Revisiting *Tarkanian*: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*

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INTRODUCTION

In 1988, in *NCAA v. Tarkanian*,[1] the United States Supreme Court held that the National Collegiate Athletic Association (NCAA) was not a state actor for purposes of the Fourteenth Amendment to the United States Constitution and Section 1983 litigation.[2] Accordingly, the Court dismissed a Section 1983 lawsuit filed by Jerry Tarkanian, then head basketball coach of the University of Nevada-Las Vegas (UNLV). Tarkanian had been suspended by the University after the NCAA found that he violated NCAA rules; moreover, the NCAA had threatened to ban the University from participation in NCAA

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1. 488 U.S. 179 (1988).

2. *Id.* at 199. The Fourteenth Amendment states, in part:

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

U.S. CONST. amend. XIV, §1. Section 1983 of the Civil Rights Act of 1871, provides citizens a cause of action when the government or government officials violates their Constitutional rights "under color of" state law. 42 U.S.C. §1983 (2008). The "state action" requirement provides that a private entity is subject to the Fourteenth Amendment under Section 1983 only if its action is "fairly attributable" to the state. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Generally, Section 1983's "under color of law" requirement is the same as the Fourteenth Amendment's "state action" requirement. *Id.* at 936.

events if the University did not discipline Tarkanian.[3] Tarkanian had alleged that the suspension by the University and the NCAA investigation violated his right to due process.[4]

The *Tarkanian* decision has been criticized in the intervening years.[5] The decision is based on a number of flawed premises. First, although the Court recognized that the NCAA is an agent of its entire membership when it enforces a rule against a particular university or college, it reasoned that there could not be state action if the public school members were not all located in one state and thereby avoided having to analyze the degree of entwinement between the NCAA and its many state-run universities and colleges.[6] Second, the decision is premised on the supposition that a member of the NCAA has a viable choice to ignore an NCAA sanction or withdraw from the NCAA.[7] The fact is that the members of the NCAA, particularly large state-run universities and colleges, simply have no such choice. No major university could withdraw from the NCAA without seriously jeopardizing its athletic program. Third, by reasoning that a university that disagrees with the NCAA during NCAA disciplinary proceedings could not be acting in a joint business activity with the NCAA, the Court side-stepped an analysis of the financially interdependent and mutually beneficial relationship of the state entities and the NCAA in the business of intercollegiate athletics, a reality that has escalated in the past twenty years.

The issue as to whether the NCAA is a state actor may well come before the Supreme Court again in the coming years. In January, 2007, the United States Court of Appeals for the Second Circuit court held, in *Cohane v.*

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3. *Tarkanian*, 488 U.S. at 187-199.

4. *Id.*

5. *E.g.*, Jose Luis Patino, *Constitutional Carte Blanche For Quasi-Public Institutions?—National Collegiate Athletic Association v. Tarkanian 109 S.Ct. 454 (1988)*, 24 HARV. C.R.-C.L. L. REV. 543 (1989); Jose R. Riguera, *NCAA v. Tarkanian: The State Action Doctrine Faces A Half-Court Press*, 44 U. MIAMI L. REV. 197 (1989); John P. Sahl, *College Athletes and Due Process Protection: What's Left After National Collegiate Athletic Association v. Tarkanian, ___U.S.___, 109 S. Ct. 454 (1988)?*, 21 ARIZ. ST. L. J. 621 (1989); Branden J. Tedesco, *National Collegiate Athletic Association v. Tarkanian: A Death Knell for the Symbiotic Relationship Test?*, 18 HASTINGS CONST. L. Q. 237 (1990); Betty Chang, *Coercion Theory and The State Action Doctrine As Applied in NCAA v. Tarkanian and NCAA v. Miller*, 22 J.C. & U.L. 133 (1995); W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1 (2000); James Potter, *The NCAA As State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA. L. REV. 1269 (2007); Dionne L. Koller, *Frozen in Time: The State Action Doctrine's Application to Amateur Sports*, 82 ST. JOHN'S L. REV. 183 (2008).

6. *Id.* at 197-198.

7. *Id.*

NCAA,[8] that the NCAA could be deemed a state actor if allegations in a coach's complaint were proven that a state university colluded with and effected the resignation of the coach in order to "placate the NCAA."[9] The Supreme Court denied certiorari.[10] The Second Circuit in *Cohane* distinguished *Tarkanian* on the narrow ground that in *Tarkanian* the public university and the NCAA acted more like adversaries than joint participants in the coach's suspension.[11]

While *Cohane* only focused on the relationship between the NCAA and one state university involved in the enforcement proceeding, any analysis as to whether the NCAA is a state actor should evaluate the relationship of the NCAA and its entire membership, as the Supreme Court did in 2001 with a high school athletic association in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.[12] Indeed, although the Court in *Brentwood* reaffirmed *Tarkanian*,[13] the rationale of *Brentwood* undermines the holding of *Tarkanian*.

In *Brentwood*, the Court held that a high school athletic association was a state actor after analyzing the relationship between state high school members and the association under its earlier precedent as applied by lower courts to athletic associations.[14] The Court concluded that the association was an agent or alter ego of its state school membership, that state schools met their obligation to provide for an important part of public education—interscholastic athletics—through the association, that state schools could not perform this function without the association, and that the schools and association were engaged in a mutual financial undertaking.[15]

The dichotomy created by *Tarkanian* and *Brentwood* between the NCAA and a high school athletic association is unsustainable. Not only are the purpose, structure and operations of the NCAA and high school athletic associations similar, with state schools critically involved in both associations, but in the 20 years since *Tarkanian*, state involvement in the NCAA has only deepened with the expanding role played by Division I members due to the

8. Cohane v. NCAA, No. 05-5860-CV, 2007 WL 247710 (2d Cir. Jan. 25, 2007).

9. *Id.* at *2-3.

10. NCAA v. Cohane, 128 S.Ct. 641 (2007).

11. *Cohane*, 2007 WL 247710 at *2.

12. 531 U.S. 288 (2001).

13. The *Brentwood* Court distinguished the NCAA on the ground that its members were not all located in one state and thus reaffirmed *Tarkanian*. *Id.* at 297-298.

14. *Id.* at 298-299. *See also infra* Part III.

15. *Brentwood*, 531 U.S. at 298-299.

popularity of college basketball and football. In short, since *Tarkanian*, schools faced with NCAA sanctions have not withdrawn from the NCAA as the Court had surmised. To the contrary, many have gone to great lengths to appease the NCAA.[16] In addition, the NCAA itself has highlighted the critical function that it provides to the states. In 2006, the NCAA defended its federal tax exempt status before Congress by emphasizing the necessary role that it performs in intercollegiate athletics on behalf of state colleges and universities and the states that fund them.[17] Moreover, the NCAA's oversight of athletics increasingly involves the high school athletic associations themselves[18]—most likely state actors under *Brentwood*.

While much of the literature has analyzed *Tarkanian* and the state action doctrine, including *Brentwood's* impact,[19] the literature has yet to provide an examination of both the early state action precedent culminating in *Brentwood*, together with an in-depth application of that precedent to the contemporary inner workings of the NCAA and its membership. This article emphasizes the importance of two key early Supreme Court cases, *Burton v. Wilmington Parking Authority*[20] and *Evans v. Newton*,[21] which provide a framework for a finding that the NCAA, like the high school athletic association in *Brentwood*, should be considered a state actor. This article also provides factual evidence concerning the relationship of the NCAA and its state-entity members that is highly relevant to the state action analysis and which the Court either did not, or could not consider in *Tarkanian*, because it was not available.

Part I provides an overview of the development of the Supreme Court's early state action precedent that led lower courts to conclude that both high school athletic associations and the NCAA were state actors. Part I also

16. *E.g*, *Cohane*, 2007 WL 247710 (complaint details the aggressive measures the school took immediately upon being informed of the NCAA charges against its coach); Kelly P. O'Neill, *Sioux Unhappy: Challenging the NCAA's Ban on Native American Imagery*, 42 TULSA L. REV.171, 173-174 (2006) (detailing how, in 2005-2006, approximately 19 colleges and universities, including a number of large state universities complied with the NCAA's notice to change their mascots or imagery under threat of sanctions).

17. Letter from Myles Brand, President, NCAA, to The Honorable William Thomas, Chairman, House Committee on Ways and Means, U.S. House of Representatives, Appendix, at 17-18 (Nov. 13, 2006).

18. Greg Johnson, *NCAA Partners with NBA On Youth Basketball Initiative*, THE NCAA NEWS, Apr. 7, 2008, http://www.ncaa.org/wps/ncaa?ContentID=5740.

19. *See generally* Patino, *supra* note 5. *See also* Riguera, *supra* note 5; Sahl, *supra* note 5; Tedesco, *supra* note 5; Chang, *supra* note 5; Carter, *supra* note 5; Potter, *supra* note 5; Koller *supra* note 5.

20. 365 U.S. 715 (1961).

21. 382 U.S. 296 (1966).

describes the more restrictive approach to the state action doctrine taken by the Supreme Court, particularly the three cases commonly referred to as the *Blum*-trilogy,[22] and how lower courts applied that precedent to conclude the NCAA was not a state actor. Part II sets forth the Supreme Court's *Tarkanian* analysis, under which the Court concluded the NCAA was not a state actor. Part III describes the Supreme Court's decision in *Brentwood.* Part IV provides a contemporary look at the NCAA and analyzes how the states are intensely involved in, and dependent upon, the NCAA through state universities and colleges. Part IV contends the NCAA should be deemed a state actor.

PART I

A. Early Supreme Court State Action Cases

In a series of civil rights cases during the 1960s and early 1970s, the Supreme Court found private entities to be state actors where their relationship to the government was a "joint participant" in challenged action, "symbiotic" or "entwined." In *Burton*, the Supreme Court concluded that a restaurant's refusal to serve a customer because of his race was state action due to the restaurant's "peculiar" relationship with a State parking authority, which was the restaurant's landlord.[23] The Court stated that there is no precise formula for determining when the state is responsible for the invasion of individual rights, but "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[24]

The Court found that the restaurant constituted "a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit."[25] The state, via the parking authority, fulfilled its function to provide a parking structure to the public by leasing part of the space in the building to private businesses.[26] The parking authority and the restaurant provided each other with many mutual benefits,

22. Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) & Rendell-Baker v. Kohn, 457 U.S. 830 (1982), all decided the same day.

23. *Burton*, 365 U.S. at 722-725.

24. *Id.* at 722.

25. *Id.* at 723-724.

26. *Id.* at 717-718, 723.

most notably, increased business.[27] Additionally, due to the restaurant's assertion that it would hurt business to serve African-Americans, the Court reasoned that "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency."[28]

The Court observed the irony that within one part of the building—the parking lot—the parking authority could not discriminate in making parking available, yet in another part of the same building—the restaurant—discrimination was occurring.[29] The Court reasoned "no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."[30] The state could have affirmatively required the restaurant to abide by the Fourteenth Amendment but by not acting, the state had placed "its power, property and prestige behind the admitted discrimination."[31] However, instead of requiring the parking authority to withdraw from its lease with the restaurant, the Court found that because the restaurant and the public parking authority were so interdependent, they were "joint participants" in the discriminatory activity and, thus, the restaurant could be deemed a state actor enjoined from discrimination.[32] The Court later describes this relationship as "symbiotic."[33]

Following *Burton*, the Supreme Court in *Evans* augmented the joint participant/symbiotic relationship test, concluding that ostensibly private conduct may become "so entwined with government policies or action or so impregnated with a governmental character as to become subject to constitutional limitations placed on state action."[34] Thus, the Court held that a city's transfer of ownership of a park to private trustees did not transform the park into a "private" endeavor so as to allow the park to be segregated. In *Evans*, the original owner of the park conveyed the land to the City of Macon,

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27. *Id.* at 724.

28. *Id.*

29. *Id.* at 724-725.

30. *Id.* at 725.

31. *Id.*

32. *Id.*

33. Compare this to *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-178 (1972) (holding that private fraternal club was not a state actor because there was "nothing approaching the symbiotic relationship between lessor and lessee" present in *Burton*; nor did the regulation by liquor licensure, the only state involvement, "make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.").

34. *Evans*, 382 U.S. at 299.

Georgia under a private will to be operated as a segregated park.[35] For many years the City did segregate the park, but then refused to do so stating it had an obligation to adhere to constitutional standards in managing a public facility.[36] In an attempt to re-segregate the park, plaintiffs, including heirs, sued to replace the City as trustee and transfer title to private trustees. The state court permitted the transfer over objections that the segregation of the park under the new ownership was unconstitutional.[37]

The United States Supreme Court reversed the state court. The Court began its analysis by citing *Burton* in that what is "state" versus "private" action is not always easy to determine. The Court employed "agency" terminology in which it set forth the principal that when the State endows private entities with "powers or functions governmental in nature, they become agencies or instrumentalities of the State" subject to constitutional limitations.[38] In finding state action, the Court reasoned that parks, in general, traditionally serve the public.[39] While the Court cautioned against finding state action merely because a private entity provides a service that governments also typically provide, such as education,[40] the Court concluded that state action was present in *Evans* because for years the park was an "integral part of the" City's activities (including having tax exempt status) thereby endowing the park with public character.[41] Moreover, the City remained "entwined in the management and control of the park."[42]

Key factors in *Burton* and *Evans* become important in finding an athletic association to be a state actor. Generally, these are: the state entity resorts to a private entity to fulfill a necessary part of its mission or function; the state entity is integrally involved with the private entity in a joint mutually beneficial undertaking, including receipt of benefits from unconstitutional conduct; and the intensely-involved state entity should not be able abdicate its constitutional mandates by giving a form of control to the private entity.

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35. *Id.* at 297.

36. *Id.*

37. *Id.* at 297-298.

38. *Id.* at 299.

39. *Id.* at 302.

40. In this regard the Court noted that education was not solely a government activity in that, for example, religious groups may maintain their own educational systems. *Id.* at 300.

41. *Id.* at 301.

