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Constitutional Law - Enforcement of NCAA Sanctions by a Public Institution - Is There State Action by the NCAA - National Collegiate Athletic Association v. Tarkanian

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CONSTITUTIONAL LAW—Enforcement of NCAA Sanctions by a Public Institution—Is There State Action by the NCAA? *National Collegiate Athletic Association v. Tarkanian,* 109 S. Ct. 454 (1988).

INTRODUCTION

The National Collegiate Athletic Association (NCAA) is an unincorporated association of nearly 960 members consisting of virtually all public and private universities and four-year colleges conducting athletic programs in America.[1] By joining the NCAA each member institution agrees to abide by and to enforce the NCAA rules which are determined by the members at annual conventions.[2] In the interim, the NCAA is governed by its Council which appoints various committees such as the Committee on Infractions.[3] The Committee on Infractions is authorized to carry on investigations, make factual determinations regarding rule violations and to impose appropriate penalties on member institutions found to be violating NCAA rules.[4]

In the early 1970s, the NCAA received several anonymous communications that violations of NCAA rules had occurred in the basketball program at the University of Nevada at Las Vegas (UNLV).[5] In 1972, the NCAA advised the president of UNLV that it was beginning an inquiry into UNLV's athletic programs.[6]

After the inquiry began, UNLV initiated a separate investigation.[7] As a result of its investigation, UNLV submitted a response to the NCAA which contended that no violations of NCAA rules had occurred.[8]

Despite UNLV's findings, the NCAA issued a report detailing 38 violations of NCAA rules by UNLV, ten involving head basketball coach Jerry Tarkanian.[9] The NCAA placed UNLV's basketball team on probation for two years and ordered UNLV to show cause why the NCAA should not impose further penalties against the university if it did not sever all ties between its athletic program and Tarkanian during the probation.[10]

Upon UNLV's request for reconsideration, the NCAA affirmed its prior findings and penalties.[11] Subsequently, UNLV conducted a hearing to determine whether to follow the NCAA directive.[12] Although the

1. National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454, 457 (1988).
2. *Id.*
3. *Id.*
4. *Id.*
5. Brief for Petitioner at 8, National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454 (1988) (No. 87-1061).
6. *Id.*
7. *Id.* at 9.
8. *Id.; see also* Tarkanian v. National Collegiate Athletic Ass'n, 103 Nev. 331, 334, 741 P.2d 1345, 1346 (1987).
9. *Tarkanian,* 109 S. Ct. at 456 (1988).
10. *Id. See also* Tarkanian v. National Collegiate Athletic Ass'n, 103 Nev. at 334, 741 P.2d at 1347.
11. Tarkanian v. National Collegiate Athletic Ass'n, 103 Nev. 334, 741 P.2d at 1347.
12. *Id.*

hearing officer questioned the factual basis of the NCAA charges against Tarkanian, he determined that the university had no choice but to accept the NCAA's penalties.[13] UNLV's president accepted the hearing officer's recommendation and suspended Tarkanian.[14]

Tarkanian filed suit against UNLV in a Nevada state court, alleging that he had been denied his fourteenth amendment due process rights in violation of 42 U.S.C. section 1983.[15] Tarkanian sought a declaration that he had been denied procedural and substantive due process of law.[16] He claimed that he was deprived of his due process rights because the meaningful factual determinations, as well as the decision as to the penalty to be imposed, had been made by the NCAA before he was afforded a hearing by UNLV.[17] The state district court found that Tarkanian's fourteenth amendment rights had been violated and enjoined UNLV "and all persons in active concert . . ." with UNLV from suspending him or taking any other action based on the NCAA report.[18]

On appeal, the Nevada Supreme Court reversed and remanded the decision, holding that the NCAA was a necessary party.[19] On remand, after NCAA was added as a defendant, the district court concluded that the actions of both the NCAA and UNLV constituted state action depriving Tarkanian of due process,[20] and permanently enjoined UNLV from suspending Tarkanian and the NCAA from taking further action against UNLV.[21] On appeal, the Nevada Supreme Court affirmed the trial court's conclusion that the NCAA's action constituted state action.[22]

The United States Supreme Court granted the NCAA's petition for *certiorari.*[23] *National Collegiate Athletic Association v. Tarkanian,* was a case of first impression because the Supreme Court had never ruled on the NCAA's status as a state or private actor.[24] The Court held that the NCAA was not engaged in state action when it conducted its investigation and directed UNLV to suspend Tarkanian.[25] Because the Court

13. *Id.* The UNLV Hearing Officer recommended that UNLV recognize the university's delegation to the NCAA of the power to act as ultimate arbiter of these matters, and reassign Tarkanian from his present position—though tenured and without adequate notice—even while believing that the NCAA was wrong. Brief for Respondent at 17-18.

