National Collegiate Athletic Association v. Tarkanian: A Death Knell for the Symbiotic Relationship Test?

Introduction

The Due Process Clause of the Fourteenth Amendment guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[1] It has been settled for over a century that fourteenth amendment protection applies only against state action.[2] When a governmental entity allegedly violates a person's due process rights, the state action inquiry is a mere formality.[3] When a private party commits the challenged act, however, the question whether the state was sufficiently involved for the act to constitute state action has proven highly problematic.[4]

National Collegiate Athletic Association v. Tarkanian,[5] decided in December 1988, involved a public university's suspension of one of its coaches at the behest of a private association. The Supreme Court held that the association was not a state actor for fourteenth amendment due process purposes. In framing its due process inquiry, the Court asked whether " 'the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State.' "[6] The Court conducted a fact-based analysis of the relationship between the state actor, the University of Nevada, Las Vegas (UNLV), and the private association, the National Collegiate Athletic Association (NCAA). The Court concluded that the relationship was too tenuous to classify the association as

---

1. U.S. CONST. amend. XIV, § 1. 42 U.S.C. § 1983 sets forth the statutory remedy for violations of the Fourteenth Amendment. It provides in pertinent part:

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

42 U.S.C. § 1983 (1979).

2. *See* The Civil Rights Cases, 109 U.S. 3, 11, 21 (1883); *see also* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (stating that the "[Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful.").

3. *See* Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 228.

4. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1689-90 (2d ed. 1988).

5. 109 S. Ct. 454 (1988).

6. *Id.* at 465 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

a state actor.[7]

Justice Stevens, writing for the five-to-four majority, relied primarily on the traditional "nexus"[8] and "public function"[9] tests of state action in his decision. His rejection of the state action claim perpetuated the Court's recent trend constricting the scope of the state action doctrine.[10]

The Burger Court found the nexus test a particularly useful tool in its series of "ad hoc efforts to limit the reach of state action."[11] Given Justice Rehnquist's role as "Burger Court state action expositor,"[12] it is not surprising that this trend should continue after his elevation to Chief Justice.[13]

The traditional state action tests[14] are especially well suited to the steady erosion of the state action doctrine, because they themselves are essentially case-by-case inquiries.[15] Indeed, writers have sharply criticized these tests because a court can easily manipulate them to reach the court's predetermined conclusion.[16] *Tarkanian* is a prime example of this type of manipulation.

This Comment examines the *Tarkanian* Court's use of the nexus and public function tests in its state action analysis. Part I traces the historical background of the tests and their development into exacting state action inquiries. Part I also demonstrates how easily a result-minded court may exploit these tests. Part II describes the facts of *Tarkanian*, focusing on the relationship between UNLV and the NCAA.

---

7. *Id.* at 463. The Court had accepted as given that "[i]n performing their official funtions, the executives of UNLV unquestionably act under color of state law." *Id.* at 457.

8. *See infra* notes 48-64 and accompanying text.

9. *See infra* notes 39-47 and accompanying text.

10. The Burger Court began this trend in the early 1970s. *See* Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683 (1984).

11. *Id.* at 720.

12. *Id.* at 713. Justice Rehnquist authored the majority opinions in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), and Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), which, together, "severely qualified the theory of significant state involvement." Stern, *State Action, Establishment Clause, and Defamation: Blueprints for Civil Liberties in the Rehnquist Court*, 57 U. CIN. L. REV. 1175, 1192 (1989). He also wrote the Court's opinion in Blum v. Yaretsky, 457 U.S. 991 (1982), yet another case in which the Court found no state action.

13. Stern, *supra* note 12, at 1192 (stating that "[w]ithout attributing inordinate importance to the role of Chief Justice Rehnquist, it can be said that his tenure on the Court has coincided with a discernible retreat from the vision that had been manifested in the [state action doctrine].").

14. *See infra* notes 29-32 and accompanying text.

15. *See* L. TRIBE, *supra* note 4, at 1690.

16. *See* Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1325 (1982) (criticizing the state compulsion test); Stern, *supra* note 12, at 1221 (state action doctrine in general); Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1, 22-23, 79 (state action doctrine in general); Comment, *The State Action Doctrine in State and Federal Courts*, 11 FLA. ST. U.L. REV. 893, 898 (1984) (symbiotic relationship test).

The Court based its decision almost exclusively on this relationship. Part II also presents the Court's holding of no state action and the dissent's argument that the NCAA was indeed a state actor for fourteenth amendment purposes.

Finally, Part III analyzes the Court's decision, positing that the *Tarkanian* Court took advantage of the extreme flexibility of the state action doctrine to justify its preconceived conclusion. Part III also argues that the facts of *Tarkanian* required the Court to find that the NCAA was a state actor because it participated jointly with UNLV in the challenged act. The Court ignored the realities of *Tarkanian* by bending the tests to fit a predetermined conclusion. In the process, the Court devalued both the nexus and public function tests as reliable means of solving the state action problem and reaffirmed one commentators' description of the state action doctrine as a "conceptual disaster area."[17]

This Comment concludes that in cases like *Tarkanian*, where both parties must participate in order to carry out the challenged act, a court must find state action. The court's use of this "joint participation" standard will preclude it from resorting to the vague, easily manipulated nexus and public function tests. Use of the joint participation standard will avoid arbitrary decisions like *Tarkanian.*

I. Historical Background

A. *Burton*'s Fact-based Analysis

State action analysis is highly fact-dependent.[18] In *Burton v. Wilmington Parking Authority*,[19] Justice Clark, writing for the majority, said that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[20]

In *Burton*, the Court found state action when the state used public funds to build and maintain a parking garage that was used for public purposes. The state leased commercial space within the garage to a private restaurant that practiced racial discrimination.[21] The Court began its state action analysis by warning that "to fashion and apply a precise

17. Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967). More recently, Professor Christopher Stone remarked that "[t]he whole state action area appears now, more than ever, a shambles." Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1484 n.156 (1982).

18. Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458, 1467 (1961).

19. 365 U.S. 715 (1961).

20. *Id.* at 722.

21. *Id.* at 716.

formula for recognition of state responsibility . . . is an 'impossible task' which '[t]his Court has never attempted.' "[22] The Court next focused on the specifics of the relationship between the parties and concluded that the relationship was sufficiently close to characterize the restaurant as a state actor.[23]

The *Burton* Court concluded by limiting its holding to the facts at bar.[24] The majority opinion stated that the state/private party relationships that are covered by the Fourteenth Amendment "can be determined only in the framework of the peculiar facts or circumstances present."[25] *Burton* has been criticized for its failure to establish even "a minimum, tentative rule"[26] to guide future courts struggling with the state action problem.[27]

B. The Traditional State Action Tests

Despite the extremely ad hoc nature of the state action inquiry after *Burton*, the Court has relied increasingly on several broad tests to aid in its state action analysis.[28] Depending on the facts of the case, a court may invoke the "state compulsion" test,[29] the "public function" test,[30] the "nexus" test,[31] or any combination of the three.[32]

1. The State Compulsion Test

The state compulsion test typically requires a finding of state action when "the wrongdoer has been commanded or encouraged by government to engage in the activity which has harmed the aggrieved party."[33] Thus, state action has occurred when the private party was obeying a statute,[34] or even a "custom having the force of law."[35] In recent years,

22. *Id.* at 722 (quoting Kotch v. Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

23. *Id.* at 723-25.

24. *Id.* at 725-26.

25. *Id.* at 726.

26. Lewis, *supra* note 18, at 1466.

27. *Id.* at 1462-63 & n.21; *see also* Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 503 (1985) (stating that "the Court has succeeded only in sowing ambiguity and incoherence in section 1983 jurisprudence").

For a contrary viewpoint, see Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 199 (1985) (praising the *Burton* Court's "failure to formalize a rule").

28. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982) (listing the various state action tests).

29. *See infra* notes 33-38 and accompanying text.

30. *See infra* notes 39-47 and accompanying text.

31. *See infra* notes 48-64 and accompanying text.

32. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

33. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 432 (3d ed. 1986).

34. Peterson v. City of Greenville, 373 U.S. 244 (1963).

35. Adickes v. S. H. Kress & Co., 398 U.S. 144, 171 (1970). *Adickes* held that if a lunch-

however, the Court has made the state compulsion test more rigorous. This changing attitude is illustrated in *Jackson v. Metropolitan Edison Co.*,[36] the case that signaled the Burger Court's intent to limit the state action doctrine.[37] The plaintiff in *Jackson* brought a section 1983 suit against the defendant private utility company for terminating her electrical service, allegedly without giving her notice or an opportunity to be heard and to pay her outstanding bills. The defendant held a certificate of public convenience from the Pennsylvania Utility Commission. The plaintiff argued that the defendant's termination of her service was " 'specifically authorized and approved' " by the Commission,[38] and was therefore state action. The *Jackson* Court rejected this argument, ruling that a state must actually order an act for there to be state action under the state compulsion test. Mere passive approval is not enough.

2. *The Public Function Test*

The public function test, in theory, prevents the state from avoiding constitutional liability by delegating its public functions to a private party. If the state delegates a public function, the Court will deem the ostensibly private party a state actor.[39] The Court has had difficulty distinguishing public functions from functions that are inherently private and therefore not restricted by the Fourteenth Amendment.[40] For example, in only eight years, the Court completely reversed itself on the question of whether a privately owned shopping center performs a public function. In *Amalgamated Food Employees Union v. Logan Valley Plaza*,[41] the Court held that a shopping center is the "functional equivalent" of a business district in a company town—an entity that the Court had already found to be a state actor.[42] In 1976, after an intervening case had failed to limit *Logan Valley* to its facts,[43] the Court rejected

room's refusal to serve the plaintiff stemmed from a "state-enforced custom of segregating the races in public restaurants," such refusal violated the plaintiff's due process rights. *Id.*

36. 419 U.S. 345 (1974).

37. Phillips, *supra* note 10, at 704.

38. *Jackson*, 419 U.S. at 354 (quoting Brief for Petitioner at 9-10, *Jackson* (No. 73-5845)). The plaintiff argued that the defendant's termination of her service was "allowed by a provision of its general tariff filed with the Commission," and was therefore state action. *Id.* at 348.

39. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 33, at 426.

40. *Id.*

41. 391 U.S. 308 (1968), *overruled by* Hudgens v. NLRB, 424 U.S. 507 (1976). *Logan Valley* considered union picketing in front of a supermarket.

42. Marsh v. Alabama, 326 U.S. 501, 503 (1946).

43. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The plaintiffs in *Lloyd* argued that by refusing to permit them to distribute handbills in its shopping center, defendant corporation had violated their first amendment rights. The Court rejected this argument. It distinguished its holding in *Logan Valley* by stating that the picketing in that case was "directly related" to the activities conducted in the shopping center, and that the picketers there had no reasonable alternative means of conveying their message. *Id.* at 563.

Logan Valley outright.[44] The inherent vagueness of the public function standard allowed the Court wide discretion in deciding exactly what types of functions fall under the heading of state action.

