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National Collegiate Athletic Ass'n v. Tarkanian: Viewing State Action through the Analytical Looking Glass

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I. INTRODUCTION

In a twenty-eight year coaching career, Jerry Tarkanian had achieved the winningest career record of any coach in the National Collegiate Athletic Association (NCAA). Tarkanian became the head basketball coach at the University of Nevada, Las Vegas (UNLV) in 1973, and in just four years Tarkanian had transformed a team with a mediocre 14-14 record into a 29-3 powerhouse that finished third in the NCAA Basketball Tournament. Tarkanian was at the pinnacle of collegiate coaching. As the coach of a successful “big-time” collegiate sports team, Tarkanian received many lucrative ben-
efits which were contingent upon remaining the head basketball coach at UNLV.¹

Tarkanian faced the loss of these substantial benefits because of a two-year suspension levied against him by UNLV in response to an NCAA report issued by the NCAA Committee on Infractions that implicated Tarkanian in recruiting violations. The Committee on Infractions had already placed the school on a two year period of probation (no television or post-season games during this period) and asked UNLV to show cause why more severe penalties should not be applied if Tarkanian were not removed from the basketball program during the probation period.²

Rather than face removal from the athletic department and a drastic pay cut to a regular professor’s salary of $53,000, Tarkanian sought an injunction against UNLV (the NCAA was subsequently added as a necessary party) in Nevada court to prevent his suspension. Tarkanian brought the injunction action pursuant to section 1983 of Chapter 42 of the United States Code,³ which provides the

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² The NCAA is an unincorporated association comprised of approximately 960 members, including virtually all public and private universities and four-year colleges conducting major athletic programs in the United States. Basic policies of the NCAA are determined by the members at annual conventions. Between conventions, the Association is governed by its Council, which appoints various committees to implement specific programs.

³ Id. at 457.

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.” It has therefore adopted “legislation,” governing the conduct of the intercollegiate athletic programs of its members. This NCAA legislation applies to a variety of issues, such as academic standards for eligibility, admissions, financial aid, and the recruiting of student athletes. By joining the NCAA, each member agrees to abide by and to enforce such rules.

⁴ Id.

Tarkanian, a tenured professor at UNLV, received a $125,000 salary (in lieu of a regular professor salary of $53,000), 10% of the net proceeds received by UNLV in NCAA-authorized championship games, fees from basketball camps and clinics, product endorsements, a newspaper column, and The Jerry Tarkanian Show on both radio and television. Id. at 456 n.1.

² Id. at 459.

³ 42 U.S.C. § 1983 (1979) provides, in part:

Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,
statutory cause of action for violations of rights guaranteed by the Constitution. Tarkanian asserted that inadequate NCAA proceedings had deprived him of property without the due process of law required by the Fourteenth Amendment to the Constitution.\textsuperscript{4}

Section 1983 provides that in order to recover under the statute, the conduct at issue must have occurred "under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."\textsuperscript{5} The United States Supreme Court refers to the section 1983 test as whether the action is "under the color of state law."\textsuperscript{6}

The Supreme Court established in 1966,\textsuperscript{7} and reaffirmed in 1982,\textsuperscript{8} that in a section 1983 case, the requirement of "under the color of state law" is identical to the "state-action" requirement of the Fourteenth Amendment. Because the Fourteenth Amendment provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . ,"\textsuperscript{9} the Court has determined that in order for the Fourteenth Amendment to be applicable, there must be state action involved.\textsuperscript{10}

A section 1983 claim consists of three factors: 1) a Constitutional component; 2) the underlying Fourteenth Amendment violation; and 3) the statutory component of "under color of state law." The Fourteenth Amendment violation can only occur when state action is present. Furthermore, the Supreme Court has held that the section 1983 "under the color of state law" requirement is identical to the

\begin{itemize}
  \item shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.
  \item Tarkanian, 109 S. Ct. at 456.
  \item Price, 383 U.S. at 794.
  \item Lugar, 457 U.S. at 928.
  \item Section 1 of the Fourteenth Amendment of the United States Constitution provides: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridges 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 the equal protection of the laws. U.S. CONST. amend. XIV § 1.
  \item 10. Civil Rights Cases, 109 U.S. 3 (1883).
\end{itemize}
state action requirement of the Fourteenth Amendment. The resolution of a section 1983 claim is therefore reduced to the issue of state action.

For Tarkanian to prevail in his section 1983 claim, the Court had to find that the action that deprived Tarkanian of his property constituted state action. In his section 1983 claim, Tarkanian alleged an underlying Constitutional violation of his Fourteenth Amendment due process rights that occurred "under the color of state law." There was no question that UNLV, a state university, was a state entity and any action by it was state action. The question in National Collegiate Athletic Ass’n v. Tarkanian was whether the action taken by the NCAA prior to the state action of UNLV would also be deemed state action.

This note will examine the Tarkanian decision and focus upon whether the NCAA is properly viewed as a private or a state actor. First, it will give an overview of National Collegiate Athletic Ass’n v. Tarkanian. Second, it will trace the development of the state-action doctrine from the original strict requirement of actual state action to the various theories of finding state action in the conduct of apparently private actors. Third, it will examine the Supreme Court’s opinion in Tarkanian with a discussion of both the majority and dissenting opinions. Finally, this note will analyze the role that Tarkanian plays in the development of state action jurisprudence and comment upon the validity of the private/state dichotomy in Fourteenth Amendment law.

II. Statement of the Case

A. Facts of National Collegiate Athletic Ass’n v. Tarkanian

In 1976, the NCAA Committee on Infractions initiated an official inquiry into alleged recruiting violations of student athletes at UNLV. The official inquiry was based upon information gleaned

13. Id. at 454.
from the Committee's own preliminary investigation. At the request of the NCAA Committee on Infractions, UNLV conducted its own investigation in which it concluded that UNLV and Tarkanian were guilty of no wrongdoing. Nevertheless, the Committee on Infractions found that UNLV committed 38 violations of NCAA rules, including ten violations committed by Tarkanian personally.\textsuperscript{14} The Committee on Infractions proposed that UNLV be placed on two years of probation in which the school would be barred from post-season tournaments and would not appear on television. The Committee on Infractions further requested UNLV to show cause why additional penalties should not be imposed if UNLV failed to remove Tarkanian from the athletic program during the two year probationary period.\textsuperscript{15}

Subsequent to the filing of the NCAA report, the vice-president of UNLV conducted a hearing to determine whether the NCAA sanctions would be adopted. Although the vice-president expressed doubt about the sufficiency of the evidence, he concluded: "given the terms of our adherence to the NCAA we cannot substitute—biased as we must be—our own judgment on the credibility of witnesses for that of the infractions committee and Council."\textsuperscript{16} The vice-president proposed three alternative courses of action for UNLV to take: 1) reject the NCAA sanction requiring UNLV to disassociate Tarkanian from the athletic department and risk heavier sanctions; 2) recognize the NCAA sanction and suspend Tarkanian even though the NCAA was wrong; or 3) pull out of the NCAA. The president of UNLV accepted option two and suspended Tarkanian.\textsuperscript{17}

\textsuperscript{14} Id. at 459. Some of the ten alleged violations of NCAA rules by Tarkanian included: (1) Tarkanian allegedly engaged booster, and part-time professor, Harvey Munford, to give player David Vaughan credit for a "B" in a class in which he did not attend or perform any of the class requirements. (2) Tarkanian allegedly arranged for free airline tickets, free clothing, and free meals at the Las Vegas Hilton for players Robert "Jeep" Kelley and Ricky Sobers in violation of the "Extra Benefit to Student Athletes" provision of NCAA Constitution section 3-1-(g)-(6). (3) Tarkanian interfered with the conduct of the investigation and through pressure and intimidation sought to prevent players "Jeep" Kelley and Ricky Sobers from discussing violations with NCAA investigators. (4) Tarkanian allegedly put pressure on four players to give false information. Brief for Appellant at 141, 152, NCAA v. Tarkanian, 109 S. Ct. 454 (1988).

