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The Battle in Both Courts: *NCAA v. Tarkanian*, 109 S. Ct. 454 (1988)

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The Battle in Both Courts

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

I. INTRODUCTION

The due process clause of the fourteenth amendment to the United States Constitution provides that no "*state shall . . . deprive any person of life, liberty, or property, without due process of law . . .*"¹ Similarly, 42 U.S.C. § 1983,² which Congress enacted pursuant to its grant of authority by section five of the fourteenth amendment,³ prohibits any person from interfering with another's federally-protected rights under color of *state* law. Both the due process clause, by its express language, and section 1983, by both its language⁴ and judicial construction,⁵ apply only to limit actions attributable to *state* actors. Unfortunately, however, the Supreme Court has not provided a clear demarcation between state action, against which these provisions provide protection, and private actions to which the provisions do not apply. In fact, a convoluted body of law, generically labeled as the state action doctrine, lives in the United States Reports as testimony to the Court's unsuccessful efforts to draw the necessary line between state and private action.

Despite the incoherency of the state action doctrine, it is clear that, at times, a private actor may become so intertwined with a state actor that the actions of the private actor can be characterized as state action.⁶ However, the already difficult characteriza-

1. U.S. CONST. amend. XIV, § 1 (emphasis added).

2. 42 U.S.C. § 1983 (1982).

3. U.S. CONST. amend. XIV, § 5.

4. In *toto*, 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

5. See *United States v. Price*, 383 U.S. 787, 794, n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment.").

6. See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (holding that a restaurant leasing space within a public parking facility, as it was in a position of pervasive interdependence with the lessor state, was itself a state actor).

tion of a private actor's status is complicated when the private actor is an organization which includes among its members some entities which are clearly private actors and others which are clearly state actors. A poignant example of such an organization, one whose status has spawned a considerable amount of litigation,⁷ is the National Collegiate Athletic Association (NCAA).

The NCAA is an unincorporated association charged with regulating a vast amount of the intercollegiate athletic competition in the United States.⁸ Its members, of which there are approximately 960, include most of the public and private colleges and universities in the United States that conduct athletic programs.⁹ Upon inspecting the NCAA's roster of members, it becomes quite clear that many are state institutions and many are not.¹⁰ Because of this hybrid membership, the courts have labored for years over whether the NCAA is a state actor.¹¹ Recently, in *NCAA v. Tarkanian*,¹² the Supreme Court of the United States endeavored for the first time to clarify the issue when it granted certiorari to determine whether the NCAA had engaged in state action when it investigated the basketball program of one of its state actor members, the University of Nevada at Las Vegas (UNLV), and, as a result of its findings, subsequently required UNLV to show cause why UNLV should not suspend its head basketball coach, Jerry Tarkanian. The Court, in a 5-4 decision, held that neither the NCAA investigation nor its recommendation that UNLV suspend

7. For years the lower federal courts have had to determine whether the NCAA is a private or a state actor. Early on, most courts of appeals found the NCAA to be a state actor. *E.g.*, *Regents of Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977); *Howard Univ. v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975); *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975); *Associated Students, Inc. of California State University v. NCAA*, 493 F.2d 1251 (9th Cir. 1974) (*per curiam*). However, after the Court's trilogy of state action decisions handed down in 1982—*Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); and *Blum v. Yaretsky*, 457 U.S. 991 (1982)—most of the lower federal courts have found the NCAA to be a private actor. *E.g.*, *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987); *Graham v. NCAA*, 804 F.2d 953 (6th Cir. 1986); *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984).

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

9. *Id.*

10. For example, the University of Florida, the University of Illinois, and the Ohio State University, like UNLV, are state institutions which are NCAA members. In contrast, the University of Miami, Duke University, and the University of Notre Dame are all private institutions that belong to the NCAA.

11. See *supra* note 7 (documenting the vast amount of federal appellate court decisions deciding the NCAA's status).

12. 109 S. Ct. 454 (1988).

