FOURTEENTH AMENDMENT – DEEDS OF PRIVATE ORGANIZATIONS CONSTITUTE STATE ACTIONS UNDER THE FOURTEENTH AMENDMENT WHERE THERE IS PERVASIVE ENTWINEMENT BETWEEN THE PRIVATE ORGANIZATION AND A GOVERNMENTAL ENTITY – *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 121 S. Ct. 924 (2001).

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The judicial obligation is not only to preserve an area of individual freedom by limiting the reach of federal law[1] *and avoid the imposition of responsibility on a State for conduct it could not control, but also to assure that constitutional standards are invoked when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.*[2]

If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between State and people operating outside formally governmental organizations. . . .[3]

I. INTRODUCTION

Although not explicitly stated, the Constitution of the United States promotes the important value of federalism[4] and the preservation of individual freedom by providing for a system of dual sovereignty between the states and the federal government.[5] Out of this notion of federalism comes the state action requirement of the Fourteenth Amendment, which necessitates delineation between private conduct and conduct that can be fairly attributable to the state.[6] The Four-

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[1] Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 121 S. Ct. 924, 930 (2001)(quoting Nat'l Collegiate Athletic Ass'n. v. Tarkanian, 488 U.S. 179, 191 (1988)).

[2] *Brentwood Academy*, 121 S. Ct. at 930 (quoting Blum v. Yaretsky, 457 U.S. 991 (1982)).

[3] *Id.* at 930.

[4] McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

[5] *Tarkanian*, 488 U.S. at 179.

[6] *Id.* at 191. The conduct must be fairly attributable to the state because the Fourteenth

teenth Amendment state action requirement emerges from the notion of federalism through the structure of the court system under which the federal courts are kept in check before governing private conduct, which should only be regulated by respective state or federal legislative and executive branches.[7] Therefore, before any constitutional challenges can be brought before a court, the challenges must satisfy the state action requirement.[8]

The Constitution, the Bill of Rights, and the Amendments to the Constitution each protect civil liberties when a state actor interferes with these civil liberty interests.[9] The Fourteenth Amendment's Due Process and Equal Protection Clauses however only apply to actions taken by a state.[10] Most Fourteenth Amendment challenges arise when a private organization has some connection to the state, and drawing a line between state action and private action is a difficult task because there is no one test to be applied.[11]

In cases involving athletic associations, as in *Brentwood*, plaintiffs bring Fourteenth Amendment and § 1983[12] claims based upon a connection between the state and the association.[13] In determining whether the athletic association is

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Amendment does not protect against merely private conduct.

[7] Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 595-96 n.1 (1991).

[8] *Blum*, 457 U.S. at 1004.

[9] Strickland, *supra* note 7, at 592.

[10] *Tarkanian*, 488 U.S. at 191.

[11] Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).

[12] 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2001).

[13] *Brentwood Academy*, 121 S. Ct. at 927.

subject to the strictures of the Fourteenth Amendment, courts often apply one of the three following tests:[14] (1) the public function test;[15] (2) the state compulsion test;[16] and (3) the symbiotic relationship test.[17] Traditionally, courts have been inclined to hold that athletic associations are state actors under the three aforementioned criteria.[18] However, the Supreme Court in *Brentwood Academy* implemented a new theory upon which to find state action, the principle of entwinement.[19]

The entwinement theory is a fact-bound inquiry whereby the private nature of an entity is overcome by the "pervasive entwinement" of public institutions and public officials in its composition and operations.[20] Beyond this brief description however, the Supreme Court goes no further in defining the scope of entwinement. For this reason, the dissent takes issue with the notion of entwinement and concludes that it extends the state action doctrine beyond its means.[21] Consequently, the development of the entwinement theory could lead to a slip-

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[14] *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982). The three tests are hereinafter collectively referred to as the "Blum trilogy."

[15] The public function test requires that the private party exercise powers that are traditionally reserved to the state. *Blum*, 457 U.S. at 1005.

[16] The state compulsion test requires the complaining party to demonstrate that the state exercised such coercive power over the conduct that the conduct may be deemed that of the state. *Blum*, 457 U.S. 1004-05.

[17] Under the symbiotic relationship test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action so that the court can fairly attribute the action to the state. *Blum*, 457 U.S. at 1004.

[18] See Griffin High School v. Illinois High School Ass'n, 822 F.2d 671 (7th Cir. 1987); Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982); United States ex rel. Missouri State High School Activities Association v. Missouri State High School Activities Ass'n, 682 F.2d 147 (8th Cir. 1982); Moreland v. Western Pennsylvania Interscholastic Athletic League, 572 F.2d 121 (3d Cir. 1978); Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963); Indiana High School Athletic Ass'n v. Carlberg, 694 N.E.2d 222 (Ind. 1997); Mississippi High School Activities Ass'n, Inc. v. Coleman, 631 So. 2d 768 (Miss. 1994); Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734 (R.I. 1992).

[19] *Brentwood Academy*, 121 S. Ct. at 933.

[20] *Id.* at 932.

[21] *Id.* at 935 (Thomas, J., dissenting).

pery slope situation whereby many other kinds of organizations are inadvertently swept into the realm of state action.