\textsuperscript{15} Tarkanian, 109 S. Ct. at 459.

\textsuperscript{16} Id.

\textsuperscript{17} Id.
B. Posture

The day before his suspension became effective, Tarkanian brought an action in Nevada state court for declaratory and injunctive relief against UNLV based upon a violation of Chapter 42, section 1983 of the United States Code. Tarkanian alleged that UNLV had acted "under the color of state law" in depriving him of property and liberty without the due process guaranteed by the Fourteenth Amendment to the Constitution. Tarkanian asserted that he had been deprived of his coaching position, which would result in the loss of property—loss of $72,000 in salary; loss of 10% of any championship game revenue; and loss of his radio show, personal appearance fees, clinic revenues and endorsements. Tarkanian further asserted that this deprivation of property occurred as a result of NCAA hearings and investigations that were allegedly arbitrary and capricious; therefore, the hearings did not afford the procedural and substantive due process required by the Constitution.18

This Constitutional violation formed the basis for Tarkanian's section 1983 claim for injunctive relief. The trial court enjoined UNLV from suspending Tarkanian because Tarkanian had been denied procedural and substantive due process of law. UNLV appealed this ruling.19 On appeal, the NCAA filed an amicus curiae brief which asserted that no controversy existed between UNLV and Tarkanian and if a controversy did exist, the NCAA was a necessary party to the litigation. The Nevada Supreme Court held that there was a legitimate controversy, but agreed that the NCAA was a necessary party to the action. The case was reversed and remanded to allow joinder of the NCAA.20

Tarkanian amended his complaint to add the NCAA. A Federal District Court rejected the NCAA's attempt to remove the case to Federal Court because UNLV had earlier waived any right to remove the case.21 The Nevada trial court held that the NCAA conduct was state action for constitutional purposes and that its decision was

18. Id.
19. Id.
20. Id. at 460.
21. Id.
capricious and arbitrary. The court continued its injunction barring Tarkanian’s suspension and further enjoined the NCAA from conducting additional proceedings against UNLV. The NCAA appealed the decision while UNLV did not.\textsuperscript{22}

The Nevada Supreme Court concluded that the NCAA had engaged in state action and that Tarkanian had been deprived of both property and liberty without due process of law.\textsuperscript{23} The court based its conclusion upon three arguments: 1) because many of the schools comprising the NCAA are public or government-supported, any regulatory action by the NCAA is state action; 2) the discipline of a state employee is a traditional state function which has been delegated to the NCAA by UNLV, rendering the NCAA a state actor; 3) the NCAA was a state actor because it engaged in joint action with UNLV to impose sanctions on Tarkanian.\textsuperscript{24} The Nevada court applied the state action test set forth by the U.S. Supreme Court in \textit{Lugar v. Edmondson Oil Co.},\textsuperscript{25} which held that a private actor engaged in joint conduct with a state entity becomes a state actor for Fourteenth Amendment purposes.

The United States Supreme Court granted certiorari\textsuperscript{26} and held that the NCAA was not a state actor and therefore was not subject to the provisions of the Fourteenth Amendment.\textsuperscript{27} The judgment of the Nevada Supreme Court was reversed, and the case was remanded for further proceedings.

\textbf{III. PRIOR LAW IN A NUTSHELL}

Chapter 42, section 1983 of the United States Code provides:

\begin{quote}
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
\end{quote}

\begin{itemize}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}; Tarkanian v. National Collegiate Athletic Ass’n, 103 Nev. 331, 741 P.2d 1345 (1987).
\item \textsuperscript{24} \textit{Tarkanian}, 109 S. Ct. at 462.
\item \textsuperscript{25} 457 U.S. 922 (1982). Because the Fourteenth Amendment provides that “No State shall ... deprive any person of life, liberty, or property, without due process,” courts hold that state action is required before conduct becomes subject to the scrutiny of the Fourteenth Amendment guarantees. \textit{Civil Rights Cases}, 109 U.S. 3 (1883).
\item \textsuperscript{26} National Collegiate Athletic Ass’n v. Tarkanian, 108 S. Ct. 1011 (1988).
\item \textsuperscript{27} \textit{Tarkanian}, 109 S. Ct. at 465.
\end{itemize}
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 for redress.

A. Under the Color of State Law

Section 1983 requires that the deprivation of a Constitutional right (in the Tarkanian case there is an alleged Fourteenth Amendment violation) must occur "‘under color of any statute, ordinance, regulation, custom, or usage of any State or Territory . . . .'" The United States Supreme Court refers to this test as "under color of state law" in the section 1983 case law. The Court’s phrase is a narrower formulation than the text of the statute. For example, the Court in Adickes v. S.H. Kress & Co., the Court found that a showing of custom and usage still required the showing of state involvement. A literal reading of the statute, however, would indicate that the mere showing of a custom or usage would be sufficient for liability under the statute.

In United States v. Price, the United States Supreme Court explicitly stated that "‘in cases under section 1983, under color of law has consistently been treated as the same thing as state action required under the Fourteenth Amendment.'" The Court reiterated in Lugar v. Edmondson Oil Co., that the requirements for "‘under the color of state law' in section 1983 are identical to the state action requirements of the Fourteenth Amendment." In determining whether the conduct of a defendant is "‘under the color of state law' in order to establish liability pursuant to section 1983, it is necessary to satisfy the state action requirements of the Fourteenth Amendment.

