PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 17
Issue 1 *Symposium: Victim's Rights*

Article 10

12-15-1989

National Collegiate Athletic Association v. Tarkanian: Supreme Court Upholds NCAA's Private Status under the Fourteenth Amendment, Repelling Shark's Attack on NCAA's Disciplinary Powers

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National Collegiate Athletic Association v. Tarkanian: Supreme Court Upholds NCAA's Private Status Under the Fourteenth Amendment, Repelling Shark's Attack on NCAA's Disciplinary Powers*

I. INTRODUCTION

A. Collegiate Athletics Overshadows Academics

The lure of lucrative rewards[1] and the burden of escalating expenditures[2] for colleges and universities in athletic events sponsored by the National Collegiate Athletic Association (NCAA)[3] are con-

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* Jerry Tarkanian, nicknamed "the Shark," has been the focus of NCAA sanctions while coaching basketball at the California State University at Long Beach (CSULB) and the University of Nevada Las Vegas (UNLV). For further information about Tarkanian's background, see *infra* notes 166-67.

1. "The 52 schools in the NCAA basketball tournament [in 1983] were each guaranteed $120,000, with $290,000 guaranteed to each of the final 16 teams and $520,000 to each in the final four." Comment, *NCAA Eligibility Regulations and the Fourteenth Amendment—Where Is the State Action?*, 13 OHIO N.U.L. REV. 433, 435 (1986). By 1988, the basketball tournament had gross receipts totaling $68.2 million with the final four teams each receiving $1.2 million. Gup, *Foul!*, TIME, Apr. 3, 1989, at 55. Furthermore, NCAA basketball has also fared well in light of its recent $166 million contract with Columbia Broadcasting System for the television rights for three years of Division I basketball. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 985 (1987) (citing NCAA News, Jan. 14, 1987, at 2, col 4). Furthermore, more than 25 million people watched the 1988-89 NCAA basketball tournament. Gup, *supra*, at 54.

During 1983, $35 million was divided between the schools participating in 16 bowl games for Division I college football. Comment, *supra*, at 435. In a 1986 survey of revenues of football programs at NCAA institutions, aggregate revenues were an estimated $1,064,749,000, representing a 48% increase from 1982. Smith, *supra*, at 985 (citing NCAA News, Nov. 3, 1986, at 14, col. 1). Furthermore, "the average income for football at Division I member institutions had reached $3.4 million in 1984, with some programs generating in excess of $10 million in gross income." *Id.* (citing Christian Sci. Monitor, June 25, 1985, at 20, col. 1).

2. "[D]ivision I schools with football programs spent an average of $3.24 million on men's athletics in 1981." Comment, *supra* note 1, at 435. Furthermore, aggregate expenses for Division I football programs were estimated at $1.2 billion. Smith, *supra* note 1, at 985 (citing NCAA News, Nov. 3, 1986, at 14, col. 1).

3. The NCAA sponsors 77 national championships composed of 41 events for the men's competition, 34 events for the women's competition, and two events which are for both sexes. Martin, *The NCAA and Its Student-Athletes: Is There Still State Action?*, 21 NEW ENG. L. REV. 49, 55 (1985-86) (citing NATIONAL COLLEGIATE ATHLETIC

stantly in conflict with the primary educational and academic purposes of such institutions and the NCAA.[4] Often the pursuit of athletic excellence, by both the school and the individual,[5] takes priority over providing the student-athlete with a diploma.[6] Consequently, the NCAA and its member institutions have been criticized by members of Congress,[7] university faculty,[8] the media,[9] legal schol-

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ASS'N, 1985-86 NATIONAL COLLEGIATE ATHLETIC ASS'N MANUAL, Exec. Reg. § 3(a), at 172 (1985)).

4. "One of the NCAA's fundamental policies is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between college athletics and professional sports." National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 457 (1988). *See also* Smith, *supra* note 1, at 986 (citing NATIONAL COLLEGIATE ATHLETIC ASS'N CONST. art. II, § 2(a), *reprinted in* NATIONAL COLLEGIATE ATHLETIC ASS'N, 1986-87 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASS'N 7 (1986)).

5. *See infra* notes 18-19 and accompanying text.

6. "[A] commitment to recruit, train, cultivate, and promote a team capable of multimillion dollar revenues may be inconsistent with the simultaneous commitment to provide a quality university education." Comment, *supra* note 1, at 446.

"[B]eneath the pageantry of . . . [the NCAA basketball tournament] lies another, more disturbing kind of madness: an obsession with winning and moneymaking that is perverting the noblest ideals of both sports and education in America." Gup, *supra* note 1, at 54.

7. *See Oversight on College Athletic Programs: Hearings Before the Subcomm. on Education, Arts, and Humanities of the Senate Comm. on Labor and Human Resources*, 98th Cong., 2d Sess. 1 (1984) [hereinafter *Hearings*]. Senator Howard Metzenbaum commented on the plight of today's intercollegiate athletics, by saying, "schools are not interested in whether Johnny can read, but whether Johnny can run, pass, and kick." *Id.* at 2-3 (statement of Sen. Howard Metzenbaum).

Representative Thomas Luken of Ohio echoed the comments of Senator Metzenbaum, by stating:

> [t]he unhappy fact is that the NCAA is not primarily concerned about kids who pass through its sports factories. Athletics departments are expected to be financially self-sustaining, so the profit motive supercedes any concern for the intellectual development of the athletes. This breeds a corrupting and destructive drive to win, regardless of the emotional, spiritual or educational cost to the student. The hope of meaningful reform within the NCAA is chimera.

Smith, *supra* note 1, at 985 (citing NCAA News, Nov. 3, 1986, at 2, col. 2) (citing N.Y. Times, Oct. 4, 1986, at 23, col. 1).

8. Dr. Harry Edwards, a sociology professor at the University of California at Los Angeles, condemned the institutional emphasis on intercollegiate athletics by telling Congress, " 'dumb jocks' are not born; they are being systematically created and institutionally accommodated." *Hearings*, *supra* note 7, at 49-102.

9. Another commentator noted an additional problem:

> [F]or many [student-athletes] the promise of an education was a sham. They were betrayed by the good intentions of others, by institutional self-interest and by their own blind love of the game. Equally victimized are the colleges and universities that participate in educational travesty—a farce that devalues every degree and denigrates the mission of higher education.

Gup, *supra* note 1, at 55; *see, e.g.*, L.A. Times, Dec. 14, 1988, § III, at 1, col. 3 ("NCAA . . . is world class in pompousness, arrogance, and highhandedness").

ars,[10] college coaches,[11] and even the NCAA itself[12] for emphasizing athletics over academics.

The overemphasis on a successful athletic program arises not only from the member institutions of the NCAA,[13] but also from the individual student-athlete, who is using collegiate athletics as a stepping-stone to a professional career[14] by accentuating his skills on the court instead of in the classroom.[15] This situation is intensified when stu-

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10. One commentator noted the possible advantage of focusing on athletics over academics:

> [N]ot only is the athlete often exchanging his prowess for an education, 'the chance to display . . . athletic prowess in college stadiums and arenas throughout the country [may be] worth more in economic terms than the chance to get a college education.' (citation omitted) Even if the college athlete does not reach the professional ranks, our sports-dominated culture often rewards outstanding college athletes in both tangible and intangible ways. Viewed from several different perspectives, the interests of athletes cannot be lightly disregarded. Moreover these are interests that are not formally represented in the NCAA process, or by member institutions.

Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U.L.J. 101, 137 (1984) (discussing how pressure of major college athletics caused NCAA to pass the controversial Proposition 48, requiring incoming freshmen to have minimum SAT or ACT scores and grade point averages to be eligible for athletic competition).

11. *See, e.g.*, L.A. Times, Dec. 13, 1988, § III, at 1, col. 4. (Larry Brown, a former college basketball coach speaks critically of the NCAA's procedures).

12. *See* Benenson, *Changing Environment in College Sports*, 1 CONG. Q., Apr. 15, 1983, at 275 (quoting Mr. David Berst, the NCAA's Director of Enforcement as saying, "if a coach's job depends on winning, the temptation is tremendous to do anything to get the talent"). Furthermore, Berst has suggested "that as many as 15% of all NCAA schools are involved in illegal activity at any given time." Comment, *supra* note 1, at 435. Walter Byers, the former Executive Director of the NCAA, conceded that it is no longer viable to assert the goal of amateurism at all levels of intercollegiate athletic competition. Smith, *supra* note 1, at 986.

13. *See supra* notes 1-2.

14. "[P]articipation in the NCAA championships in such men's sports as [football], basketball, ice hockey, and baseball brings with it not simply prestige, but exposure to major league scouts, and is thus of significant value to the student-athlete aspiring to a professional career in his sport." Martin, *supra* note 3, at 55.

15. In a recent college basketball eligibility case, U.S. District Court Judge Miles Lord lamented this undue emphasis on sports over academics:

> The private interest at stake here, although ostensibly academic, is the plaintiff's ability to obtain a 'no cut' contract with the National Basketball Association. The bachelor of arts, while a mark of achievement and distinction does not, in and of itself, assure the applicant a means of earning a living. This applicant seems to recognize this and has opted to use his college career as a means of entry into professional sports as do many college athletes. His basketball career will be little affected by the absence or presence of a bachelor of arts degree. This plaintiff has put all of his 'eggs' into the 'basket' of professional basketball. The plaintiff would suffer a substantial loss if his career objectives were impaired.

Martin, *supra* note 3, at 55-56 (quoting Hall v. University of Minn., 530 F. Supp. 104, 108 (D. Minn. 1982)). Two former football players admitted to taking "such puff

dents from lower socioeconomic backgrounds focus on athletics, rather than academics, in order to escape a depressed environment.[16] Moreover, emphasis on athletic prowess often begins in elementary and secondary schools which, not surprisingly, also receive greater athletic funding, thereby fostering athletics over academics.[17] Statistics also reveal the narrow probability of a professional career[18] as well as the strain that a student-athlete confronts when attempting to achieve professional status.[19] Consequently, many student-athletes find that their athletic careers end simultaneously with their academic endeavors, resulting in the nonexistence of a professional contract and the lack of a college diploma.

B. Efforts of the NCAA to Restore Academic Integrity

Although the commercialization of amateur athletics is certainly not novel to the NCAA,[20] the Association has adopted recent amend-

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courses as billiards, watercolor painting and recreational leisure." Gup, *supra* note 1, at 55.

16. *See* Comment, *supra* note 1, at 445.

17. *Id.* "From the time athletes are first recognized as having athletic ability they are set apart from their peers and encouraged to concentrate on developing that athletic talent." *Id.*

18. "Only about 5% of high school athletes are able to play college basketball, baseball, or football, of those eligible to enter professional sports at the end of their career, only about 1.7% do so, and of those few who do make the pros, more than 60% are back on the street in three years. *Id.* at 445 (citing N.Y. Times, Aug. 31, 1984, at 17, col. 4).

The chances of playing in the National Basketball Association are "less than 1 in 500." Gup, *supra* note 1, at 55. "The odds of becoming a brain surgeon are greater than the odds of winning a starting spot on the Boston Celtics." *Id.* (quoting John Slaughter, president of Occidental College).

19. It is estimated that Division I basketball requires 35-40 hours per week for practice, training, preparation, and games; Division I football requires 45-49 hours. The addition of travel time increases these figures to 50 and 60 hours respectively. *Hearings, supra* note 7, at 93. Student basketball players miss 30 to 40 days of classes because of road games. Gup, *Playing To Win in Vegas*, TIME, Apr. 3, 1989, at 57. Thus, "[e]ven the most motivated students would have trouble keeping up academically while practicing . . . 30 hours a week." *Gup, supra* note 1, at 55.

For example, Carl Hayes, a member of the University of Nebraska basketball team, has his textbooks tape-recorded, has a notetaker occasionally accompany him to class, and is given additional time to complete his exams, which are read to him because he has a reading disability. *Id.* at 57-58.