42. *Id.*

B. Under *Burton* and *Evans*, Courts Hold High School Athletic Associations To Be State Actors.

A seminal case applying *Burton* and *Evans* to a high school athletic association was decided in 1968 by the Court of Appeals for the Fifth Circuit, *Louisiana High School Athletic Ass'n v. St. Augustine High School.*[43] As will be seen, *St. Augustine* is embraced by the Supreme Court in *Brentwood.*

In *St. Augustine,* the Fifth Circuit affirmed the district court's holding that the Louisiana High School Athletic Association (LHSAA) engaged in state action when it refused to admit African-American students at a public high school, and a private African-American high school, into its membership.[44] The Fifth Circuit found that "[t]he evidence is more than adequate to support the conclusion that the LHSAA amounted to an agency and instrumentality of the State of Louisiana."[45] Eighty-five percent (85%) of LHSAA's member schools were public and their principals (nominal members) were state employees, the LHSAA was funded in large part by gate receipts from games between members, the majority of those games were held at state facilities, and LHSAA's staff was covered in part by the state's retirement system.[46] The LHSAA had "wide control over" athletic programs of state schools including sponsoring post-season tournaments and games, public school curriculum and the "public pocketbook."[47] Further, the LHSAA prepared and enforced rules and had the power to "investigate, discipline and punish members schools by fine or otherwise" if the principal, coach or students acted improperly.[48]

The Fifth Circuit reasoned that the factual situation was not one in which a private entity merely took over a state function—coordinating interscholastic athletics in education—rather, the state schools were "deeply involved in fielding and promoting athletic teams with expenditures of tremendous time, energy and resources" including financing, training teams, and paying the coaches.[49] The court noted that for the state schools to be so "actively and

43. 396 F.2d 224 (5th Cir. 1968).

44. *Id.* at 227-229. Plaintiffs claimed defendants violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. *Id.*

45. *Id.* at 227.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 227-228.

intensely involved" in interscholastic athletics and then "refer coordination" to a separate entity, obscured the "real and pervasive involvement of the state in the total program."[50] Citing *Burton* and *Evans*, the court also concluded that the fact that private schools were part of the LHSAA did not change the result of the association being deemed a state actor; rather, private schools that chose to become members of the athletic association subjected themselves to the Fourteenth Amendment.[51]

Six years later, in *Wright v. Arkansas Activities Ass'n*,[52] the Court of Appeals for the Eighth Circuit held that a high school athletic association, the Arkansas Activities Association (AAA), was a state actor and that a high school football coach was entitled to procedural due process in disciplinary proceedings. After finding that the coach had conducted off-season football practices in violation of AAA regulations, the AAA gave the school the "choice" to either dismiss the coach or be excluded from football competition with other schools.[53] The high school dismissed the coach.[54]

The coach brought a Section 1983 lawsuit, arguing that the disciplinary proceedings violated his right to procedural due process. In finding state action, the Eighth Circuit noted that it was well-established that athletic associations, like the AAA, were state actors.[55] The fact that the AAA had not acted directly against the coach did not shield the AAA from suit. Rather, the Court recognized the reality that the school would not risk exclusion from competition and, therefore, the AAA could use that threat to coerce the school into doing its will: "[the AAA's] stranglehold over the school district caused the latter to terminate [the coach's] contract."[56]

St. Augustine applied *Burton* and *Evans* by holding that public schools could not avoid constitutional restrictions by giving a private association ultimate authority over interscholastic athletics in education, where the public schools continued to be intensely involved in the association and in interscholastic athletics. *Wright* highlights the flip side of the coin — the power of the private association over the schools — by holding that the association effectively enforces its rules against those upon whom it cannot formally take direct action by use of the powerful threat of excluding its

50. *Id.* at 228.
51. *Id.* at 228-229.
52. 501 F.2d 25 (8th Cir. 1974).
53. *Id.* at 27.
54. *Id.*
55. *Id.* at 27 n.2.
56. *Id.* at 28.

member school from competition. Both of these rationales figure prominently for courts subsequently holding the NCAA to be a state actor.

C. Courts Hold the NCAA To Be a State Actor.

In the wake of *Burton*, *Evans* and *St. Augustine*, almost all federal district and appellate courts that addressed the issue, except one, held that the NCAA was a state actor. These courts reasoned that the NCAA was factually indistinguishable from high school athletic associations.

The seminal case in this regard is *Parish v. NCAA*,[57] decided by the District Court for the Western District of Louisiana in 1973. There, basketball players sued the NCAA for injunctive relief to prevent the NCAA from enforcing its decision to declare them ineligible to compete at Centenary College, a private school.[58] The NCAA moved for summary judgment arguing there was no jurisdiction under Section 1983 because there was no state action.[59]

The court disagreed, citing the entwinement language in *Evans*[60] and analogizing to *St. Augustine*.[61] The court reasoned that the high school athletic association's activities (membership breakdown between public and private), control, and regulation of its members were "remarkably similar to" the NCAA's activities.[62] Also, in reliance on *St. Augustine*, the court held that the fact that a private school was the subject of the discipline did not warrant a different result because of the "large number of public colleges and universities which are members [of the NCAA]."[63] Moreover, the fact that the NCAA was a nationwide, as opposed to statewide, association did not dictate a different outcome because the NCAA controlled public schools that are state agencies to the same "extent that the high school athletic associations control their respective members at least insofar as regulations, sanctions, and discipline was concerned."[64]

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57. 361 F. Supp. 1214 (W.D. La. 1973).

58. *Id.* at 1215.

59. *Id.*

60. *Id.* at 1219 (quoting *Evans*, 382 U.S. at 299).

61. *Id.* at 1218-1219 (quoting *St. Augustine*, 396 F.2d at 227-228).

62. *Id.* at 1217-1219.

63. *Id.* at 1219.

64. *Id.* Later that same year in *Buckton v. NCAA*, the District Court for the District of Massachusetts came to the same conclusion in an action by hockey players at a private university. 366 F. Supp. 1152 (D. Mass. 1973).

McDonald v. NCAA,[65] the lone case not to find the NCAA to be a state actor, involved an action by basketball players at a public university claiming Due Process violations as result of the university's enforcement of eligibility rules. The District Court for the Central District of California reasoned that *Burton* and *Evans* required inextricable involvement or control by the state in private action, but found such involvement lacking.[66] The court distinguished *St. Augustine* as involving racial discrimination that could be linked to the State of Louisiana (which had responsibility for maintaining an educational system within its borders) by virtue of the fact that all of the association's members were located in the state and most of them (85%) were public.[67] On the other hand, the facts of the *MacDonald* case did not involve racial discrimination and the NCAA member schools were located in many states. Thus, the court reasoned, the NCAA was not being used by a state or group of states to racially discriminate in college athletics.[68]

The court also reasoned that the university's enforcement of the discipline had not been compelled by its membership in the NCAA. The court observed that state schools can choose whether to become members and receive the benefits of membership including post-season tournament participation, but reasoned that concurrence in the NCAA's disciplinary procedures and decisions does not make the acts of the NCAA "state action."[69] Instead, the state university had to "withdraw its concurrence and proceed only in a constitutionally prescribed manner."[70] The "voluntariness" rationale is significant in *Tarkanian,* as we shall see.

Only one month after the *McDonald* case, the United States Court of Appeals for the Ninth Circuit in *Associated Students, Inc. of California State Univ.-Sacramento v. NCAA*,[71] effectively overruled *McDonald* by affirming a finding that the NCAA engaged in state action when it enforced an eligibility rule. For support, the Ninth Circuit relied on the *Parish* decision.[72] The court reasoned that it was the NCAA that had made the determination that the student-athletes had participated in athletics while ineligible, and although the NCAA could not impose a sanction directly on the student, the fact that the

65. 370 F. Supp. 625 (C.D. Cal. 1974).

66. *Id.* at 630.

67. *Id.* at 630-631.

68. *Id.* at 631.

69. *Id.*

70. *Id.*

71. 493 F.2d 1251 (9th Cir. 1974).

72. *Id.* at 1254.

NCAA "strongly urged" the school to declare them ineligible or face a ban on post-season competition and television appearances caused the school to choose to declare them ineligible rather than "expose the entire program to stiff sanctions by the NCAA."[73]

Subsequently, in 1975, the United States Court of Appeals for the Fifth Circuit affirmed the District Court for the Western District of Louisiana in *Parish*.[74] In affirming the finding of state action, the Fifth Circuit, among other things, addressed the "slippery slope" argument by reasoning that the educational aspect was a factor distinguishing the NCAA from other nationwide organizations concerned with athletics. The court emphasized government's "traditional interest" in all aspects of the educational system in the country,[75] that the NCAA was formed not by athletic departments but by persons on the educational side of the colleges and universities,[76] and that the NCAA plays a "large role. . .in regulating the educational effects of the mushrooming participation in, and expenditures on, intercollegiate sports."[77] Further, the court stated: "Organized athletics plays a large role in higher education and meaningful regulation of this aspect of education is now beyond the effective reach of any one state."[78] Importantly, the court acknowledged that while no one state or governmental body controls or directs the NCAA "it would be a strange doctrine indeed if the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a 'private' organization to which they have relinquished some portion of their governmental power."[79]

In another eligibility case in 1975, *Howard University v. NCAA*,[80] the United States Court of Appeals for the District of Columbia went the furthest in making explicit the applicability of *Burton* to the state action analysis. The D.C. Circuit held that a private university[81] and one of its student-athletes could sue the NCAA for injunctive and declaratory relief for alleged due process violations. The court cited *Burton* for the proposition that "pervasive"

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73. *Id.*

74. 361 F. Supp. 1214 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975).

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

76. *Id.* at 1032 n.11.

77. *Id.*

78. *Id.* at 1032.

79. *Id.* at 1033.

80. 510 F.2d 213 (D.C. Cir. 1975).

81. The Court did not decide whether the action taken by Howard was state action, just whether the action of NCAA was state action. *Id.* at 222.

involvement—indeed concerted action—by state and federal institutional members of the NCAA in promulgating and enforcing the NCAA's rules affected Howard's "athletic affairs and related educational policies" to such a degree as to constitute government action.[82] The court also cited the entwinement language from *Evans*,[83] and the rule from *Burton* that "the government may have 'so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity[.]'"[84]

The D.C. Circuit rejected the distinguishing factors that *McDonald* found persuasive. The court pointed out that while the high school athletic association cases began in the racial discrimination context, they had been extended to other contexts, *e.g.*, state action had also been found in *Wright* (which involved nonracial athletic eligibility and discipline rules).[85] Also, the high school athletic association cases had recognized the associations were voluntary private organizations, yet still found state action because the association was "sufficiently intertwined with state instrumentalities, whose involvement was significant, albeit not exclusive, as to be subject to constitutional restraints."[86] The court reasoned that even though "the NCAA, unlike the state athletic associations, is not the delegated body which is the substituted overseer of one particular state's athletic program,"[87] that fact did "not resolve the question of whether the degree of NCAA regulation of and involvement in those universities' programs and the fact that half the NCAA's membership are public institutions sufficiently intertwines their interests and affairs so that the NCAA is subject to the fifth and fourteenth amendments."[88]

The court concluded that the "degree of public participation and entanglement between the entities is substantial and pervasive."[89] About 50% of the NCAA's members were publicly supported; public schools, generally being larger than private, provide the "vast majority of the NCAA's capital;" and the public schools are the "dominant force in determining NCAA policy and dictating NCAA actions."[90] The court noted that although no particular

82. *Id.* at 217 (citing *Burton*, 365 U.S. 715).
83. *Id.* (citing *Evans*, 382 U.S. at 299).
84. *Id.* (quoting *Burton*, 365 U.S. at 725).
85. *Id.* at 218.
86. *Id.*
87. *Id.* at 219.
88. *Id.*
89. *Id.* at 220.
90. *Id.* at 219.

state's instrumentalities control NCAA actions, NCAA action is based on the "votes of public instrumentalities" and practically "no NCAA action could be taken . . . without the substantial support of the public instrumentalities."[91]

Finally, citing, *inter alia*, *Burton* it held that the NCAA and its public schools are "joined in mutually beneficial" and "symbiotic relationship."[92] The court observed that the NCAA provides "an immeasurably valuable service" for its members by conducting championship events and regulating the various aspects of intercollegiate competition, and by negotiating television contracts that bring in significant proceeds.[93] Those proceeds, in turn, "flow directly" to the participating schools, which are primarily public.[94] The court agreed with the Fifth Circuit that the public schools could not "avoid the restrictions placed upon them by the Constitution by banding together to form or to support a 'private' organization to which they relinquished some portion of their governmental power."[95] Subsequent to *Howard*, other federal courts of appeals likewise held the NCAA to be a state actor.[96]

D. Post *Blum*-Trilogy, Courts Hold the NCAA Not To Be A State Actor.

1. The Supreme Court Restricts the State Action Doctrine in Jackson and the Blum-*Trilogy.*

In 1982, the Supreme Court issued a set of decisions[97] involving state action, referred to as the *Blum*-trilogy, which is commonly recognized as restricting the state action doctrine.[98] Undergirding the *Blum*-trilogy is the precursor 1974 case, *Jackson v. Metro. Edison Co.*, in which the Supreme Court held that a private utility company that enjoyed an effective monopoly did not engage in state action when it terminated a customer's electricity without a hearing and opportunity to pay.[99] The Court reasoned that the

91. *Id.* at 219 n.11.

92. *Id.* at 220.

93. *Id.* ($13 million annually).

94. *Id.*

95. *Id.*

96. *See* Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492 (1st Cir. 1977); Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977).

97. *Blum*, 457 U.S. 991; *Lugar*, 457 U.S. 922; *Rendell-Baker*, 457 U.S. 830.

98. *E.g.*, Patino, *supra* note 5, at 543; Chang, *supra* note 5, at 152-155; Alan R. Madry, *Statewide School Athletic Associations and Constitutional Liability;* Brentwood Academy v. Tennessee Secondary School Athletic Association, 12 MARQ. SPORTS L. REV. 365, 391-392 (2001).

99. 419 U.S. 345 (1974).