As with the other state action standards, the Court recently limited the scope of the public function standard.[45] In *Jackson*, for example, the Court recognized state action when a private entity had exercised "powers traditionally exclusively reserved to the State."[46] Nevertheless, the Court ruled that the provision of utility service was "not traditionally the exclusive prerogative of the State."[47] Therefore, said the Court, the defendant utility company was not subject to the Fourteenth Amendment. This holding further narrowed the scope of the state action inquiry. The *Jackson* Court exercised wide discretion in deciding what types of functions are the state's exclusive prerogative.

3. *The Nexus Test*

a. Roots in the Symbiotic Relationship Test

Ironically, the nexus test used in *Tarkanian* traces its origins to *Burton v. Wilmington Parking Authority*,[48] where the Court specifically limited its holding to the facts of the case.[49] In *Burton*, the Court found the privately owned restaurant to be a state actor when it leased its space from the state.[50] The Court aggregated the "incidental variety of mutual benefits"[51] enjoyed by both parties as a result of their association with each other and concluded that there was state action[52] because the state

44. Hudgens v. NLRB, 424 U.S. 507 (1976). Like *Logan Valley*, *Hudgens* involved union picketing of a store located within a shopping center. Unlike *Logan Valley*, however, the Court held that the First and Fourteenth Amendments provided no protection to the picketers' activities. *Id.* at 520-21.

45. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

46. 419 U.S. at 352.

47. *Id.* at 353.

48. 365 U.S. 715, 724 (1961). In Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982), the Court listed the various state action tests. It cited *Burton* as an example of a nexus test case, presumably in reference to its "incidental variety of mutual benefits" language. *See infra* note 51 and accompanying text. But, as if to acknowledge its own confusion, the Court stated that "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here." *Lugar*, 457 U.S. at 937.

49. *See supra* notes 24-25 and accompanying text.

50. *See supra* note 21 and accompanying text.

51. *Burton*, 365 U.S. at 724. These mutual benefits included the convenience of parking for the restaurant's customers which in turn was likely to increase demand for the state's parking facilities. In addition, the restaurant would enjoy certain tax advantages due to its obtainment of the lease from a tax-exempt government agency. Finally, the Court observed that "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." *Id.*

52. *Id.*

had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity . . . ."[53]

Subsequent cases have referred to this search for mutual benefits as the "symbiotic relationship"[54] or "joint participation"[55] test. Although the Court has not explicitly rejected this test, recent decisions raising the issue have uniformly found any symbiotic relationship between the parties to be inconsequential for state action purposes.[56] In *Jackson*, the Court summarily rejected the appellant's symbiotic relationship arguments. The Court stated that *Burton* was limited to lessees of public property.[57] Because the appellee, a privately owned utility company, did not lease its facilities from the state, *Jackson* did not meet the *Burton* test.[58] By the time the Court decided *Tarkanian*, the joint participation inquiry was a virtual non-issue. *Tarkanian* made it even more so.[59]

b. The Nexus Test Today

The nexus standard, first articulated in *Jackson*,[60] is ostensibly a less demanding variant of the joint participation standard. In *Jackson*, Justice Rehnquist, writing for the majority, said "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[61] This formulation is extremely broad and may easily encompass situations in which the nexus falls far short of actual joint participation. In *Jackson*, for example, the Court reasonably could have found the state's licensure of the defendant utility company a "sufficiently close nexus" to make the defendant a state actor. Because the state had no actual involvement in defendant's deci-

53. *Id.*

54. The term was first used in Justice Rehnquist's majority opinion in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

55. Cases and commentators frequently use the terms interchangeably. *See, e.g.*, Frazier v. Board of Trustees, 765 F.2d 1278, 1285 (5th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986); Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U.L. REV. 531, 599-600 (1989); Spurlock, *Liability of State Officials and Prison Corporations for Excessive Use of Force Against Inmates of Private Prisons*, 40 VAND. L. REV. 983, 1015 (1987); Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. CAL. L. REV. 213, 231 (1984).

56. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842-43 (1982); Blum v. Yaretsky, 457 U.S. 991, 1010-11 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974); *Moose Lodge*, 407 U.S. at 175.

57. *Jackson*, 419 U.S. at 358.

58. *Id.* The Court also held that the state's regulation of the utility was not sufficient to classify the state as a "joint venturer" with the utility. *Id.* (quoting *Moose Lodge*, 407 U.S. at 176-77).

59. *See infra* notes 126-28, 134-35, 159-60 and accompanying text.

60. 419 U.S. at 351.

61. *Id.*

sion to terminate plaintiff's service, however, a finding of joint participation would be unlikely.

It would be difficult to find a closer nexus between two parties than their joint participation in the challenged act. But the Court's application of the nexus test has proved very demanding.[62] This effect results largely from *Jackson*'s tacit rejection of the *Burton* approach of aggregating the various state action factors and instead searching for state action in each individual element of the case.[63]

Since *Jackson*, the public function test has become little more than one persuasive factor to consider in the seriatim search for a nexus between the parties. In *Blum v. Yaretsky*, Justice Rehnquist, again writing for the majority, declared that "the required nexus *may* be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the state.' "[64] Thus, using the *Jackson* seriatim approach, a court theoretically could find that the public function test was satisfied, but still conclude that any nexus between the parties was insufficient to support a finding of state action.

II. Case Description

A. Relationship Between UNLV and the NCAA

Any state action analysis of *Tarkanian* must begin with an overview of the relationship between UNLV and the NCAA because this relationship is so central to the disposition of the state action question.