29. Id.
33. Id. at 167-68.
35. Id. at 794 n.7.
37. Id. at 929.
B. State Action

Justice Stevens noted in Tarkanian 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."38 Because the Fourteenth Amendment does not generally extend to private conduct, the state action requirement "preserves an area of individual freedom by limiting the reach of federal law, and avoids the imposition of responsibility on a State for conduct it could not control."39

The Supreme Court established the private/state dichotomy in the Civil Rights Cases in 1883.40 In a series of decisions invalidating the Civil Rights Act of 1875, the Court held that the Fourteenth Amendment phrase "no State shall. . ." means that deprivation of Constitutional rights by the government is forbidden while private action of the same nature is not.41 In cases decided within a few years after the Civil Rights Cases, the Court employed a literal definition of "state action" which required that acts had to be literally authorized and undertaken by the state in order for Fourteenth Amendment protections to be triggered.42

1. Public Function Theory

In the 1940's, the Supreme Court expanded the boundaries of the state action concept by subjecting seemingly private actors to the constitutional guarantees usually applicable only to government.43 The Supreme Court has employed two primary Constitutional theories that subject private parties to the strictures of the Fourteenth Amendment in certain circumstances.44

38. Tarkanian, 109 S. Ct. at 461.
39. Id.
40. 109 U.S. 3 (1883).
41. Id. at 11.
44. Id. at 865-867.
The "'public function' analysis treats private enterprises whose
'operation is essentially a public function' as sufficiently state-like
to be treated as a state for purposes of applying constitutional guar-
antees." In 1946 in Marsh v. Alabama the United States Supreme
Court held for the first time that a private party was subject to the
guarantees of the Fourteenth Amendment. The Court held that a
company-owned town which took on all of the functions and char-
acteristics of a regular public municipality was subject to the due
process requirements of the Constitution. Marsh, a Jehovah's Wit-
ness, was convicted of criminal trespass because he distributed re-
ligious literature, without permission, in a town owned by a
 corporation. Because the company town was open for use by the
public, the rights of the private corporate owners became circums-
cribed by the rights of the people that used the town. The Con-
stitutional rights of the owners of the property had to be balanced
with rights (of the people using the town) to freedom of religion
and press; the rights of the people were held to take precedence.
The company town took on all of the functions and characteristics
of a public municipality; therefore, the town was a state actor under
the "public function" theory. Hence, the company town could not
prohibit Marsh from distributing religious literature because the town
was subject to the guarantees of the First Amendment.

In 1968 the Court applied the public function theory of Marsh
in Amalgamated Food Employees Union v. Logan Valley Plaza Inc. In
Logan Valley, labor union picketers were charged with trespass

45. Id. at 867.
47. Id. at 508.
49. Ownership does not always mean absolute dominion. The more an owner, for his advantage,
opens up his property for use by the public in general, the more do his rights become
circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners
of privately held bridges, ferries, turnpikes and railroads may not operate them as freely
as a farmer does his farm. Since these facilities are built and operated primarily to benefit
the public and since their operation is essentially a public function, it is subject to state
regulation.

Id. at 506.
49. Id. at 509.
upon a shopping center's property. Justice Marshall's majority opinion held that a shopping center is the "functional equivalent" to the business district in the company town involved in Marsh.\textsuperscript{51} The shopping center was therefore held to be a state actor pursuant to the public function theory and was subject to Constitutional guarantees; the use of state trespass laws to exclude individuals from a private shopping center violates those individuals' Constitutional rights.\textsuperscript{52}

2. Nexus Theory

The "nexus" theory "seeks to identify sufficient points of contact between the private actor and the state to justify imposing constitutional restraints on the private actor or commanding state disentanglement."\textsuperscript{53} The Court first utilized the "nexus" theory in Shelley v. Kraemer.\textsuperscript{54} In Shelley, Caucasian property owners sought state judicial enforcement of racially restrictive covenants in order to enjoin black purchasers from taking possession of real property and to divest them of title.\textsuperscript{55} The state courts granted this relief. The United States Supreme Court held that the action of the state court to uphold the restrictive covenant was state action under the Fourteenth Amendment.\textsuperscript{56} Although the covenants were between private property owners, once the state court made its full coercive power available to enforce the discriminatory covenants, the state unconstitutionally participated in denying the enjoyment of property rights on the basis of race.\textsuperscript{57} The involvement of the state judiciary with the private property owners in upholding the covenants provided a sufficient "nexus" between the state conduct and the private conduct to find state action. The Constitution therefore barred the enforcement of the discriminatory private covenants.

\textsuperscript{51} Id. at 318.  
\textsuperscript{52} Id. at 319-20.  
\textsuperscript{53} G. Gunther, supra note 43, at 867.  
\textsuperscript{54} 334 U.S. 1 (1948).  
\textsuperscript{55} Id. at 6.  
\textsuperscript{56} Id. at 19-20.  
\textsuperscript{57} Id. at 20-21.
In 1961, the Supreme Court held in *Burton v. Wilmington Parking Auth.*\(^{58}\) that a private restaurant’s refusal to serve blacks constituted discriminatory state action based upon the fact that the restaurant was located in a publicly owned building. The Wilmington Parking Authority constructed and owned a public parking facility and leased space to the Eagle restaurant because the projected revenues from parking cars and the sale of bonds would not fully finance the project.\(^{59}\) The state thus benefitted from the profits of the restaurant, whose proprietors asserted that “to serve Negroes would hurt its business.”\(^{60}\) Profits earned by discrimination not only contributed to, but were indispensable elements in, the financial success of a governmental agency.\(^{61}\) The Fourteenth Amendment applied because the state had made itself a party to the refusal of service and had placed its power, property and prestige behind the discrimination.\(^{62}\) The state had placed itself in a position of interdependence with the restaurant and must be recognized as a joint participant in the discrimination; this was not purely private discrimination.\(^{63}\) The state had sufficiently entwined itself in the private conduct to render that conduct state action.\(^{64}\)

The joint participant theory, a sub-specie of the nexus theory, provides that private parties can be found to be state actors when they jointly engage with state officials in Constitutionally prohibited action.\(^{65}\) As in the other “nexus cases,” the crucial factor in joint participant cases is the degree to which the action of the state is intertwined with the conduct of the private actor; by acting jointly with the state, the private party is considered a state actor.\(^{66}\)

In *Adickes v. S.H. Kress & Co.*,\(^{67}\) the Supreme Court held that a private party’s joint participation with a state official in a con-

\(^{59}\) *Id.* at 724.
\(^{60}\) *Id.*
\(^{61}\) *Id.*
\(^{62}\) *Id.* at 725.
\(^{63}\) *Id.*
\(^{64}\) *Id.*
\(^{65}\) Lugar, 457 U.S. at 931; *Adickes*, 398 U.S. at 152.
\(^{66}\) *Adickes*, 398 U.S. at 152.
\(^{67}\) 398 U.S. 144 (1970).
spiry to racially discriminate would constitute state action. Adickes was a white school teacher who, in the company of six black pupils, was refused service in a restaurant. Upon leaving the restaurant, a city police officer arrested Adickes on a groundless charge of vagrancy and took her into custody. Adickes alleged that Kress and the city police conspired to deprive her of her rights to enjoy equal treatment and service in a place of public accommodation. The Court held that the joint act of conspiracy between the private party and the city police officer was sufficient to constitute state action.

C. Position of the Burger and Rehnquist Courts

In the 1970’s and 1980’s the Supreme Court curtailed both the public function and the nexus theories of state action. The Burger Court sought to circumscribe the scope of the state action concept by: 1) limiting the public function doctrine to traditional public functions exclusively reserved to the state; and 2) requiring some form of affirmative coercion or action by the state to satisfy the “nexus” test.