20. In 1929, the Carnegie Foundation for the Advancement of Education completed a three-year study on the effect of athletics on academics and made the following finding:

> [A] change of values is needed in a field that is sodden with the commercial and the material and the vested interests that these forces have created. Commercialism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth . . . to exercise at once the body and the mind and to foster habits [of] both bodily health and . . . high qualities of character . . . .

Smith, *supra* note 1, at 991 (citing GEORGE MASON UNIV. & THE AMERICAN COUNCIL ON EDUC., ADMIN. OF UNIV. PROGRAMS: INTERNAL CONTROL AND EXCELLENCE 18, 22 (1986)). Moreover, the NCAA was in existence at the time the Carnegie study was

ments to its bylaws[21] to curb the assault on academic integrity, and has stepped up enforcement of its rules, resulting in increased discipline of its members. Furthermore, in 1984, the NCAA formed the President's Commission, consisting of chief executive officers of NCAA institutions, to address policy and reform considerations confronting intercollegiate athletics.[22] By 1985, the Commission had proposed a plan aimed at restoring integrity to the intercollegiate system,[23] including the "death penalty,"[24] whereby repeat offenders of NCAA rules could be suspended from athletic competition for as long as two years.[25] Already, the NCAA has used the death penalty in a highly publicized two-year suspension of the once-successful Southern Methodist University football team.[26] Such notoriety may ultimately deter other member institutions from circumventing the NCAA's rules.

Nevertheless, the recent effort by the NCAA to clean up college athletics has been hindered by various judicial challenges[27] to the NCAA's authority by the institutions or the athletes which fall under NCAA scrutiny. Most cases have alleged that NCAA sanctions de-

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conducted as the NCAA began its reign in 1910. *See infra* notes 44-45 and accompanying text.

21. *See infra* notes 56, 92 and accompanying text.

22. *See* Smith, *supra* note 1, at 986-87 (footnote omitted). "The President's Commission consistently emphasizes its commitment to ensuring the 'integrity' of amateur athletics at the intercollegiate level." *Id.* at 987 (citing NCAA News, Sept. 22, 1985, at 4, col. 1).

23. *Id.*

24. The " 'death penalty' was designed to bolster the NCAA's enforcement capability. As such, it is intended to operate as a significant disincentive to cheating by the personnel of member institutions in recruiting and other activities designed to enhance and render more profitable the disobedient institution's program." *Id.*

25. *Id.* Furthermore, a Division I subcommittee advocated that:

> 'a penalty be added to the minimum package of penalties in major violations to specify that all institutional staff members who were found to have engaged in or condoned a major violation would be subject to termination, *suspension without pay for at least one year*, or reassignment to institutional duties that do not involve contact with any prospective or enrolled student-athletes or any representatives of athletics interests for at least one year.'

Id. at 1002 & n.99 (footnote omitted) (quoting 1984-85 ANNUAL REPORTS OF THE NAT'L COLLEGIATE ATHLETIC ASS'N 230 (1986)) (emphasis added).

The committee "favored procedures that would require suspension or dismissal of coaches found guilty of major or repeated violations . . . ." *Id.* Furthermore, amendments to bylaws would "require that any restrictions imposed upon an institution's coaching staff member by the Committee on Infraction or as a result of the Association's 'show cause' provisions must be applied to the coach even if the individual is employed at some other institution." *Id.* at 1003 (footnote omitted).

26. *See* McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988).

27. *See infra* notes 75-76, 144 and accompanying text.

prive schools or their athletes of procedural due process,[28] or that NCAA rules are violative of substantive due process[29] or equal protection rights.[30] However, the recent Supreme Court decision in *National Collegiate Athletic Association v. Tarkanian*,[31] upholding the NCAA's status as a private actor under the fourteenth amendment, should pave the way toward increasing the NCAA's control over its members and decreasing the number of judicial challenges to its authority.

C. Scope of Note

In Section II of this note, a brief historical background will be given on the establishment and growth of the NCAA.[32] Consideration will be given to 42 U.S.C. § 1983 and the fourteenth amendment, which most often provide the avenue for attacking NCAA authority.[33] Furthermore, Section II will analyze prior decisions reached by various federal and state courts, which have been divided on the NCAA's status as a state or private actor.[34]

Next, Section III will discuss the factual setting surrounding *Tarkanian*, which began in the early 1970's and has yet to be fully resolved.[35] This section also will discuss the procedural background during this time span,[36] wherein Tarkanian won all of his battles in the Nevada state courts.

Section IV[37] will analyze Justice Stevens' majority opinion, which upholds the NCAA's status as a private actor under the fourteenth amendment[38] and section 1983[39] of Title 42 of the United States Code. This section also will discuss Justice White's dissenting opinion, joined by three other Justices, which argues that the NCAA is a state actor.

Section V will discuss the practical impact of *Tarkanian*. In addition, this section will address the concern that the NCAA has become too powerful in administering its disciplinary procedures over state-

28. *See, e.g.*, Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213 (D.C. Cir. 1975).

29. *See, e.g.*, Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136 (5th Cir. 1977).

30. *See, e.g.*, Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028 (5th Cir. 1975).

31. 109 S. Ct. 454 (1988).

32. *See infra* notes 40-57 and accompanying text.

33. *See infra* notes 58-74 and accompanying text.

34. *See infra* notes 75-160 and accompanying text; *see also* cases cited *infra* notes 75-76, 144.

35. *See infra* notes 162-94 and accompanying text.

36. *See infra* notes 196-225 and accompanying text.

37. *See infra* notes 226-54 and accompanying text.

38. See *infra* note 60 for text of fourteenth amendment.

39. See *infra* note 58 for text of 42 U.S.C. § 1983 (1982).

funded universities. Finally, this note will conclude that although the NCAA finally won the eleven-year battle against the UNLV coach in the Supreme Court, Tarkanian stayed off his suspension long enough to claim a simultaneous victory in his battle against the NCAA.

II. HISTORICAL BACKGROUND

A. The NCAA's Roots and Development[40]

The development of intercollegiate athletics began in the mid-nineteenth century and with it grew the concern of faculty members for controlling the educational demands resulting from athletics.[41] Nevertheless, "[t]he commercialization of intercollegiate athletics, including the payment of compensation to the best athletes, was well entrenched by the latter part of the nineteenth century."[42] Subsequently, the actions of President Theodore Roosevelt, who invited officials from selected major football programs to review football rules,[43] ultimately led to the formation of the Intercollegiate Athletic Association of the United States,[44] which was renamed the National Collegiate Athletic Association in 1910.[45]

Although the NCAA had little influence during its infancy,[46] it began to exercise some control as a sponsor of national champion-

40. For an authorized history of the NCAA, published by the NCAA to celebrate its 75th anniversary, see J. FALLA, NCAA: THE VOICE OF COLLEGE SPORTS (1981).

41. Smith, *supra* note 1, at 989.

42. *Id.* at 989 (footnote omitted). Furthermore, the reforms of yesteryear faced hurdles similar to today's attempts at reform:

> [B]y the latter part of the nineteenth century, when initial efforts to control the excesses of intercollegiate athletics first were promulgated, the very tensions facing reform efforts in intercollegiate athletics today—commercialization, institutional pride and vacillation among faculty and administration relating to the purposes of intercollegiate athletics—constituted significant impediments to those early reform efforts.

Id. at 990.

43. Sadly, this was in response to 18 deaths and over 100 injuries in intercollegiate football in 1905. *Id.*

44. The original membership consisted of 62 institutions. *Id.* at 991.

45. *Id.* (footnote omitted).

46. Initially, the NCAA was formed solely to formulate rules for various sports. However, it also was organized to eliminate "unsavory violence" and "preserve amateurism." Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 12 (1985).

ships,[47] by revitalizing its rules to maintain academic integrity.[48] Intercollegiate athletics expanded tremendously after World War II, aided by the advent of television as a new medium,[49] which caused the NCAA to exercise greater control over its expanding membership.[50] Consequently, "with financial support provided by its share of the television contracts and with its unceasingly forceful role in infractions matters, the NCAA [has come] to play a dominant role in the current governance of intercollegiate athletics."[51]

Today, the NCAA is made up of nearly one thousand members consisting of four-year colleges and universities located throughout the United States—*half of which are public institutions*[52]—and the institutions' affiliated conferences and associations.[53] The NCAA describes itself as a "voluntary nonprofit educational organization,"[54] whose members "pay annual dues to the NCAA and adopt, in annual convention, various rules regulating athletic competition among the members, including the eligibility of students to compete in intercollegiate athletics."[55] However, the NCAA's effort to regulate intercol-

47. The NCAA sponsored its first championship event in 1921 and, within 20 years, was sponsoring championships in 10 different sports. Smith, *supra* note 1, at 991 n.30 (citing G. SCHUBERT, R. SMITH & J. TRENTADUE, SPORTS LAW 2 (1986)).

48. "During this period, coaches and administrators also began to take a major role in operating and recruiting for their intercollegiate athletic programs. [Also,] [t]he *federal government* under the New Deal took an active role in promoting athletics." *Id.* at 992 (footnotes omitted) (emphasis added).

49. The NCAA negotiated its first television contract for college football for over $1 million. *Id.* at 993 (citing G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 47, at 2).

50. Between 1950 and 1970 the membership increased 128%. By 1973, the NCAA had approximately 664 members; by 1983, membership had increased 146% to 971 members. Martin, *supra* note 3, at 55 (footnotes omitted).

51. Smith, *supra* note 1, at 993. The NCAA's control was augmented by a new set of enforcement procedures in 1951 and the creation of the Committee on Infractions, an enforcement body given additional authority to penalize members involved in rules violations. Gaona, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Problem*, 23 ARIZ. L. REV. 1065, 1071 (1981). Furthermore, the NCAA became powerful under the direction of Walter Byers, as Executive Director of the NCAA, who helped establish the NCAA's enforcement division, which aids the Committee on Infractions in the enforcement process. McCallum, *In the Kingdom of the Solitary Man*, SPORTS ILLUSTRATED, Oct. 6, 1986, at 70.

52. *See* cases cited *infra* note 119; *see also* Martin, *supra* note 3, at 55 (footnote omitted).

53. Martin, *supra* note 3, at 54 (citing Arlosoroff v. National Collegiate Athletic Ass'n, 746 F.2d 1019, 1020 (6th Cir. 1984)).

54. *Id.* (footnote omitted).

55. *Id.* at 55 (footnote omitted).

legiate athletics[56] has been the source of much criticism,[57] as well as the focus of several actions involving section 1983.

B. The Fourteenth Amendment Vis-a-Vis 42 U.S.C. § 1983

Section 1983[58] originated as section one of the 1871 Civil Rights Act,[59] which was enacted three years after the adoption of the fourteenth amendment.[60] Enacted during the Reconstruction era, section 1983 was aimed at correcting the social and political impediments confronting blacks at that time,[61] as well as curbing the unlawful practices of the Ku Klux Klan, who sought to further oppress the rights of the emancipated slaves.[62]

Originally, the scope of section 1983 was limited to the preservation

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56. In 1986, the NCAA passed an amendment to bylaw 5-1-(j) which requires incoming freshmen to graduate high school with a 2.0 grade point average in a core curriculum of at least 11 academic full-year courses, and receive a combined score of 700 on the SAT or 15 on the ACT. Comment, *supra* note 1, at 433.

Furthermore, bylaw 5-1-(d)-(3), which became effective in 1980, provides in pertinent part:

> Any participation by a student as an individual or as a representative of any team in organized competition in a sport during each 12-month period after the student's 20th birthday and prior to matriculation at a member institution shall count as one year of varsity competition in that sport.

Martin, *supra* note 3, at 51 (footnote omitted) (quoting 1982-83 NATIONAL COLLEGIATE ATHLETIC ASS'N MANUAL 72 (1982).