Tarkanian constituted state action.¹³ This Note discusses both the majority and dissenting opinions in *Tarkanian* and argues that the Court was too quick to distinguish *Burton v. Wilmington Parking Authority*¹⁴ which, because of the pervasive interdependence of UNLV and the NCAA and the mutual benefits each derive from the relationship, provided a basis for the Court to find that the NCAA was a state actor.

II. FACTUAL BACKGROUND AND PROCEEDINGS

A discussion of the Court's opinion in *Tarkanian* necessarily must be preceded by an account of the factual background which brought the case to the Supreme Court. As noted above, Jerry Tarkanian is the head basketball coach at UNLV¹⁵—a branch of the University of Nevada, a state funded institution.¹⁶ UNLV is a member of the NCAA¹⁷ and, as a member, had agreed to abide by and enforce the NCAA's rules governing the conduct of the athletic programs of its member schools with respect to, *inter alia*, student-athlete eligibility, admissions, recruiting, and financial aid.¹⁸ The NCAA employs a Committee on Infractions to enforce its rules.¹⁹ The Committee conducts investigations of alleged rule violations and is empowered to impose penalties upon offenders.²⁰ Particularly relevant in the *Tarkanian* litigation was the Committee on Infraction's power to command a member school to show cause why that member should not incur additional sanctions unless it disciplines an employee.²¹

The Committee on Infractions began a preliminary investigation of UNLV for alleged NCAA violations on November 28, 1972.²² On February 25, 1976, after a three year investigation, the

13. *Id.*

14. 365 U.S. 715 (1961).

15. *Tarkanian*, 109 S. Ct. at 457. Tarkanian became a tenured professor in 1977. *Id.*

16. *Id.* UNLV "is organized and operated pursuant to provisions of Nevada's State Constitution, statutes, and regulations." *Id.* The Court noted that the officers of UNLV, when acting in their official capacity, undeniably act under color of state law. *Id.*

17. *Id.* at 462.

18. *Id.* at 457.

19. *Id.*

20. *Id.* In reality, an NCAA investigation is not conducted by the Committee on Infractions. The Committee merely sits as a judicial tribunal. The actual NCAA investigations are conducted by a full-time, paid enforcement staff. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1989-90 NCAA MANUAL 355 (1989).

21. *Id.* at 458, n.7. However, irrespective of this power to force a member to show cause, it is clear that the NCAA is not permitted to sanction directly an employee of a member school. *Id.*

22. *Id.* at 458.

Committee informed UNLV's president that an official inquiry was necessary.²³ Specifically, the allegations involved UNLV's recruitment of athletes between 1971 and 1975; some of the allegations implicated Tarkanian.²⁴ The NCAA requested UNLV to conduct its own investigation and to provide detailed information with respect to each allegation.²⁵ UNLV complied and, with the assistance of the Attorney General of Nevada, conducted its own investigation of the charges.²⁶ On October 27, 1976, UNLV responded to the Committee by denying all allegations that the university or Tarkanian were guilty of any wrongdoing.²⁷ The Committee on Infractions then held several days of hearings where counsel for UNLV and Tarkanian presented their findings and challenged the legitimacy of the NCAA investigation.²⁸ Although the Committee agreed that many of the charges could not be substantiated, it determined that thirty-eight violations of the NCAA rules did occur, ten of which were committed by Tarkanian.²⁹

The Committee recommended several sanctions against UNLV, including a two-year period of probation for the basketball program.³⁰ Further, the Committee asked UNLV to show cause why "additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him completely from the University's intercollegiate athletic program during the probation period."³¹ UNLV appealed most of the Committee's findings to the NCAA Council, which, on August 25, 1977, rejected the appeal and adopted all the Committee's recommendations.³² Soon after UNLV received the NCAA ruling, university officials held a hearing to determine whether UNLV would adopt the sanctions.³³ At the hearing, UNLV's vice president outlined UNLV's three possible options: (1) UNLV could reject the sanction requiring Tarkanian's suspension and risk heavier sanctions; (2) UNLV could reassign Tarkanian—despite his tenure and the lack of no-

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* The Court said the most serious violation was Tarkanian's failure to fulfill UNLV's obligation to fully cooperate with the NCAA investigation. *Id.* at 458-59.