"public function" rationale was not to be extended to the "broad principle that all businesses 'affected with the public interest' are state actors."[100] The Court also looked to whether the state had "specifically authorized and approved" the challenged termination practice and held the utility's mere filing with the Commission was insufficient.[101] Finally, the Court found absent the "symbiotic relationship" in *Burton*.[102] A dissenter in *Jackson* noted that in reaching its conclusion, the Court had taken a litmus-test approach rather than the totality-of-circumstances approach required by *Burton*.[103]

The Court honed these "public function" and "coercion" tests in *Blum v. Yaretsky*,[104] and *Rendell-Baker v. Kohn*.[105] In *Blum*, the Supreme Court held that a private nursing home's decision to discharge or transfer Medicaid patients to a facility providing a lower level of care did not constitute state action even though the nursing home was reimbursed for more than 90% of patients' medical expenses and was subject to extensive regulation.[106] As to the public function test, the Court held that the provision of nursing home services was not "traditionally the exclusive prerogative" of the state.[107] As to the coercion test, the Court concluded that extensive regulation was not enough; only a close nexus between the state and challenged action would mean the state is responsible for the challenged conduct.[108] The Court reasoned the regulations did not "dictate the decision" to transfer.[109] Finally, the Court held that heavy subsidization and payment of medical expenses together with regulation did not make the nursing home a "joint participant" under *Burton* since "privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*."[110]

In *Rendell-Baker,* the Supreme Court held a private special needs school's decision to discharge teachers and a vocational counselor did not amount to

100. *Id.* at 353.
101. *Id.* at 355.
102. *Id.* at 357-358.
103. *Id.* at 359-361 (Douglas, J., dissenting).
104. 457 U.S. 991 (1982).
105. 457 U.S. 830 (1982).
106. *Blum*, 457 U.S. at 1012.
107. *Id.* at 1005 (citing *Jackson*, 419 U.S. at 353).
108. *Id.* at 1004 (citing, *Jackson*, 419 U.S. at 357).
109. *Id.* at 1011.
110. *Id.* at 1011 (citing *Jackson*, 419 U.S. at 357-358).

state action.[111] As to the public function test, although provision of education to students with special needs served a public function, education was not the "exclusive province" of the state.[112] As to the coercion test, the fact that over 90% of the school's income came from government funding did not make the discharge decision an act of the state, nor did any regulation compel or influence the personnel decision; mere "indirect" involvement by way of extensive general regulation was insufficient.[113] Finally, the Court held that there was no "symbiotic relationship" as in *Burton*, because the fiscal relationship between the state and the school was no more than a contractor providing services for the government.[114]

The third leg of the *Blum*-trilogy involved a somewhat different set of facts - the case did not involve extensive regulation by the state as in *Blum* and *Rendell-Baker*, but rather a private entity's resort to state procedure and use of state officials. In *Lugar v. Edmondson Oil Co.*,[115] the Supreme Court held that a private business's use of state prejudgment procedures to seize property of a customer that owed it money was state action.[116] In determining when private action leading to the deprivation of property "must be fairly attributable to the State" the Court noted a two-part test: first, it must be caused by the exercise of a right or privilege created by the state, by a rule of conduct imposed by the state, or by a state official;[117] second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor."[118] The Court concluded that state action existed in *Lugar* because first, the procedure for attachment of property on the *ex parte* application of one party to the dispute alleged to be unconstitutional was created by the state, and second, a private business by resorting to that procedure acted jointly with state officials to effect the seizure of the property and thus could be characterized as a "state actor."[119]

What the Court relied on (and did not rely on) in the *Blum*-trilogy became the template for lower courts to reverse their prior holdings that the NCAA was a state actor. For example, the *Jackson* and *Blum*-trilogy cases

111. *Rendell-Baker*, 457 U.S. at 841-843.
112. *Id.* at 842.
113. *Id.* at 841.
114. *Id.* at 842-843.
115. 457 U.S. 922 (1982).
116. *Id.* at 942.
117. *Id.* at 937.
118. *Id.*
119. *Id.* at 939-940.

characterized certain factors, such as extent of funding or regulation, as "indirect," and elevated the importance of finding a state-created rule as effectuating the challenged action. The role of the "public function" factor was relegated to cases in which the function had been traditionally and exclusively performed by a state. The *Blum*-trilogy recognized the viability of *Burton's* symbiotic relationship test but found it inapplicable where the private entity merely provided services under contract that the state would not otherwise provide. The *Evans* entwinement test was not applied or cited in any of the *Blum*-trilogy cases.

2. *Athletic Associations Cases Post* Blum-*Trilogy*

Beginning in 1984, the lower federal courts began to hold that the NCAA was not a state actor. The Court of Appeals for the Fourth Circuit in *Arlosoroff v. NCAA*,[120] held the NCAA was not a state actor reasoning that in the *Blum*-trilogy the Supreme Court had rejected the "indirect involvement of state governments" theory relied upon by the earlier NCAA cases such as *Parish* and *Howard*.[121] In *Arlosoroff*, a college tennis player at a private school sought to enjoin application of an NCAA rule under which plaintiff was declared ineligible for competition, claiming a violation of Equal Protection and Due Process.[122]

In finding the NCAA was not a state actor under the *Blum*-trilogy the Fourth Circuit found the "public function" and "coercion/compulsion" factors determinative. With respect to the public function factor, the court reasoned that while the NCAA performed a public service as "overseer of the nation's intercollegiate athletics," that function was not "traditionally exclusively reserved to the state," and thus it lent "*no* support to the finding of state action."[123] With respect to coercion, the court held that the facts that the NCAA was comprised of half public institutions and more than half of its revenues come from those institutions did not establish that the public institutions compelled, controlled or directed the adoption of the rule: "[t]here is no suggestion in this case 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."[124] Thus, it held the NCAA's "basic

120. 746 F.2d 1019 (4th Cir. 1984).

121. *Id.* at 1021.

122. *Id.* at 1020.

123. *Id.*

124. *Id.* at 1021-1022.

character" was a "voluntary association of public and private institutions" and adoption of the bylaw private action.[125]

Following *Arlosoroff*, other federal courts of appeals applied a similar analysis to conclude that the NCAA was not a state actor.[126] One of these courts was the Fifth Circuit, which had earlier found the NCAA to be a state actor in *Parish*.[127] In *McCormack v. NCAA*,[128] in overruling its *Parish* decision, the court stated that while it still might agree with the views of the *Parish* case, it had to abide by the Supreme Court's later decisions, which "have more narrowly defined the concept of state action and, since these decisions, virtually every court to consider the issue has concluded that the NCAA"[129] is not a state actor.

McCormack and the other cases holding the NCAA not to be a state actor post *Blum*-trilogy did not distinguish high school athletic associations or even discuss them. However, courts analyzing high school athletic associations post *Blum*-trilogy continued to conclude that high school athletic associations were state actors without much, if any, discussion of whether the *Blum*-trilogy should require a different result.[130] Thus, a divergence was forming between the high school athletic association cases and the NCAA cases. By the time the *Tarkanian* case made its way to the Supreme Court in 1988 (having begun a decade before in 1977) there were two lines of cases—the high school athletic association cases finding state action based largely on the *Burton-Evans* rationale, and the post *Blum*-trilogy NCAA cases finding no state action based on an implicit rejection of the *Burton-Evans* rationale. Yet, none of these cases analyzed why *Burton-Evans* should still be viable for the high-school athletic association cases but not the NCAA cases.

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125. *Id.* at 1022.

126. *See, e.g.*, Spath v. NCAA, 728 F.2d 25 (1st Cir. 1984) (dictum); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986); Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987).

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

128. 845 F.2d 1338 (5th Cir. 1988).

129. *Id.* at 1345.

130. *See, e.g.*, Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1128 (9th Cir. 1982); Griffin High Sch. v. Illinois High Sch. Ass'n, 822 F.2d 671, 674 (7th Cir. 1987). *See also* Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 736 (R.I. 1992).

PART II –*TARKANIAN*

In 1973, Jerry Tarkanian[131] became the head men's basketball coach at UNLV, a branch of the University of Nevada, a public university.[132] By 1977, he had taken the team from a 14-14 record to a 29-3 record, and UNLV placed third in NCAA championship tournament.[133] That same year, UNLV elevated Tarkanian to tenured status, but also informed him that he would be suspended, because the NCAA found he committed recruiting violations.[134]

In 1988, when the Supreme Court decided *Tarkanian*, the NCAA was the governing body over the athletic programs of its approximately 960 member universities and colleges, which included nearly every public and private university and college in the United States with a major athletic program.[135] A fundamental policy of the NCAA was to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."[136] As such, the NCAA adopted rules covering a wide range of activities including recruiting, admissions, academic standards for eligibility and financial aid for student-athletes.[137] As a condition to membership in the NCAA, the schools agreed to abide by and enforce the NCAA rules.[138] The NCAA also did not have subpoena power and thus the schools agreed to fully disclose relevant information and cooperate during an NCAA investigation.[139]

The NCAA's findings against Tarkanian were the result of an investigation of UNLV by the NCAA's enforcement arm (the Committee on Infractions)[140]

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131. One of college basketball's "winningest" coaches. *Tarkanian*, 488 U.S. at 180-181; Official 2005 NCAA Men's Basketball Records, *available at* http://www.ncaa.org/library/records/basketball/m_basketball_records_book/2005/2005_m_basketball_records.pdf (last visited July 8, 2008) (31 seasons, 729-201 record; .784 winning percentage).

132. *Tarkanian*, 488 U.S. at 180.

133. *Id.*; *See also*, Official 2005 NCAA Men's Basketball Records, *supra* note 133, at 143.

134. *Tarkanian*, 488 U.S. at 180-182.

135. *Id.* at 183.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 184-186. *See also*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2007-2008 NCAA DIVISION I MANUAL, Bylaw 32.1.4, Cooperative Principle, at 407.

140. The Committee on Infractions, as described the Court in the 1988 *Tarkanian* opinion, was the entity that administered the NCAA's enforcement program: it investigated alleged violations of NCAA rules; made factual determinations; and could impose or recommend sanctions against a school, including suspension and ineligibility for post-season competition and television appearances. *Tarkanian*, 488 U.S. at 183-184 n.6. The Committee could also investigate an individual coach,

that had begun in late 1972, even before Tarkanian was hired.[141] The NCAA also requested that UNLV investigate and respond to each allegation.[142] UNLV, together with the Attorney General of Nevada and private counsel, thoroughly investigated the allegations.[143] However, they were unable to interview the sources of the allegations, whose identities were not revealed until the hearing, and even then they were not present to be cross-examined.[144] UNLV responded with exhibits and sworn affidavits, denying all allegations and concluding Tarkanian was innocent of wrongdoing.[145] The Committee held a hearing and concluded that many of the allegations could not be supported, but did find thirty-eight violations, only ten of which pertained to Tarkanian. The Committee proposed imposing probation against UNLV's men's basketball team, which would have barred them from participating in postseason games or appearing on television. The Committee also requested that UNLV "show cause" why additional sanctions should not be imposed if the administration failed to remove Tarkanian from their athletic program during the probationary period.[146]

After receiving the Committee's report and recommendations, UNLV's vice-president held a hearing to determine whether to apply the Committee's sanctions.[147] UNLV's vice-president advised UNLV's president that UNLV could:

> (1) refuse to suspend Tarkanian and take the risk of still heavier sanctions, "e.g., possible extra years of probation"; (2) recognize UNLV's delegation of the power to act as ultimate arbiter of these matters, reassign Tarkanian – though tenured and without adequate notice – even while believing the NCAA was wrong; (3) pull out of the NCAA so as not to execute an unjust judgment.[148]

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employee or representative of the school's athletic interests and order a school to "show cause" why the school should not face sanctions if it failed to take prescribed action against such individual. *Id.* at 184 n.7.

141. *Id.* at 185.

142. *Id.*

143. *Id.*

144. *University of Nevada v. Tarkanian*, 594 P.2d 1159, 1160-1161 (Nev. 1979).

145. *Tarkanian*, 488 U.S. at 185.

146. *Id.* at 185-186.

147. *Id.* Tarkanian was present at this hearing as was UNLV's counsel; however, UNLV's counsel, who had argued in support of Tarkanian's position at the NCAA's Committee on Infraction's hearing, now reversed their position and stated that UNLV was bound by the findings in the Committee's report. *University of Nevada*, 594 P.2d at 1161.

148. *Tarkanian*, 488 U.S. at 187.

UNLV's president chose the second option and subsequently informed Tarkanian that he was suspended, noting UNLV was "simply left without alternatives."[149] Thus, as indicated by the vice-president's explanation to the president of the second option and the president's acceptance of that option, UNLV was willing to suspend Tarkanian even though it apparently believed the NCAA was incorrect and that compliance with the NCAA's requested action against Tarkanian would violate Tarkanian's due process rights.[150]

A. Nevada State Court Rulings

Tarkanian sued UNLV in state court under Section 1983 claiming a denial of Due Process as a result of the NCAA's finding that he had committed recruiting violations, and UNLV's decision to acquiesce in the NCAA's recommendation to suspend Tarkanian.[151] The trial court found that UNLV had denied Tarkanian his due process rights and enjoined UNLV from enforcing his suspension.[152]

UNLV appealed. The NCAA, which was not a party, filed an *amicus curie* brief contending that the injunction effectively invalidated its enforcement proceedings and that if the case were to go forward, the NCAA should be joined as a necessary party to litigate the scope of relief.[153] The Nevada Supreme Court agreed and ordered the case remanded for joinder[154] of the NCAA.[155] The court reasoned that if UNLV did not have to comply with the NCAA's sanction because of the trial court's injunction, then the NCAA's ability to uniformly enforce its rules would be impaired; alternatively, if UNLV followed through with its contractual right to bind UNLV to additional sanctions for refusing to suspend Tarkanian, then UNLV would be subject to

149. *University of Nevada*, 594 P.2d at 1162.

150. *Id.* at 1161-1162 (UNLV concluded that although "the NCAA's standards of proof and due process were inferior to what we might reasonably expect" it would suspend Tarkanian in accordance with the NCAA's proposed sanctions); *Tarkanian*, 488 U.S. at 185-187 (UNLV's response to the NCAA charges "denied all of the allegations and specifically concluded that Tarkanian was completely innocent of wrongdoing," UNLV's vice-president described the NCAA judgments as "unjust" and the suspension of Tarkanian as "without adequate notice," but recommended suspension nonetheless).

151. *Tarkanian*, 488 U.S. at 187.

152. *Id.* at 187-188.

153. *Id.* at 188.

154. Nevada's Rules of Civil Procedure 19(a) mandated a party be made a party to the litigation if that party's interest would be impaired by the outcome of the litigation or parties to the litigation would be subject to inconsistent obligations. *University of Nevada*, 594 P.2d at 1163.