14. Brief for Respondent at 17-18.

15. *Id.* at 18. *See also Tarkanian,* 109 S. Ct. at 456.

16. University of Nev. v. Tarkanian, 95 Nev. 389, 394, 594 P.2d 1159, 1162 (1979).

17. *Id.* 95 Nev. at 398, 594 P.2d at 1164.

18. Brief for Respondent at 18.

19. *University of Nev. v. Tarkanian,* 95 Nev. at 399, 594 P.2d at 1163.

20. Brief for Respondent at 18-19.

21. *Id.* Although the NCAA appealed this ruling to the Nevada Supreme Court, UNLV did not. *Id.* at 21.

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

23. 108 S. Ct. 1011 (1988).

24. *Id.; see also* 109 S. Ct. at 457 n.5

25. *Tarkanian,* 109 S. Ct. at 457.

characterized the NCAA as a private actor, the constitutional remedies under 42 U.S.C. section 1983 are not available against the NCAA for state employees who are suspended or terminated because of recommendations made by the NCAA. This casenote will analyze the Court's treatment of the NCAA as a private actor, concluding that the NCAA should be characterized as a state actor when it is acting in concert with a state university.

BACKGROUND

Section 1983 provides a civil remedy for deprivations, under color of state law, of any of the rights, privileges, and immunities secured by the Constitution.[26] In order to bring a section 1983 action, a plaintiff must allege two elements.[27] First, the plaintiff must allege that a person has deprived him of a constitutionally protected right. Second, the plaintiff must allege that the person who has deprived him of that right has acted under color of state law.[28]

Private actors are not subject to fourteenth amendment constraints. However, actions of the state clearly are subject to the fourteenth amendment.[29] The questions raised in state action cases arise because it appears that the state is involved with private action to an extent that the challenged action has become an action of the state. If the state is participating in private action to a sufficient degree, then that action and the private party may become subject to the constraints of the fourteenth amendment.

On numerous occasions the Court has attempted to define the degree of participation by the state that is necessary to transform private action into state action. In *Shelley v. Kraemer,* the Court held that judicial enforcement by state courts of a racially restrictive covenant was state action which denied petitioners equal protection of the laws under the fourteenth amendment.[30] Thus, the racially restrictive covenants were not illegal as between private parties but judicial enforcement of the covenants constituted state action and such enforcement was in contravention of the fourteenth amendment.[31] *Shelley* made it clear that participation by the state in a discriminatory activity violated the four-

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26. 42 U.S.C. § 1983 (1982), which states:
> Every person who, under color of any statute, ordinance, regulation . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

See also Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away,* 60 N.Y.U. L. REV. 4 (1985).

27. Mahoney, *The Prima Facie Section 1983 Case,* in SECTION 1983 SWORD AND SHIELD 120 (R. Freilich & R. Carlisle ed. 1983).

28. *Id.; see also,* Gomez v. Toledo, 446 U.S. 635, 640 (1980).

29. Adickes v. S.H. Kress & Co., 398 U.S. 144, 169-70 (1970).

30. 334 U.S. 1, 20 (1948).

31. *See generally,* 334 U.S. 1 (1948).

teenth amendment.[32] The question then became: what constituted state participation or state action?