The NCAA is an unincorporated association comprised of about 960 members.[65] This membership includes the majority of American public and private universities and four-year colleges with "major athletic programs."[66] Every year, the membership gathers at a national convention to determine NCAA policies.[67] Between conventions, the NCAA Council and various Council-appointed committees govern the NCAA's affairs.[68]

One of the NCAA's primary 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."[69] In

62. *See* Phillips, *supra* note 10, at 704-05, 719.

63. *Id.* at 705. This adoption of a seriatim analysis was the basis for Justice Douglas' dissent in *Jackson*. *See Jackson*, 419 U.S. at 360 (Douglas, J., dissenting).

64. Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) (quoting *Jackson*, 419 U.S. at 353) (emphasis added).

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

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* (quoting Joint Appendix at 80, *Tarkanian* (No. 87-1061)).

connection with this purpose, the NCAA has enacted rules on such matters as eligibility standards and student-athlete recruitment.[70]

NCAA policies are enforced by a Committee on Infractions which has the authority to conduct investigations, to make findings regarding alleged rule violations, and to " 'impose appropriate penalties on a member found to be in violation.' "[71] This Committee also has the power to order a member institution to show cause why further sanctions should not be incurred unless the member "imposes a prescribed discipline on [its] employee."[72] The Committee, however, has no authority to discipline an institution's employees directly.[73]

UNLV is a branch of the University of Nevada, a state institution.[74] The State of Nevada's constitution, statutes, and regulations govern the university's operations.[75] UNLV is a member institution of the NCAA.[76] As such, UNLV must comply with and enforce the NCAA's rules[77] and is " 'expected to cooperate fully' with the administration of the enforcement program."[78]

B. Facts of *Tarkanian*

Jerry Tarkanian, "college basketball's winningest coach,"[79] turned a mediocre team into one of the most successful teams in the country.[80] The UNLV basketball team's success also meant success for Tarkanian. His annual salary at the time of trial was $125,000 plus various bonuses.[81] He also did product endorsements,[82] had his own radio and television shows,[83] and wrote a commercially successful autobiography.[84]

After conducting its own preliminary investigation, the NCAA's Committee on Infractions notified UNLV of the commencement of an "Official Inquiry" on February 25, 1976. The inquiry focused on alleged

70. *Id.*
71. *Id.* (quoting Joint Appendix at 98, *Tarkanian* (No. 87-1061)).
72. *Id.* at 457-58.
73. *Id.* at 458.
74. *Id.* at 457.
75. *Id.*
76. *Id.* at 456.
77. *Id.* at 457.
78. *Id.* at 458 (quoting Joint Appendix at 97, *Tarkanian* (No. 87-1061)).
79. J. TARKANIAN & T. PLUTO, TARK—COLLEGE BASKETBALL'S WINNINGEST COACH (1988).
80. *Tarkanian*, 109 S. Ct. at 456. When Tarkanian was appointed head coach in 1973, UNLV had a 14-14 record. Four years later, it posted a 29-3 record and placed third in the NCAA's national basketball tournament. *Id.* In 1990, the team won the national tournament by a record 30 points. Rhoden, *N.C.A.A. Championship: Las Vegas Hits Jackpot in a Record Runaway*, N.Y. Times, Apr. 3, 1990, at B9, col. 3 (late ed.).
81. 109 S. Ct. at 456 n.1.
82. *Id.*
83. *Id.*
84. *See supra* note 79.

recruiting violations made by UNLV's basketball staff, including Tarkanian.[85] The Committee requested that UNLV investigate all allegations and report its findings back to the Committee.[86]

UNLV conducted the requested investigation and filed its report with the Committee on October 27, 1976.[87] The report denied each of the allegations and specifically denied that Tarkanian had engaged in any misconduct.[88] The Committee then held hearings, at which both UNLV and Tarkanian were represented.[89] At the conclusion of the hearings, the Committee found thirty-eight rules violations, including ten by Tarkanian.[90] Accordingly, the Committee proposed that UNLV be placed on two years probation[91] and requested that UNLV show cause why it should not incur further sanctions if it did not suspend Tarkanian during the team's probationary period.[92] The NCAA Council unanimously approved these proposals.[93]

After receiving the NCAA report, UNLV's president directed the vice-president to schedule a hearing to advise him whether UNLV should comply with the NCAA's show-cause order or suspend Tarkanian.[94] At the advisory hearing, the vice-president stated that the University had three options: (1) retain Tarkanian despite the proposals, thereby risking further sanctions;[95] (2) "[r]ecognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters";[96] or (3) "[p]ull out of the NCAA completely."[97] The president chose the second option and suspended Tarkanian.[98]

The day before his suspension was to take effect, Tarkanian brought suit against UNLV and several of its officers in Nevada state court.[99] He sought declaratory and injunctive relief, claiming deprivation of property and liberty without due process of law in violation of the Fourteenth

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

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* This fact presumably would have a bearing on any due process decision. The Court, however, granted the NCAA's petition for certiorari only as to the state action question. *Id.* at 467 n.1 (White, J., dissenting). Thus, for the purposes of this discussion, the adequacy of the NCAA's hearings is immaterial.

90. *Id.* at 458.

91. *Id.* at 459. During the probationary period, UNLV's basketball team was barred from playing post-season games and from appearing on television. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (quoting Joint Appendix at 76, *Tarkanian* (No. 87-1061)).