155. *Tarkanian*, 488 U.S. at 187.

conflicting obligations.[156] The court also reasoned that Tarkanian's claim for due process could not be fully addressed without joining the NCAA, since the NCAA had made the "meaningful factual determinations as well as the penalty to be imposed" and thus, in effect, had been the one to effectuate his suspension.[157] Moreover, the Court observed that although the NCAA is a voluntary association, it is "so dominant in its field that membership in a practical sense is not in fact voluntary, but rather an economic necessity."[158] Thus, to keep the NCAA out of the litigation would insulate it from judicial scrutiny for actions it had taken against an individual employee "through a member university."[159] On remand, Tarkanian sued both UNLV and the NCAA.[160] The trial court again found in his favor and barred UNLV from enforcing the suspension.[161]

On appeal, the Nevada Supreme Court affirmed the finding that the NCAA was a state actor and had violated Tarkanian's due process rights.[162] The court acknowledged that the *Blum*-trilogy had resulted in a rejection by federal courts of cases finding NCAA regulatory activity to be state action, nonetheless, it reasoned that under *Blum* and *Rendell-Baker* a private entity may be a state actor where that entity exercises powers "traditionally the exclusive prerogative of the state,"[163] and while neither the regulation of intercollegiate athletics nor education is traditionally the exclusive prerogative of the state, the discipline of a public employee is and UNLV had delegated that function to the NCAA.[164] Further, the Court held that *Tarkanian* satisfied the *Lugar* two-part test. First, it found the NCAA could not impose disciplinary sanctions on Tarkanian without relying on a state university-created-rule.[165] Second, it concluded that both UNLV and the NCAA were fairly said to be state actors because UNLV acted jointly with the NCAA by

156. *University of Nevada*, 594 P.2d at 1163-64 (citing Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 360 (8th Cir. 1977) (in which the state court enjoined the university from declaring the students ineligible without affording them a university hearing complying with due process, and the NCAA subsequently placed the university on indefinite suspension, including a ban on post-season play or television appearances for all sports until the university declared the students ineligible)).

157. *Id.*

158. *Id.* at 1164-1165 (quoting Bd. of Regents v. NCAA, 561 P.2d 499, 504 (Okla. 1977)).

159. *Id.*

160. *Tarkanian*, 741 P.2d. at 1347.

161. *Id.*

162. *Id.*.

163. *Id.* at 1348 (citing *Blum*, 457 U.S. at 1005 & *Rendell-Baker*, 457 U.S. at 842).

164. *Id.* at 1348-1349.

165. *Id.* at 1349.

delegating to the NCAA authority over athletic personnel decisions, and imposing NCAA sanctions against Tarkanian.[166]

B. Supreme Court Holds NCAA Is Not a State Actor.

The United States Supreme Court reversed the Nevada Supreme Court and held the NCAA was not a state actor.[167] In reaching this conclusion, the Court held that Tarkanian failed to show that the NCAA was a state actor under its state action precedent. The *Lugar* case figured more prominently in the Court's analysis. In particular, it found the Nevada Supreme Court's attempt to apply *Lugar* was faulty.[168] In this regard, the Court stated the appropriate inquiry was "whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."[169]

The Court proceeded to evaluate whether NCAA policies were developed and enforced under color of Nevada law. Although not expressly so stated this appears to be an application of the coercion test. The Court reasoned that while Nevada, through UNLV, had some part in creating NCAA rules, it was not the "source of the legislation adopted by the NCAA;" rather the source of the legislation was "the collective membership, speaking through an organization that is independent of any particular State."[170] In a footnote the Court cited to *Burton* for the proposition that the "degree to which the activities of the state entity and the arguably private entity are intertwined also is pertinent" to the question of whether the rule in question is a rule of the state, but did not analyze the intertwinement of all of the state school members in the NCAA.[171] The Court focused on UNLV and reasoned that neither its minor role in the formulation of NCAA rules nor its decision to adopt those rules transformed them into state rules and the NCAA into a state actor because the UNLV could "withdraw from the NCAA and establish its own standards" or stay in the NCAA and work through the NCAA's "legislative

166. *Id.* With respect to violation of due process, the Court held that the NCAA Committee's findings based on investigators' recollection of interviews and notes (often dictated after the fact) without being reviewed for accuracy by the interviewees were subject to "unconscious subjective coloring" and, at a minimum, due process required that the NCAA produce written affidavits of those interviewed. *Id.* at 1351.

167. *Tarkanian*, 488 U.S. at 199.

168. *Id.* at 192.

169. *Id.* at 193.

170. *Id.*

171. *Id.* at 194 n.14 (citing *Burton*, 365 U.S. at 721-26).

process to amend rules or standards it deemed harsh, unfair, or unwieldy."[172] Noting that its decision would impact the high school line of cases, the Court opined in dictum that it might rule differently if all of the many public school members were in the same state.[173]

The Court then analyzed whether the NCAA was a state actor because the state, via UNLV, had delegated its authority over intercollegiate athletics to the NCAA to investigate and enforce rules of competition.[174] The Court held that such an analogy did not apply to the NCAA because the mere promise by UNLV to abide by NCAA sanctions did not result in a "partnership agreement or transfer of certain university powers" since the university could refuse to comply and risk sanctions including expulsion from the NCAA or withdraw from the NCAA.[175] Instead of the NCAA as "partner" with or "agent" of UNLV in the proceeding, they were adversaries:

> [The NCAA] is more correctly characterized as an agent of its remaining members which, as competitors of UNLV, had an interest in the effective and evenhanded enforcement of the NCAA's recruitment standards. Just as a state compensated public defender acts in a private capacity when he or she represents a private client in a conflict with the State, the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university.[176]

The Court rejected Tarkanian's argument that UNLV had no practical alternatives but to comply since the NCAA's power was so great, reasoning that a desire to remain a "powerhouse" did not mean its options were "nonexistent."[177] In any event, the Court noted, citing *Jackson*, that monopoly status does not convert a private party into a state actor.[178]

The Court concluded in a footnote that Tarkanian failed the public function test because regulation of amateur athletics while "critical" was not a "traditional, essential state function."[179] Also, the NCAA did not perform the

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172. *Id.* at 194-195.

173. *Id.* at 193 n.13.

174. *Id.* at 195 (citing West v. Atkins, 487 U.S. 42 (1988) (case involving state, through its state prisons, delegating authority to private medical personnel to provide medical services for the prisons).

175. *Id.* at 197-198.

176. *Id.* at 197.

177. *Id.* at 198 n.19.

178. *Id.* at 199 (citing *Jackson*, 419 U.S. at 349).

179. *Id.* at 197 n.18.

state function of disciplining Tarkanian because the NCAA could only impose sanctions against UNLV itself, and not the state employee.[180]

The Court concluded in another footnote that Tarkanian did not meet the *Burton* test. The Court described *Burton* as a case in which state action was found because a state parking garage "knowingly accept[ed] the benefits derived from unconstitutional behavior" in accepting rental proceeds from a restaurant housed in the structure that had a policy of discriminating against African-Americans.[181] The Court reasoned that the NCAA and UNLV were not as interdependent as the public parking authority and the restaurant in *Burton* where the parties' relevant interests coincided—increased business for both—since the NCAA and UNLV were antagonists in *Tarkanian*.[182]

In sum, the Supreme Court in *Tarkanian*, like the lower courts post *Blum*-trilogy that found no state action on the part of the NCAA, did not undertake a factual analysis of the NCAA and its membership. Thus, the Court failed to take into account the similarities between the NCAA and a high school athletic association in terms of their purposes, functions and operations. This failure to take a closer look at the facts of the NCAA and its membership characteristics also may have caused the Court to give short shrift to the *Burton-Evans* analyses, which as set forth below, is the most applicable framework to both the high school association cases and the NCAA cases like *Tarkanian*. As a result of *Tarkanian* decision, states resorted to legislative efforts to inject due process requirements into the NCAA proceedings.

C. States Attempt To Legislate Due Process.

Following the Supreme Court's decision in *Tarkanian,* Nevada and a number of other states, including Nebraska, Illinois, and Florida enacted due process statutes.[183] The Nevada statute, for example, contained a number of procedural requirements applicable to investigations not present in the NCAA rules; it required written statements be signed under oath, that defendants be able to confront and respond to all witnesses, and that an impartial entity preside over the proceeding and judicial review; it prohibited the association

180. *Id.* at 196-197.

181. *Id.* at 192.

182. *Id.* at 196 n.16.

183. Imposition of Sanctions by National Collegiate Athletic Association, NEV. REV. STAT. §§398.155-398.295 (1991); Nebraska Collegiate Athletic Association Procedures Act, NEB. REV. STAT. §§85-1201 to 85-1210 (1990); Collegiate Athletic Association Compliance Enforcement Procedures Act, 110 ILL. COMP. STAT. 25/1-25/13 (1991); Collegiate Athletic Association Compliance Enforcement Procedures Act, FLA. STAT. §§240.5339-240.5349 (1991).

from avoiding compliance by expelling its Nevada members; and it authorized the state court to enjoin an athletic association and award damages and attorneys fees.[184]

In *NCAA v. Miller*,[185] the NCAA challenged the constitutionality of the Nevada statute and the United States Court of Appeals for the Ninth Circuit held that the statute violated the Commerce Clause.[186] The court reasoned that the Nevada statute directly regulated interstate commerce by, in effect, requiring the NCAA to apply Nevada procedures to every member state so as to enforce its procedures uniformly (i.e. to avoid liability under the Nevada statute)[187] and, secondly, by putting the NCAA – a national association – at risk of being subject to inconsistent legislation as statutes had been enacted in other states that might have differing standards.[188]

Notably, with respect to the former, the court's rationale indicates how the inability to uniformly enforce less stringent (and as Tarkanian argued, unconstitutional) NCAA rules would hamper "the integrity of the NCAA's product [intercollegiate athletic competition],"[189] as the court explained,

> Nevada procedures do not allow the Committee on Infractions to consider some types of evidence, like hearsay and unsworn affidavits that it can consider under the NCAA Bylaws. As a result, if its case against the U of X were based on unsworn affidavits from unavailable witnesses, the NCAA might not have enough admissible evidence to prove that there was a violation of the recruiting rules. The NCAA could be forced to allow the U of X to use an illegally recruited quarterback from state Y because it could not prove a rules violation under the strictures of Nevada law[190]

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184. NEV. REV. STAT. §§398.155-398.295.

185. 10 F.3d 633 (9th Cir. 1993).

186. *Id.* at 637.

187. *Id.* at 638-39 (noting that the finding that the NCAA must enforce its procedures uniformly in order to accomplish its goals is consistent with the Supreme Court's statement in *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984), that the NCAA's product cannot be preserved "except by mutual agreement; if an institution adopted [its own athlete eligibility regulations] unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.").

188. *Id.* at 639-40 and nn.6-7 (*citing* NEB. REV. STAT. §§85-1201 to 85-1210 (1990); 110 ILL. COMP. STAT. 25/1-25/13 (1991); FLA. STAT. §§240.5339-240.5349 (1991) and noting similar legislation had been introduced in Kansas, Kentucky, Missouri, Ohio, South Carolina).

189. *Id.* at 638.

190. *Id.* at 639.

and in this way Nevada would be controlling the "integrity of the product."[191] The Supreme Court denied certiorari in *Miller*.[192] Subsequently, Tarkanian resigned his position as the head men's basketball coach at UNLV.[193]

PART III

In 2001, over a decade after *Tarkanian*, the Supreme Court, in *Brentwood* held that a private athletic association composed of public and private high schools in Tennessee engaged in state action when it enforced its rules against a private high school member.[194] Brentwood Academy, a private high school, sued the Tennessee Secondary School Athletic Association ("TSSAA") under Section 1983 seeking an injunction against enforcement of sanctions after the TSSAA found Brentwood had violated a recruiting rule when it wrote to incoming students and their parents about spring football practice.[195]

The TSSAA placed Brentwood's athletic program on probation for four years, declared its football and basketball teams ineligible to compete in playoffs for two years and imposed a $3,000 fine.[196] Brentwood claimed enforcement of the rule was state action and a violation of its First and Fourteenth Amendment rights.[197] The District Court granted summary judgment and enjoined the TSSAA from enforcing the rule.[198] The United States Court of Appeals for the Sixth Circuit reversed applying the *Blum*-trilogy factors and finding no state action.[199] Brentwood appealed.

The Supreme Court began its analysis by focusing on an approach that hearkened back to *Burton*'s no-precise-formula language for making the state actor determination. The Court eschewed reliance on any one test or series of tests and described the process as "a matter of normative judgment"[200] and as

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191. *Id.*

192. Tarkanian v. NCAA, 511 U.S. 1033 (1994). The NCAA also challenged the Florida statute. The District Court for the Northern District of Florida, relying on *Miller* held that the Florida statute was unconstitutional. NCAA v. Roberts, No. TCA 94-40413-WS, 1994 WL 750585 (N.D. Fla. Nov. 8, 1994).

193. NCAA Press Release. NCAA and Jerry Tarkanian Agree to Settlement (Apr. 2, 1998).

194. *Brentwood*, 531 U.S. at 302.

195. *Id.* at 293.

196. *Id.*

197. *Id.*

198. *Id.* (citing Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n, 13 F. Supp. 2d 670 (M.D. Tenn. 1998)).

199. *Id.* at 294 (citing Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 180 F.3d 758 (6th Cir. 1999)).