30. *Id.* at 459. Under the terms of its probation, UNLV's basketball team would not be allowed to participate in post-season games or appear on television. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

tice—because of the recognition that UNLV had delegated power to the NCAA to act as the ultimate arbiter in these matters; or (3) UNLV could pull out of the NCAA completely.³⁴ Choosing the second option, UNLV's president notified Tarkanian that he was to be "‘completely severed of any and all relations, formal or informal, with the University's Intercollegiate athletic program during the period of the University's NCAA probation.’"³⁵

On the day before he was to be suspended officially, Tarkanian filed suit in a Nevada state court seeking declaratory and injunctive relief against UNLV, alleging that UNLV, in violation of 42 U.S.C. § 1983, had deprived him of liberty and property without affording him the due process of law required by the fourteenth amendment.³⁶ Reasoning that Tarkanian had been deprived procedural and substantive due process, the trial court enjoined UNLV from enforcing its suspension.³⁷ UNLV appealed.³⁸

In the Nevada Supreme Court, the NCAA filed an *amicus curiae* brief contending that the suit should be dismissed because there was no existing controversy between Tarkanian and UNLV; in the alternative, the NCAA argued that if there was a controversy, the NCAA was a necessary party to the litigation.³⁹ The Nevada Supreme Court found that a controversy existed between UNLV and Tarkanian, but concluded that the NCAA was a necessary party to the litigation and remanded to permit joinder.⁴⁰

Upon remand, Tarkanian amended his complaint to include the NCAA as a defendant.⁴¹ Finally, after four years, and a two week bench trial, the trial court ruled in favor of Tarkanian, concluding that the NCAA's conduct constituted state action and that its decision was arbitrary and capricious.⁴² The trial court reaffirmed its previous injunction which had prohibited UNLV from suspending Tarkanian and, after Tarkanian's subsequent filing of a petition for attorney's fees pursuant to 42 U.S.C. § 1988,⁴³ granted

34. *Id.*

35. *Id.* (quoting Joint Appendix at 70, *Tarkanian* (No. 87-1061)).

36. *Tarkanian*, 109 S. Ct. at 459. For a full discussion of the lower court decisions, as well as the NCAA investigation of UNLV and Tarkanian, see *State Action & the NCAA: Will Tarkanian Sport the Old Look?*, 4 ENT. & SP. L.J. 385 (1987).

37. *Id.*

38. *Id.*

39. *Id.* at 460.

40. *University of Nevada v. Tarkanian*, 95 Nev. 389, 594 P.2d 1159 (1979).

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

42. *Id.*

43. 42 U.S.C. § 1988 (1982) (allowing a court in its discretion to award a party prevailing in a § 1983 action a reasonable attorney's fee as a part of the costs).

Tarkanian a total of \$196,000, ninety percent of which was to be paid by the NCAA.⁴⁴ The NCAA alone appealed the injunction and the award of attorney's fees.⁴⁵

The Nevada Supreme Court affirmed, holding that the NCAA was a state actor.⁴⁶ The Nevada Supreme Court based its affirmation on a number of factors. First, the court made the assumption that it was reviewing the imposition of penalties by UNLV and the NCAA on Tarkanian and not the NCAA's threat of sanction against UNLV for failing to discipline Tarkanian.⁴⁷ Second, the court reasoned that the NCAA's activities constituted state action because many member schools are public institutions.⁴⁸ Further, the court noted that the right to discipline a public employee is traditionally the exclusive prerogative of the state and UNLV could not escape liability by delegating this responsibility to a private actor.⁴⁹ Finally, the court, implementing the two-part test announced by the Supreme Court of the United States in *Lugar v. Edmondson Oil Co.*,⁵⁰ concluded that Tarkanian's deprivation was caused by the exercise of a state created right and that because of UNLV's delegation of authority to the NCAA, UNLV and the NCAA acted jointly, rendering the NCAA, as well as UNLV, a state actor.⁵¹

III. THE MAJORITY

The Supreme Court reversed, holding that the NCAA was not a state actor when it investigated UNLV and recommended Tarkanian's suspension.⁵² In his opinion for a five Justice majority, Justice Stevens initially explained the doctrinal setting:

Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be.⁵³

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

45. *Id.*

46. *Tarkanian v. NCAA*, 741 P.2d 1345, 1349 (Nev. 1987), *cert. granted*, 108 S. Ct. 1011 (1988).