97. *Id.*

98. *Id.*

99. *Id.*

Amendment and 42 U.S.C. section 1983.[100]

C. Lower Court Holdings

The Nevada state court enjoined UNLV's suspension of Tarkanian on procedural and substantive due process grounds.[101] UNLV appealed to the Nevada Supreme Court.[102] The NCAA filed an amicus curiae brief, arguing *inter alia* that it was a necessary party to the suit.[103] The Nevada Supreme Court agreed and remanded the case for joinder of the NCAA.[104] Tarkanian filed a second amended complaint naming the NCAA as codefendant with UNLV.[105]

Finally, after much dispute over the proper forum, the state trial court entered judgment against both defendants.[106] The court specifically found that the NCAA's conduct constituted state action and that this conduct violated Tarkanian's fourteenth amendment due process rights.[107] Consequently, the court enjoined the NCAA from enforcing its show-cause order and from carrying out any other Committee recommendations.[108]

Soon after the court entered its judgment, Tarkanian filed a petition for attorney's fees pursuant to 42 U.S.C section 1988.[109] After additional forum maneuvering, the Nevada state court awarded attorney's fees of approximately $196,000 to Tarkanian, and ordered the NCAA to pay 90 percent of this sum.[110] The NCAA appealed both the injunction and the fee order, but UNLV was apparently satisfied with the outcome and did not appeal either part of the final judgment.[111] The Nevada Supreme Court affirmed the trial court's decision on all issues except attorney's fees.[112] In upholding the trial court's finding of state action, the court relied heavily on the public function test.[113] The court observed that "the right to discipline public employees is traditionally the exclusive

100. *Id.*

101. *Id.*

102. *Id.*; *see* University of Nevada v. Tarkanian, 95 Nev. 389, 594 P.2d 1159 (1979).

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

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

105. Tarkanian v. University of Nevada, No. A173498 (8th Judicial Dist. Ct. of Nevada, June 25, 1984), available in Joint Appendix at 16, *Tarkanian*, 109 S. Ct. 454 (No. 87-1061).

106. Joint Appendix at 33-34, *Tarkanian* (No. 87-1061).

107. Joint Appendix at 26, *Tarkanian* (No. 87-1061).

108. Joint Appendix at 34, *Tarkanian* (No. 87-1061); *see supra* note 91 and accompanying text.

109. *See* Tarkanian v. University of Nevada, No. 173498 (8th Judicial Dist. Ct. of Nevada, January 21, 1985), available in Joint Appendix at 36, *Tarkanian* (No. 87-1061).

110. Joint Appendix at 41-42, *Tarkanian* (No. 87-1061).

111. National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 460 (1988).

112. Tarkanian v. National Collegiate Athletic Ass'n, 103 Nev. 331, 334, 741 P.2d 1345, 1346 (Nev. 1987), *rev'd*, 109 S. Ct. 454 (1988).

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

prerogative of the state."[114] Therefore, UNLV's delegation of this right to the NCAA made both parties state actors for fourteenth amendment purposes.[115]

D. Supreme Court Holding

On December 23, 1987, the NCAA filed its petition for writ of certiorari with the United States Supreme Court.[116] The Court granted certiorari to address the state action issue.[117] It determined that the NCAA was not a state actor and reversed the Nevada Supreme Court's decision.[118]

1. Majority Opinion

Justice Stevens, writing for the five member majority, began by distinguishing the facts of *Tarkanian* from those of the "typical" state action case.[119] In the typical case, he declared, the private entity commits the challenged act, with the principal question being "whether the State was sufficiently involved to treat that decisive conduct as state action."[120] In *Tarkanian* however, the governmental entity took the decisive act of suspending Tarkanian. Justice Stevens determined that this unique situation required the Court "to step through an analytical looking glass to resolve it."[121] Thus, the issue was not the extent of UNLV's participation in NCAA activities, but "whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."[122] In the very next paragraph, however, the majority began an analysis of UNLV's participation in NCAA activities.

First, the Court focused on UNLV's role as a member of the NCAA. It acknowledged UNLV's participation in the promulgation of the NCAA's rules,[123] but noted that hundreds of institutions make up the NCAA, with the vast majority of the members located outside of Nevada.[124] Because Nevada institutions had played such a minor part in

114. *Id.* at 336, 741 P.2d at 1348.

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

116. Petition for Writ of Certiorari to the Supreme Court of the State of Nevada, National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454 (1988) (No. 87-1061).

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

118. *Id.* at 465-66.

119. *Id.* at 462.

120. *Id.*

121. *Id.*

122. *Id.* at 465. Toward the end of its opinion, the majority rephrased its basic inquiry as whether " 'the conduct allegedly causing the deprivation of a federal right [can] be fairly attributed to the State.' " *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)). This is the type of overly broad inquiry that makes the state action doctrine so susceptible to manipulation.

123. *Id.* at 462; *see also supra* note 67 and accompanying text.

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

creating the NCAA's rules, the state of Nevada could not have conferred any authority on the NCAA.[125] Similarly, UNLV's decision to adopt the NCAA's policies did not transform the NCAA into a state actor. The Court recognized that UNLV's adoption of NCAA policies constituted state action, but held that this act did not turn the NCAA's policy formulation into state action.[126] Justice Stevens analogized to *Bates v. State Bar of Arizona*,[127] where the Arizona Supreme Court's freedom to amend, or even reject, the American Bar Association's disciplinary rules insulated the ABA from a state action claim. Likewise, he argued, UNLV's power to amend or reject the NCAA standards insulated the NCAA from such a claim.[128]