57. *See supra* notes 7-12 and accompanying text.

58. The text of 42 U.S.C. § 1983 (1982) reads:

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

Id.

59. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871).

60. The fourteenth amendment reads, in pertinent part:

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

U.S. CONST. amend. XIV, § 1.

61. *See* Note, *Constitutional Law: Section 1983 and Due Process Liberties*—Kelson v. City of Springfield, *767 F.2d 651 (9th Cir. 1985)*, 12 U. DAYTON L. REV. 129 (1986); *see also* Martin, *supra* note 3, at 71.

62. *See* Note, *supra* note 61, at 131.

of voting rights.[63] Subsequently, the United States Supreme Court expanded the coverage of section 1983[64] so that a variety of constitutional claims,[65] alleging violations under color of state law, may be brought before a federal court.[66] As a result, for the past twenty-five years a dramatic increase in the use of section 1983 has occurred. In fact, it comprises eleven percent of all federal district court civil cases.[67] Part of this increase may be attributed to a section 1983 plaintiff filing in state court, whereupon the defendant removes the case to federal jurisdiction.[68] Consequently, courts hearing a section

63. *See, e.g.*, Nixon v. Herndon, 273 U.S. 536 (1927); Myers v. Anderson, 238 U.S. 368 (1915).

64. In McNeese v. Board of Educ., 373 U.S. 668 (1963), the Supreme Court articulated four main purposes of § 1983: (1) the ability "to override certain kinds of state laws"; (2) "to provide a remedy where a state law was inadequate"; (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice"; and (4) "to provide a remedy in federal courts supplementary to any remedy any State may have." *Id.* at 672 (citations omitted).

65. In order to bring an action under § 1983, a plaintiff must initially establish two elements: (1) the alleged conduct must have been committed by a person acting under color of state law, and (2) the alleged conduct must have deprived the plaintiff of "rights, privileges, or immunities secured by the Constitution or laws of the United States." Note, *supra* note 61, at 132 (citing Parratt v. Taylor, 451 U.S. 527, 535 (1981), *rev'd in part sub nom.* Daniels v. Williams, 474 U.S. 327, 330 (1986)).

66. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 162 (1970) (to act under color of state law, an individual must act with knowledge of and pursuant to the statute); Screws v. United States, 325 U.S. 91, 111 (1945) (Court held that police officers who fatally beat a black man after arrest were acting under "color of state law" as under color of law meant under pretense of law); United States v. Classic, 313 U.S. 299, 326 (1941) ("under color of state law" interpreted to mean "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law"); Hague v. Committee for Indus. Org., 307 U.S. 496, 517 (1939) (Court upheld an injunction restraining various city officials from interfering with the plaintiffs' right to discuss the National Labor Relations Act); Cannon v. University of Chicago, 559 F.2d 1063, 1069 (7th Cir. 1976) (Court held that "neither general government involvement nor even extensive detailed state regulation is sufficient for a finding of state action. Rather, the state must affirmatively support and be directly involved in the specific conduct which is being challenged."); Parker v. Graves, 479 F.2d 335, 336 (5th Cir. 1973) (Court held that "[a]n action under 42 U.S.C. § 1983 does not lie against a private person in his individual capacity. It is only where the person acts to deprive another of his federal rights under color of state law that § 1983 provides authority for a federal claim."); *see also* Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965).

67. *See* Martin, *supra* note 3, at 72 (citing Baumann, *Civil Rights Litigation: Section 1983*, in ANNUAL SURVEY OF AMERICAN LAW 204 n.9 (1985)); *see also* Blackman, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 4-5 (1985).

68. Because § 1983 claims create a federal question, the U.S. District Courts have original jurisdiction under 28 U.S.C. § 1343 (1982), which states in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . .
>
> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . .
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress

1983 claim possibly will be less inclined to find "state action" in order to ease the burden on the court system.

Commentary has developed on the relationship between the fourteenth amendment and section 1983, as well as the difference, if any, between the requirements of "state action"[69] and "under color of state law."[70] Because section 1983 and the fourteenth amendment clearly address the same fundamental rights, the two acts of legislation effectively mirror each other.[71] Nonetheless, the distinction between "state action" and "under color of state law" has been the subject of judicial debate. However, the Supreme Court resolved the debate in *United States v. Price*,[72] holding that "under color of state law" is equivalent to "state action."[73] Thus, if an action is deemed to be "state action," then it will satisfy the "under color of state law" requirement.[74]

C. Judicial Findings of State Action

1. NCAA as a State Actor

During the mid-1970's, a line of federal appellate[75] and district court[76] cases held that the NCAA was a state actor for purposes of section 1983. Although the holdings in these cases have been under-

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providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . .

Id.

69. *See* U.S. CONST. amend. XIV, § 1; *see also supra* note 60.

70. *See supra* notes 65-66.

71. "Because of the close relationship between section 1983 and the fourteenth amendment, [the latter] is, in effect, incorporated into section 1983 in a manner analogous to the incorporation of various provisions of the Bill of Rights through the fourteenth amendment itself." Nahmod, *Due Process, State Remedies, and Section 1983*, 34 U. KAN. L. REV. 217, 218 (1985) (citing Monroe v. Pape, 365 U.S. 167, 171 (1961)).

Moreover, the original title of Section 1983 was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." Civil Rights Act, ch. 22, § 1, 17 Stat. 13, 13 (1871).

72. 383 U.S. 787 (1966).

73. *Id.* at 794 n.7; *see also* Lugar v. Edmondson Oil Co., 457 U.S. 922, 928-39 (1982).

74. *But see* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (Court held that claim arising "under color of law" will not always give rise to "state action").

75. *See* Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136 (5th Cir. 1977); Regents of Univ. of Minn. v. National Collegiate Athletic Ass'n, 560 F.2d 352 (8th Cir. 1977); Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213 (D.C. Cir. 1975); Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. National Collegiate Athletic Ass'n, 493 F.2d 1251 (9th Cir. 1974).

76. *See* Colorado Seminary v. National Collegiate Athletic Ass'n, 417 F. Supp. 852 (D. Colo. 1976); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295 (D. Mass. 1975); Buckton v. National Collegiate Athletic Ass'n, 366 F. Supp. 1152 (D. Mass. 1973).

cut by the Supreme Court's decision in *Tarkanian*, the cases contain persuasive arguments[77] for upholding the NCAA's status as a state actor. The two leading cases holding that the NCAA was a state actor are *Parish v. National Collegiate Athletic Association*[78] and *Howard University v. National Collegiate Athletic Association*.[79]

In *Parish*, basketball players from Centenary, an NCAA member, challenged the constitutionality of the NCAA's 1.6 minimum grade point average requirement[80] for freshman players arguing that it violated their equal protection and due process rights.[81] The action arose after the NCAA placed Centenary on indefinite probation because it declared members of its basketball team eligible, despite noncompliance with the 1.6 minimum grade point average rule.[82] The plaintiffs sought a permanent injunction to enjoin the NCAA from enforcing the sanctions.[83]

Subsequently, the Fifth Circuit held that the NCAA was a state actor based on two premises. First, the court reasoned that state-supported institutions play a substantial role in the NCAA,[84] and thus "state participation in or support of nominally private activity is a well recognized basis for finding state action."[85] Second, the court reasoned that the NCAA performed a traditional government function by regulating intercollegiate athletics[86] because "organized athletics play a large role in higher education,"[87] which is a traditional government function. The court found state action to avoid the anomalous situation in which states could elude constitutional scrutiny by collectively forming a private association such as the NCAA,

77. *See infra* notes 116-19 and accompanying text.

78. 506 F.2d 1028 (5th Cir. 1975).

79. 510 F.2d 213 (D.C. Cir. 1975).

80. "This rule required that NCAA-affiliated schools grant athletic scholarships, first year eligibility for participation in athletics, and other benefits only to applicants who could 'predict'—on the basis of their high school grade point average or class rank and their grade on one of two standardized achievement tests—a minimum 1.6 grade point average during their first year of college." *Parish*, 506 F.2d at 1030 (footnote omitted). This rule was changed in 1973 to require an entering college freshman to have earned an overall 2.00 grade point average in high school. *Id.* n.1.

81. *Id.* at 1033-34. Although the court found that the NCAA was a state actor under § 1983, it upheld the 1.6 grade point average requirement against the plaintiffs' constitutional attack. *Id.*

82. *Id.* at 1030-31 n.3.

83. *Id.* at 1031.

84. *Id.* at 1032.

85. *Id.* (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Smith v. Young Men's Christian Ass'n, 462 F.2d 634 (5th Cir. 1972)).

86. "[M]eaningful regulation of this aspect of education is now beyond the effective reach of any one state." *Id.*

87. *Id.* For examples of state action resulting from performing a traditional government function, see Evans v. Newton, 382 U.S. 296 (1966) (running a municipal park); Terry v. Adams, 345 U.S. 461 (1953) (registering to vote in elections); Marsh v. Alabama, 326 U.S. 501 (1946) (operating a company-owned town).

thereby relinquishing government power. Consequently, if the NCAA were nonexistent, the government would have to regulate college athletics.[88]

Moreover, the decision in *Parish* was followed three months later by *Howard*, in which the Court of Appeals for the District of Columbia held that the NCAA was a state actor under section 1983.[89] In *Howard*, the university and one of its soccer players sought injunctive and declaratory relief to prevent the NCAA from imposing sanctions on the university for violating the NCAA's foreign-student rule,[90] the five-year rule,[91] and the 1.6 grade point average rule.[92]

The *Howard* court held that because approximately one-half of the NCAA members are state or federally supported,[93] a substantial and pervasive entanglement existed between the NCAA and its state-supported members, thereby making the NCAA a state actor.[94] Furthermore, the NCAA is a state actor because public universities usually have the largest number of students among NCAA members,[95] and "public institutions provide the vast majority of NCAA capital,"[96] as well as receive substantial benefits from the NCAA.[97] As a result,

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

89. Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213, 217-20 (D.C. Cir. 1975).

90. The foreign student rule provides: "Participation as an individual or as a representative of any team whatever in a foreign country by an alien student-athlete in each twelve-month period after his nineteenth birthday and prior to his matriculation at a member institution shall count as one year of varsity competition." *Id.* at 215 n.1 (citing NCAA Bylaw 4-1(f)(2)).

91. The five-year rule states: "[A student-athlete] must complete his seasons for participation within five calendar years from the beginning of the semester or quarter in which he first registered at a collegiate institution." *Id.* at 215 n.2 (citing NCAA CONST. art. III, § 9(a)).

92. The 1.6 grade point average rule provides: "A member institution . . . [must limit] its scholarship or grant-in-aid awards . . . and eligibility for participation in athletics or in organized athletic practice sessions during the first year in residence to student-athletes who have predicted minimum grade point averages of at least 1.600 . . . ." *Id.* at 216 n.3 (citing NCAA Bylaw 4-6(b)(1)).

93. *Id.* at 219.

94. *Id.* at 220. The court based its entanglement theory on the rationale that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with governmental character as to become subject to the constitutional limitations placed upon state action." *Id.* at 217 (citing Evans v. Newton, 382 U.S. 296, 299 (1966)).

95. *Id.* at 219.

96. *Id.* This result arises because NCAA contribution levels are based upon school size and public schools are usually comprised of large student bodies. *Id.*

97. *Id.* at 220 (proceeds from lucrative television contracts flow primarily to public schools).

state institutions are a major force in NCAA decision making.[98] Finally, the *Howard* court summed up its logic by stating that the NCAA and its state-supported institutions "are joined in a mutually beneficial relationship . . . [that] form[s] the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny."[99]

2. Organizations Similar to the NCAA Held to be State Actors

Cases holding that the NCAA is a state actor have been reinforced by case law in which private organizations with functions similar to the NCAA were held to be state actors. For example, the *Howard* court cited a line of cases[100] in which private organizations were held to be state actors for purposes of regulating high school athletic programs and extracurricular activities.[101]

In addition, a few cases have held that organizations similar to the NCAA were state actors[102] based upon prior decisions holding that the NCAA was a state actor.[103] In *Tenorio v. Liga Atletica In-*

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98. *Id.* at 219. Furthermore, at the time *Howard* was being decided, both the NCAA's president and secretary-treasurer were members of public institutions. *Id.*

99. *Id.* at 220 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)).