The Court recognized that even slight participation by the state would violate the fourteenth amendment.[33] In *Burton v. Wilmington Parking Auth.,* the Court found state action where a private segregated cafeteria was operated in a state owned parking building.[34] The Court found state action because the building was owned by the state, the upkeep and maintenance were responsibilities of the state, and the location of the building conferred a benefit on the operator of the cafeteria. This degree of state participation in a discriminatory activity violated the fourteenth amendment.[35]

The Court found that state action could be present when a private action initiated a state action. In *Adickes v. S.H. Kress & Co.,* Sandra Adickes, a white school teacher brought suit under section 1983 for violation of her constitutional rights under the equal protection clause of the fourteenth amendment.[36] Adickes entered the Kress store with six of her black students. A waitress took the orders of the students but refused to serve Adickes because she was a white person "in the company of Negroes."[37] After the refusal of service, the group left the store.[38] Once outside, Adickes was arrested for vagrancy by a police officer.[39]

The Court in *Adickes* considered whether there was sufficient state action to prove a violation of petitioner's fourteenth amendment rights if she showed that Kress refused her service because of a state enforced custom compelling segregation of the races in restaurants.[40] The Court remanded the case and held, *inter alia,* that if Adickes proved that Kress refused her service because of a state enforced custom of segregating the races in public restaurants, then she would show an abridgement of her equal protection rights.[41] Following *Adickes,* the Court was faced with situations that were closer to the line between state and private action and the Court became more restrictive and ruled on the private side of the line.

In *Moose Lodge No. 107 v. Irvis* the Court held that the operation of a state's liquor regulations upon a private club with racially discriminatory bylaws did not sufficiently involve the state in the club's discriminatory policies as to make those practices state action.[42] The

32. *Id.*
33. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). *See also,* Terry v. Adams, 345 U.S. 461 (1953).
34. 365 U.S. 715 (1961).
35. *Id.* at 724.
36. 398 U.S. 144 (1970).
37. *Id.* at 146, 149.
38. *Id.* at 149.
39. *Id.*
40. *Id.* at 169.
41. *Id.* at 170-71.
42. 407 U.S. 163 (1972).

Court found nothing in *Moose Lodge* to approach the symbiotic relationship between the lessor and lessee in *Burton.*[43] Since *Moose Lodge,* the Court has been reluctant to find state action present in private activity on the basis that there is a state law which recognizes the legitimacy of actions taken by a private person.[44] But the Court will find state action when the state and a private party are jointly engaged in an action.

In *Dennis v. Sparks,* the Court held that private persons, jointly engaged with state officials in a challenged action, are acting "under color" of law for purposes of section 1983 actions.[45] The Court explained that to act under color of state law for section 1983 purposes does not require that the defendant be an officer of the State; rather, "it is enough that he is a willful participant in joint action with the State or its agents."[46]

In 1982 the Supreme Court, in *Lugar v. Edmondson Oil Co.,* articulated a new test for what constitutes state action.[47] In *Lugar,* the Court stated that the state action requirement of the fourteenth amendment is identical to the statutory requirement in section 1983 of action taken under color of state law.[48]

In *Lugar* the Court articulated a two-part test for deciding whether conduct allegedly causing the deprivation of a constitutionally protected right is fairly attributable to the state.[49] First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible.[50] Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor."[51] A person may be considered a state actor because "he is a state official, because he acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state."[52] The Court held that Lugar was deprived of his property through state action and therefore Edmondonson Oil Co. was acting under color of state law in participating in the deprivation of Lugar's property.[53]

43. *Id.* at 174.
44. *See* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW, 435 (3d ed. 1986).
45. 449 U.S. 24, 27-28 (1980). The *Dennis* decision resulted from a § 1983 action, brought against a state court judge and others who allegedly conspired to bribe the judge to obtain an injunction. The defendants (petitioners) argued that the immunity to § 1983 actions for judges should be extended to their actions. *Id.*
46. *Id.*
47. 457 U.S. 922 (1982). In *Lugar,* the petitioner, who operated a truck stop was indebted to his supplier, Edmondson Oil Co., Edmondson Oil Co., through a prejudgment attachment procedure, which only required Edmondson to allege a belief that petitioner might dispose of his property in order to defeat his creditors, was able to obtain a writ of attachment. The writ of attachment was executed by the Sheriff who sequestered petitioner's property. Petitioner brought suit under § 1983. *Id.*
48. *Id.* at 929.
49. *Id.* at 937.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 942.