47. *Id.* at 1347.

48. *Id.*

49. *Id.* at 1348.

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

51. *Tarkanian*, 741 P.2d at 1349.

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

53. *Id.* at 461.

The primary task for the *Tarkanian* Court was to determine under which of these labels the NCAA's conduct would fall. Justice Stevens noted that the Nevada Supreme Court had characterized the NCAA as a state actor because, the state court held, after UNLV had delegated to the NCAA its responsibility over personnel decisions, "the two entities acted jointly to deprive Tarkanian of liberty and property interests."⁵⁴ However, Justice Stevens rejected the Nevada Supreme Court's reasoning as "fundamentally misconstru[ing] the facts of this case."⁵⁵ Instead, Justice Stevens contended, the facts make this case atypical, "uniquely mirror[ing] the traditional state action case."⁵⁶ Normally, Justice Stevens noted, a state action issue arises after a *private party* has engaged in the decisive conduct which harmed the plaintiff.⁵⁷ When that is the case, he continued, the Court is required to ask whether the state was sufficiently involved with the private actor so that the private actor's conduct can be characterized as state action.⁵⁸ However, Justice Stevens pointed out, here the decisive conduct—Tarkanian's suspension—was committed not by the private actor but by UNLV, the *state* actor.⁵⁹ Hence, he concluded, the issue created by the facts "is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."⁶⁰

Having framed the issue, Justice Stevens first examined the relationship between UNLV and the NCAA regarding the NCAA's rulemaking procedures.⁶¹ In doing so, he rejected the contention that state action could be imputed to the NCAA merely because UNLV is an NCAA member and, as a member, has had some impact on the formulation of NCAA policy.⁶² Observing that hundreds of other member schools also have equal input into NCAA policymaking, Justice Stevens argued that the legislation adopted by the NCAA is formulated not by Nevada, but by a collective membership of both private and public institutions, independent of any particular state.⁶³ Thus, he concluded, "[n]either UNLV's

54. *Id.* at 462.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* Justice Stevens, however, does make the distinction between the NCAA which

decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance."⁶⁴

Next, Justice Stevens rejected Tarkanian's contention that the entire NCAA investigation and its subsequent recommendations constituted state action because they were a product of UNLV's delegation of power to the NCAA.⁶⁵ Although Justice Stevens conceded that a state may transform a private party into a state actor by delegating authority to that private party, and that UNLV as a member of the NCAA subscribed to the NCAA bylaw which recognizes that enforcement procedures are an essential component of each member's programs, he noted that UNLV never delegated power to the NCAA to take any specific action against any UNLV employee.⁶⁶ Instead, he continued, the "commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself."⁶⁷

Indeed, Justice Stevens noted an adversarial relationship between UNLV and the NCAA as UNLV's goal throughout the years of investigation was to retain its successful coach, while the NCAA primarily wanted to find the truth in its investigation.⁶⁸ The nature of this relationship, Justice Stevens argued, militates against any conclusion that "UNLV's promise to cooperate in the NCAA enforcement proceedings was tantamount to a partnership agreement or the transfer of certain University powers to the

is comprised of numerous state institutions from *different* states and those athletic associations, most obviously on the high school level, whose institutional members are all located in the same state. *Id.* at 462 n.13. In the latter scenario, Justice Stevens uninformatively contends, "[t]he situation would, of course, be different" *Id.*

64. *Id.* at 463.

65. *Id.* at 463-65.