100. *Id.* at 218; *see, e.g.*, Wright v. Arkansas Activities Ass'n, 501 F.2d 25 (8th Cir. 1974); Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970); Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963); Baltic Indep. School Dist. No. 115 v. South Dakota High School Activities Ass'n, 362 F. Supp. 780 (D.S.D. 1973); Brenden v. Independent School Dist. 742, 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972).

101. The *Howard* court, with the NCAA obviously in mind, commented on why these high school private organizations constitute state action:

> [T]he courts recognized that the organizations were private, voluntary associations, yet found state action by focusing on the facts that membership consisted substantially of public high schools which provided personnel, facilities and financial support, that the organizations' rules were promulgated by vote of the members, including the public schools, and that the private organizations significantly regulated and affected the programs of these public entities, including . . . conducting state championship events, imposing restrictions on practices and eligibility, and conducting investigations and meting out sanctions. Consequently the organizations were sufficiently intertwined with state instrumentalities, whose involvement was significant, albeit not exclusive, as to be subject to constitutional restraints.

Howard, 510 F.2d at 218 (footnote omitted). *Contra* McDonald v. National Collegiate Athletic Ass'n, 370 F. Supp. 625, 630-31 (C.D. Cal. 1974) (distinguishing the high school cases and finding the NCAA to be a private entity).

102. *See, e.g.*, Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492 (1st Cir. 1977) (Puerto Rican equivalent to the NCAA); Williams v. Hamilton, 497 F. Supp. 641 (D.N.H. 1980) (National Association of Intercollegiate Athletics); Pavey v. University of Alaska, 490 F. Supp 1011 (D. Alaska 1980) (Association for Intercollegiate Athletics for Women).

103. *See supra* notes 75-76 and accompanying text.

teruniversitaria,[104] the First Circuit held that the Liga Atletica Interuniversitaria (LAI), the Puerto Rican equivalent to the NCAA, was a state actor under the Commonwealth of Puerto Rico. The First Circuit relied on the arguments set forth in *Howard*,[105] and noted that four of the LAI's seven members were Commonwealth-funded institutions.[106] Thus, these institutions had "a dominant force in determining LAI policy and in dictating LAI actions."[107]

Similarly, in *Williams v. Hamilton*,[108] the court analyzed the "NCAA state action cases"[109] and *Tenorio* to determine whether the National Association of Intercollegiate Athletics (NAIA)[110] was a state actor when the NAIA ruled that the plaintiff, a soccer player, was ineligible after transferring from another school.[111] Although the NAIA attempted to distinguish itself from the NCAA,[112] the court held that the NAIA was a state actor because its public members "contribute[d] substantially to its financial stability and decision-making [sic] process."[113] Finally, in *Pavey v. University of Alaska*,[114] the Association for Intercollegiate Athletics for Women (AIAW) conceded that it was a state actor under section 1983, based upon the Ninth Circuit's decision in *Associated Students, Inc. v. National Collegiate Athletics Association*,[115] which held that the NCAA was a

104. 554 F.2d 492 (1st Cir. 1977).

105. *See supra* notes 89-99 and accompanying text.

106. *Tenorio*, 554 F.2d at 495.

107. *Id.* (citing Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213, 219 (D.C. Cir. 1975)). Moreover, the court held that, "[the] LAI and its member public instrumentalities are joined in a mutually beneficial relationship and in fact may be fairly said to form the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny." *Id.* at 496 (citation omitted).

108. 497 F. Supp. 641 (D.N.H. 1980).

109. Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213 (D.C. Cir. 1975); Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. National Collegiate Athletic Ass'n, 493 F.2d 1251 (9th Cir. 1974).

110. The NAIA's membership "is a voluntary association of 512 four-year colleges ranging in size from small . . . to moderate . . . whose primary purpose" is similar to the NCAA's. *Williams*, 497 F. Supp. at 643.

111. *Id.* The transfer eligibility rule requires a student-athlete transferring to a new school to wait 16 calendar weeks to establish residency at the new school before eligibility is granted. *Id.* at 643-44 (citation omitted).

112. The NAIA argued it was different from the NCAA because state-supported schools comprised only 33% of the NAIA's membership and 37% of its total dues. Furthermore, private institutions represented a majority on both the NAIA's Executive Committee and the National Eligibility Committee. *Id.* at 644.

113. *Id.* at 645.

114. 490 F. Supp. 1011 (D. Alaska 1980).

115. 493 F.2d 1251 (9th Cir. 1974).

state actor.

Thus, *Parish*, *Howard*, and their progeny provide three different reasons to support the conclusion that the NCAA is a state actor. First, "the NCAA performs a public function by regulating intercollegiate athletics."[116] Second, "substantial interdependence [exists] between the NCAA and the state institutions that comprise about one-half of its membership."[117] Finally, "state institutional members play[] a substantial . . . role in NCAA funding and decision making."[118] All in all, four circuits of the courts of appeals[119] found these arguments sufficiently persuasive to find state action on the NCAA's behalf. Nevertheless, this precedent was insufficient to persuade a majority of the Justices on the Supreme Court.

D. Judicial Opinions: The NCAA as a Private Actor

During the period when most cases held that the NCAA was a state actor, *McDonald v. National Collegiate Athletic Association*[120] stood alone in upholding the NCAA's private status and avoiding section 1983 liability. In *McDonald*, two basketball players[121] from the California State University at Long Beach[122] were declared ineligible for violating the 1.6 grade point average rule.[123] They sought an injunction under section 1983 to enjoin the NCAA from declaring them ineligible.[124] The fact that one-half of the NCAA's members were state-supported schools[125] concurring with NCAA policies and decision making did not persuade the district court.[126] Rather than look-

116. Martin, *supra* note 3, at 61 n.77 (citing Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028, 1032 (5th Cir. 1975)).

117. *Id.* (citing Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213, 219 (D.C. Cir. 1975)).

118. *Id.* (citing *Parish*, 506 F.2d at 1032); *see Howard*, 510 F.2d at 219.

119. The following circuits have held that the NCAA is a state actor: Regents of Univ. of Minn. v. National Collegiate Athletic Ass'n, 560 F.2d 352 (8th. Cir. 1977); Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213 (D.C. Cir. 1975); Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. National Collegiate Athletics Ass'n, 493 F.2d 1251 (9th Cir. 1974).

120. 370 F. Supp. 625 (C.D. Cal. 1974).

121. The two basketball players were Glenn S. McDonald and Roscoe Pondexter [sic]. *Id.* at 626.

122. Interestingly, Jerry Tarkanian was the coach at the California State University at Long Beach during the period in which the alleged violations took place. *See infra* note 167.

123. *McDonald*, 370 F. Supp. at 626, 628. For text of the 1.6 grade point average rule, see *supra* note 92.

124. *Id.* at 626.

125. U.S. District Court Judge Real criticized the holding in *Parish*, which was partly based on state institutions representing half of the NCAA, as being a "quantitative[] conclu[sion]." *Id.* at 630.

126. *Id.* at 631-32. The court further stated that:

> [v]oluntary concurrence of a state in a decision of an organization (NCAA) or other body—not a state, state instrumentality, or sovereign equivalent—does

ing at the acts of the NCAA, the court reasoned that "it is the act of the state . . . that must be measured by constitutional standards."[127] Consequently, a state-supported school's concurrence with NCAA decisions is insufficient to give rise to state action.[128]

1. Supreme Court Narrows State Action

By 1982, the weight of precedent favored the NCAA as a state actor.[129] Nevertheless, three Supreme Court cases,[130] decided on the same day[131] in 1982, became the impetus for changing such precedent.[132] Although none of these cases directly concerned the NCAA, the NCAA inevitably benefited from the views put forth by the Supreme Court, which was attempting to limit the scope of conceivable state action.[133]

In *Blum v. Yaretsky*,[134] medicaid patients in private nursing homes challenged the decision of a reviewing panel of physicians appointed by the state to transfer them to lower levels of care without affording due process.[135] Despite the government's involvement in setting up the review panel of physicians, the Court ruled that the actions were performed solely by private physicians, who based their decision on professional standards.[136] The Court stated that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must . . . be deemed to be that of the State."[137]

In *Rendell-Baker v. Kohn*,[138] the Court relied upon similar reason-

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not make the acts of the organization (NCAA) 'state action' in a constitutional sense. Rather it is the *concurrence by the state* . . . that is state action.

Id. at 631 (emphasis in original and added).

127. *Id.* at 632.

128. *Id.* at 631-32; *see supra* note 126.

129. *See* cases cited *supra* notes 75-76.

130. 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).

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

132. *See generally* Martin, *supra* note 3, at 60-61; Comment, *supra* note 1, at 442-43.

133. *See supra* notes 64-68 and accompanying text (demonstrating that section 1983 cases burden the federal court system, prompting the Supreme Court to limit the scope and definition of state action).

134. 457 U.S. 991 (1982).

135. *Id.* at 995-96.

136. *Id.* at 994-95.

137. *Id.* at 1004. The Court further stated that mere regulation, subsidization, or acquiescence in the actions of a private party do not create state action. *Id.* at 1004-05.

138. 457 U.S. 830 (1982).

ing to hold that a private high school for maladjusted students did not act under color of law when it discharged its teachers.[139] The Court reached this conclusion despite the fact that the school was regulated by the government, received most of its students by referral from public schools, and public funds accounted for over 90% of its budget.[140] Finally, in *Lugar v. Edmondson Oil Co.*,[141] the Court held that a private party's joint participation with state officials in the seizure of disputed property constituted state action.[142] The Court interpreted its cases to require "that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State."[143]

2. Effect of Supreme Court on NCAA's State Action Status

The impact of *Blum*, *Rendell-Baker*, and *Lugar* has led to a new line of cases[144] holding that the NCAA is not a state actor under section 1983. The Fourth Circuit Court of Appeals in *Arlosoroff v. National Collegiate Athletic Ass'n*[145] examined *Blum* and *Rendell-Baker*'s impact on the so-called "NCAA state action cases."[146] In *Arlosoroff*, the plaintiff sought to enjoin the NCAA from declaring him ineligible to play for Duke University because he had participated in amateur tennis tournaments and had played on Israel's Davis Cup team.[147] Subsequent analysis of the *Arlosoroff* case revealed

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139. *Id.* at 840-43.

140. *Id.*

141. 457 U.S. 922 (1982).

142. *Id.* at 942.

143. *Id.* at 937. This requirement imposed by the Court contains a two-part approach:

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

Id.

144. *See, e.g.*, McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988); Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986); Arlosoroff v. National Collegiate Athletic Ass'n, 746 F.2d 1019 (4th Cir. 1984); Hawkins v. National Collegiate Athletic Ass'n, 652 F. Supp. 602 (C.D. Ill. 1987); Kneeland v. National Collegiate Athletic Ass'n, 650 F. Supp 1047 (W.D. Tex. 1986), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 868 (1989); McHale v. Cornell Univ., 620 F. Supp 67 (N.D.N.Y. 1985).

145. 746 F.2d 1019 (4th Cir. 1984).

146. The court commented on cases such as *Parish* and *Howard* by stating: "These earlier cases rested upon the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action. That notion has now been rejected by the Supreme Court, however, and its decisions require a different conclusion." *Arlosoroff*, 746 F.2d at 1021 (citing *Blum*, 457 U.S. at 991; *Rendell-Baker*, 457 U.S. at 830).