II. STATEMENT OF THE CASE

The Tennessee Secondary School Athletic Association ("Association") regulated interscholastic sports programs for both the public and private high schools located in Tennessee.[22] Although membership into the Association was voluntary, most of Tennessee's high schools belonged to the Association because there were no other organized interscholastic athletics programs available in the state.[23] Moreover, under the rules of the Association, once a school became a member, the Association restricted the school's sports team to only playing against teams of other members.[24] As a result, it was advantageous for schools to enroll as members.[25]

The Association's legislative council enacted its rules and regulations, whereby the Association's board of control handled all of the administrative procedures.[26] Each committee was comprised of nine individuals who had to be principals, assistant principals, superintendents, or public school administrators in order to be part of the Association's voting membership.[27] The Association produced its revenue mainly through the tickets sold for various sporting events, and supplemented the remainder with membership dues paid by member schools.[28]

In order to gain membership into the Association, both schools and students had to meet certain standards for eligibility.[29] Once a school was accepted as a

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[22] *Id.* at 928.

[23] *Brentwood Academy*, 121 S. Ct. at 928. The Association consisted of 290 public high schools and 55 private schools, thereby placing the majority of the voting membership (84%) with the State's schools. *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* At all times relevant to this action, all of the Association's voting members were public high school administrators, and while the Association's voting membership was not paid by the State of Tennessee, they were, however, entitled to participate in the state's retirement system. *Id.*

[28] *Id.*

[29] *Brentwood Academy*, 121 S. Ct. at 928. For example, the Association required that

member, it had to agree to follow the constitution and bylaws of the Association, which stated that the principal of the school was responsible to the Association, and that the Association reserved the power to suspend, penalize, or fine any schools which violated the Association's rules.[30] Tennessee's State Board of Education ("State Board") acknowledged the Association's value and responsibilities as the regulator of interscholastic athletic activities, and authorized Tennessee's public schools to continue with their voluntary memberships.[31]

In 1997, the Association brought a regulatory enforcement proceeding against Brentwood Academy[32] for violating a rule that prohibited member schools from using undue influence in recruiting athletes.[33] The Association asserted that Brentwood Academy's action of writing to incoming students about football practice constituted such undue influence.[34] Consequently, the Association fined the Academy $3,000, placed their athletic program on probation for four years, and additionally decided that the football and basketball teams were banned from competing in any playoffs for two years.[35] Brentwood Academy challenged the penalties by filing suit in the United States District Court for the Middle District of Tennessee.[36]

Brentwood Academy contended that the Association's actions were state actions and alleged that enforcement of the Association's rule violated the First and Fourteenth Amendments.[37] The district court ultimately held that under §

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financial aid only be awarded to a student where the coach of the team had a teaching license, and the players met minimum academic standards and adhered to student employment limitations. *Id.*

[30] *Id.*

[31] *Id.* at 928. In 1996, the State Board repealed Rule 0520-1-2-08, which expressly provided that the Association was the regulator of Tennessee's athletic activities. *Id.*

[32] Brentwood Academy was one of the Association's private parochial high school members. *Id.* at 929.

[33] *Brentwood Academy*, 121 S. Ct. at 929.

[34] *Id.*

[35] *Id.*

[36] Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 13 F. Supp. 2d 670 (M.D. Tenn. 1998).

[37] *Brentwood Academy*, 121 S. Ct. at 929.

1983,[38] the Association was a state actor.[39] The court reasoned that the state had given the Association regulatory authority, the Association and its public school members had a symbiotic relationship, and the Association's membership was predominantly of public character.[40] The district court granted summary judgment for Brentwood Academy and enjoined the Association from enforcing the recruiting rule because it violated the First and Fourteenth Amendments.[41]

The United States Court of Appeals for the Sixth Circuit reversed the decision of the district court, holding that there was no state action found in the proceedings of the Association.[42] Unlike the district court, the Sixth Circuit opined that there was no single test to apply to an organization's conduct; rather, the Sixth Circuit applied the three principles of the "Blum trilogy" to define the scope of state actions as compared to private parties.[43] Judge Gilman, speaking for the court, found no state action under any of the three criteria.[44] The Sixth Circuit rejected the district court's finding that a symbiotic relationship existed between the state and the Association because the Sixth Circuit reasoned that neither extensive state regulation nor state funding of a private organization created a sufficiently close nexus between the state and the private entity.[45]

The Supreme Court of the United States granted *certiorari* to ultimately determine whether the Association's conduct could be fairly attributable to the State of Tennessee.[46] The Court, in an opinion written by Justice Souter, held

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[38] 42 U.S.C. § 1983 (2001).

[39] *Brentwood Academy*, 13 F. Supp. 2d at 695.

[40] *Id.* at 683-86. The district court specifically relied on *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. at 193 n. 13, which provided that statewide athletic associations are state actors where "membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." *Id.* at 682.

[41] *Id.* at 696.

[42] Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.3d 758, 760 (6th Cir. 1999).

[43] *Id.* at 762. *See supra* notes 14-16 and accompanying text.

[44] *Id.* at 766.