66. *Id.* at 464. In fact, Justice Stevens noted:

The NCAA enjoyed no governmental powers to facilitate its investigation. It had no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual. Its greatest authority was to threaten sanctions against UNLV, with the ultimate sanction being expulsion of the University from membership. Contrary to the premise of the Nevada Supreme Court's opinion, the NCAA did not—indeed, could not—directly discipline Tarkanian or any other state university employee.

Id. at 464-65. Further, Justice Stevens rejected Tarkanian's argument that the "NCAA has assumed the state's traditional and exclusive power to discipline its employees" when he claimed that Tarkanian's argument "overlooks the fact that the NCAA's own legislation prohibits it from taking any direct action against Tarkanian." *Id.* at 465 n.18.

67. *Id.* at 464.

68. *Id.*

NCAA”⁶⁹ Therefore, he concluded, it is improper to characterize the NCAA as an agent of UNLV during the NCAA’s investigation of UNLV’s basketball program.⁷⁰ More accurately, he claimed, the NCAA was an agent of the other members of the NCAA who had an interest in the enforcement of the NCAA’s rules and regulations: “[T]he NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university.”⁷¹

Finally, Justice Stevens rejected Tarkanian’s argument that the NCAA’s power was so substantial that UNLV had no choice but to comply with its demands.⁷² Justice Stevens reasoned that even if one were to assume that a monopolist could impose its will on a state agency by threatening not to deal with it, “it does not follow that such a private party is therefore acting under color of state law.”⁷³

In the end, Justice Stevens noted that the test the Court enunciated in *Lugar* provided the relevant inquiry: whether “the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the state.”⁷⁴ Because UNLV and its counsel, including the Attorney General of the State of Nevada, vigorously opposed the NCAA’s imposition of sanctions upon UNLV throughout the proceedings, Justice Stevens reasoned that it would be “ironic” to conclude that the NCAA’s action was fairly attributable to the State of Nevada.⁷⁵ The more appropriate conclusion, he said, would be to concede “that UNLV has conducted its athletic program under color of the policies adopted by the NCAA”⁷⁶ That, however, he concluded without saying, does not make the NCAA a state actor.

IV. THE DISSENT

Justice White filed a dissenting opinion, which Justices Brennan, Marshall, and O’Connor joined.⁷⁷ Justice White believed the

69. *Id.*

70. *Id.*

71. *Id.* Cf. *Polk County v. Dodson*, 454 U.S. 312, 320 (1981) (noting that a state-compensated public defender acts in a private capacity when she represents a private client in a conflict against the state).

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

73. *Id.*

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

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

76. *Id.*

77. *Id.* at 466 (White, J., dissenting).

central issue to be "whether the NCAA acted jointly with UNLV in suspending Tarkanian and thereby also became a state actor."⁷⁸ He agreed with the majority that the facts of this case—especially the fact that a party conceded to be a state actor, and not a private party, committed the final act causing Tarkanian's harm—distinguish it from the facts of the typical state action case in which the private party takes the decisive act.⁷⁹ However, Justice White explained, this factual scenario is neither unique nor unprecedented.⁸⁰ He argued that in two previous cases—*Dennis v. Sparks*⁸¹ and *Adickes v. S.H. Kress & Co.*⁸²—the Court had to decide whether private parties could be labeled state actors where the final or decisive act causing the alleged harm was undertaken by a state official. On both occasions, Justice White argued, the Court held that the private parties would be state actors if they were "jointly engaged with state officials in the challenged action."⁸³

After concluding that *Dennis*⁸⁴ and *Adickes*⁸⁵ make a search for joint action the relevant inquiry, Justice White found that the NCAA acted jointly with UNLV in suspending Tarkanian, giving three reasons to support his finding.⁸⁶ First, he noted that UNLV

78. *Id.*

79. *Id.*

80. *Id.*

81. 449 U.S. 24 (1980). In *Dennis*, a state trial court judge granted an illegal injunction to enjoin the production of minerals from oil leases owned by the plaintiff. *Id.* at 25. The plaintiff then brought suit under 42 U.S.C. § 1983, alleging the injunction was a product of a corrupt conspiracy between the judge and the private parties seeking the injunction and that it worked to deprive the plaintiff of property without due process of law. *Id.* at 25-26. The Supreme Court held that the private parties' involvement in the conspiracy, which involved bribing the judge, constituted state action because the private parties were willful participants in joint action with a state agent. *Id.* at 27-28.