The Burger Court narrowed the ambit of the “nexus” theory in Moose Lodge No. 107 v. Irvis. The Moose Lodge, a private club, refused to serve Irvis, a black guest of a club member. The Court held that the fact that the state granted a liquor license to the club did not transform the racial discrimination of the private club into state action. The state was not sufficiently implicated in the discriminatory practices of the lodge because: 1) the decision to discriminate could not be attributed to any governmental decision, and 2) the governmental action that did affect the lodge—granting of the liquor license—was wholly unrelated to the discrimination. The Court adamantly refused to hold:

68. Id. at 149.
69. Id. at 149-50.
70. Id. at 148.
72. Id.
73. 407 U.S. 163 (1972).
74. Id.
75. Id. at 175.
[that] discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life such as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in the Civil Rights Cases.\textsuperscript{76}

In 1974 the Court limited the scope of the public function theory by holding in \textit{Jackson v. Metropolitan Edison Co.}\textsuperscript{77} that a private entity will be a state actor only if it engages in "powers traditionally exclusively reserved to the states."\textsuperscript{78} Metropolitan Edison terminated the electric service of Jackson because she did not pay her electric bill. Jackson argued that state action was present because Edison provided an essential public service required by law to be supplied reasonably and continuously.\textsuperscript{79} The Court declined to expand the public function theory into a broad principle that all businesses affected with public interest are state actors in all their actions.\textsuperscript{80} A heavily regulated, privately owned utility is not a state actor because the provision of electricity is not exclusively reserved to the state—despite the fact that the utility enjoyed a partial monopoly.\textsuperscript{81}

In 1976 Justice Stewart, writing for the majority in \textit{Hudgens v. NLRB},\textsuperscript{82} overruled \textit{Logan Valley} and held that a shopping center does not perform a public function traditionally reserved exclusively to the state. Like \textit{Logan Valley}, \textit{Hudgens} involved labor picketers who were charged with trespass upon a shopping center’s property. Private property should only be treated as public when the property possesses all of the attributes of a public town; a shopping center did not have all of the attributes of a public town and should not be treated as a state actor under the public function theory.\textsuperscript{83} The public function argument was therefore curtailed once more as the

\textsuperscript{76} \textit{Id.} at 173 (emphasis added).
\textsuperscript{77} 419 U.S. 345 (1974).
\textsuperscript{78} \textit{Id.} at 352-53.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at 359.
\textsuperscript{81} \textit{Id.} at 358.
\textsuperscript{82} 424 U.S. 507 (1976).
\textsuperscript{83} \textit{Id.} at 516-21.
Court directly overruled an eight-year-old case involving almost identical facts.

In Flagg Bros., Inc. v. Brooks,\(^{84}\) another "nexus" case, the Court held that a state is responsible for the act of a private party only when the state compels an unconstitutional act. The state's mere acquiescence in a private act does not convert it into state action. Brooks was evicted from her apartment, and the city marshal arranged for Brooks' possessions to be stored at the Flagg Brothers warehouse even though the cost of storage was more than Brooks wanted to pay.\(^{85}\) Following a series of disputes concerning the storage charges which Brooks failed to pay, Flagg Brothers, pursuant to a state warehouseman's lien statute,\(^{86}\) gave Brooks ten days to pay the bill or the furniture would be sold. Brooks then brought a section 1983 claim. The Court found no violation of section 1983 because a warehouseman's sale of bailed goods to satisfy a warehouseman's lien pursuant to a state statute was not state action.\(^{87}\) Although the state had enacted the statute, the state did not compel the sale of the goods.\(^{88}\) The Court required affirmative coercive action rather than inactive acquiescence in order for state action to exist.\(^{89}\)

The United States Supreme Court rendered two opinions in 1982 that further restricted the application of due process restraints upon private actors. Considered together, Rendell-Baker v. Kohn\(^{90}\) and Blum v. Yaretsky\(^{91}\) stand for the proposition that state financial support of a private entity, without some other state coercion or encouragement to commit some objectionable act, does not constitute the state involvement necessary to convert these actions into state action.\(^{92}\)

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85. Id. at 153.
87. Flagg, 436 U.S. at 153.
88. Id. at 166.
89. Id. at 164-66.
In *Blum*, the Court found that decisions by private nursing homes to transfer Medicaid patients from higher care "skilled nurse facilities" to lower care and less expensive "health related facilities" did not constitute state action despite the fact that the homes are regulated and receive reimbursement from the state. The Medicaid patients claimed that they had been transferred without due process of law. The Court held that the transfer decisions were medical judgments by private physicians using professional standards not established by the state. The mere fact that the state subsidized the hospital, licensed it, and paid the medical expenses of 90% of the patients did not convert the decisions into state action. The state will "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 in law be deemed to be that of the State."  

Similarly, in *Rendell-Baker*, the Court held that a private school's firing of an employee was not state action despite the fact that government funding was the major source of the school's financial resources. The private school for behaviorally disturbed students received 90 to 99 percent of its funding from the state. *Rendell-Baker* was dismissed following a protest concerning school policies. She alleged that her First Amendment rights had been abridged by the discharge and that the state was implicated due to the funding. The Court quoted *Blum*’s requirement that the state must exercise coercive power in order to find state action. In *Rendell-Baker*, the private school was not a state actor because the decision to discharge employees was not compelled or even influenced by any state regulation.

94. *Id.* at 996.
95. *Id.* at 1008.
96. *Id.* at 1011.
97. *Id.* at 1004.
99. *Id.* at 832.
100. *Id.* at 841.
101. *Id.*
Despite the Court's steadfast adherence to its trend of limiting the applicability of the Fourteenth Amendment to private parties, one significant exception to this trend has been the joint participant cases. In *Dennis v. Sparks*,\(^{102}\) the Court found that private persons who had bribed a judge to issue an injunction were illegally engaged in joint action and were therefore state actors subject to liability under section 1983. A Texas judge had issued an injunction prohibiting the production of oil on oil leases owned by Sparks. Sparks claimed that the injunction had been corruptly issued due to a conspiracy between the private defendant and the judge, thus causing a deprivation of property without due process.\(^ {103}\) The Court found that the private actors became state actors who acted under the color of state law as a result of their conspiracy with a state actor, the judge, to engage in unlawful conduct.\(^ {104}\)

In *Lugar v. Edmondson Oil Co.*,\(^ {105}\) the Court held by a 5 to 4 majority that a private party who had invoked a procedurally defective state attachment statute had engaged in state action by acting jointly with state officials to deprive a citizen of his due process rights. Unlike *Adickes* or *Dennis*, *Lugar* did not involve a conspiracy to do something that was clearly illegal.\(^ {106}\) The Edmondson Oil Company invoked what it perceived to be a Constitutional state attachment procedure which was subsequently held to be unconstitutional. Lugar, the operator of a truck-stop was indebted to his fuel supplier, Edmondson Oil Company. In attempting to enforce the debt from Lugar, Edmondson Oil Company sought pre-trial attachment of Lugar's property pursuant to a Virginia statute.\(^ {107}\) The pre-judgment attachment procedure required that Edmondson allege in an ex parte proceeding a belief that Lugar was disposing of or might dispose of his property in order to defeat his creditors. The attachment was later dismissed because the plaintiff had failed to show that Lugar

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103. *Id.* at 25.
104. *Id.*
106. *Id.* at 922.
107. *Id.* at 924. The applicable prejudgment attachment statute was VA. CODE ANN. § 8-519 (1973).
had attempted to dispose of his property to defeat his creditors. Lugar then brought a section 1983 action, asserting that Edmondson had acted jointly with the state to deprive him of his property without due process of law. The attachment statute was held to be unconstitutional under the due process clause of the Fourteenth Amendment. Writing for the majority, Justice White held that by invoking this unconstitutional statute, Edmondson Oil acted jointly with the state, which had created and enforced the statute, to deny a third party of due process.