The majority next rejected Tarkanian's argument that UNLV's delegation of its power to investigate employee misconduct, impose sanctions, and make disciplinary recommendations rendered the NCAA a state actor.[129] The Court recognized that delegation of state authority to a private party may make that party a state actor.[130] The Court also implicitly accepted that discipline of state employees is traditionally a public function.[131] In *Tarkanian*, however, UNLV had retained the right to directly discipline its employees.[132] The NCAA, by its own legislation, was prohibited from directly disciplining the employees of member institutions. Under these facts the Court determined that the NCAA had not acquired the authority to perform the challenged act.[133]

The majority summarily refuted Tarkanian's argument that state action resulted from the codefendants' joint participation in suspending Tarkanian.[134] The Court stressed the antagonistic nature of the relationship between the NCAA and UNLV throughout the Nevada state court litigation and held that "[i]t would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV—sanctions that UNLV and its counsel . . . steadfastly opposed during protracted adversary proceedings—is fairly attributable to the State of Nevada."[135]

Finally, the majority dismissed Tarkanian's argument that the NCAA was so powerful that UNLV had no choice but to obey the Asso-

125. *Id.* at 462-63.

126. *Id.* at 463.

127. 433 U.S. 350 (1977).

128. *Tarkanian*, 109 S. Ct. at 463.

129. *Id.* at 463-64.

130. *Id.* at 464 (citing West v. Atkins, 108 S. Ct. 2250 (1988), in which a private physician who had contracted with a state prison to provide medical care for the inmates was found to be a state actor).

131. *Id.* at 465 n.18.

132. *Id.* at 465; *see also supra* notes 72-73 and accompanying text.

133. *Tarkanian*, 109 S. Ct. at 465 n.18.

134. *Id.* at 464 n.16.

135. *Id.* at 465.

ciation's demands.[136] Relying on *Jackson*,[137] the Court stated that "even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is acting under color of state law."[138]

2. Dissenting Opinion

Justice White wrote the dissenting opinion, in which Justices Brennan, Marshall, and O'Connor joined. Justice White began by framing his basic inquiry differently than the majority. "The question here," he said, "is whether the NCAA acted jointly with UNLV in suspending Tarkanian and thereby also became a state actor."[139]

The dissent rejected the majority's contention that the facts of *Tarkanian* were unique.[140] Justice White pointed to two cases, *Adickes v. S. H. Kress & Co.*[141] and *Dennis v. Sparks*,[142] which, like *Tarkanian*, dealt with the question whether private parties were state actors when the decisive act was taken by a state official. In both *Adickes* and *Dennis*, the issue was whether the private parties were " 'jointly engaged with state officials in the challenged action.' "[143] In *Adickes*, the plaintiff was a white school teacher who had accompanied six black students into the defendant's lunchroom and was refused service. The Court ruled that the plaintiff would be entitled to recovery against the defendant if she could prove that one of its employees had "reached an understanding" with a local policeman to violate her fourteenth amendment equal protection rights.[144] The *Tarkanian* dissenters found several such "understandings" between the NCAA and UNLV.

First, the dissent referred to the Nevada Supreme Court's finding that " '[a]s a member of the NCAA, UNLV contractually agrees to administer its athletic program in accordance with NCAA legislation.' "[145] "Indeed," said Justice White, "NCAA rules provide that NCAA 'enforcement procedures are an essential part of the intercollegiate athletic program of each member institution.' "[146] The dissent also noted that by joining the NCAA, UNLV had agreed that the NCAA would make the final decision in any matter pertaining to rules violations. Furthermore,

136. *Id.*
137. *See supra* note 38 and accompanying text.
138. *Tarkanian*, 109 S. Ct. at 465.
139. *Id.* at 466 (White, J., dissenting).
140. *Id.*; *see supra* notes 119-22 and accompanying text.
141. 398 U.S. 144 (1970).
142. 449 U.S. 24 (1980).
143. *Tarkanian*, 109 S. Ct. at 466 (White, J., dissenting) (quoting *Dennis*, 449 U.S. at 27-28).
144. *Adickes*, 398 U.S. at 152.
145. *Tarkanian*, 109 S. Ct. at 466 (White, J., dissenting) (quoting University of Nevada v. Tarkanian, 95 Nev. 389, 391, 594 P.2d 1159, 1160 (1979)).
146. *Id.* (quoting Joint Appendix at 97, *Tarkanian* (No. 87-1061)).

as a result of this agreement, the NCAA directly conducted the very hearings that allegedly violated Tarkanian's due process rights.[147]

Next, the dissent observed that "[b]y the terms of UNLV's membership in the NCAA, the NCAA's findings were final and not subject to further review by any other body, and it was for that reason that UNLV suspended Tarkanian, despite concluding that many of those findings were wrong."[148] Based on the extensive nature of UNLV's grant of authority to the NCAA through their joint agreement, the dissent concluded that the two were jointly engaged in the challenged action.[149] Thus, the dissent argued that the NCAA was a state actor.[150]

The dissent next analogized to *Dennis* to rebut the majority's arguments. *Dennis* involved a conspiracy between a judge and private parties to issue an illegal injunction against mineral production under oil leases owned by the plaintiffs. The private parties in that case had no authority to take action directly against the plaintiff, yet the Court still held them to be state actors.[151] The conspiring judge in *Dennis* could have withdrawn from the agreement at any time. Justice White declared that the mere option of withdrawal was not significant. The significance lay in the fact that the judge did not exercise the option.[152]

Finally, the dissent criticized the majority's emphasis on the antagonistic relationship between UNLV and the NCAA throughout the proceedings. The dissent found no reason to set the agreement aside merely because the codefendants entered into an agreement that permitted conflicts to arise between them.[153] Again, the dissent analogized to *Dennis*, stating that the outcome in *Dennis* would not change even if the private parties had allowed the judge to attempt to dissuade them from seeking the injunction before he granted it.[154] "The key there," as in *Tarkanian*, was that "ultimately the parties agreed to take the action."[155]