147. *Arlosoroff*, 746 F.2d at 1020. The NCAA regulation, Bylaw 5-1-(d)-(3), at issue

that the NCAA could only be a state actor if the plaintiff can prove:

> (1) that the state supported members of the NCAA exercised coercive power or provided such significant encouragement, either overt or covert . . . that the choice must be deemed to be that of the state; or (2) that the NCAA, in applying its rules, has performed a public function which has traditionally been the exclusive prerogative of the state.[148]

Under the first theory espoused above, the *Arlosoroff* court held that the NCAA is not a state actor even though half of its members are state-supported schools providing over half of the NCAA's revenue.[149] Furthermore, the court stated that while the NCAA may "perform a public function as the overseer of the nation's intercollegiate athletics . . . [this] regulation of intercollegiate athletics, however, is not a function 'traditionally exclusively reserved to the state.' "[150] As a result, "[t]he adoption of the Bylaw was private conduct, not state action."[151]

The Sixth Circuit reached a similar result in *Graham v. National Collegiate Athletic Ass'n*.[152] Relying heavily on the language in *Arlosoroff*, the Court determined that the NCAA was not a state actor for adopting the five-year rule[153] or the transfer rule.[154] The *Graham* court agreed with the *Arlosoroff* opinion and held that regulating intercollegiate athletics is not a function exclusive to the

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in *Arlosoroff*, states that any participation in "organized competition in a sport during each twelve month period after the student's 20th birthday and prior to matriculation with a member institution should count as one year of varsity competition in that sport." *Id.*

148. *McHale*, 620 F. Supp. at 69 (citing *Blum*, 457 U.S. at 1004-05 (1982); *Rendell-Baker*, 457 U.S. at 840-42).

149. *Arlosoroff*, 746 F.2d at 1021-22. The court commented on the fact that the NCAA was nearly equally divided between state and private schools by stating:

> Those facts, however, do not alter the basic character of the NCAA as a voluntary association of public and private institutions. Nor do they begin to suggest that the public institutions, in contrast with private institutional members, caused or procured the adoption of the Bylaw . . . . There is no suggestion in this case that the representatives of the state institutions joined together to vote as a bloc to effect adoption of the Bylaw over the objection of private institutions. There is simply no showing that the state institutions controlled or directed the result.

Id.

150. *Id.* at 1021 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)). This rationale is buttressed by the holding in *Rendell-Baker* in which the Court held that "the operation of a school [*i.e.*, education] . . . is [not] traditionally an exclusive prerogative of the state." *Id.* (quoting *Rendell-Baker*, 457 U.S. at 842).

151. *Id.* at 1022.

152. 804 F.2d 953 (6th Cir. 1986).

153. *See supra* note 91.

154. *See supra* note 111. The plaintiffs were two football players from the University of Louisville who were declared ineligible because of the five-year and transfer rules. *Graham*, 804 F.2d at 954-56.

states.[155] Furthermore, the NCAA's adoption of these rules does not give rise to state action since no "state-supported university caused, directed, or controlled the implementation of the[se] . . . rules."[156]

Additionally, in *McCormack v. National Collegiate Athletic Ass'n*,[157] the Fifth Circuit followed the lead of *Arlosoroff* and *Graham*, holding that the NCAA was not a state actor for promulgating rules which inevitably resulted in the "death penalty,"[158] a two-year suspension, for Southern Methodist University's football team for various violations of NCAA regulations.[159] In so doing, the Fifth Circuit overruled its holding in *Parish* that the NCAA was a state actor.[160]

By 1988, it was evident that the federal circuit courts of appeals were split in determining the issue of state action. Consequently, the Supreme Court in *National Collegiate Athletic Ass'n v. Tarkanian*[161] was faced with diametrically opposed circuit court rulings concerning whether the actions of the NCAA constitute state action under section 1983.

III. STATEMENT OF THE CASE

A. Factual History

The University of Nevada Las Vegas (UNLV) is a branch of the University of Nevada system, pursuant to the Nevada Constitution,[162] and is a state-supported member of the NCAA. During the early 1970's, the NCAA, after receiving anonymous tips, began to gather information about possible violations surrounding the UNLV athletic department.[163] On November 28, 1972, the NCAA sent a letter to the president of UNLV advising that the NCAA was conducting a preliminary inquiry[164] into the practices and policies of UNLV's athletic department.[165]

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155. *Graham*, 804 F.2d at 958 (citations omitted).

156. *Id.*

157. 845 F.2d 1338 (5th Cir. 1988).

158. *See supra* notes 24-26 and accompanying text.

159. *McCormack*, 845 F.2d at 1340, 1343-45.

160. The *McCormack* court stated:

> We therefore conclude that *Parish* is no longer good law and join the virtually unanimous roster of courts that have held, since the decisions in *Rendell-Baker* and *Blum*, that the NCAA is not the state or state agency and hence does not act under color of law within the meaning of § 1983.

Id. at 1346.

161. 109 S. Ct. 454 (1988).

162. NEV. CONST. art. XI, § 4.

163. Brief for Petitioner at 8, National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454 (1988) (No. 87-1061).

164. "The purpose of the NCAA's preliminary inquiry is to determine whether there is adequate evidence to warrant an official inquiry." *Id.*

165. *Id.* Although the preliminary inquiry letter was sent to UNLV several months

Meanwhile, in March of 1973, Jerry Tarkanian[166] announced that he would accept the head coaching position for UNLV's basketball team.[167] Subsequently, on February 25, 1976, after over two years of investigating UNLV,[168] the NCAA's Committee on Infractions (the

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before Tarkanian was hired by UNLV, Tarkanian was the basketball coach during the course of subsequent investigations. *Id.*

166. Jerry Tarkanian is one of the more controversial coaches in the NCAA as evidenced by his clashes with the association. However, in Las Vegas, he and the UNLV Runnin' Rebels are the top attraction in a town full of stars. An excerpt from Tarkanian's book reads: "Las Vegas is Tarkanian's town. For clues you can see the following: Jerry Tarkanian T-shirts . . . towels . . . posters . . . basketballs . . . masks . . . stuffed sharks . . . shark candy, cookies, and drinks . . . shark earrings . . . shark hats . . . and 'Sharks,' the hottest disco in town." J. TARKANIAN & T. PLUTO, TARK—COLLEGE BASKETBALL'S WINNINGEST COACH 346 (1988).

Despite his controversial nature, Tarkanian has the highest career winning percentage among all active college basketball coaches. L.A. Times, Dec. 26, 1989, at C14, col. 6. During his 21-year career, Tarkanian has compiled 530 victories against 114 losses, which is a winning percentage of 83.2%. *Id.* Tarkanian's success at UNLV has also brought him financial rewards: use of a Cadillac; a $173,855 salary; $80,000 in potential postseason revenues; an endorsement contract with Nike shoes; a promotional arrangement with the Las Vegas nightclub, "Sharks"; and a sporting goods store at Las Vegas' McCarren Airport. Gup, *supra* note 1, at 57. Furthermore, Tarkanian is notorious for chewing on a white towel during critical moments in basketball games, and uses the nickname of "Tark" or "Shark." J. TARKANIAN & T. PLUTO, *supra*, at 346.

Moreover, the atmosphere surrounding UNLV is unique in college basketball. For example, traditional Las Vegas celebrities such as Wayne Newton and Frank Sinatra have come to watch UNLV at the Thomas & Mack Center, which has indoor fireworks before the pregame introduction of the players and Tarkanian. Also, there are eight front row seats, known as "Gucci Row," which are $1,500 each. Furthermore, the UNLV basketball program usually takes in over $3,000,000 in profits annually. *Id.* at 347.

167. J. TARKANIAN & T. PLUTO, *supra* note 166, at 116. Prior to accepting the head coach position at UNLV, Tarkanian had coached for five years at the California State University at Long Beach (CSULB), where he had turned around the dismal CSULB basketball team which made the NCAA's basketball tournament in only his second year as coach. *Id.* at 72. He was extremely successful at CSULB where he compiled a 122-20 win-loss record, which included a 65-0 record in home games. *Id.* at 98.

As with UNLV, Tarkanian was the subject of controversy while at CSULB. After he left CSULB, the school was put on a three-year probation on January 6, 1974, for alleged violations of NCAA regulations by the football and basketball teams. Tarkanian's departure from CSULB prior to its discipline by the NCAA implied that he was leaving CSULB because of the violations. However, Tarkanian denied knowledge of the NCAA's investigation into CSULB's program when he accepted the position at UNLV. *Id.* at 112. Moreover, two of Tarkanian's players brought suit in McDonald v. National Collegiate Ass'n, 370 F. Supp. 625 (C.D. Cal. 1974); *see supra* notes 120-27 and accompanying text. Furthermore, Tarkanian, as well as others, have expressed the notion that the NCAA is engaged in a vendetta against Tarkanian which followed him from CSULB to UNLV. J. TARKANIAN & T. PLUTO, *supra* note 166, at 160.

168. *See* Tarkanian v. National Collegiate Athletic Ass'n, 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987).

Committee)[169] sent UNLV a letter of "official inquiry,"[170] which consisted of fifty-four pages alleging seventy-eight separate violations of NCAA rules, half of which implicated Tarkanian.[171] The letter requested that UNLV investigate and provide detailed information concerning the allegations.[172] It also asked for the cooperation of UNLV's president.[173]

UNLV subsequently responded[174] to the NCAA's official inquiry by rebutting each allegation and "submit[ting] two boxes of sworn statements, affidavits, and other documentary evidence supporting

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169. The Supreme Court outlined the role of the Committee:

> The NCAA's bylaws provide that its enforcement program shall be administered by a Committee on Infractions. The Committee supervises an investigative staff, makes factual determinations concerning alleged rule violations, and is expressly authorized to impose appropriate penalties on a member found to be in violation, or recommend to the Council suspension or termination of membership.

National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 457 (1988).

The sanctions the Committee could impose include:

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

Id. at 457-58 n.6 (citation omitted).

Moreover, "the Committee may order a member institution to show cause why that member should not suffer further penalties unless it imposes a prescribed discipline on an employee, it is not authorized, however, to sanction a member institution's employees directly." *Id.* at 458.

Furthermore, if discipline of an employee is necessary, "the Committee may require the member to show cause why . . . a penalty or additional penalty should not be imposed if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against athletic department personnel involved in the infractions case . . . ." *Id.* at 458 n.7 (citation omitted).

170. The purpose of an official inquiry is "to guide the institution to develop fully and independently as much or more information as was developed by the NCAA staff." Brief for Petitioner at 9, National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454 (1988) (No. 87-1061).

171. Brief for Petitioner at 8. The official inquiry further alleged that Tarkanian was involved in illegal conduct only two weeks after starting at UNLV. *Id.* at 9 n.5. The inquiry reported that the 78 violations were related to, *inter alia*, recruiting violations which occurred between 1970 and 1976. *See Tarkanian*, 103 Nev. at 332, 741 P.2d at 1346.

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

173. Brief for Respondent at 5, *Tarkanian* (No. 87-1061).

174. UNLV enlisted the aid of the Nevada State Attorney General and private counsel for the investigation. They collectively found that Tarkanian was innocent of all alleged conduct. *See* Brief for Respondent at 6 nn.6 & 10.

denials of the rule violations."[175] Upon receiving UNLV's official response, the NCAA's Committee on Infractions[176] held three days of hearings[177] in which UNLV submitted its evidence.[178] The Committee then issued confidential report No. 123(47), which reduced the seventy-eight allegations against UNLV to thirty-eight, and found only ten violations against Tarkanian personally.[179] Still, the committee imposed a number of sanctions against UNLV for the remaining violations.[180]

After receiving the Committee's confidential report, UNLV and

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175. *Tarkanian*, 103 Nev. at 334, 741 P.2d at 1346.