Justice Powell, in a vigorous dissent, argued that it was unjust and illogical to hold that a private person was a state actor as a joint participant when a statute invoked was later ruled unconstitutional. A private act followed by an objectionable state act does not logically transform the private actor into a state actor:

[Respondent's private action was followed by state action. . . . But '[t]hat the State responds to [private] actions by [taking action of its own] does not render it responsible for those [private] actions.' And where the State is not responsible for a private decision to behave in a certain way, the private action generally cannot be considered 'state action' within the meaning of our cases.]

Furthermore, Justice Powell argued that the other joint participant cases such as Adickes and Dennis involved charges of conspiracy "with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity."

Thus, "in such a context, the private party could be characterized as hiding behind the authority of law and as engaging in joint participation with the State in the deprivation of constitutional rights." A holding that the private party was a state actor due to joint participation was unwarranted in Edmondson because the litigant merely invoked a statutory process that had never been constitutionally questioned.

108. Lugar, 457 U.S. at 924.
109. Id.
110. Id. at 940-41.
111. Id. at 941.
112. Id. at 944, 955-56 (Powell, J., dissenting).
113. Id.
114. Id. at 949.
115. Id. at 955 (Powell, J., dissenting).
In cases involving the NCAA prior to the Supreme Court decisions of *Rendell-Baker* and *Blum* (which have apparently narrowed the scope of state action), the federal circuit courts had uniformly held that the NCAA was a state actor. The NCAA was a state actor because state universities and other government entities played a major role in its policy formulation and in its funding. Under these rulings, the NCAA was a state actor whether it was dealing with a private or a state institution.

As a result of *Rendell-Baker* and *Blum*, which rejected the notion that the state funding of a private organization, without more, could result in a finding of state action by the private entity, the circuit courts changed their stance on the disposition of NCAA cases. The circuit courts began to hold that the NCAA was not a state actor when the only indicia of state involvement with the NCAA was the funding by state schools. The circuit courts recognized that the Supreme Court cases required that in order to find state action, the state must have coerced or encouraged the NCAA’s decision to the extent that it was essentially the state’s choice. For example, in *McCormack v. National Collegiate Athletic Ass’n*, there was no showing that the state was responsible for the NCAA’s formulation of eligibility rules; therefore, the NCAA’s actions were not state action.

IV. ANALYSIS OF NCAA v. TARKANIAN

A. Majority Opinion

The Court, in a 5-4 majority, held that the NCAA was not a state actor and therefore did not act under the color of state law.

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118. 845 F.2d 1338 (5th Cir. 1988).

119. *Id.* at 1346.
for the purposes of a section 1983 claim. Justice Stevens, writing for the Court, indicated that “[i]n this case the under color of law requirement of 42 U.S.C. section 1983 and the state action requirement of the Fourteenth Amendment are equivalent.” This statement is consistent with Price and Lugar which held that the “under color” requirement and the “state action” requirement were identical. Therefore, in order to resolve the section 1983 claim, the Court examined whether the NCAA engaged in state action when it conducted its investigation and recommended that Tarkanian be disciplined.

1. Mirror Image of State Action

The Majority noted that Tarkanian presented a mirror image of the usual state action situation and that the Court was required to “step through an analytical looking glass to resolve it.” In the typical state action case, a private actor has engaged in harmful, discriminatory conduct. The question then became whether the state has sufficiently entwined itself with the private discriminatory conduct so that the conduct is deemed state action and is subject to Constitutional prohibitions.

In Tarkanian, the private action of the NCAA to recommend Tarkanian's suspension preceded the state action of UNLV to suspend the coach. There was no question that state action was present in this case because the suspension of a state employee by a state university clearly constituted state action. The question became whether the clear state action of UNLV to suspend Tarkanian in compliance with the previous NCAA recommendations transformed the preceding NCAA conduct into state action? The Court stated that it required an “analytical looking glass” to resolve the question of whether the Court would look beyond the conduct of UNLV to

121. Id. at 457 n.4.
122. Id. at 462.
123. Id.
124. Id.
hold that the previous related private conduct of the NCAA was also state action subject to due process constraints.\(^\text{125}\)

The Court first examined UNLV's role in promulgating the rules of the NCAA. While the Court stated that UNLV had some impact on the policies of the NCAA, the hundreds of other schools making up the collective membership of the NCAA also had input.\(^\text{126}\) The vast majority of the collective members are from states other than Nevada, and these schools did not act under the color of Nevada law in promulgating the NCAA rules.\(^\text{127}\) Therefore, "it necessarily follows that the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any state."\(^\text{128}\)

Stevens then rejected the proposition that merely because UNLV embraced the NCAA's rules, the rules became state rules and the NCAA was transformed into a state actor.\(^\text{129}\) The Court analogized NCAA rule-making with the rules promulgated by the American Bar Association (ABA) in *Bates v. State Bar of Arizona.*\(^\text{130}\) In *Bates,* the action of the state supreme court in adopting and enforcing the ABA rules was state action, while the ABA's formulation of those disciplinary rules was not state action because the state court retained the power to reject those rules and promulgate its own standards.\(^\text{131}\) Similarly, in *Tarkanian,* the actions by UNLV to adopt and enforce NCAA—formulated rules was state action, but the NCAA was not a state actor because while the NCAA made the rules, UNLV was free to reject the rules, free to seek to amend the rules, or free to withdraw from the NCAA.\(^\text{132}\)

2. Public Function Analysis

The majority noted that the NCAA did not possess the power of government or the mantle of authority of the state in its dealings

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125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 463.
130. *Id.* (citing *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977)).
131. *Id.*
132. *Id.*
with UNLV and Tarkanian. "The NCAA enjoyed no governmental powers to facilitate its investigation. It had no power to subpoena witnesses, impose contempt sanctions, or to assert sovereign authority over any individual." Therefore, it was not appropriate to view the NCAA as a state actor.