III. Case Analysis

A. Majority's Reasoning Unpersuasive

The *Tarkanian* majority's analysis was flawed from the outset. By phrasing its inquiry as "whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into

147. *Id.* at 466-67.
148. *Id.* at 467 (citations omitted).
149. *Id.*
150. *Id.*
151. *Id.*; Dennis v. Sparks, 449 U.S. 24 (1980).
152. *Tarkanian*, 109 S. Ct. at 467 (White, J., dissenting).
153. *Id.*
154. *Id.* at 467-68.
155. *Id.* at 468.

state action,"[156] the majority simply begged the question. The Court set the stage for the manipulative, result-oriented analysis with which the state action doctrine has become synonymous.

The majority's analysis not only manipulated the facts at will but also analyzed the wrong facts. Despite its declaration at the outset that "the question is not whether UNLV participated to a critical extent in the NCAA's activities,"[157] the Court began its inquiry by addressing that very question.[158] The Court's discussion of UNLV's role as one among hundreds of NCAA members and of its rather insignificant participation in the creation of the NCAA's rules had no conceivable purpose other than to demonstrate that UNLV's participation in NCAA activities as a whole was not "critical" for state action purposes.

In addition, the majority focused on the closeness, or more properly, the lack of closeness, between the parties as a result of UNLV's membership in the NCAA. The majority examined UNLV's alternatives to compliance with NCAA standards, and concluded that the NCAA's formulation of those standards did not constitute action under color of state law.[159] The Court supported this conclusion by stressing the antagonism between the parties throughout the state court proceedings,[160] as though this fact alone could protect the NCAA from liability for an act carried out at its insistence. This argument, however, is peripheral to the real issue of the case.

The more pertinent inquiry is: How much did the NCAA participate in UNLV's suspension of Tarkanian? Without UNLV's participation, Tarkanian could never have been suspended. The NCAA, acting alone, had no power to suspend Tarkanian. As Justice White remarked in his dissent, "The key . . . is that ultimately the parties agreed to take the action."[161]

The *Tarkanian* Court proved once again how easily, albeit unconvincingly, a court may bend the traditional state action tests to achieve a predetermined result. For the Rehnquist Court, this result is likely to be a finding of no state action in whatever fourteenth amendment case happens to be before the Court.[162]

The *Tarkanian* Court's analysis of UNLV's alleged delegation of investigative and disciplinary powers to the NCAA provides an excellent example of manipulation in the context of the public function test. The majority acknowledged that "a state may delegate authority to a private

156. *Id.* at 462; *see supra* note 122 and accompanying text.

157. *Tarkanian*, 109 S. Ct. at 462; *see supra* note 122 and accompanying text.

158. *See supra* notes 123-25 and accompanying text.

159. *See supra* notes 126-28 and accompanying text.

160. *See supra* notes 134-35 and accompanying text.

161. *Tarkanian*, 109 S. Ct. at 468 (White, J., dissenting); *see supra* note 155 and accompanying text.

162. *See supra* notes 10-13 and accompanying text.

party and thereby make that party a state actor,"[163] but found that UNLV had made no such delegation. This finding is incongruous in light of UNLV's own recognition of its " 'delegation to the NCAA of the power to act as ultimate arbiter of these [disciplinary] matters.' "[164] Furthermore, it was an undisputed fact that by joining the NCAA, UNLV delegated its authority to the NCAA to investigate alleged rules violations and to make findings resulting from such investigations.[165] UNLV also agreed to be bound by and to enforce the NCAA's recommendations.[166]

Rather than give these findings the weight they demand, the *Tarkanian* majority focused upon: (1) the NCAA's inability to discipline Tarkanian directly,[167] and (2) UNLV's power to retain Tarkanian and risk further sanctions, or withdraw from the NCAA altogether.[168] By focusing on these factors, the Court was able to conclude that UNLV had not delegated its public functions to the NCAA despite persuasive evidence to the contrary.

UNLV's imposition of the NCAA's recommended discipline, despite its obvious reluctance and the availability of other alternatives, actually undercut the majority's argument. UNLV ultimately decided not to carry out those alternatives, but chose to suspend Tarkanian. As the dissent noted, "[I]t did so because it embraced the NCAA rules governing conduct of its athletic program and adopted the results of the hearings conducted by the NCAA concerning Tarkanian, as it had agreed that it would."[169] UNLV's delegation of a substantial amount of its authority to the NCAA is manifested also by the adversity between the parties. UNLV's suspension of Tarkanian was clearly against its own wishes. The only reason for suspending him was UNLV's recognition that it had delegated to the NCAA " 'the power to act as ultimate arbiter' " of the matter.[170]

The Court applied the nexus test even less convincingly than it applied the public function test. As discussed previously, the Court analyzed the nexus between UNLV and the NCAA as a result of UNLV's decision to become a member of the NCAA.[171] The true issue, however, was the nexus between the parties with regard to UNLV's suspension of

163. *Tarkanian*, 109 S. Ct. at 464; *see supra* note 130 and accompanying text.

164. *Tarkanian*, 109 S. Ct. at 459 (quoting Joint Appendix at 76, *Tarkanian* (No. 87-1061)); *see supra* note 96 and accompanying text.

165. *See supra* note 71 and accompanying text.

166. *See supra* notes 77-78 and accompanying text.