On the same day that the Court decided *Lugar* it decided two other state action cases.[54] Applying the *Lugar* test, the Court stated that the ultimate issue in determining whether a person is subject to suit under section 1983 is whether the alleged infringement is "fairly attributable" to the state.[55] Thus, the *Lugar* test is the Court's articulation of how it will determine state action and what constitutes "under color of state law" for purposes of section 1983.[56]

The NCAA As a State Actor

In the pre-*Lugar* period of Supreme Court state action decisions, virtually every federal court considering whether NCAA conduct constituted state action found that it did.[57] In fact, until October of 1984, with only one exception, every federal court that considered whether NCAA actions were "under color of state law" within the meaning of section 1983 answered that question in the affirmative.[58]

After *Lugar,* however, federal courts began to hold that NCAA actions were not state actions.[59] For example, the Fifth Circuit, in *McCormack v. National Collegiate Athletic Ass'n,* held that the NCAA was not a state agency and did not act under color of law within the meaning of section 1983.[60] In *Arlosoroff v. National Collegiate Athletic Ass'n,* the Fourth Circuit held that the NCAA was a private entity and did not find any state action.[61] The Sixth Circuit in *Karmanos v. Baker,*

54. Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

55. *Rendell-Baker,* 457 U.S. at 838.

56. *Lugar,* 457 U.S. 922 (1982).

57. *See* Regents of Minnesota v. National Collegiate Athletic Ass'n, 560 F.2d 352, (8th Cir. 1977); Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213 (D.C. Cir. 1975); Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028 (5th Cir. 1975) (later overruled); Associated Students, Inc. v. National Collegiate Athletic Ass'n, 493 F.2d 1251 (9th Cir. 1974). In the pre-*Lugar* context, the NCAA was found to be a state actor even in situations that involved private colleges or universities. *See, e.g.,* Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028, 1030 (5th Cir. 1975) (later overruled); Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213, 220 (D.C. Cir. 1975).

58. Martin, *The NCAA and Its Student-Athletes: Is There Still State Action?,* 20 NEW ENG. L. REV. 49, 56 (1985-1986). The exception was McDonald v. National Collegiate Athletic Ass'n, 370 F. Supp. 625 (C.D. Cal. 1975).

59. *See, e.g.,* McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988); Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987); Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986); Arlosoroff v. National Collegiate Athletic Ass'n, 746 F.2d 1019 (4th Cir. 1984); *see also* Spath v. National Collegiate Athletic Ass'n, 728 F.2d 25, 28 (1st Cir. 1984).

60. McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1346 (5th Cir. 1988). *McCormack* involved a suit against the NCAA for violation of civil rights and antitrust laws for enforcing sanctions against Southern Methodist University. The court in *McCormack* specifically distinguishes the Nevada Supreme Court's holding in Tarkanian v. National Collegiate Athletic Ass'n because the Nevada Supreme Court relied on the fact that UNLV was a state university and Tarkanian was a public employee. *Id.* at 1346.

61. Arlosoroff v. National Collegiate Athletic Ass'n, 746 F.2d 1019, 1020-21 (4th Cir. 1984). In *Arlosoroff* the action was brought by a college tennis player against the NCAA and Duke University. *Id.* at 1020. The issue of joint action with the NCAA and

held that the plantiffs failed to demonstrate that the NCAA had acted under color of state law.[62] The Sixth Circuit, in *Graham v. National Collegiate Athletic Ass'n,* had previously held that the NCAA's adoption of rules regulating eligibility of transfer students did not constitute state action.[63]

After *Lugar,* some circuits overruled their previous decisions. For example, the Fifth Circuit in *Parish v. National Collegiate Athletic Ass'n,* held that NCAA action constituted state action.[64] In 1988, the Fifth Circuit reversed *Parish* in *McCormack.*[65] The Fifth Circuit reversed *Parish* because *Lugar* had more narrowly defined the concept of state action.[66] Since *Lugar* every court to consider the issue has held that NCAA actions are not state actions or actions under color of state law.[67] This trend in the federal courts set the stage for the Supreme Court to hear *Tarkanian.* The United States Supreme Court granted certiorari in 1988.[68]

THE PRINCIPAL CASE

In *Tarkanian,* the United States Supreme Court held that UNLV's suspension of Tarkanian in compliance with NCAA sanctions did not turn the NCAA's otherwise private conduct into state action.[69] Therefore, the NCAA was not liable for violation of Tarkanian's right to due process.[70] In so holding, the Court reversed the Nevada State Supreme Court's decision that the NCAA was a state actor.[71]

In reaching this result, the United States Supreme Court characterized UNLV as a branch of the University of Nevada which is a state funded institution, and found that the executives of UNLV "unquestionably" acted under the color of state law when performing official

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a *public* university was not addressed in *Arlosoroff* or *McCormack. See Tarkanian,* 109 S. Ct. at 467 n.2. (White, J., dissenting).