The Court rejected Tarkanian's claim that the NCAA's conduct was state action because UNLV had delegated powers to the NCAA. Under the "public function" or "traditional government powers" theory cases such as Marsh, Jackson, and Hudgens, if the NCAA had assumed a traditional exclusive government power, it would be a state actor subject to the Constitution. Tarkanian argued that the NCAA had taken on the traditional exclusive government power to discipline state employees because of a delegation of power from the state. The delegation of state authority to a private party can result in a finding that the private actor is actually a state actor. However, "UNLV delegated no power to the NCAA to take specific action against any University employee." The only power possessed by the NCAA was to levy sanctions upon UNLV if the school did not comply with the NCAA request. The power to suspend Tarkanian still resided solely in UNLV because NCAA rules prohibited the Association from taking any direct disciplinary action against a coach or any other member university employee. The University still had the power to retain Tarkanian in defiance of the NCAA request, at the risk of heavier NCAA sanctions.

133. Id. at 465.
134. Id. at 464-65.
135. Id. at 465.
136. Id. at 463-64. Tarkanian argued that since UNLV had agreed to adhere to NCAA rules, UNLV had delegated power to the NCAA to take specific action against a University employee. Id. He argued that a state that delegates authority to a private party may thereby make that party a state actor. Id. (citing West v. Atkins, 108 S. Ct. 2250 (1988)). In Tarkanian, however, the Court held that UNLV did not delegate authority to the NCAA to take action against Tarkanian and therefore the NCAA did not become a state actor because of delegation of authority from a state entity. Tarkanian, 109 S. Ct. at 464.
137. Id. at 465 n.18.
138. Id. at 464.
139. Id.
140. Id.
141. Id. at 465 n.18.
142. Id. at 465.
was no delegation of governmental powers from UNLV to the NCAA, the NCAA did not possess traditional exclusive governmental powers and was therefore not a state actor pursuant to the "public function theory."

3. The Nexus Theory and Its Sub-Specie

The Court then held that there was no joint participation between the NCAA and UNLV because the interests of the two parties were adverse:

UNLV used its best efforts to retain its winning coach—a goal diametrically opposed to the NCAA's interests in ascertaining the truth of its investigator's reports. . . . [T]he NCAA and UNLV acted much more like adversaries than like partners engaged in a dispassionate search for the truth. . . . Just as a state-compensated public defender acts in a private capacity when she represents a private client in a conflict against the State, the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public. 143

The Court points out that in other joint participant cases the interests of the state and the private party were not adverse.144 The Court noted that in Burton the lease arrangement between the restaurant and the parking authority was mutually beneficial—the restaurant received tax exemptions, the parking authority received rent, and business increased for both parties.145 A mutual benefit was also found in Dennis, where the judge (the state) received a bribe for issuing an improper injunction and the private party benefitted from the issuance of the injunction.

Justice Stevens echoed the dissent of Justice Powell in Lugar by arguing that the joint participant theory should not be applied in the absence of an improper agreement between the state and the private party.146 Both Dennis and Adickes involved conspiracies to

143. Id. at 464. The Joint Participant Theory holds that "private parties could be found to be state actors, if they were 'jointly engaged with state officials in the challenged action.'" Id. at 466 (White, J., dissenting).
144. Id. at 464 n.16.
145. Id.
146. Id. at 464 n.17.
violate Constitutional rights from the very beginning of the relationship between the state and the private persons.\textsuperscript{147}

In \textit{Tarkanian}, the Court found that there was no impropriety in the agreement between the NCAA and UNLV that the university would abide by NCAA rules.\textsuperscript{148} This was not a conspiracy between UNLV and the NCAA to deprive Tarkanian of his due process rights. Because the NCAA and UNLV acted at odds throughout the investigation and later litigation, rather than for the mutual benefit of each party, and because the NCAA and UNLV did not conspire to violate Tarkanian's rights, the "joint participation" theory did not convert the NCAA into a state actor.

Finally, the Court found that even if, as Tarkanian asserted, the NCAA had so much power that UNLV had no choice but to accept its sanctions, it does not automatically follow that the NCAA is a state actor or acting under the color of state law.\textsuperscript{149} "In the final analysis the question is whether 'the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State.'"\textsuperscript{150} This is the standard enunciated in \textit{Lugar}.\textsuperscript{151} The Court in \textit{Irvis} required that in order to find state action in a private party, the private discriminatory conduct must be attributable to a governmental decision.

In \textit{Flagg Bros.}, \textit{Blum}, and \textit{Rendell-Baker}, the Court required that the state must exercise coercive power over or provide significant encouragement to the private discriminatory party before the state would be implicated in the discrimination. Only then would the private actor be considered a state actor. Considering the fact that UNLV and its counsel, including the Nevada Attorney General, opposed the NCAA at nearly every turn throughout the proceedings, the Court found that "[i]t would be ironic indeed to conclude that

\begin{itemize}
  \item In Dennis, the private party and the judge conspired to issue an improper injunction that deprived the respondent of property without due process. In Adickes, the police and a private restaurant conspired to deprive Adickes of her rights to enjoy equal treatment and service in a place of public accommodation.
  \item Tarkanian, 109 S. Ct. at 464 n.17.
  \item Id. at 465.
  \item Id.
  \item Lugar, 457 U.S. at 937.
\end{itemize}
the NCAA’s imposition of sanctions against UNLV ... is fairly attributable to the State of Nevada.” 152 The NCAA imposed its sanctions independently of any action by UNLV. Because the NCAA sanctions occurred before the action of UNLV, it cannot be said that the NCAA sanctions were imposed because of a governmental decision or any coercive state action. Therefore, the NCAA was not a state actor, nor did the NCAA act “under color” of state law.

B. Dissenting Opinion

Justice White, writing for the dissent argued that the NCAA is a state actor because it jointly participated with state officials to deprive Tarkanian of his due process rights. The dissent points out that “the situation presented by this case is not unknown to us and certainly is not unique.” 153 In Adickes, and Dennis, the court “faced the question of whether private parties could be held to be state actors in cases in which the final or decisive act was carried out by a state official.” 154 Justice White concluded that it was not necessary for the majority to employ an “analytical looking glass” because Tarkanian was not significantly different from Adickes and Dennis. 155 It does not matter to the joint participant analysis whether the private act occurred before a decisive state act or a state act occurs followed by a decisive discriminatory private act. The only pertinent fact was that the NCAA was a “willful participant in joint action with the State or its agents.” 156

Justice White opined that UNLV embraced the rules of the NCAA when UNLV contractually agreed to administer its athletic program in accordance with NCAA legislation. 157 UNLV also agreed that the NCAA would conduct hearings concerning rule violations and that

152. Tarkanian, 109 S. Ct. at 465.
153. Id. at 466 (White, J., dissenting).
154. Id. at 466. In Adickes, a police officer committed the decisive act of arresting Adickes for vagrancy, while in Dennis, a judge issued an improper injunction. In both cases the Court held that the private parties could be found to be state actors if they were jointly engaged with state officials in a challenged action. Adickes, 398 U.S. at 152; Dennis, 449 U.S. at 29.
155. Id.
156. Id.
157. Id.
UNLV would be bound by the fact-finding of the proceedings. Although the NCAA did not possess direct authority to suspend Tarkanian, through its joint action with UNLV it was able to accomplish this goal. The dissent argued that there was no difference between the NCAA in this case and the private parties in Dennis who did not have the power to grant an injunction, but were able to obtain that result through their joint agreement with the judge. Here the NCAA was able to suspend Tarkanian due to its joint action with UNLV to attain a result that would be beyond its powers acting alone. As in Dennis, the joint action of the NCAA resulted in the private association becoming a state actor despite its lack of power to act individually.

