegations.<sup>377</sup> The sanctions against Illinois' basketball

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367. *Id.* at 194-95.

368. *Id.* at 202-03 (White, J., dissenting).

369. *Id.* at 202 (citation omitted).

370. *Id.*

371. *Id.*

372. *Id.* at 203.

373. For example, the University of Alabama lost \$253,447 in basketball receipts from the 1987 NCAA basketball tournament because two of its players, Derrick McKey and Terry Coner, dealt with agents before their eligibility expired. *New York Times*, Dec. 16, 1987, at B1, col. 5.

374. In fact, the University of Miami, seeking to minimize the risk of NCAA violations, pays a Kansas City law firm approximately \$50,000 a year to monitor and investigate its athletic program. *Philadelphia Inquirer*, June 21, 1990, at 8-E, col. 2 ("The practice is not unique, but, because of the cost, it is unusual. The NCAA and certain conferences offer similar services for free, but Miami prefers to pay for a more comprehensive study, athletic director Sam Jankovich said.").

375. See Wieberg, *NCAA to Hear Two Schools' Final Appeals*, *USA Today*, Aug. 10, 1990, at 2C, col. 1.

376. *Id.*

377. Sherman, *supra* note 355, at 1, col. 2.



program were largely premised on self-reported incidents.<sup>378</sup>

In short, it should be the procedures of the NCAA which should be reviewed, not whether the institution is a willing or unwilling participant in the investigation or proceedings. And if NCAA procedures, be they hearings or investigations, do not conform with one's sense of fair play, then the NCAA sanction should not be valid. Presently, the only procedural safeguards available during any NCAA enforcement hearing are notice of the charge and an opportunity to appear at the hearing.<sup>379</sup> In addition, at a minimum, member institutions and participating individuals should be provided the following procedural safeguards:<sup>380</sup>

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378. *Id.*

379. NCAA MANUAL, *supra* note 3, at 273 (NCAA Operating Bylaw 19.3).

380. A proposed bill in the Illinois legislature would require more procedural due process safeguards. H.B. 3182, 86th Gen. Assembly, 1990 Sess. In fact, it would give colleges under investigation by the NCAA rights similar to those now enjoyed by criminal defendants, including the right to suppress illegally obtained evidence. Provisions of the Illinois bill state:

Section 3. Hearing required as prerequisite to finding of violation; Procedures applying at hearing.

(a) No penalty may be imposed by a collegiate athletic association on any institution of higher education operating in the State of Illinois, nor shall any collegiate athletic association require or cause any institution of higher education to impose a penalty on any student or employee, unless the findings upon which the penalties are based are made at a formal hearing in conformity with the rules in this Section. Any association may adopt rules prescribing the procedures for such a hearing, including the method of selecting a presiding officer, provided that such rules are not inconsistent with this Act.

(b) Any finding must be made in writing and supported by clear and convincing evidence.

(c) Any individual employee or student who is charged with misconduct must be notified, in writing prior to the hearing of the specific charges against that individual, that a hearing will be held at a specific date and time to determine the truth of the charges, and that a finding that the misconduct occurred may result in penalties imposed on the institution or imposed by the institution on the individual. The institution shall also be notified in writing of the hearing on the charges.

(d) Any such person or institution has a right to have counsel present, to interrogate and cross-examine witnesses, and to present a complete defense.

(e) The rules of evidence applying at civil trials in Illinois shall apply at such hearings.

(f) Any individual charged with misconduct which might result in a penalty, and the institution with which he or she is associated, shall be entitled to full disclosure of all facts and matters relevant to the same degree as a defendant in a criminal case and shall have the same right to discovery as applies in criminal and civil cases.

(g) Any individual or institution may suppress at the hearing any evidence garnered from any interrogation of any party if the evidence was not procured in accordance with Section 5 or if obtained indirectly because of interrogation not in conformity with Section 5.

(h) Any hearing shall be open to the public unless any party charged with misconduct or the institution involved objects.

(i) No hearing may be held on any given charge unless commenced within 6 months of the date on which the institution of higher education first receives notice of any kind from the association that it is investigating a possible violation of its rules,

- (1) The right to a fair and impartial hearing;
- (2) The right to a public hearing;
- (3) The right to have counsel present;
- (4) The right to present a complete defense involving the right to cross-examine witnesses;
- (5) The right to full disclosure and discovery of all facts and matters relevant;
- (6) The right to a speedy hearing.