200. *Id.* at 295.

a "fact-bound" inquiry.[201] The Court described its prior cases as providing a "range of circumstances" and identifying a "host of facts" that can have a bearing on the fairness of attributing state action to a private entity.[202] No one fact was absolutely necessary nor would a convergence of predetermined facts be sufficient because there may be a "countervailing reason against attributing activity to the government."[203]

While reaffirming *Tarkanian,* the Court found it did not control the *Brentwood* case because the members of a high school athletic association, unlike the NCAA member institutions, are all located in one state.[204] The Court proceeded to apply the "entwinement" analysis, something *Tarkanian* had not done.[205] The Court, as had the court in *St. Augustine*, held that the TSSAA was a state actor because there was "pervasive entwinement of public institutions and public officials in [TSSAA's] composition and workings."[206] The Court looked at entwinement from two perspectives—"bottom up" and "top-down." "Bottom-up" entwinement consisted of facts such as: 84% of the members in TSSAA are public schools, the voting representatives are "overwhelmingly" public school officials who in turn adopt the rules and regulations and choose who will enforce them, and public schools and their officers – through the TSSAA – satisfy their obligation to provide for an important part of public education.[207] As to this latter point, the Court recognized:

> Interscholastic athletics obviously play an integral part in the public education of Tennessee, where nearly every public high school spends money on competitions among schools. Since a pickup system of interscholastic games would not do, these public teams need some mechanism to produce rules and regulate competition. The mechanism is an organization overwhelmingly composed of public school officials who select representatives (all of them public officials at the time in question here), who in turn adopt and enforce the rules to make the system work.[208]

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201. *Id.* at 298.
202. *Id.* at 295-296.
203. *Id.*
204. *Id.* at 297-298 (applying dictum in *Tarkanian,* 488 U.S. at 193 n.13).
205. *Id.* at 297 (citing *Evans*, 382 U.S. at 299).
206. *Id.* at 298.
207. *Id.* at 299.
208. *Id.*

The Court also noted that half of the TSSAA's meetings are held during school hours and public schools have largely provided for the TSSAA's financial support through gate receipts at tournaments.[209]

Further, the Court described the joint financial undertaking between the public schools and the association. The Court highlighted the financial stake that the public schools have vested in the system and the TSSAA as arbiter of that system. Without expressly stating that it was applying the "symbiotic" test or directly citing to *Burton*, the Court, in distinguishing the relationship of the public schools and the TSSAA from that of a mere buyer of contract services, validated the "financially interdependent" rationale at work in *Burton*:

> [S]chools . . . obtain membership in the service organization and give up sources of their own income to the collective association. The Association thus exercises the authority of the predominantly public schools to charge for admission to their games; the Association does not receive this money from the schools, but enjoys the schools' moneymaking capacity as its own.[210]

The Court summed up its "bottom up" entwinement analysis by stating that there could be no recognizable TSSAA "without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association acts and functions in practical terms."[211]

The Court also held that entwinement came from the "top down" by the State Board of Education assigning ex officio members of the governing committees, the State providing retirement benefits to TSSAA's employees, and the fact that the State Board of Education had at one point expressly designated a rule that the TSSAA was regulator of interscholastic athletics in public schools.[212] That it deleted that language from the rule to avoid being deemed a state actor by the courts, did not change the nature of the close relationship that had existed before, citing *Evans*.[213]

Significantly, the Court dealt a blow to *Blum*-trilogy's "public function" and "coercion" tests. The Court assumed that application of the "exclusively

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209. *Id.*

210. *Id.* Moreover, the Court does reference the symbiotic test in other parts of its opinion by noting that the District Court had relied on that test, *Id.* at 294, and that it is a criterion of state action—one in which the dissenters even accept. *Id.* at 301 n.4.

211. *Id.* at 300.

212. *Id.*

213. *Id.* at 301.

and traditionally public" function test stated in *Rendell-Baker*, would result in a finding that there was no state action in *Brentwood.* However, the Court stated that *Rendell-Baker* did not have anything to do with entwinement of public officials in a school as did *Brentwood.*[214] Likewise, the Court dismissed the need to apply the "coercion" test (that the State either coerced or encouraged the actions complained of), since the key facts in *Brentwood* showed "pervasive entwinement to the point of largely overlapping identity[.]"[215]

The Court explained that tests such as "coercion" and "entwinement" were facts that could justify finding state action but "no one criterion must necessarily be applied."[216] Indeed, in a footnote earlier in its opinion, the Court chastised the dissent for looking for some express statute spelling out the link to the government or state in order to find state action, instead of looking at the facts in *Brentwood* that showed the organizers of the TSSAA chose to use public education as an integral part of their mission (i.e. "the Association's organizers structured the Association's relationships to the officialdom of public education"[217]) and the "practical certainty . . . that public officials will control the operation of the Association under its bylaws."[218]

The *Brentwood* dissent found no state action under either a "common sense" approach or under the various tests.[219] Notably, the TSSAA did not perform a function "traditionally exclusively reserved to the State," since organization of interscholastic sports is neither a traditional nor exclusive function of the states. [220] The TSSAA was not created by the state to fulfill a government objective, but was created as a private corporation without involvement of the state to fulfill the objective of organizing interscholastic athletic tournaments which the government had not contemplated, much less pursued.[221] The state did not exercise "coercive power or encouragement" to the TSSAA either overt or covert, where the state had not promulgated any regulations of interscholastic sports nor encouraged TSSAA in enforcing its rule.[222] Finally, the dissent found no "symbiotic relationship" between the

214. *Id.* at 302-303.
215. *Id.* at 303.
216. *Id.*
217. *Id.* at 301 n.4.
218. *Id.*
219. *Id.* at 306-315.
220. *Id.* at 309.
221. *Id.* at 310.
222. *Id.* at 310-311.

state and TSSAA since the fiscal relationship of the state to TSSAA was no different than a contractor performing a service – organization of athletic tournaments – in exchange for dues and gate fees, and it held "there is no suggestion . . . that, as was the case in *Burton*, the State profits from the TSSAA's decision to enforce its recruiting rule."[223] In conclusion, the dissent noted the reference to *Tarkanian* as foreshadowing this case to be "ironic" because the "application of the majority's entwinement test could change the result reached in that case, so that the [NCAA]'s actions could be found to be state action given its large number of public institution members that virtually control the organization."[224]

As has been demonstrated in this article, and as other commentators have suggested, the *Brentwood* approach is not novel, instead it is a resort back to the Court's state action jurisprudence of the 1960s and a rejection of the more restrictive approach of the *Blum* trilogy.[225] And, although *Brentwood* reaffirmed *Tarkanian*, the Court did not expound upon why the fact that all public schools were located in one state as opposed to many states should be determinative in light of all of the other similarities between high school and collegiate athletic associations.

Commentators have pointed out, however, that neither the language of Section 1983 nor the Fourteenth Amendment Due Process Clause require such a result and indeed state (or government) action has been found when state actors band together in a collective organization.[226] In any event, there cannot be anything like the formality approaching "a rule created by a state" in this context. Every state has a public university or college that is a member of the NCAA (and many have more than one),[227] yet attempts by state legislatures to regulate the NCAA by enacting due process standards in enforcement proceedings have been struck down by federal courts as a violation of the Constitution.

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223. *Id.* at 311.

224. *Id.* at 314 n.7.

225. *See e.g.*, Potter, *supra* note 5, at 1291; Madry, *supra* note 98, at 391-392; Megan M. Cooper, *Dusting Off The Old Play Book: How the Supreme Court Disregarded The Blum Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in* Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 35 CREIGHTON L. REV. 913, 961-962 (2002).

226. Patino, *supra* note 5, at 558-559; *see also* Robin Petronella, *A Comment On the Supreme Court's Machiavellian Approach to Government Action and the Implications of Its Recent Decision in* Brentwood Academy v. Tennessee Secondary School Athletic Association, 31 STETSON L. REV. 1057, 1080 (2002).

227. NCAA Members by Division, *available at* http://web1.ncaa.org/onlineDir/exec/divisionListing (last visited June 5, 2008).

Brentwood explicitly relied on the *Evans* and *St. Augustine* cases, which had also been relied on by federal courts prior to the *Blum*-trilogy to find the NCAA to be a state actor. Moreover, *Brentwood* implicitly relied on *Burton*. While *Brentwood's* failure to explicitly rely on *Burton* has led some courts to question whether *Burton* is still good law, they concede *Burton* is viable albeit they would limit *Burton* to its facts.[228] Those "limited" facts include a financially beneficial relationship whereby the state entity needs the private entity to meet its mission; the state entity conducts that mission together with the private entity in a mutually beneficial business; the private entity uses public assets; and the state entity benefits from the challenged activity.[229] Even under such "limitation to its facts" argument, however, the NCAA would be considered a state actor. As explained in the next section, these factors are present in the relationship between the NCAA and its member state universities and colleges as is the *Burton-Evans* "entwinement" analysis as applied by *St. Augustine* and ultimately *Brentwood*.

Given that the purpose, structure, and operations of the NCAA and high school athletic associations are similar, and public school members are critically involved in both associations, there is no convincing basis to distinguish between high school athletic associations and the NCAA for state actor purposes. If anything, by highlighting the nature of the relationship between the public high schools and the TSSAA, emphasizing the money that schools spend on competition, their need for the association, how the association's functioning is so dependent upon public education and the interdependence on each other, *Brentwood* leads the way for a finding that the NCAA, too, should be a state actor. Part IV provides a roadmap for that analysis.

PART IV

Public universities and colleges are the driving force in the enactment of NCAA rules and the enforcement of those rules against other members whether public or private. There exists a financial interdependence and exchange of mutual benefits between the large contingency of public universities and colleges and the NCAA, including that those schools benefit

228. *See, e.g.*, Crissman v. Dover Downs Entertainment Inc., 289 F.3d 231, 242 (3d Cir. 2001).

229. *See id.* at 242-243; *See also* Laudadio v. Southeastern Pennsylvania Youth LaCrosse Ass'n, No. 08-1525, 2008 U.S. Dist. LEXIS 33224, at *6 (E.D. Pa. Apr. 23, 2008) (citing same and concluding LaCrosse clubs not to be state actors under *Burton* where the private clubs were not essential to the financial viability of a government enterprise and did not provide a tangible benefit to the state).

from enactment and enforcement of the NCAA rules. This is an interdependence that, like the public parking authority in *Burton*, places schools in positions of such economic dependence that they will not voluntarily disassociate in order to comply with Constitutional restrictions.

The cases of *Burton*, *Evans*, *St. Augustine* and *Brentwood*, and the federal court cases finding the NCAA to be a state actor prior to the *Blum*-trilogy identified a number of factors and circumstances leading to the finding of state action. Each of these factors and circumstances will be discussed below.

A. Public Schools Delegate a Portion of Their Educational Mission, Intercollegiate Athletics, To the NCAA and Use the NCAA To Generate Revenue and Exposure.

The states need the NCAA to perform an indispensable function for public universities and colleges in meeting their mission to provide for a critical part of public education — intercollegiate athletics. The *Brentwood* Court recognized that high school interscholastic athletics obviously plays an integral part in the public education of the state where nearly every public school spends money on competition and a pickup system would not do.[230] So, too, intercollegiate athletics obviously plays an integral part in the higher education at public colleges and universities where nearly every state university and college spends money on competitions between schools. They need a mechanism, *e.g.*, the NCAA, to produce rules and regulate competition. Indeed, the recognition in *Brentwood* that public schools carry out an integral element of their responsibility to provide public education through a necessary, though voluntary, private organization such as the TSSAA,[231] is similar to the Supreme Court's recognition in *Burton* that the private lessees were an "indispensable part of the State's plan to operate its project as a self-sustaining unit."[232]

The non-profit NCAA[233] was founded in the early 1900s by 39 colleges and universities[234] at the urging of the White House as a way to curb violence

230. *Brentwood*, 531 U.S. at 299.

231. *Id.* at 299-300.

232. *Burton*, at 723-724.

233. JOSEPH N. CROWLEY, IN THE ARENA: A COMPREHENSIVE HISTORY OF THE ASSOCIATION (2006) (The association was originally called the Intercollegiate Athletic Association of the United States (IAAUS). In 1910, the IAAUS became known as the NCAA).

234. *Id.* at 21 (The 39 founding member institutions of the IAAUS, attending its first meeting December 29, 1906, were; Allegheny, Amherst, Bucknell, Colgate, Colorado, Dartmouth, Denison, Dickinson, Franklin & Marshall, George Washington, Grove City, Haverford, Leigh, Miami (OH),

in college football.[235] While most of its founding members were private and the impetus was football, today the NCAA dominates intercollegiate athletics, public and private.[236] The Supreme Court has recognized that the NCAA has a "historic role in the preservation and encouragement of intercollegiate amateur athletics."[237]

Since its founding, the NCAA has always been linked to the educational missions of its members. The original constitution stated the NCAA's purpose: "shall be the regulation and supervision of college athletics through the United States, in order that the athletic activities . . . may be maintained on an ethical plane in keeping with the dignity and high purpose of education."[238] Today, the NCAA bylaws emphasize even more clearly its purpose: "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."[239] To this end, "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education. . .Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[240]

The NCAA is exempt from Federal income taxes under the provisions of Section 501(c)(3) of the Internal Revenue Code.[241] It has also been exempt from state taxes for a number of years.[242] The NCAA enjoys additional

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Minnesota, Missouri, Nebraska, New York, Niagara, North Carolina, Oberlin, Ohio Wesleyan, Pennsylvania, Rochester, Rutgers, Seton Hall, Swarthmore, Syracuse, Tufts, Union, US Military Academy, Vanderbilt, Washington & Jefferson, Wesleyan (CT), Western (PA), Westminster (PA), Williams, Wittenberg, and Wooster. Ten were public and 29 private).

235. *Id.* at 9 (As a result of numerous injuries and deaths occurring in college football due to use of the flying wedge, President Theodore Roosevelt, summoned college athletics leaders from Harvard, Yale and Princeton to the White House to encourage changes to the rugged nature of football).

236. RICHARD E. LAPCHICK & JOHN B. SLAUGHTER, THE RULES OF THE GAME: ETHICS IN COLLEGE SPORTS (1994).

237. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 101.

238. JACK FALLA, NCAA: THE VOICE OF COLLEGE SPORTS 21 (1981).

239. NCAA, *supra* note 139, at 1.

240. *Id.* at 4-5.

241. Notes to Consolidated Financial Statements (Notes), Aug. 31, 1999 & 2000, http://www.ncaa.org/library/membership/membership_report/2000/financial_statement_notes.pdf (last visited June 16, 2008). *See also* Letter from The Honorable William Thomas, Chairman, Committee on Ways and Means, U.S. House of Representatives, to Myles Brand, President, NCAA (Oct. 2, 2006).