176. It is noteworthy that four of the five members on the infractions committee were from state-supported schools. The members of the committee were: Arthur Reynolds, Dean of the Graduate School, University of Northern Colorado, Chairman; Alan Wright, Professor of Law, University of Texas; Harry M. Cross, Associate Dean and Professor of Law, University of Washington; John W. Sawyer, Professor of Mathematics, Wake Forest University; and William L. Mathews, Professor of Law, University of Kentucky. Brief for Petitioner at 6 n.4, *Tarkanian* (No. 87-1061).

177. The hearings were held on November 14, and December 13 and 14, 1976. Brief for Respondent at 10. The NCAA's evidence against Tarkanian consisted "solely of having . . . [an] NCAA staff investigator orally relate his recollection of conversations he . . . purportedly had with other individuals concerning their knowledge of [the] facts or hearsay relating to the alleged violations." *Id.*

Furthermore, the investigators were not sworn under oath, did not produce affidavits or sworn statements from any of the individuals interviewed, nor had any physical evidence to present. *Id.*

Finally, there was no written transcript of the hearing; the only record of the hearing was the NCAA's tape recording of the proceedings. The NCAA specifically forbade UNLV from using a court reporter to transcribe the proceedings. *Id.* at 8.

178. UNLV presented sworn statements made by the people identified in the allegations involving Tarkanian. The sworn statements were in direct conflict with the testimony given by NCAA staff investigators, who orally recounted the testimony made by these people in front of the committee. *Id.* at 11. However, the NCAA refused to allow in-person testimony of the witnesses which implicated Tarkanian because it would allegedly "cost too much." *Id.* at 12.

179. Brief for Petitioner at 10; Brief for Respondent at 12. The most serious violation charged against Tarkanian was that he "had violated the University's obligation to provide full cooperation with the NCAA investigation." Allegedly, he "attempted to frustrate the NCAA's application of the rules by getting people to 'change their story' or to fabricate bodies of countervailing evidence." *Tarkanian*, 109 S. Ct. at 458-59 n.9.

180. Brief for Petitioner at 11. The sanctions imposed on UNLV included, *inter alia*:

> public reprimand of UNLV along with a two year period of probation during which the UNLV's intercollegiate basketball program would not be eligible to participate in any postseason basketball competition, nor appear on television . . . a limit of three basketball scholarships to be given per year during the 1978-79 and 1979-80 academic years . . . .

Id.

Furthermore, the committee requested UNLV:

> to show cause . . . why additional penalties should not be imposed upon the

Tarkanian appealed the Committee's findings and penalties[181] to the sixteen-member NCAA Council[182] which is authorized to hold a hearing[183] to review the Committee's findings.[184] The Council unanimously[185] voted to approve the Committee's findings and penalties,[186] and thereafter notified UNLV of its holding.[187]

On September 6, 1977, from the impetus of the NCAA,[188] UNLV held a hearing[189] for Tarkanian to show cause why he should not be suspended.[190] After this hearing, UNLV's vice president issued a memorandum to the school's president outlining three possible courses of action.[191] The school's president decided to follow the vice

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University if it does not take appropriate disciplinary and corrective actions with regard to:

. . . .

. . . Head basketball coach Jerry Tarkanian which, in the Committee's present view, should be complete severance of any and all relations Tarkanian may have, formally or informally, with the University's intercollegiate athletic program during the period of the University's probation . . . .

Id. at 12; *see* Brief for Respondent at 13.

As a result of the NCAA's findings, and its dissemination to the media, Tarkanian lost the opportunity to coach several basketball clinics in various states because sponsors cancelled such agreements. Brief for Respondent at 14 n.17.

181. All ten allegations charged against Tarkanian were appealed by UNLV and Tarkanian. Brief for Petitioner at 13.

182. Of the sixteen members comprising the NCAA Council, nine were from state-supported schools. Brief for Respondent at 15.

183. The hearing was held on August 22, 1977. *Id.*

184. Brief for Petitioner at 16.

185. *Id.*

186. As previously stated, the Committee had no written transcripts of its hearings and, thus, only submitted the confidential report with additional commentary to the NCAA Council for its review. Brief for Respondent at 15; *see supra* note 177. Furthermore, the council personally interviewed the NCAA staff investigators upon whose oral testimony the sanctions were initially based. However, UNLV and Tarkanian were not given notice of this secret meeting and no transcript or recording of the meeting was made. Brief for Respondent at 15.

187. Brief for Petitioner at 14.

188. Brief for Respondent at 16. The 1976-77 NCAA Manual obligates an institution to provide "due notice and a hearing" to an individual before it takes any disciplinary or corrective action. *Id.*

189. "Tarkanian and UNLV were represented at the meeting, but the NCAA was not." National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 459 (1988).

190. Brief for Petitioner at 14.

191. The vice president doubted the factual basis for the charges against Tarkanian, "but concluded that UNLV was contractually compelled to adopt and implement the findings and penalty specified in the NCAA's confidential report." Brief for Respondent at 17. The three options were:

1. Reject the sanction requiring [UNLV] to disassociate . . . Tarkanian from the athletic department and take the risk of still heavier sanctions . . . .
2. Recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning . . . Tarkanian from his present position—though tenure and without adequate notice—even while believing that the NCAA was wrong . . . .
3. Pull out of the NCAA completely on the grounds that [the president of UNLV] will not execute what [he] hold[s] to be their unjust judgments.

Tarkanian, 109 S. Ct. at 459 (citation omitted); Brief for Respondent at 17.

president's advice to suspend Tarkanian,[192] realizing that the other two options would result in an even greater hardship to UNLV. Thereafter, the president notified Tarkanian by letter[193] that he was suspended as of September 9, 1977.[194] Consequently, on September 8, 1977, Tarkanian filed an action in Nevada state court, alleging violation of his due process rights.[195]

B. Procedural History

Tarkanian's complaint listed UNLV and some of its officers as defendants, but not the NCAA.[196] The complaint alleged that Tarkanian's suspension violated his due process rights under section 1983[197] and the fourteenth amendment,[198] and requested declaratory and injunctive relief removing the suspension.[199]UNLV answered the complaint by stating that the litany of hearings provided by the NCAA and UNLV afforded Tarkanian adequate due process.[200] UNLV chose to argue the case in state court despite the availability of removal to federal district court,[201] pursuant to 28 U.S.C. § 1343(a)(3).[202]

On October 12, 1977, the trial court granted Tarkanian's preliminary injunction, finding that UNLV did indeed violate his procedural and substantive due process rights. UNLV appealed to the Nevada Supreme Court,[203] which reversed the trial court's findings because UNLV had failed to join the NCAA—a necessary party to the case.[204] The court's order directed that the NCAA be joined as a

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

193. The letter "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.' " *Id.* (citation omitted).

194. Brief for Respondent at 18.

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

196. Brief for Petitioner at 15.

197. See *supra* note 58 for text of 42 U.S.C. § 1983 (1982).

198. See *supra* note 60 for text of U.S. CONST. amend XIV, § 1.

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

200. Brief for Respondent at 18.

201. Brief for Petitioner at 15.

202. See *supra* note 68 for text of 28 U.S.C. § 1343(a)(3) (1982).

203. *Tarkanian*, 109 S. Ct. at 459-60; *see also* Brief for Respondent at 18.

204. University of Nev. v. Tarkanian, 95 Nev. 389, 395-99, 594 P.2d 1159, 1163-65 (1979), *aff'd in part, rev'd in part*, 103 Nev. 331, 334, 741 P.2d 1345, 1347 (1987); *see also* Brief for Petitioner at 15. In an an amicus curiae brief, the NCAA alleged that no actual controversy existed between Tarkanian and UNLV and, thus, a dismissal of the suit was required. *Tarkanian*, 109 S. Ct. at 460. Alternatively, the NCAA argued that the trial court had overstepped its scope of authority by its failure to join the NCAA because the NCAA was a necessary party with respect to the scope of any relief. *Id.*

defendant.[205]

Complying with the court's directive, Tarkanian filed a second lawsuit in Nevada state court naming both UNLV and the NCAA as defendants.[206] Subsequently, both the NCAA and UNLV attempted to remove the case to federal court under section 1343(a)(3), by filing a petition with the appropriate district court.[207] However, because UNLV had waived its right of removal by not removing the initial lawsuit in 1977, the district court granted Tarkanian's motion to remand the case back to state court.[208]

On June 25, 1984, after nearly four years had elapsed, the trial court upheld Tarkanian's prior injunction, stating that both UNLV and the NCAA were state actors under section 1983, and that Tarkanian's denial of due process by the NCAA was "arbitrary and capricious."[209] Consequently, the NCAA was enjoined from: compelling UNLV to suspend Tarkanian, enforcing the penalties in the confidential report, conducting further proceedings against UNLV, and enforcing its show cause order against UNLV.[210] Subsequent to the trial court's decision, Tarkanian filed a petition for attorney's fees pursuant to 42 U.S.C. § 1988,[211] which allows for reimbursement of attorney's fees in section 1983 cases. The court granted Tarkanian's petition, and the NCAA was ordered to pay ninety percent of Tarkanian's attorney's fees which amounted to approximately $200,000.[212] On July 17, 1984, the NCAA filed another petition to remove the case to federal court because Tarkanian's request for attorney's fees allegedly had substantially changed the litigation between the parties.[213] When UNLV refused to join the removal petition, the NCAA protested that UNLV should be realigned as a plaintiff "be-

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Furthermore, the NCAA argued, like UNLV, that its proceedings afforded Tarkanian adequate due process. *Id.*

205. *Tarkanian*, 95 Nev. at 399, 594 P.2d at 1165.

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

207. *Id.*

208. *Id.*; *see also* Brief for Petitioner at 15.

209. *Tarkanian*, 109 S. Ct. at 460. The trial judge, Paul Goldman, criticized the NCAA enforcement procedures by saying, "[i]t might be considered efficient, but so was Adolf Eichmann and so is the Ayatollah." N.Y. Times, June 26, 1984, at A23, col. 1.

210. *Tarkanian*, 109 S. Ct. at 460. It is noteworthy that, despite the Supreme Court's eventual reversal of this case, the injunction prohibiting UNLV from suspending Tarkanian is final, and was therefore not before the Supreme Court. Brief for Respondent at 21; *see infra* note 288 and accompanying text.

211. Section 1988 states in pertinent part: "In any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982).

212. Brief for Petitioner at 16. UNLV was ordered to pay the remaining 10% in fees. *Id.*

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

cause they actually wanted Tarkanian to prevail."[214] The district court again refused to grant the NCAA's request for removal because UNLV had failed to do so in 1977.[215] As a result, the NCAA appealed the injunction to the Nevada supreme court, even though UNLV had decided to accept the trial court's findings.[216]

The Nevada supreme court issued its opinion on August 27, 1987,[217] affirming the trial court's decision that the NCAA was a state actor, and that the NCAA had denied Tarkanian substantive and procedural due process.[218] The court did limit the scope of the injunction to "only . . . prohibit enforcement of the penalties imposed upon Tarkanian in [the] [c]onfidential [r]eport and UNLV's adoption of those penalties."[219]

The court focused on the ramifications of *Rendell-Baker* and *Blum* on the present action and held that these cases did not necessarily mandate the result that the NCAA is a private actor.[220] Because Tarkanian was a public employee working for UNLV, the court deduced that the NCAA was also a state actor because "the right to discipline public employees is traditionally the exclusive prerogative of the state" and "UNLV cannot escape responsibility for disciplinary action against employees by delegating that duty to a private entity."[221] The court further distinguished *Arlosoroff* which held that regulating athletics is not an exclusive state function, on the basis that UNLV is a state-supported institution, while Duke University, the school in *Arlosoroff*, is private.[222] Furthermore, the court also

214. *Id.*

215. Brief for Petitioner at 15. The Ninth Circuit affirmed the district court's refusal to remove the case from state jurisdiction. *Tarkanian*, 109 S. Ct. at 460.

216. UNLV's rationale for not appealing the trial court's findings is obvious as the trial court's decision allowed Tarkanian to continue coaching its basketball team. *Tarkanian*, 109 S. Ct. at 460.