Justice White concluded, even if, as the majority asserted, the NCAA and UNLV were actually adversaries, that fact does not affect the reality that the two parties nevertheless engaged in the joint action. Although the parties may disagree, “the key... as with any conspiracy, is that ultimately the parties agreed to take the action.” UNLV agreed to be bound by NCAA rules and fact-finding proceedings. Although the NCAA and UNLV disputed almost every matter at every stage of the investigation and subsequent litigation, UNLV ultimately suspended Tarkanian in adherence to its agreement with the NCAA. The suspension constituted joint action in fulfillment of the agreement between the parties. Therefore, Justice White concluded that the NCAA was a state actor and was acting under the color of state law.

V. Comment

The Tarkanian decision is consistent with the twenty year trend of the United States Supreme Court limiting the applicability of Constitutional standards to private actors. The majority retreated from the broad interpretation of the joint participation theory espoused by the dissent and by the Court in Lugar v. Edmondson Oil

158. Id. at 467 (White, J., dissenting).
159. Id. at 467-68 (White, J., dissenting).
160. Id. at 468 (White, J., dissenting).
161. Id.
Co.\textsuperscript{162} The dissent would hold that a private party was subject to Constitutional guarantees if the party engaged in any kind of joint conduct with the state.

*Tarkanian* preserves the dichotomy between private conduct and state action that is fundamental to American Constitutional jurisprudence.\textsuperscript{163} The Fourteenth Amendment generally does not extend to private conduct abridging individual rights.\textsuperscript{164} This distinction between private conduct and state action is vital because "it preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."\textsuperscript{165}

*Tarkanian* indicates that in a section 1983 claim alleging state action, the question must still be whether the action complained of is fairly attributable to the state.\textsuperscript{166} Section 1983 cases such as *Adickes* and *Lugar* have indicated that a private party becomes a state actor where there is joint action between the private party and the state resulting in the harm.\textsuperscript{167} The *Tarkanian* majority indicated that the joint participant theory will not automatically apply to convert a private party, who interacts with government or a state supported entity, into a state actor.\textsuperscript{168} In the final analysis, the action must still be fairly attributable to the state.\textsuperscript{169} The question of fair attribution to the state is a factual question, and "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."\textsuperscript{170}

The Fourteenth Amendment was designed to eliminate governmental abridgement of rights,\textsuperscript{171} and a violation of rights by a government entity is extremely dangerous because the full sovereign power of government is behind the conduct.\textsuperscript{172} A single citizen can-

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\item \textsuperscript{162} *Lugar*, 457 U.S. at 941.
\item \textsuperscript{163} *Tarkanian*, 109 S. Ct. at 468 (White, J., dissenting).
\item \textsuperscript{164} Id. at 461.
\item \textsuperscript{165} *Lugar*, 457 U.S. at 946.
\item \textsuperscript{166} *Tarkanian*, 109 S. Ct. at 465.
\item \textsuperscript{167} Id. at 466 (White, J., dissenting).
\item \textsuperscript{168} Id. at 465.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} *Burton*, 365 U.S. at 722.
\item \textsuperscript{171} *Tarkanian*, 109 S. Ct. at 464-65.
\item \textsuperscript{172} Id. at 461.
\end{itemize}
not successfully combat the full array of sovereign power utilized to violate his rights. The government has at its disposal the power to make a wrongful law, and the coercive police power to enforce it with impunity.

However, the NCAA possessed no governmental powers which it could utilize during its investigation and enforcement of rule violations.\(^{173}\) Because the NCAA lacked the power of the state to compel Tarkanian’s suspension (even under its own rules the NCAA did not have the power to directly suspend Tarkanian), there was no exercise of the coercive sovereign power which the Fourteenth Amendment is designed to limit.\(^{174}\) The only coercive power at the disposal of the NCAA was the threat of further penalties against the UNLV basketball program. The Court properly held that this was not an instance of state action.\(^{175}\)

The majority analogized ABA rule-making, which is not state action, with NCAA rule-making: adoption of rules by state entities such as a state supreme court or a state university is state action but the original rule-making is not because the state body may reject the standards.\(^{176}\) It can be argued, however, that the NCAA wields a tremendous economic stick against a member university which realistically diminishes the state university’s freedom to reject the NCAA standards.\(^{177}\) A failure to adhere to NCAA guidelines or withdrawal or expulsion from the Association would result in the loss of significant revenues to the university, likely to reach into millions of dollars for a “big-time athletic program.”\(^{178}\) Tarkanian argued that the threat of lost revenues effectively left UNLV with no choice but to accept NCAA dictates; he then argued that the Court should have held that the NCAA was a state actor.\(^{179}\)

Undoubtedly, powerful private entities such as the NCAA, major corporations, and other accrediting bodies can wield extensive ec-

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173. Id.
174. Id. at 464.
175. Id. at 466.
176. Id. at 463.
177. Id. at 465.
178. Id.
179. Id.
onomic power that can influence state action. However, the existence of such economic power is not dispositive of the Constitutional question of state action. The Tarkanian Court correctly found that even if the possibility exists that a private party could coerce the state, the question remains whether the offensive conduct of the private party is fairly attributable to the state. In Blum, the Court made it clear that state action does arise when the state uses its power to coerce or encourage a private party to take a discriminatory action. However, in order for Fourteenth Amendment standards to apply to a private party, the decision for the private party to discriminate must originate with a governmental decision. Despite the economic power of private parties, the Constitution serves as a curb on government power and not upon private actors. Private actors are merely that—private actors—regardless of their economic strength.

An important element of Tarkanian is the majority’s rejection of the joint participant theory espoused by the dissent and the Nevada courts. The dissent argued for a very broad joint participant standard which would convert any private actor who has joint dealings with the state into a state actor if the state abridges some civil right in the joint dealings. The dissent’s use of the joint participant theory to find that a private actor is actually a state actor does violence to the distinction between private conduct and state conduct. The dissent asked the question “is there joint action?” An affirmative answer would end the inquiry without asking the pivotal question asked by the majority: “can the action be fairly attributed to the state?”