242. The NCAA has enjoyed exemption from state property taxes in Kansas, the state of its headquarters from 1952-1999. *See* Nat'l Collegiate Realty Corp. v. Bd. of County Comm'rs, 690 P.2d

financial benefits from the state in which it is headquartered. In July of 1999, the NCAA moved its headquarters from Overland Park, Kansas to White River State Park, near Indianapolis, Indiana. There, the NCAA secured a 30-year lease from the Indiana White River State Park Development Commission in the amount of one dollar annually. Further, the State of Indiana, City of Indianapolis and other interested parties provided funds for the construction of the NCAA's new facilities.[243]

Despite the nonprofit and tax-exempt status of the NCAA, by the 1980s, one of the major justifications for university-sponsored intercollegiate athletics was that athletics generates revenue, visibility and prestige for the university.[244] Even the Supreme Court has recognized that the NCAA and its member institutions are organized to maximize revenues.[245] As the Court observed in *Bd. of Regents of the Univ. of Okla*, the "NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes."[246]

Yet, the educational setting is critical to the business of intercollegiate athletics. As the Supreme Court stated:

> What the NCAA and its member institutions market in this case is competition itself-contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed

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1366 (Kan. 1984) (affirming district court's reversal of the decision of the Board of Tax Appeals, reasoning that property used by NCAA for its national headquarters was used exclusively for educational purposes within the meaning of state statute and constitutional provision granting an exemption from taxation for property used exclusively for educational purposes). The NCAA has also enjoyed exemption from sales taxes in Kansas. Nat'l Collegiate Athletic Ass'n v. Kansas Dep't of Revenue, 781 P. 2d 726 (Kan. 1989) (reversing order of the Board of Tax Appeals that denied the NCAA's application for a sales tax exemption, reasoning that the NCAA was an "educational institution" within the purview of applicable Kansas statute and exempt from such taxes). On July 26, 1999, the NCAA moved its headquarters to Indiana.

243. Notes, *supra* note 241, at 28 ("The property consists of an 89,000 square foot warehouse and distribution facility, tenant finish improvements for the NCAA conference facilities and furnishings, technology infrastructure and equipment to support the new NCAA facility.").

244. JOHN R. GERDY, THE SUCCESSFUL COLLEGE ATHLETIC PROGRAM 31 (1997).

245. *See Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 100 n.22 (noting that "the District Court found that the NCAA and its members institutions are in fact organized to maximize revenues").

246. *Id.* at 99.

> upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football-college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.[247]

In 2006, the NCAA defended its tax exempt status before Congress by highlighting its critical role in education and public education specifically.[248] Despite its considerable profit-making objectives, the NCAA argued that it should retain its tax-exempt status because it performed educational and charitable functions the state otherwise would provide:

> In addition to 'educational purposes, educational activities, including those relating to intercollegiate athletics, can be said to further 'charitable' purposes as well. * * * The term 'charitable' in section 501(c)(3) also includes lessening the burdens of government. Generally, in order to be considered to be lessening the burdens of government, an organization must be performing a function that the government has taken on as its burden, and the organization's activities must actually lessen that burden. By founding and operating institutions of higher education, each of the states, countless political subdivisions of such states and even the federal government have indicated that they consider the education, past the high school level, of its citizens to be its obligation, which public colleges and universities lessen.[249]

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247. *Id.* at 101-102.

248. *See generally*, Letter from Myles Brand, *supra* note 17.

249. *Id.* Appendix A, at 18-19.

The NCAA also cited the Supreme Court's recognition in *Bd. of Regents of the Univ. of Okla*, of the NCAA's critical role in regulating and preserving the character of intercollegiate athletics.[250]

The states, therefore, need the NCAA to perform an educational obligation of their state-run universities and colleges. Those universities' and colleges' delegation of authority to the NCAA, in turn, has enabled the NCAA to create a marketable product that the universities and colleges depend upon and benefit from.

B. Public Schools Dominate NCAA Funding, Management and Control.

The states, through the membership of their public universities and colleges in the NCAA, dominate the funding, management and control of the NCAA. Today, there are over 1000 members in the NCAA.[251] While the overall number of public school members in the NCAA is lower than the number of private schools (44% public, 56% private),[252] the public schools significantly eclipse private schools in the type and amount of control within the NCAA due to the dominance of the public schools in the Division I athletic championship tournaments and the revenue generated by the NCAA's coordination and oversight of those tournaments.[253]

1. NCAA's Ability To Generate Revenue Is Largely Due To Public Schools.

Membership is broken down into three Divisions: I, II and III. Division I, with 328 members, comprises roughly one-third (32%) of the NCAA's total membership, yet it generates 98% of the NCAA's total revenue ($602 million) and accounts for nearly 75% ($420.379 million) of the NCAA's expenses and allocations.[254] The great majority (66%) of Division I members are public

250. *Id.* Appendix A, at 17-18.

251. NCAA Members by Division, *supra* note 227.

252. *Id.*

253. *See* Appendix 1, NCAA Division I Member Institutions who have made the Men's Basketball Tournament from 1939-2006.

254. The authors compiled the following data: Division II membership (281, or 27% of total NCAA membership), comprised of 157(56%) public schools and 124(44%) private, is allocated 4.78% ($26.832 million). Division III membership, which accounts for the largest percentage (41%, or 421) of the total NCAA membership, consists of 84 (20%) public schools and 337 (80%) private; expense and allocation—3.48% ($19.525 million). NCAA Members by Division, *supra* note 225. The NCAA Revised Budget for Fiscal Year Ended August 31, 2008 (NCAA Budget), *available at* http://www.ncaa.org/wps/wcm/connect/resources/file/ebca1c0e7492aa3/2007-08%20BUDGET%20(06-07%20Budget%20with%20moves).pdf?MOD=AJPERES (last visited August 31, 2008).

colleges and universities.[255] Likewise, the majority (63%) of Division I men's basketball teams that made it to the annual NCAA men's basketball tournament from 1939-2006 (n=291) — the NCAA's primary revenue generating events — are public institutions.[256]

In its 2007-08 annual budget, the NCAA reported total operating revenue of $614 million (equating to a percentage of total operating revenue of 108.87).[257] More specifically, $548.25 million (97%) was generated from television and marketing rights fees alone, with an additional seven percent ($39.5 million) coming from Division I men's basketball championships non-television contract sources (i.e. in the form of gate receipts, merchandise, apparel). [258] Thus, 104% of the NCAA's annual revenue is generated by just 6% of its total membership (sixty-five men's basketball teams, who make the NCAA tournament, divided by 1,030 active members), the great majority of which are public schools. [259]

The NCAA Division I women's basketball tournament has also proved profitable—the NCAA's contract with ESPN is for 11-years and $200 million ($18.2 million annually).[260] Further, the NCAA maintains corporate sponsorship agreements with Pontiac General Motors, Monster.com, Cingular Wireless, Kraft Foods, Inc., Coca-Cola, Inc., and The Hartford Financial Group.[261] The NCAA also benefits from licensee agreements with 40 companies and owns the rights to 53 trademarks.[262] If the public schools dropped out of the NCAA, depleting Division I of 2/3 of its membership, the NCAA would lose a significant piece of its valuable product (i.e., men's basketball tournament participants, of which, 63% public); thereby, making it difficult for the NCAA to negotiate such lucrative television contracts.

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255. The authors compiled the following data: Active NCAA Division I membership is comprised of 328 members, which includes 216 (66%) public institutions and 112 (34%) private institutions. NCAA Members by Division, *supra* note 227.

256. *See* Appendix 1 (184 (63%) are public institutions and 107 (37%) are private institutions).

257. NCAA Budget, *supra* note 254.

258. *Id.*

259. NCAA Members by Division, *supra* note 225. *See also* Appendix 1.

260. Jackie Abellada, *NCAA Women's Basketball Tourney Gets New TV Contract*, ESPN NETWORK, *available at* http://espn.go.com/ncw/news/20010802/01274482.html (last visited June 12, 2008).

261. NCAA Corporate Champions and Corporate Partners, *available at* http://www.ncaa.org/wps/ncaa?ContentID=1994 (last visited June 6, 2008).

262. NCAA Official Licensee List (June 2008), http://www.ncaa.org/wps/ncaa?ContentID=745. NCAA Trademarks (May 8, 2008), http://www.ncaa.org/wps/ncaa?ContentID=529.

2. The NCAA Is Governed Predominantly by Public Schools.

The NCAA describes itself as "a bottom-up organization in which the members rule the Association."[263] In August 1997, restructuring[264] allowed greater autonomy for each division and more control by chancellors and presidents.[265] The NCAA governance structure is made up of more than 125 committees. Of the four most powerful and most influential committees in the NCAA (the Executive Committee, the Division I Board of Directors, the Division I Management Council and the Division I Committee of Infractions), n=90, 77% (69) represent public members; whereas, just 23% (21) represent private members. Specifically,

- The Executive Committee, the highest governance body in the NCAA,[266] is comprised of representatives from 18 schools or conferences.[267] Of the 17 schools (conference representative excluded), 71% (12) are public, 29% (5) are private.
- The Division I Board of Directors, which plays an important role in drafting legislation for the NCAA and its member

263. Overview, *available at* http://www2.ncaa.org/portal/about_ncaa/overview/ (last visited June 5, 2008).

264. The NCAA underwent a major restructuring in 1997, replacing the one-school, one-vote principle for approving legislation in Division I with a system based on conference representation. Legislation is approved by an 18-member Board of Directors rather than a vote of all Division I members at an annual convention. The Division I committee structure includes cabinets responsible for academic affairs, eligibility and compliance, and championships and competition. All cabinets report to the Division I Management Council, which reports to the Board. The Management Council contains athletics administrators and faculty athletics representatives empowered to make recommendations to the Board and to handle responsibilities delegated to it. NCAA Division I Committees Homepage (Division I Committees), *available at* http://www2.ncaa.org/portal/legislation_and_governance/committees/division1.html (last visited June 6, 2008).

265. *Id.* Under restructuring, athletics administrators play a primary role in the maintenance of college sports and, in most instances, in developing legislation that the chancellors and presidents then consider for each division and the Association. *See generally* Carter, *supra* note 5.

266. The Executive Committee is composed of institutional chief executive officers that oversee Association-wide issues, is charged with ensuring that each division operates consistently with the basic purposes, fundamental policies and general principles of the Association. NCAA Executive Committee, *available at* http://www1.ncaa.org/eprise/main/membership/governance/assoc-wide/executive_committee/index.html (last visited June 6, 2008).

267. Current Executive Committee member schools: Oregon State, Iowa State, Clemson, Georgia, Memphis, San Diego State, Campbell, Georgia Southern, Dayton, Holy Cross, Winthrop, Northeast-10 conference, Pfeiffer, Virginia State, Randolph-Macon, Franklin & Marshall, and Christopher Newport. Executive Committee, *available at* http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=EXEC (last visited June 6, 2008).

institutions,[268] is comprised of members from 78% (14) public institutions and 22% (4) private institutions.

- The Division I Management Council is 80% (39) public institutions and 20% (10) private institutions.[269]
- Of its NCAA schools, the Division I Committee on Infractions[270] is made up of 67% public and 33% private members.[271]

Thus, it could be argued in light of the overwhelmingly public makeup of four of the most influential NCAA committees, the NCAA is governed predominantly by its public members.

3. The NCAA Effectively Governs a Wide Array of Activities at Public Schools.

Public school members agree to be bound by NCAA regulations. These regulations, therefore, structure and govern a wide array of activities at public schools; for example, recruiting,[272] post-season and regular-season competition,[273] academic credentials,[274] eligibility for financial aid,[275] compensation and remuneration,[276] and promotional activities.[277]

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268. The 18 member Board is comprised of chief executive officers (CEOs). All 11 FBS (Football Bowl Subdivision, formerly called Division I-A) conferences have a permanent seat. Seven FCS (Football Championship Committee) conferences rotate seats. Division I Board of Directors, *available at* http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=BOARD (last visited June 6, 2008).

269. Division I Management Council, *available at* http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1MC (last visited June 6, 2008).

270. The Division I Committee on Infractions currently has ten members composed of six individuals from NCAA member institutions, one conference commissioner, and three from the general public. One of the seven members from the NCAA membership is a non-voting committee member. One of the public members is also a non-voting committee member; these two individuals represent the committee on matters appealed to the Division I Infractions Appeals Committee. The committee has the authority to determine what findings (if any) should be made and what (if any) penalties should be assessed upon a member institution. Division I Committee on Infractions, *available at* http://www1.ncaa.org/ membership/governance/division_I/infractions/index.html (last visited June 6, 2008).

271. Lerner David LLP, Law Offices of Brian P. Halloran, Baker Botts LLP, University of Miami (FL), University of Nebraska, Central Michigan University, University of Alabama-Tuscaloosa, University of Wyoming, University of the Pacific, and the Mid-Eastern Athletic Conference. Division I Committee on Infractions Roster, *available at* http://www1.ncaa.org/membership/governance/ division_I/infractions/index.html (last visited June 5, 2008).

272. NCAA, *supra* note 139, Bylaw 13 (Recruiting).

273. *Id.* Bylaw 14.1.1 (Postseason and Regular-Season Competition).

274. *Id.* Bylaw 14.1.2 (Validity of Academic Credentials).

Public schools' dependence upon their continued participation in the NCAA makes enforcement of NCAA rules and regulations (which as noted above the public schools are largely instrumental in adopting and enforcing) extremely effective. In addition to all of the examples in the cases above of how schools complied with sanctions (even those with which they disagreed) under threat of exclusion from post-season competition, a recent example shows how effective the NCAA enforcement is even in areas not directly involving the rules of competition.

In 2005, the NCAA notified approximately 19 of its member institutions, including a number of large public universities (*e.g.* University of Illinois, Florida State University, University of North Dakota) that as of February 1, 2006, their student-athletes were prohibited from wearing uniforms or equipment with hostile or abusive imagery at the NCAA championships, nor could these institutions host NCAA championships unless school officials eliminated hostile or abusive references at their facilities.[278] Despite criticism, much of it by the schools themselves,[279] the sanction was effective and nearly every school either changed its imagery or received an exemption.[280] Indeed, one of the schools most opposed agreed to comply after its football team finished the season with an excellent record so that it could host the NCAA championship events.[281]

The NCAA influence is not limited to the post-secondary educational level of athletics but increasingly extends to the high school, and lower, level. Since 1999, the NCAA has maintained its headquarters adjacent to the National Federation of State High School Associations (NFHS).[282] The NFHS

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275. *Id.* Bylaw 14.3 (Eligibility for Financial Aid, Practice and Competition).

276. *Id.* Bylaw 11.3.1-2 (Control of Employment and Salaries).

277. *Id.* Bylaw 12.5 (Promotional Activities).

278. O'Neill, *supra* note 16, at 174.

279. *See generally id. See also*, Jennifer Jacobson, *Bill Introduced to Limit Mascot Ban*, CHRON. HIGHER EDUC., May 19, 2006, at A41 (In May 2006, in order to thwart the NCAA's mandate, Dennis Hastert, Speaker of the U.S. House of Representatives and Illinois Republican, Rep. Timothy V. Johnson, introduced the Protection of University Governance Act. "The NCAA was established as a sports-management association," Mr. Johnson said. "The organization has since assumed the mantle of social arbiters. They need to go back to scheduling ballgames and leave the social engineering to others.").