217. Tarkanian v. National Collegiate Athletic Ass'n, 103 Nev. 331, 741 P.2d 1345 (1987).

218. *Id.* at 337-41, 741 P.2d at 1349, 1351-54. However, the Nevada Supreme Court reversed the award of attorney's fees under § 1988 as the trial court had compelled the NCAA to pay Tarkanian's fees for the first trial when the NCAA had not been joined as a party. Under § 1988, recovery of attorney's fees is awarded only to a prevailing party and, because the Nevada Supreme Court reversed the trial court's initial injunction favoring Tarkanian, he is not entitled to attorney's fees for that part of the case. *Id.* at 341-42, 741 P.2d at 1352.

219. *Id.* at 343, 741 P.2d at 1353.

220. *Id.* at 336-37, 741 P.2d at 1348-49.

221. *Id.* at 337, 741 P.2d at 1348.

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

upheld its decision against the two-part test contained in *Lugar*.[223]

On December 23, 1987, the NCAA filed for a writ of certiorari to the United States Supreme Court which was granted on February 22, 1988,[224] and the case was limited to the issue of whether the NCAA was a state actor.[225]

IV. ANALYSIS OF THE COURT'S OPINION

A. Justice Stevens' Majority Opinion

The United States Supreme Court's narrow 5-4 decision to reverse the Nevada supreme court's ruling in *National Collegiate Athletic Ass'n v. Tarkanian*[226] marked the first, but final, loss for Tarkanian in his battle against the NCAA.[227] Justice Stevens' opinion[228] measured the state supreme court's ruling in favor of Tarkanian against the backdrop of Supreme Court precedent which has interpreted and narrowed the meaning of "state action."[229] Thus, the Nevada court, in the eyes of the Supreme Court, "traveled" a bit too far in declaring that the NCAA was a state actor.

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223. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); see *also supra* note 143 and accompanying text for *Lugar*'s two-part test. The *Tarkanian* court held that:

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

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

224. Brief for Petitioner at 1, National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454 (1988) (No. 87-1061).

225. The question presented to the Court was:

> Whether the action of the NCAA in directing one of its members, a state university, to show cause why it should not temporarily suspend an employee from his duties relating to intercollegiate athletics for violating the Association's rules, constitutes state action, where the member university, in compliance with NCAA rules, suspends the coach from coaching.

Id. at 2.

226. 109 S. Ct. 454 (1988).

227. The NCAA complained that Tarkanian had a "home-court advantage" in his victories over the NCAA in the Nevada state courts. Brief for Petitioner at 27.

228. Justice Stevens was joined in the majority opinion by Chief Justice Rehnquist, and Justices Blackmun, Scalia, and Kennedy. *Tarkanian*, 109 S. Ct. at 456.

229. *Id.* at 460-63. The Court stated that "[e]mbedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *Id.* at 461 (citing Shelley v. Kraemer 334 U.S. 1 (1948) (footnote omitted)); *see also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974).

In addition, the Court noted that "protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.'" *Tarkanian*, 109 S. Ct. at 461 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).

The state high court ruled that the NCAA was a state actor partly because "UNLV had delegated its authority over personnel decisions to the NCAA" and that "the two entities acted jointly to deprive Tarkanian of liberty and property interests."[230] Nevertheless, the Supreme Court correctly pointed out that while UNLV's decision to suspend Tarkanian was based on NCAA rules and recommendations, it was UNLV, and not the NCAA, which actually suspended Tarkanian.[231] As such, UNLV had not actually delegated any authority to the NCAA because the NCAA's only authority in the matter was to threaten UNLV with additional sanctions or possible expulsion from the membership if UNLV did not comply with the "show cause order."[232] The NCAA *could not* directly suspend Tarkanian.[233]

Furthermore, the Court rejected the notion that UNLV and the NCAA acted in concert to suspend Tarkanian.[234] Looking at the factual[235] and procedural history[236] of the case, the Court stated, "It is quite obvious that UNLV used its best efforts to retain its winning coach—a goal diametrically opposed to the NCAA's interest in ascertaining the truth of the investigators' reports."[237] Thus, it was incorrect for the state court to presume that UNLV and the NCAA acted jointly during the proceedings against Tarkanian because the two entities "acted much more like adversaries than . . . partners engaged in a dispassionate search for the truth."[238] Instead of acting jointly with UNLV, the NCAA was actually "an agent of its remaining members which, as competitors of UNLV, had an interest in the effective and evenhanded enforcement of NCAA's recruitment standards."[239]

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230. *Tarkanian*, 109 S. Ct. at 462. Tarkanian claimed that UNLV, by allegedly delegating its own function of disciplining a state employee to the NCAA had, "cloth[ed] the Association with authority . . . to adopt rules governing UNLV's athletic programs and to enforce those rules on behalf of UNLV." *Id.* at 461-62.

231. *Id.* at 462.

232. *Id.* at 465.

233. *Id.*

234. *Id.* at 464-65.

235. *See supra* notes 162-94 and accompanying text.

236. *See supra* notes 196-225 and accompanying text.

237. *Tarkanian*, 109 S. Ct. at 464 (1988). But see *supra* note 177 in which it appears that the NCAA did not seem compelled to establish the veracity of its investigators.

238. *Tarkanian*, 109 S. Ct. at 464. The court emphasized the conflict between the two entities by saying: "[T]hey have clashed throughout the investigation, the attempt to discipline Tarkanian, and this litigation. UNLV and the NCAA were antagonists, not joint participants, and the NCAA may not be deemed a state actor on this ground." *Id.* at 464 n.16.

239. *Id.* The Court analogized this case to Polk County v. Dodson, 454 U.S. 312, 320 (1981), where a public defender who is employed by the state is a private actor when representing a private client against the state. *Id.* The Court applied the reasoning in

Another argument pressed by Tarkanian and the Nevada court, as well as cases such as *Parish* and *Howard*, is that the NCAA is a state actor because about half of its membership is state-supported. The Court conceded that Nevada's membership in the NCAA may have had some impact on NCAA policy.[240] Nevertheless, such an impact is small when compared to the vast majority of other institutions located outside of Nevada which equally affect NCAA policy and do not act pursuant to Nevada law.[241] As a result, the NCAA's legislation does not evolve from Nevada or UNLV, but rather through "the collective membership speaking through an organization that is independent of any particular [s]tate."[242]

Perhaps the most persuasive argument formulated by Tarkanian and the Nevada court against the NCAA was that the "NCAA[ ] assumed the state's traditional and exclusive power to discipline its employees."[243] After all, only a state can discipline its own employees. However, this argument fails because the facts in *Tarkanian* manifest that UNLV actually suspended Tarkanian, while the NCAA could only discipline UNLV for not suspending Tarkanian. The NCAA could not suspend him pursuant to its regulations.[244] Furthermore, any argument that the NCAA expropriated an exclusive and traditional state function by promulgating its rules and enforcement procedures is meritless since regulation of education or intercollegiate athletics is not an exclusive state function.[245]

Tarkanian's last argument against the NCAA—which perhaps was a final "desperation shot"—was that the NCAA was, in effect, a mo-

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Dodson by stating, "[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." *Tarkanian*, 109 S. Ct. at 464 (footnote omitted).

240. *Id.* at 462.

241. *Id.*

242. *Id.* The Court emphasized that the NCAA is not a state actor merely because UNLV adopted NCAA regulations by stating: "Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance." *Id.* at 463.

The Court indicated the situation would be different if, as in the "high school cases," all of the NCAA's members were located within one state where the majority of institutions are public. *Id.* at 462 n.13. For a discussion of the "high school cases," see *supra* notes 100-01 and accompanying text.

243. *Tarkanian*, 109 S. Ct. at 465. In Tarkanian's brief to the Court, the coach argued, "the NCAA requires that its standards, procedures and determinations *become* the State's standards, procedures and determinations for disciplining state employees . . . [thereby obligating the state] to impose NCAA standards, procedures and determinations making the NCAA a joint participant in the State's suspension of Tarkanian." *Id.* (citing Brief for Respondent at 34-35, *Tarkanian* (No. 87-1061)).

244. *Id.*

245. *Id.* (citing National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984)).

nopoly, and thus UNLV had no practical alternative but to comply with the NCAA's decision regarding Tarkanian's discipline.[246] However, *Jackson v. Metropolitan Edison Co.*[247] explicitly held that the state's mere conferral of monopoly status on a private party does not convert that party's conduct into state action.[248]

Before deciding Tarkanian's fate, the Court examined its prior case law, which had stated that a private entity can only be a state actor if its "conduct . . . causing the deprivation of a federal right can be fairly attributed to the State."[249] The Court stated that it would be anomalous to hold that the NCAA's sanctions against UNLV are "fairly attributable" to the State of Nevada, when the state itself, through UNLV and the Nevada Attorney General, opposed the NCAA's sanctions.[250] The Court concluded "that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law."[251] In essence, UNLV acted under color of NCAA law—not vice-versa.

Surprisingly, in analyzing the case *sub judice*, the Supreme Court did not consider the "NCAA state action cases,"[252] its holdings in *Blum* and *Rendell-Baker*, or appellate cases, such as *Arlosoroff* and *Graham*, holding the NCAA to be a private actor. After all, the

246. *Id.* at 465. The Court expressed its hesitancy to accept the notion that UNLV was powerless: "The University's desire to remain a powerhouse among the nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal. But that UNLV's options are unpalatable does not mean they were nonexistent." *Id.* at 465 n.19.

However, at least one commentator has suggested that such reasoning by the Court may not be completely sound:

> The response of the NCAA to dissidents when criticism of its actions arises has always been that it is a voluntary association and that its dissatisfied members may simply leave. However, for the institution that wanted prestige in [major collegiate athletics], just as for the institution that simply wanted a cut of the NCAA's television revenue, membership was far from voluntary.
>
> . . . .
>
> Despite the Supreme Court's break-up of the organization's television monopoly, there is still no alternative for the institution seeking any real form of athletic prominence. In the high pressure sport of major intercollegiate basketball, there is no substitute for the season-end NCAA tournament. To varying degrees, this holds true in the other intercollegiate sports.

Martin, *supra* note 3, at 56 (footnotes omitted).

247. 419 U.S. 345 (1974).

248. *Id.* at 351-52.

249. *Tarkanian*, 109 S. Ct. at 465 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

250. *Id.*

251. *Id.*

252. *See* cases cited *supra* notes 75-76.

Court's logic in sustaining the NCAA's private authority seems to parallel those later cases. Yet, the Court's decision reflects the growing trend not to find state action when a private entity is involved with a state actor. The *Tarkanian* Court reiterated this sentiment, which was stated in *Lugar*, by noting that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law"[253] and the notion of state action "avoids the imposition of responsibility on a State for conduct it could not control."[254]

B. Justice White's Dissenting Opinion

Three Justices[255] joined Justice White's[256] appraisal that the NCAA is a state actor because it acted jointly with UNLV in suspending Tarkanian.[257] The dissent cited two Supreme Court cases[258] holding that a private party was a state actor when the final act of deprivation was carried out by the state official, because the private party was jointly engaged with state officials.[259] Following this line of reasoning, the dissent listed three separate reasons why UNLV and the NCAA were jointly participating as state actors in suspending Tarkanian.[260]

First, the dissent argued there was joint action because UNLV embraced the rules of the NCAA in its membership agreement and suspended Tarkanian based on those rules.[261] This is supported by the fact that UNLV administers its athletic department in accordance with NCAA regulations, which state that "enforcement procedures are an essential part of the intercollegiate athletic program of each member institution."[262]

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253. *Tarkanian*, 109 S. Ct. at 461 (quoting *Lugar*, 457 U.S. at 936).

254. *Id.* (citing *Lugar*, 457 U.S. at 936).