However, it would seem that formal rules of evidence need not apply, only that hearsay be inadmissible. Furthermore, it would seem that Miranda-type warnings will only perpetuate cheating and more unfairness.

The Nebraska Legislature apparently agrees. Recently, the Cornhusker State enacted the Nebraska Collegiate Athletic Association Procedures Act.<sup>381</sup>

or, in a situation in which the institution itself brings the possibility of a violation to the attention of the association, unless commenced within nine months of the date such notice is provided to the association. The running of the 6 or 9 month period shall be tolled because of any delay occasioned by the institution or individual being investigated, whether or not for good cause. Any individual charged with a violation or the institution with which he or she is affiliated may petition the circuit court for a determination of whether the provisions of this subsection (i) have been violated prior to proceeding with the hearing. The filing of any such petition tolls the running of the 6 or 9 month period.

(j) Any findings made pursuant to the hearing under this Section are subject to review in the circuit court based on the standard of whether the findings are consistent with the manifest weight of the evidence.

*Id.*

381. The Nebraska statute provides:

Be it enacted by the people of the State of Nebraska,

Section 1. This act shall be known and may be cited as the Nebraska Collegiate Athletic Association Procedures Act.

Section 2. The Legislature hereby finds and declares that:

(1) The National Collegiate Athletic Association is a national unincorporated association consisting of public and private colleges and universities and is a private monopolist that controls intercollegiate athletics throughout the United States;

(2) The National Collegiate Athletic Association adopts rules governing member institutions' admissions, academic eligibility, and financial aid standards for collegiate athletes;

(3) A member must agree contractually to administer its athletic program in accordance with National Collegiate Athletic Association legislation;

(4) National Collegiate Athletic Association rules provide that association enforcement procedures are an essential part of the intercollegiate athletic program of each member institution;

(5) The National Collegiate Athletic Association exercises great power over member institutions by virtue of its monopolistic control of intercollegiate athletics and its power to prevent a nonconforming institution from competing in intercollegiate athletic events or contests;

(6) Substantial monetary loss, serious disruption of athletic programs, and significant damage to reputation may result from the imposition of penalties on a college or university by the National Collegiate Athletic Association for what the association determines to be a violation of its rules; and

In short, the Act requires the NCAA to comply with due process of law as guaranteed by the Nebraska Constitution.<sup>382</sup>

It is unclear whether the Nebraska Act will be challenged in the near future, not to mention whether it will pass constitutional muster.<sup>383</sup> However, similar acts have been proposed in South Carolina, Florida, Kentucky, Illinois,<sup>384</sup> and in Congress.<sup>385</sup> If enacted, the state laws of Florida and Illinois

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(7) Because of such potentially serious and far reaching consequences, all proceedings which may result in the imposition of any penalty by the National Collegiate Athletic Association should be subject to the requirements of due process of law.

Section 3. Every stage and facet of all proceedings of a collegiate athletic association, college, or university that may result in the imposition of a penalty for violation of such association's rule or legislation shall comply with due process of law as guaranteed by the Constitution of Nebraska and the laws of Nebraska.

Section 4. No collegiate athletic association shall impose a penalty on any college or university for violation of such association's rule or legislation in violation of the due process requirements of the Nebraska Collegiate Athletic Association Procedures Act.

Section 5. No collegiate athletic association shall impose a penalty on any college or university for failure to take disciplinary action against an employee or student for violation of such association's rule or legislation in violation of the due process requirements of the Nebraska Collegiate Athletic Association Procedures Act.

Section 6. A collegiate athletic association that violates the Nebraska Collegiate Athletic Association Procedures Act shall be liable to the aggrieved college or university in an action at law, suit in equity, or other proper proceeding for redress. No penalty shall be threatened against or imposed upon an aggrieved college or university for seeking redress pursuant to this section.

Section 7. In addition to costs and a reasonable attorney's fee, a collegiate athletic association that violates the Nebraska Collegiate Athletic Association Procedures Act shall be liable to the aggrieved college or university for an amount equal to one hundred percent of the monetary loss per year or portion of a year suffered during the period that any monetary loss occurs due to a penalty imposed in violation of the act. For purposes of calculating monetary loss, one hundred percent of the yearly loss shall be equal to the gross amount realized by the affected athletic program during the immediately preceding calendar year.