167. *See supra* notes 132-33 and accompanying text.

168. *See supra* notes 95, 97, 136-38 and accompanying text.

169. National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 468 (1988) (White, J., dissenting).

170. *Id.* at 459 (quoting Joint Appendix at 76, *Tarkanian* (No. 87-1061)); *see supra* notes 96-98 and accompanying text.

171. *See supra* notes 126-28 and accompanying text.

Tarkanian. Wisely, the Court dealt only briefly with this issue.[172] A more thorough treatment would have led inexorably to the conclusion that the Court sought to avoid, namely that the nexus between the parties was so close that the NCAA must be characterized as a state actor. "[I]t 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."[173] The nexus between the state entity and the private party was undeniable and inextricable.

B. A Proposal

Ironically, *Burton v. Wilmington Parking Authority*,[174] which has received heavy criticism for its failure to provide a concrete test,[175] may provide the pathway out of the state action morass in cases like *Tarkanian*. *Burton* found that the state had "so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity . . . ."[176] The Court relied in particular on the "incidental variety of mutual benefits" running between the parties as a result of their relationship.[177]

This joint participation, or symbiotic relationship, standard, although moribund for well over a decade, should be revived. On its surface, the standard looks like nothing more than a particularly demanding version of the nexus test, but it is not as nebulous. Either the parties receive "an incidental variety of mutual benefits from the challenged action" or they do not. There is far less room for factual manipulation than with either the nexus or public function tests.

In *Tarkanian*, UNLV and the NCAA received many mutual benefits from their association with one another and even from Tarkanian's suspension. UNLV's NCAA membership gave both the basketball team and the University itself higher visibility, much of it due to the team's success in the NCAA tournament.[178] As a result of Tarkanian's suspension, the NCAA gained a reputation among its member institutions as an "effective and evenhanded" enforcer of its recruitment standards.[179] This reputation, in turn, reflected positively on all of the NCAA's members, including UNLV. Additionally, UNLV gained a reputation as a school that played by the rules, even when it worked to the school's

172. *See supra* notes 134-35 and accompanying text.
173. *Tarkanian*, 109 S. Ct. at 467 (White, J., dissenting).
174. 365 U.S. 715 (1961).
175. *See supra* notes 26-27 and accompanying text.
176. *Burton*, 365 U.S. at 725; *see supra* notes 51-53 and accompanying text.
177. *Burton*, 365 U.S. at 724; *see supra* note 51 and accompanying text.
178. *See supra* note 80 and accompanying text.
179. National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 464 (1988).

disadvantage.[180]

The benefits to UNLV must have outweighed the obviously high costs it incurred by suspending Tarkanian, or it never would have agreed to the suspension. UNLV could have withdrawn from the NCAA, as it had contemplated doing.[181] This undoubtedly would have created a hardship for the University, but as the majority pointed out, just because "UNLV's options were unpalatable does not mean that they were nonexistent."[182]

The joint participation standard is admittedly a high one. On its face, it is more demanding than the public function and nexus tests. The latter tests, however, may be manipulated to the point where they become more rigorous than the joint participation standard. Proper application of the joint participation standard would obviate the need to resort to these more easily manipulated standards. In cases like *Tarkanian*, where both parties clearly participated jointly in the challenged act, a court's state action inquiry may end without prolonged inquiries and factual acrobatics.

IV. Conclusion

Inconsistency has plagued state action jurisprudence for decades. This stems largely from the highly fact-based, ad hoc inquiry that the search for state action requires. In recent years, the Supreme Court has taken advantage of the inherent vagueness of traditional state action standards to constrict the scope of the state action doctrine whenever possible.[183] The Supreme Court perpetuated this trend in *National Collegiate Athletic Association v. Tarkanian*.

The *Tarkanian* Court employed a strained application of the public function and nexus tests to find a lack of state action. In reaching its conclusion, the Court focused on several relatively unimportant factors.[184] The majority virtually ignored the fact that without the participation of both the public entity and the private entity, the challenged action could have never occured. *Tarkanian*'s disregard of such a key element demonstrates how easily a court may twist the traditional state action standards to reach a remotely plausible result. This extreme mal-

180. UNLV's continued sensitivity on this point was revealed in a recent quote by the school's current president: " 'Athletically, we are not a bandit school, we are not an outlaw school. . . . We've made mistakes, like other people. But we're not outlaw, we're not crooked.' " Rhoden, *Like his Team, Tarkanian is Always on the Run: Success Muted by Scrutiny*, N.Y. Times, Nov. 12, 1989, § 8, at 1, col. 1 (national ed.) (quoting Dr. Robert Maxson, president, University of Nevada-Las Vegas).

181. *See supra* note 97 and accompanying text.

182. *Tarkanian*, 109 S. Ct. at 465 n.19.

183. *See supra* notes 10-13 and accompanying text.

184. *See supra* notes 167-68 and accompanying text.

leability simultaneously discredits these standards as useful tools in the creation of a coherent state action doctrine.

This Comment argues that in cases like *Tarkanian*, where the joint participation of both the public and private actors is necessary for the challenged act to occur, a court is compelled to find state action. In such cases, the participation of the public actor is by definition an *essential* element of the challenged act. Once the court finds such participation, the state action search ends. This proposed analysis eliminates the need to resort to the problematic tests used in *Tarkanian* and restores a modicum of coherence to an area of law that desperately requires cogency. The joint participation test would not find an application in every state action case, but its use where appropriate would be a major step in the right direction.

*By Branden J. Tedesco**

* A.B., University of California, Davis, 1987; Member, Third Year Class.