82. 398 U.S. 144 (1970). In *Adickes*, a white school teacher brought suit in federal court seeking to recover damages under 42 U.S.C. § 1983 for an alleged violation of her constitutional rights. *Id.* at 146. *Adickes'* suit resulted from Kress' refusal to serve her lunch at its Hattiesburg, Mississippi store and *Adickes'* subsequent arrest by the Hattiesburg Police on vagrancy charges upon leaving the store. *Id.* The Court held that *Adickes* would be entitled to relief if she could prove that the private party and the involved police officer had conspired to effect the discrimination and to cause her arrest on impermissible grounds. *Id.* at 152. The Court said that this could be shown if proof was presented that the private actor and police officer had "reached an understanding" regarding the *Adickes'* arrest. *Id.* The Court noted that "a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983." *Id.* The Court noted that "[i]t is enough that [the private party] is a willful participant in joint activity with the state or its agents" *Id.* (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

83. *Tarkanian*, 109 S. Ct. at 466 (quoting *Dennis*, 449 U.S. at 24, 27-28).

84. 449 U.S. 24 (1980).

85. 398 U.S. 144 (1970).

86. *Tarkanian*, 109 S. Ct. at 466.

suspended Tarkanian because of Tarkanian's violation of NCAA rules, rules which bound UNLV contractually pursuant to its membership agreement with the NCAA.⁸⁷ Second, Justice White pointed out that the NCAA and UNLV agreed that the NCAA would conduct the hearings on all alleged rules infractions.⁸⁸ In fact, he noted, the NCAA alone conducted the hearings which the Nevada Supreme Court found to be violative of Tarkanian's rights to procedural due process; UNLV was not in control.⁸⁹ Finally, Justice White was persuaded by the membership agreement between the NCAA and UNLV under which UNLV agreed that the NCAA's findings made at any hearing the NCAA conducted would be binding on the university.⁹⁰ He argued that in its capacity as a member of the NCAA, UNLV did more than merely "promise to cooperate in the NCAA enforcement proceedings."⁹¹ It agreed, he claimed, to accept the NCAA's findings of fact as determinative.⁹² As a result, he remarked, UNLV made the decision to suspend Tarkanian based on the NCAA's findings, even though UNLV considered many of these findings wrong.⁹³ "On these facts," Justice White concluded, "the NCAA was 'jointly engaged with [UNLV] officials in the challenged action,'" and therefore was a state actor.⁹⁴

After concluding that the facts warranted a finding of joint action, Justice White attacked the majority's reasons for not finding state action in *Tarkanian* by claiming that they were rejected implicitly in *Dennis*.⁹⁵ Initially, he assailed the majority's reliance on the NCAA's inability to take action directly against Tarkanian as being determinative of whether the NCAA was a state actor.⁹⁶ He claimed that in *Dennis* the private party lacked the power to take the decisive action against the complainant—in *Dennis*, the power to issue an injunction—yet the Court still found state action in *Dennis*.⁹⁷ In addition, Justice White took exception to the majority's claim that UNLV had the ability to disassociate itself from

87. *Id.*

88. *Id.*

89. *Id.* at 467.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

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

95. *Tarkanian*, 109 S. Ct. at 467.

96. *Id.*

97. *Id.*

the NCAA.⁹⁸ Again, Justice White noted, a similar situation was presented in *Dennis*, where the trial judge could have withdrawn from his agreement to issue the illegal injunction at any time.⁹⁹ Still, he continued, the Supreme Court found state action in *Dennis*.¹⁰⁰ The important factor, Justice White noted, was not the state entity's ability to withdraw, but that it did not actually withdraw.¹⁰¹