Section 8. A collegiate athletic association, college, or university which subjects, or causes to be subjected, any employee or student to a penalty in violation of the Nebraska Collegiate Athletic Association Procedures Act shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. No penalty shall be threatened against or imposed upon an aggrieved party for seeking redress pursuant to this section. In addition to any other relief granted, an aggrieved employee or student shall be awarded costs and a reasonable attorney's fee.

Section 9. Any penalty imposed by any collegiate athletic association, college, or university shall be subject to judicial review in the district court.

Section 10. The remedies provided in the Nebraska Collegiate Athletic Association Procedures Act are cumulative and in addition to any other remedies provided by law.

1990 Neb. Laws L.B. 397.

382. *Id.*

383. It is unknown whether the NCAA is currently investigating any member institutions located in the State of Nebraska.

384. Marcotte, *Regulating Sports—Bills, Suits Seek Due Process Protections for NCAA Athletes*, A.B.A. J., Dec. 1990, at 40. For the relevant portions of the text of the Illinois bill, see *supra* note 380.

385. S. 2996, 101st Cong., 2d Sess. (1990); H.R. 5464, 101st Cong., 2d Sess. (1990).

would have the best chance of being reviewed, given repeated NCAA investigations at those two state universities over the years.<sup>386</sup>

If nothing else, such a "grass roots" movement will pressure the NCAA into comporting with due process of law during its investigations and hearings of member institutions. Given all the power the NCAA now has in light of the Court's decision in *Tarkanian*, the NCAA should remember that its power is derived solely from its membership.<sup>387</sup> Ye who giveth, can also taketh away.

## VI. POSTSCRIPT

On March 28, 1990, Jerry Tarkanian's thirteen-year court battle with the NCAA ended when both sides reached an agreement preventing the NCAA from seeking the two-year suspension of Tarkanian, that the organization had originally requested in 1977.<sup>388</sup> The agreement required Tarkanian to pay the NCAA over \$20,000 in legal fees incurred at the Supreme Court level, as well as to assume his own legal fees, which amounted to \$350,000.<sup>389</sup>

Five days later, "[i]n an awesome display of power, discipline and sparkle, the Rebels breezed to the championship of college basketball, thrashing Duke, 103-73, . . . before a sellout crowd of 17,000 . . . to win its first national championship."<sup>390</sup> It was not a contest, "it was a carnage."<sup>391</sup> "UNLV's point total was the highest in any NCAA final, and the thirty-point margin of victory was the largest in any national title game."<sup>392</sup> UNLV's field goal percentage was an astounding 61.2%—the fourth-best performance in an NCAA championship game.<sup>393</sup> The Rebels also unleashed one of the finest defensive exhibitions in tournament history, a performance that left their coach saying that his team had played "about as well as we could play" and had Duke coach Mike Krzyzewski saying he was "in awe."<sup>394</sup>

386. Sherman, *supra* note 355, at 1, col. 2.

387. See NCAA MANUAL, *supra* note 3, *passim*.

388. Philadelphia Inquirer, Mar. 29, 1990, at 8-D, col. 1.

389. *Id.*

390. Missanelli, *The Rebels Run Right to the Top: UNLV Crushes Duke to Win National Title*, Philadelphia Inquirer, Apr. 3, 1990, at 1-C, col. 5. ("You can call us bad. You can call us thugs. You can call us hoodlums. But at the end of that, please call us national champions, too," UNLV forward Larry Johnson said.)

391. *Id.* Four UNLV starters hit double figures, led by Anderson Hunt, "a spunky, 6-foot-2-inch sophomore guard from Detroit." *Id.* Hunt racked up 29 points, including four three-pointers. *Id.* For his performance, Hunt was named the most valuable player in the Final Four. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* During the year, Duke was one of the most efficient ball-handling teams in college basketball. *Id.* at 4-C, col. 1. However, UNLV forced Duke into 23 turnovers, leading to 32 UNLV points. *Id.* Hounded by tournament MVP Anderson Hunt and Greg Anthony, Duke guards Bobby Hurley and Phil Henderson combined for 11 turnovers. *Id.* Hurley scored only two points. *Id.* Henderson scored 21, 9-for-20 from the field but only 1-for-8 from three-point range. *Id.*

"It was an incredible display of basketball," observed Krzyzewski.<sup>395</sup> "Their half-court defense is the best in the country. They dictated the basketball game to us. Their defense led to their offense. They were so positive offensively because they knew they were in such control defensively."<sup>396</sup>