255. Justice White was joined in the dissenting opinion by Justices Brennan, Marshall, and O'Connor. *Id.* at 466.

256. Justice White, nicknamed "Whizzer," was an all-American running back for the University of Colorado football team, and he won the Heisman trophy award in 1937 as the outstanding collegiate football player. As such, he and his school came under the direction of the NCAA. THE NEW COLUMBIA ENCYCLOPEDIA 2968 (4th ed. 1975).

257. *Tarkanian*, 109 S. Ct. at 466 (White, J., dissenting).

258. *Id.*; *see* Dennis v. Sparks, 449 U.S. 24 (1980) (defendant private party who willfully conspired with state judge to have the judge issue meritless injunction against plaintiff was state actor); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (defendant private party who reached agreement with state police officers to arrest plaintiff on impermissible grounds was state actor).

259. *Tarkanian*, 109 S. Ct. at 466 (White, J., dissenting).

260. *Id.* at 466-68 (White, J., dissenting).

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

262. *Id.* (White, J., dissenting) (quoting University of Nev. v. Tarkanian, 95 Nev. 389, 391, 594 P.2d 1159, 1160 (1979); *aff'd in part, rev'd in part*, 103 Nev. 331, 334, 741 P.2d 1345, 1347 (1987)).

Second, the dissent claimed joint action occurred because, as part of the membership agreement, UNLV and the NCAA impliedly agreed that the NCAA would conduct the initial hearings pertaining to Tarkanian's alleged violations of its rules.[263] The membership agreement between the two entities provided that the Committee on Infractions would hold hearings to determine the factual basis for alleged violations, subject to the approval of the NCAA council.[264]

The dissent's final argument for joint action was that the two entities "agreed that the findings of fact made by the NCAA at the hearings it conducted would be binding on UNLV."[265] This was bolstered by the fact that the vice president of UNLV, while doubting the veracity of the NCAA's findings, felt contractually bound to accept the NCAA's findings as UNLV's own, which ultimately led to Tarkanian's suspension.[266] The dissent summed up its "joint action" analysis by commenting that "it was the NCAA's findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Tarkanian's suspension by UNLV."[267]

Additionally, the dissent criticized the majority's logic in holding that the NCAA is a private actor, by comparing the facts of this case to *Dennis v. Sparks*.[268] Although the majority relied heavily on the fact that the NCAA could not discipline Tarkanian directly, the dissent argued that this also was the case in *Dennis*, where the defendant private party did not have the authority to issue a meritless injunction against the plaintiff.[269] Like the trial judge in *Dennis*, UNLV was the only one who could provide the act which deprived the plaintiff of his rights.[270]

Although the majority argued that UNLV could have voluntarily withdrawn from NCAA membership, the dissent noted that the judge in *Dennis* also could have removed himself from the conspiracy to grant a meritless injunction.[271] The critical point is that neither

263. *Id.* (White, J., dissenting).
264. *Id.* at 466-67 (White, J., dissenting).
265. *Id.* at 467 (White, J., dissenting).
266. *Id.* (White, J., dissenting); *see also supra* notes 191-94 and accompanying text.
267. *Tarkanian*, 109 S. Ct. at 467 (White, J., dissenting).
268. *Id.* at 466 (White, J., dissenting); *see* Dennis v. Sparks, 449 U.S. 24 (1980); *see also supra* note 258.
269. *Tarkanian*, 109 S. Ct. at 467 (White, J., dissenting).
270. *Id.* (White, J., dissenting).
271. *Id.* (White, J., dissenting).

UNLV, nor the judge in *Dennis*, actually rescinded their respective agreements.[272]

Finally, the animosity between UNLV and the NCAA during the proceedings provided an impetus for the majority's finding that there was no joint action. Nevertheless, the dissent compared this animosity to the possibility that the judge in *Dennis* might have tried to persuade the defendant that granting an injunction was improper. The dissent stated that "[t]he key . . . as with any conspiracy, is that ultimately the parties agreed to take the action."[273] Hence, the dissent urged that, despite the animosity between UNLV and the NCAA, UNLV eventually accepted the NCAA's findings as their own, and conspired to suspend Tarkanian.

V. IMPACT OF THE COURT'S DECISION

The Supreme Court's holding in *Tarkanian* ended a fifteen-year debate between the federal district and appellate courts as to the status of the NCAA vis-a-vis the "state action" requirement under the fourteenth amendment and section 1983.[274] Although the arguments contained in the "NCAA state action cases"[275] were factually and logically based, and cited by subsequent appellate and district court cases,[276] such arguments could not withstand the judicial pressure of limiting the scope of "state action." As a result, while the NCAA may be labeled as a "quasi-state actor," due to its involvement with state institutions and its performance of nonexclusive state functions, such a label does not provide those under the NCAA's auspices with any Constitutional guarantees.

A. Impact on Future Section 1983 Claims

The Supreme Court's decision in *Tarkanian* follows in the footsteps of cases such as *Jackson*, *Blum*, and *Rendell-Baker*, which established an exacting threshold for a section 1983 plaintiff to cross when seeking vindication of the deprivation of a constitutionally protected interest. Although a private entity may be granted monopoly status by the state,[277] receive over ninety percent of its funds from the state,[278] be given the right to make administrative decisions by the state,[279] or be able to compel the state to suspend a state employee,[280]

272. *Id.* (White, J., dissenting).
273. *Id.* at 468 (White, J., dissenting).
274. *See supra* notes 58, 60.
275. *See supra* note 109.
276. *See* cases cited *supra* notes 75-76.
277. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).
278. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
279. *See* Blum v. Yaretsky, 457 U.S. 991 (1982).
280. *See* National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct 454 (1988).

such action does not rise to the level of constitutional protection. It may be that a narrower scope of state action is a manifestation of the shift toward a more conservative Court[281] as the Bush administration commences; or perhaps the Court is trying to limit the burden on the federal courts which has escalated, in part, from the multitude of section 1983 claims.[282] Whatever the motivation, the effect is that plaintiffs, such as Tarkanian,[283] who have suffered a deprivation of Constitutional rights, may find their options decreasing in the future.

B. Future Impact on the NCAA

The Court's decision in *Tarkanian* may provide the NCAA with an effective deterrent against members and their athletes, who may now think twice before violating NCAA rules. With the Supreme Court's stamp of approval, the NCAA can promulgate its regulations, investigate possible violators, and enforce its disciplinary measures without fear of protracted court battles involving due process claims, such as the eleven-year ordeal in *Tarkanian*.[284] Furthermore, issues such as drug testing,[285] steroid abuse, and compensation for student-athletes have become areas of debate, for which the NCAA may offer solutions which could draw spirited opposition. Nevertheless, the NCAA's triumph over Tarkanian may be the first step in a series of changes surrounding the NCAA and the integrity of intercollegiate athletics.

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281. All five Supreme Court Justices constituting the majority in *Tarkanian* are republicans who were selected by republican presidents. President Richard Nixon appointed both Justice Rehnquist, who was named Chief Justice by President Ronald Reagan, and Justice Blackmun. President Ford appointed Justice Stevens, and President Reagan appointed Justices Scalia and Kennedy. Conversely, three of the four dissenting Justices—Justices White, Brennan, and Marshall—are democrats, with the exception being Justice O'Connor. *See* Howard, *Living With the Warren Legacy*, A.B.A. J., Oct. 1989, at 69-70; *see also* S. GOLDMAN, CONSTITUTIONAL LAW AND SUPREME COURT DECISION-MAKING 538, table 8.1 (1982).

282. *See supra* notes 67-68 and accompanying text.

283. Because the question presented to the *Tarkanian* Court was limited to the state action issue, it did not decide whether Tarkanian was denied his due process of law. However, the Nevada Supreme Court affirmed the trial court's decision that Tarkanian's rights had been violated. Tarkanian v. National Collegiate Athletic Ass'n, 103 Nev. 331, 333, 741 P.2d 1345, 1346 (1987). Furthermore, Justice White, in his dissent, stated that he took it as a given that "the hearings provided to Tarkanian were constitutionally inadequate." *Tarkanian*, 109 S. Ct. at 467 n.1 (White, J., dissenting).

284. Tarkanian filed his initial suit in Nevada on September 8, 1977, and the Supreme Court handed down its verdict on December 12, 1988. *Tarkanian*, 109 S. Ct. at 454, 456.

285. *See* Comment, *Mandatory Drug Testing of College Athletes: Are Athletes Being Denied Their Constitutional Rights?*, 16 PEPPERDINE L. REV. 45 (1988).

Hopefully, the NCAA will not abuse its monopolistic privileges with overzealous or selective enforcement of membership rules. The many critics of the NCAA fear that the NCAA may become too powerful and hurt college athletics with a myriad of disciplinary proceedings which draw great publicity. If the NCAA becomes too overbearing, disgruntled universities may join together to form a competing entity to challenge the NCAA's reign.[286] As professional athletic contracts continue to rise at an unprecedented rate, the lure of enticing student-athletes into professional sports will inevitably create a higher level of competition at the collegiate ranks. The increased competition will lead to additional pressures to succeed, thereby raising the possibility of violating NCAA rules. In the end, it will be the actions of the NCAA, and not its members, that will dictate the rise or fall of intercollegiate athletics.

Furthermore, the Court's opinion should allow athletic and private organizations similar to the NCAA,[287] to have a more distinct role in promulgating rules and disciplining members or employees.

C. Impact on Tarkanian

Subsequent to the Supreme Court's decision in *Tarkanian*, speculation surfaced concerning what actions the NCAA would take with regard to UNLV and Tarkanian. Although UNLV suspended Tarkanian in 1977, he has avoided such suspension up until now. However, the NCAA is not yet in a position to compel UNLV to suspend Tarkanian. Before any such discipline can occur, the Nevada supreme court must lift the injunction prohibiting Tarkanian's suspension.[288] Until this occurs, Tarkanian can continue to coach into the 1990s despite his suspension for alleged rule violations occurring in the early seventies.

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286. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984) (the Universities of Oklahoma and Georgia established the Collegiate Football Association, which provides its members with a television contract, thereby eliminating the NCAA's monopoly in televising college football).

287. *See supra* notes 100-15 and accompanying text; *see, e.g.*, San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (USOC not a government actor under the fifth amendment when it sought to enjoin petitioner from using the word "Olympic" in promoting the "Gay Olympic Games," even though congressional act gave USOC right to prohibit unauthorized use of the word "Olympic").

288. The NCAA asked the Nevada Supreme Court to lift the injunction on May 11, 1989. L.A. Times, May 13, 1989, at C16, col. 1. Thereafter, Tarkanian asked the court to uphold the twelve-year-old injunction. *Id.*, May 22, 1989, at C7, col 1. The court subsequently allowed Tarkanian to continue coaching at UNLV pending a hearing at the Clark County District Court of Nevada to determine whether the United States Supreme Court's decision effectively overturned the injunction. Washington Post, Sept. 29, 1989, § 3, at 2, col. 2.

VI. CONCLUSION

The Court's ruling in *Tarkanian* reinforces the Court's reluctance to find state action on behalf of a private party engaged in conduct with an alleged state actor. Such a trend may keep plaintiffs with viable constitutional claims out of the federal courts, thereby lessening the courts' crowded dockets.

In its battle with Tarkanian, the NCAA received a boost for enforcing its method of regulating intercollegiate athletics. Perhaps the problems that have plagued collegiate athletics for decades can be rectified by the NCAA and its various committees and member institutions. The NCAA's victory over UNLV and Tarkanian may be the first in the NCAA's long battle of improving the integrity of intercollegiate athletics.

Although Tarkanian lost his court battle against the NCAA, his avoidance of a suspension for twelve years has given him the time to create a highly successful program on the court at UNLV. A suspension back in 1977 may have scarred the UNLV program and hindered its success. Thus, in a practical sense, Tarkanian may have ended up a winner anyway, even though the NCAA finally defeated him at the buzzer.

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