62. Karmanos v. Baker, 816 F.2d 258, 260 (6th Cir. 1987). In *Karmanos* a hockey player was declared ineligible by the eligibility committee of the NCAA but Karmanos failed to allege that a state university caused or directed implementation of the rules at issue. *Id.* at 259.

63. Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953, 958 (6th Cir. 1986). *Graham* involved the University of Louisville and players who attempted to transfer from their football program to the football program at Western Kentucky University. *Id.* at 955, 958.

64. Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028, 1033 (5th Cir. 1975).

65. McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1346 (5th Cir. 1988).

66. *Id.* at 1345, n.38.

67. *Id.; see also* Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953, 957-58 (6th Cir. 1986); Arlosoroff v. National Collegiate Athletic Ass'n, 746 F.2d 1019, 1021-22 (4th Cir. 1984); Hawkins v. National Collegiate Athletic Ass'n, 652 F.Supp. 602, 606-09 (C.D. Ill. 1987); Kneeland v. National Collegiate Athletic Ass'n, 650 F. Supp. 1047, 1054-55 (W.D. Tex. 1986); McHale v. Cornell Univ., 620 F. Supp. 67, 69-70 (N.D.N.Y. 1985).

68. National Collegiate Athletic Ass'n v. Tarkanian, 108 S. Ct. 1011 (1988).

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

70. *Id.* at 465-66.

71. *Id.* at 466.

functions.[72] The Court, however, described the NCAA as an unincorporated association of nearly 960 members consisting of virtually all public and private universities conducting major athletic programs in America.[73] The Court conceded that a state university is without question a state actor.[74] Therefore, the issue was whether UNLV's actions, taken in compliance with the NCAA rules and recommendations, turned the NCAA's conduct into state action.[75]

In the majority's view, UNLV was able to participate in promulgating the NCAA's rules by virtue of its membership.[76] Therefore, the Court stated that UNLV had the option of changing the NCAA's policies from within the NCAA organization. However, since the NCAA adopts its rules through member-initiated legislation, the rules are a product of the NCAA and not individual member institutions.[77] Because UNLV retained the authority to withdraw from the NCAA, or to work through the NCAA's legislative process to attempt to change rules that it considered unfair, the Court held that the NCAA's conduct did not constitute state action.[78]

Since UNLV made efforts to retain its winning coach, a goal which was in conflict with the NCAA's investigation, and because UNLV and the NCAA acted like adversaries during the investigation, the Court stated that the NCAA could not be regarded as an agent for UNLV.[79] The Court analogized their adversarial positions to the facts in *Polk County v. Dodson.*[80] In *Polk County,* a state compensated public defender was held to be a private actor because she represented a private client in a conflict against the state.[81] Thus, following *Polk County,* the Court viewed the NCAA as a private actor at odds with the state when the NCAA represents the interests of its entire membership in an investigation of one public university.[82]

Moreover, the Court found that the NCAA did not have governmental powers to facilitate its investigation,[83] and that the NCAA could not directly impose sanctions on any state employee.[84] Because of these factors, the Court held that the NCAA's conduct did not constitute state action.[85]

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72. *Id.* at 457.
73. *Id.*
74. *Id.* at 462. Note that the Court applies the test enunciated in *Lugar* in this case. *Id.* at 463, 465.
75. *Id.* at 462.
76. *Id.*
77. *Id.*
78. *Id.* at 463; *see also, id.* at 465 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-52 (1974), where the Court held that a state's conferral of monopoly status does not convert a private party into a state actor).
79. *Tarkanian,* 109 S. Ct. at 464.
80. 454 U.S. 312, 320 (1981).
81. *Tarkanian,* 109 S. Ct. at 464 (citing *Polk County,* 454 U.S. at 320).
82. *Id.* n.16.
83. *Id.* at 464.
84. *Id.* at 465.
85. *Id.* at 466.