Finally, Justice White attacked the majority's reliance on the adversarial nature of the relationship between UNLV and the NCAA throughout the investigatory process.¹⁰² Although conceding that UNLV did attempt to avoid the imposition of sanctions by the NCAA, including Tarkanian's recommended suspension, Justice White was convinced that UNLV's efforts did not "undercut the [membership] agreement itself."¹⁰³ Again, relying on *Dennis*—in which, he posited, the trial judge could have sought to persuade the parties that he should not grant the injunction before ultimately doing so—Justice White claimed that the dispositive factor was "that ultimately the parties agreed to take the action."¹⁰⁴

Because he believed that "UNLV did suspend Tarkanian, and [that] it did so because it embraced the NCAA rules governing conduct of its athletic program and adopted the results of the hearings conducted by the NCAA concerning Tarkanian, as it had agreed that it would," Justice White concluded that the NCAA acted jointly with UNLV, rendering the NCAA a state actor.¹⁰⁵

V. AN ALTERNATIVE REASONING

One theory of state action analysis would find a private party to be a state actor where the private party and the government are engaged in a *symbiotic* relationship.¹⁰⁶ In such a relationship, "multiple or joint contacts," especially if the contacts confer upon each participant numerous benefits, act to transform the private

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 468.

105. *Id.*

106. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 12.4(b) (3rd ed. 1986).

actor into a government agent.¹⁰⁷ The classic symbiotic relationship case is *Burton v. Wilmington Parking Authority*,¹⁰⁸ in which the Supreme Court held that a private restaurant which leased space in a publicly owned parking facility was a state actor subject to the constraints of the fourteenth amendment. In *Burton*, the Court reasoned that the relationship between the restaurant and the owner of the parking facility—the government—was such that each party benefitted from its involvement.¹⁰⁹ The restaurant benefitted in that its location in a public parking facility increased its business, gave its guests a convenient place to park, and provided a potential tax exemption.¹¹⁰ Similarly, the restaurant's location, aside from bestowing an obvious benefit upon the government in the form of rental income, also provided the government with the possibility of increased demand for its parking facilities.¹¹¹ These mutual benefits, which were indicative of a pervasive interdependence between the state and the private restaurant, led the Court to find that the restaurant was a state actor.¹¹²

In reaching his conclusion that the NCAA's conduct did not constitute state action, Justice Stevens summarily distinguished *Burton*.¹¹³ However, it seems that reliance on *Burton* could have allowed the Supreme Court to find the NCAA to be a state actor in *Tarkanian*.¹¹⁴ Specifically, Justice Stevens' summary distinction of *Burton* ignored the fact that in *Tarkanian* a relationship of pervasive interdependence existed between a government actor and a private actor so as to constitute the "symbiotic relationship" which would allow the Court to find that the private party was a state actor. When looking at the relationship between UNLV and the NCAA, it is clear that this relationship confers on each "an incidental variety of mutual benefits."¹¹⁵ Consequently, Justice Stevens' statement that in this case "[UNLV] and [the NCAA's] rele-

107. *Id.*

108. 365 U.S. 715 (1961).

109. *Id.* at 724.

110. *Id.*

111. *Id.*

112. *See id.*

113. *NCAA v. Tarkanian*, 109 S. Ct. 454, 464 n.16 (1988).

114. Justice Stevens himself admits in *Tarkanian* that the amount of interdependence between the two entities is relevant to the ultimate characterization of the private entity as either a private or a state actor: "The degree to which the activities of the state entity and the arguably private entity are intertwined also is pertinent." *Id.* at 463 n.14 (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721-26 (1961)) (emphasis added).

115. *Tarkanian*, 109 S. Ct. at 464 n.16 (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724 (1961)).

vant interests do not coincide, as they did in *Burton*¹¹⁶ is belied by the nature of the relationship.

Both the NCAA and UNLV benefit from UNLV's membership in the NCAA. Most importantly, UNLV's participation provides the NCAA with another nationally recognized, championship-caliber basketball program, whose presence in the association confers on the NCAA schools who play UNLV a number of benefits: recognition, enhancing the member schools' recruiting efforts; national exposure, producing television revenues for the member school; and increased gate revenues, a product of scheduling a national power like UNLV.