Leading by ten points with 16:24 remaining, UNLV scored eighteen unanswered points in the next three minutes, giving the Rebels an insurmountable 75-47 lead with 13:14 left.<sup>397</sup> "It was all over but the post-game celebration and Brent Musburger's farewell sign-off from CBS Sports."<sup>398</sup>

"In an awkward scene at center court, Tarkanian accepted the championship trophy from an NCAA official" and thanked "'the great fans of Nevada for their support.'"<sup>399</sup> Speculation about forthcoming NCAA sanctions cast a shadow over the celebration.<sup>400</sup> Some three months later, UNLV was indeed nailed by the NCAA: UNLV is ineligible for postseason play in 1992.<sup>401</sup>

395. *Id.* at 4-C.

396. *Id.* Krzyzewski continued, "They are so physically and mentally mature and focused," he stated. "They played beyond anyone we had played this year. That's the best anyone has ever played against me. We were ready to play. They just wouldn't let us. I'm truly in awe." *Id.*

"I'm proud of my guys," the Duke coach said. "I'm sorry we didn't give [UNLV] a better challenge. But we win and lose together. This team, I think, came closer to realizing its potential than perhaps any team I've had. We just got beat by a great basketball team." *Id.*

After eight minutes, the Rebels had a 10-point lead. "[Anderson] Hunt, perhaps the least heralded started on the UNLV juggernaut, scored 10 of the team's first 23 point and hit his first four shots from the floor, leaving [Phil] Henderson, perhaps Duke's best defender," grabbing for air. *Id.*

"[Hunt] never got tired," Henderson said. "He ran the floor very well. And that made it difficult for me to find out where he was all the time." *Id.*

With four minutes left in the first half, the Runnin' Rebels had a 16-point lead. *Id.* The Rebels' lead at half time was 47-35 after Greg Anthony went the length of the floor and made a runner at the buzzer. *Id.* Tarkanian had started the game with his team in a man-to-man defense. *Id.* Later in the first half, and again after Larry Johnson and Greg Anthony picked up their third fouls early in the second half, he went to his so-called "amoeba" zone. *Id.*

"And that destroyed [Duke]," Tarkanian said. *Id.*

397. *Id.*

398. *Id.*

399. The coach revealed his thoughts after the game:

"I didn't want to accept [the trophy]," Tarkanian said. "I wanted my athletic director to accept it. But they said I had to accept it. It's not a big thing with me. It means a lot to the great fans we have, though. It was great that the kids could play so well in a game of this magnitude for them."

"Isn't this sweet revenge for you?" a questioner persisted.

"It's not revenge, but it is sweet," Tarkanian said. "I never felt I'd ever win a national championship. I didn't play basketball at a great university. I never coached at a big-time program. I guess UNLV now is a big-time program. But it wasn't when I took the job. I'm just fortunate that I was able to get one, that's all."

*Id.*

400. *Id.*

401. On July 20, 1990, the NCAA declared UNLV ineligible for postseason play in 1991. Myslenski, *NCAA Nails Tarkanian, UNLV*, Chicago Tribune, July 21, 1990, § 3, at 1, col. 2. Recently, the NCAA agreed to reconsider the ban, which prompted UNLV and Tarkanian to offer alternative penalties. Chicago Tribune, Oct. 29, 1990, § 3, at 3, col. 1. Under one alternative,

“[I]n the world of intercollegiate athletics, there is but one well-kept playing field open to colleges and universities, private or public, and the NCAA is the groundkeeper” as well as the timekeeper and referee.<sup>402</sup>

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Tarkanian offered to sit out the 1991 tournament and forgo his personal stake in playoff revenues, if only his Runnin' Rebels are allowed to defend their title. *Id.*

On November 29, 1990, the NCAA made the unprecedented move of reversing itself, agreeing to let UNLV defend its national title in 1991. Myslenski, *UNLV Wins 1-Year Reprieve*, Chicago Tribune, Nov. 30, 1990, § 4, at 1, col. 1. Instead, the Runnin' Rebels will sit out the 1992 NCAA tournament. *Id.* “It took him 13 years, but Nevada-Las Vegas basketball coach Jerry Tarkanian finally won one from the NCAA.” *Id.*

402. McKenna, *Age Limitations and the National Collegiate Athletic Association: Discrimination or Equating Competition?*, 31 ST. LOUIS U.L.J. 379, 407 (1987) (quoting Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism*, 28 ST. LOUIS U.L.J. 101, 127 (1984)).