Justice White, in dissent, argued that the issue was whether the NCAA acted jointly with UNLV in suspending Tarkanian and thereby also became a state actor.[86] He recognized that *Tarkanian* was factually different from many of the Court's prior decisions in which the presence or absence of state action was an issue.[87] In those cases, a private party had taken the decisive step that caused the harm to the plaintiff and the question was whether the private party acted under the color of state law.[88] *Tarkanian* differed because the final act which caused harm to Tarkanian was committed by a party conceded to be a state actor, and the question was whether the actions by a private party which laid the groundwork for the state actor also constituted state action.[89]

Justice White relied on *Adickes v. S.H. Kress & Co.*,[90] and *Dennis v. Sparks*.[91] In both *Adickes* and *Dennis*, the Court held that private parties could be found to be state actors if they were jointly engaged with state officials in the challenged action.[92] Justice White concluded that under these facts, the NCAA had acted jointly with UNLV and therefore was a state actor.[93]

ANALYSIS

The NCAA was jointly engaged with state officials in the challenged action in *Tarkanian*. In fact, as a member of the NCAA, UNLV had *contractually* agreed to enforce NCAA policies and regulations.[94] UNLV agreed that it would accept the NCAA's findings of fact as superior to its own and that those findings of fact would be binding.[95] UNLV conducted its own investigation into the allegations against Tarkanian and found no violations of NCAA rules. Despite this contrary conclusion, UNLV had to accept the NCAA findings. Because UNLV was not free to accept findings from its own investigation, the NCAA and UNLV were joint actors and not separate actors.

UNLV's agreement to accept the NCAA's findings resulted in UNLV imposing NCAA sanctions on Tarkanian which effectively deprived him of his fourteenth amendment rights without due process of law. By its delegating power to determine disciplinary conditions

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. 398 U.S. 144 (1970).
91. 449 U.S. 24 (1980).
92. *Tarkanian*, 109 S. Ct. at 466.
93. *Id.* at 468.
94. University of Nev. v. Tarkanian, 95 Nev. at 391, 594 P.2d at 1160 (emphasis added). *See also*, Regents of Univ. of Minn. v. National Collegiate Athletic Ass'n, 560 F.2d 352, 360 (8th Cir. 1977) (NCAA does not allow any individual institution to retain interpretative or enforcement authority over NCAA legislation).
95. *Tarkanian*, 109 S.Ct. at 467.

and sanctions for state employees,[96] the state, via UNLV, directly involved itself in the NCAA's deprivation of Tarkanian's fourteenth amendment rights.

The majority relied on the argument that because the NCAA did not have any power to take action directly against Tarkanian, the NCAA was not a state actor.[97] The problem with this finding is that it is inconsistent with, and rejected by, *Dennis.*[98] In *Dennis,* the private parties did not have any power to take action against the plaintiff; only the state actor, with his authority, could act against the plaintiff.[99] The same was true in *Tarkanian;* the NCAA could take no action against Tarkanian without the participation of the state actor, UNLV.

The majority's position that the NCAA was not a state actor because the NCAA did not have any power to take action directly against Tarkanian, was also rejected in *Adickes.*[100] In *Adickes,* the Court held that private parties could be state actors if they were jointly engaged with state officials in a challenged action.[101] The NCAA was jointly engaged with state officials at UNLV in the suspension of Tarkanian. Here, as in *Adickes,* a private party initiated an action that was enforced by state officials in violation of the fourteenth amendment.

Under the *Lugar* test, a party may be considered a state actor if it has acted together with or has obtained significant aid from state officials, or because its conduct is otherwise chargeable to the state.[102] Applying the *Lugar* test to the facts in *Tarkanian,* it is indisputable that the NCAA acted together with UNLV and obtained significant aid from state officials, via UNLV, in suspending Tarkanian.