UNLV, meanwhile, benefits in numerous ways as well. First, UNLV's membership in the NCAA—which has a substantial framework of rules governing the admissions, recruitment, and eligibility of student athletes, as well as the ability to enforce these rules—ensures UNLV fair intercollegiate athletic competition. Further, UNLV's membership in the NCAA facilitates its obtaining competition with other members, attracting television revenues and fans.¹¹⁷ Moreover, membership allows UNLV to participate in the NCAA's showcase event—the widely acclaimed NCAA post-season basketball tournament, again providing UNLV with outstanding exposure and automatic recognition as a successful program, enhancing recruiting efforts and increasing alumni support. Finally, membership provides UNLV, as an institution which seeks to make available to its students a program of intercollegiate athletics, access to a governing body which facilitates the maintenance of “intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body”¹¹⁸ In fact, as one commentator has noted: “Without regulation [by the NCAA], the desire of member institutions to remain athletically competitive would lead them to engage in activities that deny amateurism to the public. No single institution could confidently enforce its own standards since it could not trust its competitors to do the same.”¹¹⁹ Therefore, as Justice White has noted, “[b]y mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable

116. *Tarkanian*, 109 S. Ct. at 464 n.16.

117. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99, 103 (1984).

118. *Tarkanian*, 109 S. Ct. at 457 (quoting Joint Appendix at 80, *Tarkanian* (87-1061)).

119. Note, *Antitrust and Nonprofit Entities*, 94 HARV. L. REV. 802, 817-18 (1981).

product”¹²⁰ Thus, as UNLV undoubtedly seeks to provide its student body with a program of intercollegiate athletics and, at the same time, seeks to maintain its commitment to the values of higher education, its membership in the NCAA provides it with a mechanism to ensure that it achieves both goals.

Clearly, the NCAA and UNLV both derive benefits from UNLV's membership in the NCAA. As a result of these benefits which membership bestows on UNLV, and because the NCAA is in reality a monopolist, it is impractical to conclude, as Justice Stevens did, that UNLV had viable alternatives to compliance such as withdrawal.¹²¹ Withdrawing from the NCAA would cost UNLV great sums of revenue, the benefit of high caliber competition, and the voluminous amount of national exposure the school derives from its membership in the NCAA. To say UNLV had a choice is to ignore reality.

In *Burton*, the Supreme Court noted that private actors whose relationships with governmental entities place them within the category of state actors characterized by a symbiotic relationship only can be identified by “sifting facts and weighing circumstances.”¹²² However, in *Tarkanian*, if the Court had done a little more sifting and weighing it would have seen that the relationship between the NCAA and UNLV is one of mutual interdependence, which warranted a finding of state action pursuant to *Burton*.

VI. CONCLUSION

In *Tarkanian* the Court held that the NCAA does not engage in state action when it investigates a state university's athletic program for alleged NCAA violations and requests the university to show cause why additional sanctions should not be imposed if the university fails to suspend one of the perpetrators of a rule violation who happens to be a university employee. Justice Stevens's majority opinion distinguished *Tarkanian* from the typical state action case because in *Tarkanian* the state, not the private actor, committed the final act causing the plaintiff's harm. Justice White's dissent, however, relied on two previous decisions in which, he claimed, the Court found state action on the part of a private party who acted jointly with the state, even though the decisive action was taken by the state actor.

120. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 122 (1984) (White, J., dissenting).

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

122. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

There is still no formal test indicating how much contact with the government will subject a private party's activities to constitutional restrictions. Indeed, according to *Burton*,¹²³ the Court will continue to determine who is and is not a state actor on a case-by-case basis by "sifting facts and weighing circumstances."¹²⁴ Even so, if the Court had recognized the mutual interdependence of the NCAA and UNLV and realized that, pursuant to *Burton*, this interdependence would render the NCAA a state actor, the outcome would have been different. The Court should have taken a realistic look at the power of the NCAA and recognized its interdependence with the state actors which fill its membership rolls.

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123. 365 U.S. 715 (1961).

124. *Id.* at 722.

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