280. O'Neill, *supra* note 16, at 179-180 (noting eleven schools agreed to change their imagery, mascots or nicknames five received approval from a "namesake tribe").

281. *Id.* at 181 (Newberry College).

282. Founded in 1920, the NFHS publishes playing rules in 16 sports for boys and girls competition. Specifically, in its mission statement, the NFHS states that it is "the recognized national authority on interscholastic activity programs and the pre-eminent authority on competition rules for

is comprised of the high school athletic associations in every state.[283] One notable NFHS member, the TSSAA, has in its bylaws that its all-star regulations are patterned after the NCAA rules.[284] During the 1999-2000 year, the NCAA and NFHS relocated their headquarters from Kansas City to Indianapolis and currently operate in buildings physically attached to one another.[285]

In April of 2008, the NCAA announced that it had entered into "an unprecedented agreement among the major stakeholders," which includes the NFHS, the NBA, USA Basketball, the men's and women's coaches associations, shoe companies and the Amateur Athletic Union, in an initiative to "add new structure to youth basketball" (focusing, initially, on boys ages 6-17).[286] Not only will the initiative have its own president and governing board under the leadership of the NCAA and the NBA, but the new limited liability corporation (yet to be named), "will sanction leagues, tournaments, camps and year-round development opportunities of which NCAA coaches may attend."[287] The president of the NCAA stated that "tying education to youth basketball is such an important part of the initiative."[288]

The full impact that this corporation will have on the regulation of high school athletics is yet to be determined. However, concerns already abound. Doug Chickering, currently serving in his twenty-second year as executive director of the Wisconsin Interscholastic Athletic Association (WIAA),

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interscholastic activity programs." National Federation of High School Athletic Associations (NFHS), *available at* http://www.nfhs.org/ (last visited June 18, 2008). *See specifically* National Federation of High School Athletic Associations – Mission Statement, *available at* http://www.nfhs.org/web/2006/09/mission_statement.aspx (last visited July 14, 2008).

283. National Federation of High School Athletic Associations (NFHS), *available at* http://www.nfhs.org/ (last visited June 18, 2008). *See specifically* National Federation of State High School Associations - Member Associations, *available at* http://www.nfhs.org/stateassociations.aspx (last visited July 9, 2008).

284. 2008-2009 TSSAA Handbook, *available at* http://www.tssaa.org/Handbook/handbook.pdf (last visited June 19, 2008) ("Section 23 (a). No student shall be permitted to participate in an all-star game unless it is sanctioned by the TSSAA and unless he/she has completed high school eligibility in that sport; (b) no individual player is allowed to participate in more than two sanctioned all-star contests during the school year; and (c) any student who fails to comply with the preceding requirements loses athletic eligibility for a period of time to be determined by the Board of Control. *This rule reflects the present NCAA rule involving all-star games and is designed to parallel those regulations.*") (emphasis added).

285. NFHS, *supra* note 282.

286. Johnson, *supra* note 18, at 1.

287. *Id.* at 2. ("The NCAA will not own this initiative, nor will it be an arm of the NCAA—it will be a free-standing organization in which the NCAA and NBA will be the primary partners.").

288. *Id.*

warned 412 delegates in attendance at Association's annual conference, of a "very real threat" to the stability and very existence of high school athletics.[289] Chickering voiced his concerns to the delegates when he said, "The . . . people who talked to us . . . in Indianapolis . . . all want to be a part of the sports scene. But they only want to be involved with the most elite kids."[290]

Whatever the motivation of the NCAA may be, its power over post-secondary level sports and its unique position as the gateway into professional sports, presents the potential for the NCAA to influence the regulation of high school sports. The cases discussed in this article have demonstrated how the necessity of being a member of a private governing organization that is not subject to the Constitution can lead a public entity to abdicate Constitutional rights. One can surmise that, over time, NCAA involvement in its new endeavor at the high school level might have a similar effect.

4. The Enforcement of NCAA Rules Is Carried Out Primarily Against Public Schools Using State Resources.

Since its inception in 1953, the NCAA's enforcement arm has investigated various schools for major violations. An analysis of the NCAA institutions (entire membership [Divisions I, II and III]) with the most major infractions (1953-Present) (n=269; ranging from 1 to 8) revealed that 180(67%) are public and 89(33%) are private.[291] Furthermore, of the institutions who have committed three or more (up to eight) major violations (n=77) 86% are public and only 14% private.[292]

The NCAA's enforcement division has only 31 staff members to handle the totality of the members.[293] Moreover, as the Supreme Court recognized in *Tarkanian*, the NCAA does not have subpoena power.[294] Thus, the NCAA must rely on its members to fully assist with the NCAA enforcement procedures.[295] In *Tarkanian*, that cooperation took the form of utilization of the State of Nevada Attorney General in investigating the charges against

289. Dennis Semrau, *Siphoning Off Elite Athletes a Threat*, THE CAPITOL TIMES (Apr. 24, 2008), http://www.madison.com/tct/sports/preps/283000.

290. *Id.*

291. *See generally*, NCAA Members by Division, *supra* note 227. Specific summations performed by authors.

292. *Id.*

293. Frequently Asked Questions about the NCAA Enforcement Process, *available at* http://www.ncaa.org/enforcement/faq_enforcement.html#top (last visited June 10, 2008).

294. *Tarkanian*, 488 U.S. at 184-186.

295. *Id. See also*, NCAA, *supra* note 139, Bylaw 32.1.4 (Cooperative Principle).

Tarkanian.[296] In *Cohane*, the investigation was alleged to have been undertaken with the full services of the state university (SUNY-Buffalo) and New York State legal counsel.[297] Indeed, important to the Second Circuit's holding in *Cohane* that the NCAA could be a state actor was the fact that despite the NCAA's lack of subpoena power it did have government power, through the university, to facilitate its investigation as plaintiff had alleged.[298]

Public school cooperation in NCAA investigations also involves an outlay of school money. Today, a public school under investigation often hires (and pays large amounts to law firms that specialize in handling NCAA major infraction cases.[299]

C. Public Schools Lend Their Power, Property and Prestige To the NCAA.

State-run universities and colleges conduct their educational mission of providing for intercollegiate athletics together with the private NCAA in a mutually beneficial business endeavor that involves the use by the NCAA of public assets. Public schools have become increasingly invested in the financial and intangible benefits that flow from the chance to compete in post-season games and, in turn, devote considerable resources to that endeavor. As the Fifth Circuit reasoned in *St. Augustine,* the relationship between the public schools and the private athletic association is not one in which a private entity merely takes over a coordination of interscholastic athletics in public education, rather the public schools remain "deeply involved in fielding and promoting athletic teams with expenditures of tremendous time, energy and resources" including financing, equipping, training teams, and paying the coaches.[300] This is particularly true in the intercollegiate athletics. In addition to the outlay of resources described above during enforcement proceedings, the investment of public schools in time, talent, name recognition, and other

296. *Tarkanian*, 488 U.S. at 185.

297. Cohane v. NCAA, No. 04-CV-181S, 2005 WL 2373474, *1 (W.D.N.Y. Sept. 27, 2005).

298. *Cohane*, 2007 WL 247710, at *2 (allegations that SUNY-Buffalo used its authority to compel witnesses to testify against the plaintiff-coach).

299. Joe Drape, *Facing NCAA, the Best Defense Is a Legal Team*, N.Y. TIMES (Mar. 4, 2007), http://www.nytimes.com/2007/03/04/sports/ncaabasketball/04ncaa.html?_r=1&oref=slogin. Notable public schools have paid large sums of money (University of Kansas, in 2003, nearly $480,000; University of Minnesota, in 1999, $920,000; Ohio State University, from 2003-06, over $500,000; and, University of Oklahoma, 2003, $336,000) to such firms for their assistance in the investigations.

300. *St. Augustine,* 396 F.2d at 228.

resources increases the viability and power of the NCAA with concomitant mutual benefits to the members themselves.[301]

Public schools provide the physical structures necessary to hold competition throughout the season that culminates in the championship events, and they utilize public resources to do it. Taxpayers assist in funding educational budgets of each state university. In some cases, these monies, in part, finance the construction and maintenance of stadiums and athletic programs. For example, Florida State University secured a portion of the funding necessary for its football stadium from the Florida legislature by incorporating many of its administrative offices as well as an educational department into the building plan—

> The south end zone houses the Florida State School of Hospitality Education where students in the program receive hands-on experience in various aspects of the food and beverage industry. The multi-level facility includes a food court, a restaurant and a sports grill on the top floor that gives a panoramic view of Doak Campbell Stadium.[302]

Taxpayer dollars contribute to funding "educational" salaries—including coaches' salaries. A special report in the *USA Today* revealed the coaches' salaries for the 65 schools that played in the 2006 NCAA men's basketball tournament. "The average coaching salary. . .is about $800,000, not including benefits, perks and incentives."[303] Coaches from the power conferences (ACC, Big 12, Big East, Big Ten, Pacific-10 and SEC) earn, on average, $1.2 million; three times more than coaches in other conferences.[304] An examination of the 65 coaches' salaries who participated in the 2006 NCAA Tournament revealed, on average, public school coaches' base compensation was $792,150; private school compensation, $596,390.[305] Women's basketball coaches' salaries are also on the rise. Currently, more than a

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301. NAND E. HART-NIBBRIG & CLEMENT COTTINGHAM, THE POLITICAL ECONOMY OF COLLEGE SPORTS 7 (1986) (The term 'corporate athleticism' best fits the influence that commercialization and business has had on 'big-time' Division I athletics. This model of 'corporate athleticism' places profit as its top priority: Expending great effort (investment) to recruit, train, and develop top athletes (workers) and to find and reward 'winning' coaches (management). Winning football or basketball (the product) will then generate substantial gate receipts and television contracts (profit)).

302. Facilities, *available at* http://seminoles.collegesports.com/facilities/fsu-trads-fac-campbell.html (last visited June 14, 2008).

303. *Compensation for Division I Men's Basketball Coaches* (*Compensation*), USA TODAY, Mar. 8, 2007, at 8C.

304. *Id.*

305. *Id.*

handful of women's basketball coaches make just under, or more than, $1 million per year in base pay alone (not including benefits, endorsements, perks and other incentives).[306]

The relationship between a university or college and its athletic department is, in itself, a microcosm of the mutually beneficial (and even cyclical) relationship of school to sports. When a university funds an athletic department, the athletic department uses the money to create a better (winning team) which leads to increased fans and more money and more exposure, which ultimately leads back to the school's continued funding (and in many cases increased funding) for such an enterprise.[307]

Indeed, one of the most notable revenue sources for a university or college is its participation in NCAA-sponsored post-season championships.[308] NCAA member schools making it to the Division I men's basketball tournament receive one unit ($191,013) from the NCAA's basketball fund for each round they advance in tournament play; furthermore, television revenues are distributed among conference members.[309]

The NCAA is the gatekeeper of, what one commentator termed the "entertainment Goliath."[310] "If a university's athletic program is prevented from participating in championship events because of a sanction imposed by the NCAA, the school stands to lose considerable money."[311] The same can also be said of Division I-A football. Even though the NCAA has lost its financial hold over the Bowl Championship Series (BCS) television revenue,[312] it maintains its regulatory role of preserving amateurism in college athletics.[313] As the trend to capture national, regional and local television revenues by conferences and universities continues (e.g., Big 10 Television,

306. Dick Patrick, *Rising Salaries Increase Pressure On Top Women's Coaches*, USA TODAY. Mar. 8, 2007, at 9C.

307. *See generally*, HART-NIBBRIG & COTTINGHAM, *supra* note 301.

308. Barry W. Ponticello, *'Over' Due Process: The Saga of the NCAA, Its Members and Their Representatives*, 20 LINCOLN L. REV. 1, 43-69 (1991).

309. 2007-08 Basketball Revenue Distribution, *available at* http://www.ncaa.org/wps/wcm/connect/resources/file/ebca2e0e762dbb8/2008%20Division%20I%20Basketball%20Distribution%20Chart%20in%20Excel.pdf?MOD=AJPERES (last visited June 9, 2008). *See also* 2004-2005 NCAA Broadcast Manual Championship Guidelines, *available at* http://www.ncaa.org/bbp/bmi_manual (last visited June 9, 2008). The NCAA owns the television rights to all 88 championship events.

310. GERDY, *supra* note 244, at 51.

311. Peter C. Goplerud, *NCAA Enforcement Process: A Call for Procedural Fairness*, 20 CAPITAL UNIV. L. REV. 3, 543-560, at 543 (1991).

312. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 101.

313. Letter of Myles Brand, *supra* note 17, at 7.

ACC Television Partners, SEC-TV, Pac-10 Multimedia, BIGEAST.tv), the NCAA still has a direct effect on members' ability to generate revenue. Consider the five 2008 BCS bowl games—all of the participants were public schools.[314] If, for example, Virginia Tech, who represented the ACC in the FedEx Orange Bowl worth a total of $17 million,[315] was sanctioned, and thus not allowed to participate, they would have lost $1.4 million in bowl game revenue not to mention the significant loses in the form of "exposure and merchandise sales and other revenue streams tied to the BCS".[316]

The financial benefits that stem from NCAA membership make it exceedingly difficult for a public school to honor one's constitutional obligations when they conflict with the NCAA's sanctions. Public schools are subject to the constitution and, therefore, are obligated to provide an employee or athlete with constitutional rights and protections; yet, schools that do not adhere to the NCAA's rules are faced with exclusion from post-season competition and television appearances—the prize for which they have devoted their programs and resources throughout the year. In such circumstances, as discussed below, constitutional rights are at risk of being sacrificed.

D. Public Schools Arguably Benefit From Enforcing Unconstitutional Standards and Thus Do Not Change the System From Within.