However, the majority relied extensively on the argument that the NCAA and UNLV were adversaries throughout the proceedings and therefore there was no joint participation between them.[103] The dissent pointed out that the key in this relationship, "as with any conspiracy, is that ultimately the parties agreed to take the action."[104] Although UNLV disputed the NCAA's findings, in the final analysis UNLV agreed to act *with* the NCAA and therefore UNLV and the NCAA were not adversaries.

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96. The majority argues that there is no delegation of power by UNLV to the NCAA. However, the agreement between UNLV and the NCAA requires UNLV to accept the NCAA's findings of fact as superior and requires UNLV to cooperate fully with an NCAA investigation. More broadly, UNLV has delegated its ability to fashion rules and regulations, make factual findings and to determine sanctions and penalties. This is a substantial delegation.

97. *Tarkanian,* 109 S. Ct. at 467 (White, J., dissenting).

98. *Id.*

99. *Id.*

100. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

101. *Id.* at 169; *see also, Tarkanian* 109 S. Ct. at 466 (White, J., dissenting).

102. *Lugar,* 457 U.S. at 937.

103. *Tarkanian,* 109 S. Ct. at 467 (White, J., dissenting).

104. *Id.* at 468.

Because UNLV was free to withdraw from the NCAA, the majority found no state action.[105] The state actor in *Dennis* had the option to withdraw from the agreement as well, but the relevant consideration is not that the state actor could have withdrawn, but that it did not.[106] The state actor in both cases chose to abide by the agreement and use its power as a state actor to enforce penalties without the due process of law required by the fourteenth amendment.

The theoretical option to withdraw from the NCAA is not a realistic one. UNLV is completely dependent upon the NCAA for its ability to engage in intercollegiate athletics.[107] For an institution that wants prestige in intercollegiate athletics or a share of the NCAA's television revenue, membership is far from voluntary.[108] Participating NCAA members in the NCAA television program received in excess of thirteen million dollars in television rights for both 1972 and 1973.[109] Television appearances provide not only network money but alumni contributions, exposure to scouts for athletes aspiring to a professional career, and easier recruiting for future teams.[110] For a college or university, membership in the NCAA is an economic necessity.[111] Yet, the only choice the *Tarkanian* decision leaves state universities is either to follow NCAA policies, rules and sanctions — at the expense of the employee's rights — or not to have an intercollegiate athletic program.

In *Burton,* the Court found state action because a private entity received state benefits.[112] In *Burton,* a private actor was using a state owned building and the state and private actor were in such a position of interdependence that the action was not purely private.[113] The NCAA has a similar position of interdependence with state university members such as UNLV. Public institutions, which compose approximately one-half of the NCAA's membership, pay state funds to the NCAA.[114] States also provide the facilities in which NCAA athletic contests take place.[115]

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105. *Id.* The majority argued that UNLV could participate inside the NCAA process to change NCAA policies and rules. *Id.* However, if that is true, then the regulations promulgated by the NCAA can be fairly attributed to UNLV because it has participated in promulgating those regulations.

106. *Id.* at 467.

107. Brief for Respondent at 24.

108. Martin, *The NCAA and the Fourteenth Amendment,* 11 NEW ENG. L. REV. 383, 392 (1976).

109. *Id.* at 391.

110. *Id.* at 391-92. For further reading *see* Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?,* 28 ST. LOUIS U.L.J. 101 (1984).

111. University of Nev. v. Tarkanian, 95 Nev. at 398, 594 P.2d at 1165 (1979). *See also,* National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984), where the Court held that the anti-trust laws did apply to some aspects of college football competition and that the NCAA had violated those laws by restricting the ability of member schools to seek the rights to televise the schools' football games. McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1343 (5th Cir. 1988).

112. 365 U.S. 715, 725 (1961).

113. *Id.*

114. Martin, *supra* note 108, at 395.

115. *Id.; see also* Kelly v. Board of Education, 293 F. Supp. 485, 491 (M.D. Tenn.), where that court emphasized the utilization of state facilities as a determining factor in finding state action.