It is unjust and illogical to say that any joint action will transform a private party into a state actor when a private act is followed by a decisive unconstitutional state act. In the typical state action case, a finding of state action is appropriate because the private

180. Id.
181. Blum, 457 U.S. at 991.
182. Id. at 1004.
183. Tarkanian, 109 S. Ct. at 466 (White, J., dissenting).
184. Id. at 466-68 (White, J., dissenting).
185. Id. at 465.
186. Blum, 457 U.S. at 944 (Powell, J., dissenting).
actor engages in some conduct that the state coerces or compels. In such a case, the action may truly be attributed to the state because the private party is not acting independently, but is acting at the behest of the government. However, when “looking through the analytical looking glass,” if the private party independently chooses to engage in some conduct, and in response to the private conduct, the state acts to violate Constitutional rights, it is not logical to assert that the initial independent private action no longer retains its character as a private act, and now may be viewed as state action. While the state may be properly held accountable for its invasion of Constitutional rights, it is unjust to impose these sanctions upon the private party because the state had no part in the original private action. Thus, the private actor remains a private actor unless the state uses its power to coerce or encourage the private party to violate the Constitution.187

The joint participant theory has been employed in section 1983 cases involving a conspiracy in which the conspirators set out to violate a citizen’s civil rights.188 The Tarkanian majority indicated that the joint participant theory is appropriate in situations where there is “impropriety” such as the bribery of a judge as in Dennis, or the collusion of the restaurant owner with the police to exclude blacks from the restaurant as in Adickes.189 In both of these cases, the parties knowingly intended from the start to deprive the plaintiff of a clear Constitutional right. But the Court found that there was no “impropriety” under the Tarkanian facts because the initial agreement between the NCAA and UNLV was not to deprive somebody of his rights, but merely consisted of the university’s acceptance of NCAA rules.190 There is no agreement to violate rights which would make the application of the joint participant theory appropriate. Justice Powell, writing for the dissent in Lugar, indicated that it may make sense to hold that a private party in a true conspiracy with the state to violate an individual’s rights acts under color of state law. This is because the individual is inten-

187. Id. at 1004.
188. Lugar, 457 U.S. at 922.
189. Tarkanian, 109 S. Ct. at 464 n.17.
190. Id.
tionally using, with the cooperation of a state actor, state law to further his impermissible action. However, when the application of the joint participant theory becomes so broad as to include private actors that are merely invoking state attachment proceedings as in Lugar, the public/private distinction is totally obscured. The Tarkanian Court recognized the importance of the public/private dichotomy and properly refused to further extend the joint participant doctrine beyond its proper bounds.

It is important to retain the public/private distinction or else an important area of personal freedom—autonomous choice—will be lost. As one scholar notes, "there are essentially private realms, albeit circumscribed by the state and society, in which actions are autonomous." Within this "circumscribed" area of autonomy, a

191. Lugar, 457 U.S. at 944 (Powell, J., dissenting).
192. Tarkanian, 109 S. Ct. at 454.

The essence of autonomy is the ability of the actor to choose freely. Within the private realm of autonomy, the private actor is able to choose his course. Sometimes the actor may choose to act in an unfair manner; although others may not approve of the choice, the individual has the freedom to make such choices within certain limits. The State Action Doctrine which provides that the Fourteenth Amendment does not erect a shield against unfair private conduct, preserves this area of freedom from government intrusion. It must be recognized that any erosion of the private/state dichotomy in order to enhance the rights of the victim of private discrimination necessarily impinges on the realm of freedom of the person discriminating. This notion suggests that a balancing analysis may lie behind the state action cases. One commentator asserts the following:

an examination of "state action" cases reveals that whether the nature and extent of state involvement in a given case will be deemed sufficient to constitute state action depends upon the importance of the interest sought to be vindicated by the party claiming discrimination, when weighed against the interests of the person said to discriminate.


Thus state action was found to exist when the weighty interest of correcting racial discrimination was involved. See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); and Adickes v. S.H. Kress & Co. 398 U.S. 144 (1970). Under this balancing analysis, the interest of the victim of racial discrimination outweighed the rights of the ostensibly private party to discriminate because of race. In Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1973), however, the Court rejected a state action claim involving racial discrimination. This case could be distinguished on balancing grounds because the state's involvement in issuing liquor licenses was so far removed from the alleged discrimination that it could be said that the state was not actually involved in the discrimination. Thus, in Irvis, the interests of the victim of discrimination did not outweigh the rights of the private person to discriminate because the state's connection with the discrimination was too tenuous.

The Court has generally been reluctant to find state action when economic interests are involved. See, e.g., Jackson v. Metropolitan Edison, 419 U.S. 345 (1974); Flagg Bros. v. Brooks, 436 U.S.
person should be free to make choices—even free to be unfair or to discriminate.

VI. Conclusion

The Court in *National Collegiate Athletic Ass'n v. Tarkanian* continued its trend of limiting the applicability of Constitutional principles to private parties. In so doing, the Court once again reaffirmed the distinction between public and private conduct in Constitutional jurisprudence and recognized the area of individual private conduct into which the federal Constitutional law will not intrude.

The Court properly found that action by a private party followed by subsequent state action in violation of the Constitution does not convert the private actor into a state actor. The joint participant theory will not be utilized to transform the private actor into a state actor solely because the private actor acted jointly in some manner with the state. The final result in state action cases depends upon whether the conduct complained of can fairly be attributed to the state.

The *Tarkanian* decision makes it clear that a state action analysis is inherently and necessarily a factual inquiry that is informed by no hard doctrine but is guided by various elements derived from the case law. The analysis involves sifting through the factual sit-

149 (1978); Blum v. Yaretzky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982). A balancing analysis would suggest that the injury created by the deprivation of an economic right by an ostensibly private person is not to be given sufficient weight to overcome the rights of a private person to engage in unfair conduct. Lugar v. Edmondson, 457 U.S. 922 (1980), is an obvious exception to this trend as a property interest was upheld against a party invoking a state pre-judgment attachment statute. This case seems to present a situation that cannot be resolved under a balancing analysis. If the theory is applied, the interests of the victim of property deprivation would generally not outweigh the interest of the private party that merely invoked what was an apparently valid statutory process. *Lugar* is a problem for the balancing theory.

NCAA v. Tarkanian involves a deprivation of a property right which would place this case within the economic category above. The Court may have placed more weight on the freedom of choice in the NCAA rather than in the property rights of Tarkanian. This may be another explanation of the Court's holding that there was no state action by the NCAA.

uation, case by case, to discern if there is conduct fairly attributable to the state.¹⁹⁶

The Court found that the action by the state in suspending Tarkanian did not result in transforming the NCAA into a state actor. Subsequent cases involving "analytical looking glass" fact patterns similar to Tarkanian, where a private action is followed by an act of the state to violate Constitutional rights, must satisfy the following standard: before the initial private conduct will be deemed to be that of the state, the private conduct itself must be attributable to the state. A simple finding of joint action will not suffice to create state action unless there is also evidence of an improper conspiracy to employ state law to violate Constitutional rights.

The current conservative Court will continue to maintain a state action requirement by demanding actual state involvement in the acts of a private party before the Court will deem the private actor to be a state actor subject to the provisions of the Fourteenth Amendment.

Stephen R. VanCamp

¹⁹⁶ Burton, 365 U.S. at 715.