The *Tarkanian* Court rejected *Burton* as a basis for finding state action on the part of the NCAA because UNLV and NCAA were "antagonists" during the NCAA's investigation and thus their relevant interests did not coincide as in *Burton* with increased business for both.[317] However, the authors of this article contend that that is precisely what is happening—enforcement by the school does result in increased business for both even if in the short term it appears to be a loss for the school to fire a coach or suspend a player. While a school may disagree with the NCAA rule or its enforcement as applied to it in a given circumstance, and even view it as unconstitutional as in *Tarkanian*, the

314. Louisiana State, Ohio State, Southern California, Illinois, Kansas, Virginia Tech, Georgia, Hawaii, West Virginia and Oklahoma. *See* BCS Bowl Facts, *available at* http://www.bcsfootball.org/cfb/story/5899050/BCS-Bowl-Facts?print=true (last visited June 21, 2008).

315. Thomas O'Toole, *$17M BCS payouts sound great, but. . .*, USA TODAY (Dec. 6, 2006), http://www.usatoday.com/sports/college/football/2006-12-06-bowl-payouts_x.htm. The ACC splits its bowl game revenue equally; therefore, each school received about $1.4 million.

316. *Id.*

317. *Tarkanian*, 488 U.S. at 196.

benefits of remaining in the NCAA outweigh any short-term detriment.[318] The very fact that they choose to abide by the sanction indicates they are receiving a greater benefit by suspending that individual and staying in the NCAA.[319] The benefit of staying in and enforcing a rule also answers the question why the public schools have not, as the Supreme Court suggested in *Tarkanian*, either withdrawn from the NCAA when faced with a sanction they disagree with, or worked through the NCAA to change a rule they might consider to be unconstitutional.[320] Thus, the public schools can be said to have, like the parking authority in *Burton*, in some sense "knowingly accepted the benefit of" that unconstitutional behavior.[321] While certainly as the Ninth Circuit in *Miller* recognized, the NCAA does need the ability to enforce its rules uniformly,[322] the NCAA should not be granted the ability to do so at the expense of Constitutional rights.

How can a public college or university comply with NCAA rules and sanctions when they arguably conflict with the school's constitutional obligations? The reality appears to be that those obligations are getting glossed over, with the effect that individual rights become diluted or sacrificed in order to remain in the game. In effect, by not finding the NCAA to be a state actor, the public schools are able to, as the federal courts (pre *Blum*-trilogy) found, promulgate and enforce rules not subject to the Constitution at least with respect to a portion of their education program—their athletic

318. *See also*, Tedesco, *supra* note 5, at 254-255 (arguing that the NCAA should have been deemed a state actor in *Tarkanian* and particularly under *Burton* "joint participation" or "symbiotic relationship" standard noting "UNLV and NCAA received many mutual benefits from their association with one another and even from Tarkanian's suspension" and that the "benefits to UNLV must have outweighed the obviously high costs it incurred by suspending Tarkanian, or it never would have agreed to the suspension."). *See also*, K. Alexa Otto, *Major Violations and NCAA 'Powerhouse' Football Programs: What Are the Odds of being Charged?*, 15 J. LEGAL ASPECTS OF SPORT 39, 54 (2005) (noting "that the benefits of being a powerhouse football program...far outweigh the cost of being charged with a major violation").

319. The instance in which a particular school is sanctioned manifests itself in a crisis point or economic duress. *See* BLACK'S LAW DICTIONARY 521 (8th ed. 2004) (defining "economic duress" as "an unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will."). *See also Wright*, 501 F.2d at 28 (using words "stranglehold" and "coercion improperly applied."); *University of Nevada*, 594 P.2d at 1163-1164 (recognizing that the NCAA "is so dominant in its field that membership in any practical sense is not in fact voluntary, but rather an economic necessity.").

320. *Tarkanian*, 488 U.S. at 194-195.

321. *See id.* at 192 (describing *Burton*).

322. *Miller*, 10 F.3d at 638-39.

programs.[323] This sets up the irony, similar to that noted in *Burton*, that in one part of the public university or college constitutional rights are being observed, but in another - the athletic department - they are not.

CONCLUSION

In sum, state schools are agencies of the states, tasked with providing post-secondary education to their students. These state schools, in order to generate money to sustain their institutions, have utilized an aspect of those institutions — their athletic programs — in a traditionally "private" endeavor, namely, marketing and carrying out a "business" of sports. To facilitate that business, many public schools together with many private schools support and maintain an entity — the NCAA—to enable them to most effectively and fairly compete.

However, under the entwinement analysis the public schools dominate and control the NCAA as the Court found with a high school athletic association in *Brentwood*. Moreover, as *Brentwood* and *Burton* found important, state action can be found where the state entity — here public schools — has given up a portion of its money making capacity to the private entity, which exercises that predominantly public authority. Indeed, as in *Burton*, the NCAA and its public school membership have a symbiotic relationship and are joint participants in the business of intercollegiate athletics in higher education. The NCAA has received tax-exempt status because of its educational purpose; furthermore, its money-making capacity is attributable largely to the financial and physical contribution of the public schools. Concomitantly, the schools benefit from the uniform enforcement of the rules against one another and the most effective and efficient enforcement of those rules. When those rules are enforced, even arguably unconstitutional rules, against another school and through it to the individual player or coach, that enforcement benefits all the schools including the school that enforces it.

Finally, all of the public schools are subject to the constitutional restrictions and could have made it a requirement of their membership that the NCAA also abide by the constitution in its rules and enforcement. But, they have not. Thus, in light of the entwined and interdependent nature of the two,

323. *See alsoi,* Riguera, *supra* note 5, at 231 (noting *Tarkanian*'s holding that the NCAA is not a state actor means the NCAA will continue to "exert pressure on public universities to take constitutionally impermissible actions" and "enables the NCAA to continue to commit 'indirect' violations of constitutional rights").

the United States Supreme Court should revisit and overrule *Tarkanian*, holding the NCAA to be a state actor.

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APPENDIX 1

NCAA DIVISION I MEMBER INSTITUTIONS WHO HAVE MADE THE MEN'S BASKETBALL TOURNAMENT FROM 1939-2006 (n=291)

Public	Yrs.	F4	Champ	Private	Yrs.	F4	Cham
air force	4	0					
akron	1	0					
alabama	18	0					
uab	13	0					
alabama a&m	1	0					
alabama st	2	0					
albany	1	0					
alcorn st	6	0					
app st	2	0					
arizona	24	4	1				
arizona st	12	0					
arkansas	27	6	1				
ark little rock	3	0					
ark st	1	0					
auburn	8	0					
austin peay	4	0					
ball st	7	0					
				baylor	4	2	
				belmont	1	0	
boise st	4	0					
				boston coll	16	0	
				boston univ	6	0	
bowling green	4	0					
				bradley	8	2	
				brigham young	21	0	
				brown	2	0	
				bucknell	4	0	
				butler	6	0	
california	14	3	1				

Public	Yrs.	F4	Champ	Private	Yrs.	F4	Champ
uc santa barbara	3	0					
cal st fullerton	1	0					
cal st l.a.	1	0					
cal st northridge	1	0					
				campbell	1	0	
				canisius	4	0	
				catholic	1	0	
central conn st	2	0					
ucf	4	0					
central mich	4	0					
coll of charleston	4	0					
				charleston so	1	0	
charlotte	11	1					
chattanooga	9	0					
cincinnati	24	6	2				
ccny	2	2	1				
				colgate	2	0	
colorado	10	2					
colorado st	8	0					
				columbia	3	0	
uconn	26	2	2				
coppin st	3	0					
				cornell	2	0	
				creighton	15	0	
				dartmouth	7	2	
				davidson	8	0	
				dayton	13	1	
delaware	4	0					
delaware st	1	0					
				depaul	18	2	
				detroit	5	0	
				drake	3	1	
				drexel	4	0	
				duke	30	14	3
				duquesne	5	1	

Public	Yrs.	F4	Champ	Private	Yrs.	F4	Champ
east carolina	2	0					
east tenn st	7	0					
eastern ill	2	0					
eastern kentucky	6	0					
eastern mich	4	0					
eastern wash	1	0					
				evansville	5	0	
				fairfield	3	0	
				fairleigh dickinson	4	0	
florida	11	3	1				
florida a&m	2	0					
fl atlantic	1	0					
fl int'l	1	0					
fsu	10	1					
				fordham	4	0	
fresno st	4	0					
				furman	6	0	
george mason	4	1					
				george wash	9	0	
				georgetown	23	4	1
georgia	7	1					
ga so	3	0					
ga st	2	0					
ga tech	14	2					
				gonzaga	9	0	
				hampton	3	0	
				hardin-simmons	2	0	
				harvard	1	0	
hawaii	4	0					
				hofstra	4	0	
				holy cross	11	2	1
houston	18	5					
				houston baptist	1	0	
				howard	2	0	
idaho	4	0					

Public	Yrs.	F4	Champ	Private	Yrs.	F4	Champ
idaho st	11	0					
ill	26	5					
ill chicago	3	0					
ill st	6	0					
indiana	33	8	5				
iupui	1	0					
indiana st	3	1					
				iona	7	0	
iowa	22	3					
iowa st	13	1					
jackson st	2	0					
				jacksonville	5	1	
james madison	4	0					
kansas	35	12	2				
kansas st	22	4					
kent st	4	0					
kentucky	47	13	7				
				lasalle	11	2	1
				lafayette	3	0	
lamar	5	0					
				lebannon valley	1	0	
				lehigh	3	0	
				liberty	2	0	
long beach st	4	0					
				long island	3	0	
la lafayette	7	0					
la monroe	7	0					
lsu	19	4					
la tech	5	0					
louisville	32	8	2				
				loyola ill	5	1	1
				loyola la	3	0	
				loyola md	1	0	
				loyola marymount	4	0	
				manhattan	6	0	
				marist	2	0	

Public	Yrs.	F4	Champ	Private	Yrs.	F4	Cham
				marquette	24	3	1
marshall	4	0					
maryland	20	2	1				
umass	8	1					
mcneese st	2	0					
memphis	14	1					
				mercer	2	0	
				miami fl	5	0	
miami oh	16	0					
mich	16	4	1				
mich st	20	6	2				
middle tenn	6	0					
minn	5	0					
miss	6	0					
miss st	8	1					
miss vall	3	0					
missouri	20	0					
missouri st	6	0					
				monmouth	4	0	
montana	7	0					
montana st	3	0					
morehead st	5	0					
				mt st mary's	2	0	
murray st	13	0					
navy	11	0					
nebraska	6	0					
nevada	5	0					
unlv	14	4	1				
new mexico	11	0					
new mexico st	13	1					
new orleans	4	0					
new york univ	6	2					
				niagara	2	0	
nicholls st	2	0					
unc ch	38	16	4				
unc asheville	1	0					

Public	Yrs.	F4	Champ	Private	Yrs.	F4	Champ
unc greensboro	2	0					
unc wilmington	4	0					
nc a&t	9	0					
nc st	20	3	2				
north texas	1	0					
				northeastern	7	0	
northern arizona	2	0					
northern ill	3	0					
uni	4	0					
northwestern st	2	0					
				notre dame	27	1	
oakland	1	0					
ohio	11	0					
ohio st	19	8	1				
oklahoma	24	4					
				oklahoma city	11	0	
oklahoma st	22	6	2				
odu	8	0					
				oral roberts	3	0	
oregon	8	1	1				
oregon st	13	2					
				pacific	8	0	
				penn	22	1	
penn st	8	1					
				pepperdine	13	0	
pittsburgh	18	1					
				portland	2	0	
prairie view	1	0					
				princeton	23	1	
				providence	15	2	
purdue	19	2					
radford	1	0					
rhode island	8	0					
				rice	4	0	
				richmond	7	0	

Public	Yrs.	F4	Champ	Private	Yrs.	F4	Chan
				rider	3	0	
				robert morris	5	0	
rutgers	6	1					
				st bonny	5	1	
				st francis pa	1	0	
				st johns ny	26	2	
				st joes	17	0	
				st louis	6	0	
				st mary cal	4	0	
				st peters	2	0	
sam houston st	1	0					
				samford	2	0	
				san diego	0		
san diego st	5	0					
				san francisco	16	3	2
san jose st	3	0					
				santa clara	11	1	
				seattle	11	1	
				seton hall	9	1	
				siena	3	0	
south alab	7	0					
south carolina	8	0					
south carolina st	5	0					
south fl	2	0					
southeast mo st	1	0					
southeastern la	1	0					
southern univ	7	0					
				southern cal	12	2	
southern ill	9	0					
				smu	10	1	
southern miss	2	0					
southern utah	1	0					

Public	Yrs.	F4	Champ	Private	Yrs.	F4	Champ
				springfield	1	0	
				stanford	14	2	1
				syracuse	31	4	1
temple	25	2					
tenn	14	0					
tenn st	2	0					
tenn tech	2	0					
texas	24	3					
utep	16	1	1				
utsa	3	0					
texas a&m	7	0					
				tcu	7	0	
texas so	4	0					
texas st	2	0					
texas tech	12	0					
toledo	4	0					
towson	2	0					
				trinity tx	1	0	
troy	1	0					
				tufts	1	0	
				tulane	3	0	
				tulsa	14	0	
ucla	38	15	11				
utah	26	4	1				
utah st	17	0					
				valparaiso	7	0	
				vanderbilt	8	0	
vermont	3	0					
				villanova	26	2	1
virginia	15	2					
vcu	7	0					
vmi	3	0					
virginia tech	7	0					
				wagner	1	0	
				wake forest	20	1	
wash	13	1					
wash st	4	1					
wayne st mich	1	0					

	Public	Yrs.	F4	Champ	Private	Yrs.	F4	Champ
	weber st	13	0					
	west texas a&m	1	0					
	west virginia	20	1					
	western carolina	1	0					
	western kentucky	18	0					
	western mich	3	0					
	wichita st	8	1					
					williams	1	0	
	winthrop	6	0					
	wisconsin	12	2	1				
	wisconsin green bay	4	0					
	wisconsin milwaukee	3	0					
	wright st	1	0					
	wyoming	14	1	1				
					xavier	17	0	
					yale	3	0	
Total	**184**	**1607**	**199**	**55**	**107**	**812**	**64**	**13**
%of DI	**63.23%**				**36.77%**			
Ave # T.App/yr		**23.62**				**11.94**		
%T.App.in F4			**12.38%**				**7.88%**	
%T.Champ				**3.42%**				**1.60%**

KEY:

Yrs. = Total # of NCAA tournament appearances
F4 = Total # of NCAA Final Four appearances
Champ = Total # of NCAA Championships
Ave # T.App/yr = Average number of tournament appearances/year
%T.App.in F4 = percentage of appearances in Final Four
%T.Champ = percentage of Championships