Arguably, UNLV could have provided a more meaningful hearing for Tarkanian prior to suspending him. The problem with that is twofold. First, the NCAA regulations are such that the university must accept the NCAA's fact findings as superior to its own. Therefore, UNLV was prevented by its agreement with the NCAA from making a decision based upon its own investigation and findings of fact. Second, the sanctions that the NCAA was threatening to impose were such that the hearing officer felt that there was no other option available to UNLV other than to comply with the NCAA and suspend Tarkanian. The fundamental requirement of due process is the opportunity to be heard at a meaningful time.[116] The binding factual determinations, as well as the decision as the to penalty to be imposed, had been made by the NCAA before Tarkanian was afforded a hearing.[117] Any hearing that UNLV provided to Tarkanian would not have given him an opportunity to be heard at a meaningful time because the facts and the penalty had already been determined.

The majority relied on what is seemingly a clear dividing line in the federal court decisions.[118] At first glance, it appears that federal courts held that the NCAA was a state actor for section 1983 purposes and then, after the Court's decision in Lugar, the federal courts held to the contrary.[119] Upon closer examination, however, the line drawn is not as clear as the majority suggests. In fact, none of the cases addressed the theory before the Court in *Tarkanian.*[120]

For example, *Arlosoroff* involved an action that was brought against the NCAA and Duke University, a private institution. In *McCormack,* the action involved Southern Methodist University, which is also a private university. The issue of joint action between the NCAA and a public university would never have arisen in either of those cases. In addition, *Karmanos* and *Graham* principally rely on *Arlosoroff* which challenged the actions of a private university.[121] In none of these cases did the courts address the theory before the Court in *Tarkanian,* that the NCAA, acting in concert with a *state* university, was a "state actor."[122]

Another very important difference between these cases and *Tarkanian* is that none of them involved a tenured state employee; rather, they all involved students. Tarkanian was a tenured state employee who had a substantial property interest in his position. When a state university decides to impose serious disciplinary sanctions on a tenured employee it must comply with the terms of the due process clause of

116. University of Nev. v. Tarkanian, 95 Nev. at 398, 594 P.2d at 1164.
117. *Id.* When a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 574 (1972).
118. *Tarkanian,* 109 S. Ct. at 457 n.5.
119. *Id.*
120. *Id.* at 467 n.2 (White, J., dissenting).
121. *Id.*
122. *Id.*

the fourteenth amendment.[123] Thus, the situation presented in *Tarkanian* was unique. State institutions owe their employees the protections of the fourteenth amendment due process clause.[124] An employee's property and liberty interest varies significantly from a student athlete's interests.

The Court's holding effectively enables the NCAA to force a state institution to violate a constitutional obligation that it has toward its tenured employees. In the present case the NCAA mandated UNLV to enforce its sanctions in a fashion which violated due process and after doing so, UNLV ended up in court, while the NCAA's only response was that they weren't involved.[125] The *Tarkanian* decision leaves state institutions in a serious dilemma: either they violate the constitution by enforcing NCAA sanctions[126], or they withdraw from the NCAA. The second is not a viable option for institutions involved in intercollegiate athletics.

CONCLUSION

Given the prestige, the revenue and the exposure that member institutions receive from affiliation with the NCAA, membership is far from voluntary. The NCAA ultimately decides whether to discipline state employees involved with intercollegiate athletics. The United States Supreme Court should have ruled that the NCAA was a state actor in its relationship with UNLV, thus protecting due process rights normally afforded to state employees. However, with the majority's holding in *Tarkanian,* the NCAA, without risk of liability is able to put state institutions in a position where they are essentially forced to violate their employee's due process rights. With the Court's characterization of the NCAA as private actor, Tarkanian and other state employees do not have a remedy against the NCAA for violating their procedural due process rights.

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123. *Tarkanian,* 109 S. Ct. at 462. *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Board of Regents v. Roth, 408 U.S. 564 (1972).

124. *Tarkanian,* 109 S. Ct. at 462. Section 1983 actions have secured due process rights of public employees. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away,* 60 N.Y.U. L. REV. 4, 20-21 (1985).

125. Brief for Respondents at 19. The NCAA argued that there was no actual controversy. *Id.*

126. Hypothetically, the NCAA could issue a Confidential Report or order that required a state institution to fire a coach, because the coach is black, or face further sanctions. This graphically points to the dilemma of a state school. A state employee in that situation would have an action against the state university but, under the Court's holding would not have an action against the NCAA.