[45] *Id.*

[46] Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 121 S. Ct. 924, 927 (2001).

that the Association's regulatory activity was attributable to the state.[47] The Court reasoned that the private characterization of the Association was overcome by the "pervasive entwinement" of the public school systems and public officials with the Association.[48] The Court therefore concluded that the Association was a state actor under § 1983, and additionally, its enforcement proceeding against Brentwood Academy violated the Fourteenth Amendment.[49] The Court remanded the case back to the Sixth Circuit to determine whether the recruiting rule violated the First Amendment right to free speech.[50]

III. PRIOR CASE HISTORY

A. FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

It is a well-settled principle that the freedom of speech under the First Amendment provides that "each person should decide for himself of herself the ideas and beliefs deserving of expression, consideration, and adherence."[51] Rules and regulations that "stifle speech on account of its message. . .pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[52] Consequently, regulations on speech found to regulate the content of speech are subjected to a strict scrutiny analysis.[53]

In order for a regulation to pass a strict scrutiny analysis, the government must show a compelling state interest in the regulation and that the regulation is narrowly drawn.[54] If the regulation is found to be content-neutral however, and thus a time, place and manner restriction, the regulation will be subject to an in-

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[47] *Brentwood Academy*, 121 S. Ct. at 927-28.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 641 (1994).

[52] *Id.*

[53] *Id.* at 641-42.

[54] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978).

termediate scrutiny standard of judicial review.[55] Under this lesser degree of scrutiny, the government must demonstrate an important interest that is substantially related to the action taken.[56]

The main inquiry as to whether a regulation on speech is content-based or content-neutral examines the government's purpose in adopting the regulation.[57] In the case of *Ward v. Rock Against Racism*,[58] the Court was faced with the issue of whether New York City's regulation on the volume of amplified music that could be played in a park was a content-neutral regulation.[59] In making a determination, the Court looked to several factors.[60] One factor was whether the regulation was created because of a "disagreement with the message it conveyed."[61] The Court stated, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[62] However, the majority stated that regulations created for purposes of the listeners' reactions are content-based regulations.[63] Concluding that the regulation was substantially related to serve the interest of avoiding excessive volumes of music in the park, the Court in *Ward* found that the volume regulation was content-neutral.[64] As a result, the Court held that the regulation was a valid time, place and manner restriction under the First Amendment.[65]

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[55] Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (holding that New York City's attempt to regulate the volume of amplified music in a park was a valid content-neutral regulation of speech).

[56] *Id.* at 797-98.

[57] *Id.* at 791-92.

[58] 491 U.S. 781 (1989).

[59] *Id.* at 784.

[60] *Id.*

[61] *Id.* at 791-92. In *Ward*, the Court found that the city's desire to control noise levels had nothing to do with the content of speech being regulated. *Id.* at 792.

[62] *Ward*, 491 U.S. at 792 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986)).

[63] Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123, 133-34 (1992).

[64] *Ward*, 109 S. Ct. at 2760.

[65] *Id.*

B. PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

In addition to the underlying First Amendment issue in *Brentwood Academy*, at issue was whether the Association's actions violated Brentwood Academy's Fourteenth Amendment rights to procedural due process. The deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property trigger procedural due process.[66] Thus, a Fourteenth Amendment issue turns on whether there has been a deprivation of an interest protected by the Constitution. For example, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests – property interests – may take many forms."[67] Property interests derive from an independent source of rules, such as state law, and they protect benefits, as well as claims of entitlement to the benefits.[68] The property interest in a benefit is a purpose of the constitutional right to a hearing, which in turn gives people the opportunity to vindicate their claims.[69]

Before 1960, liberty and property interests were defined by the common law.[70] The Due Process Clause required a hearing where there was a taking of an individual's property by the government or an invasion of bodily integrity.[71] However, this traditional form of defining rights and privileges changed with the critique of Charles A. Reich.[72] As a result of Reich's analysis, a "new property"

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[66] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972).

[67] *Id.* at 2708.

[68] *Id.* at 2709.

[69] *Id.*

[70] *Bailey v. Richardson*, 182 F.2d 46. 57-58 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951). In *Bailey*, the court held that a hearing was not required for a dismissal from government employment. *Id.* at 57. In so holding, the court stated that due process did not apply to the holding of a government position because government employment was not a property interest. *Id.*

[71] *Id.*

[72] Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1963). In his article, Reich set forth the notion that individual security depended on relationships with the government. *Id.* Examples of these relationships included the following: insurance, Social Security benefits, employment, licenses, and welfare. *Id.* Reich claimed that as a result of the government's interaction with individuals, there was a need for a "new property" to be created that would be protected in the same way the "old property" was under due process because of the common law. *Id.*

emerged that was to be afforded the same due process rights as the "old property."[73] The courts began to adopt this approach to protect individuals who began to rely on governmental benefits from the subjective will of government officials.[74]

One such case where the Supreme Court followed Reich's methodology was *Goldberg v. Kelly*.[75] In *Goldberg*, the Court addressed whether the recipient of welfare benefits had the right to an evidentiary hearing before the termination of those benefits under the Due Process Clause.[76] The Court stated that welfare benefits were a "statutory entitlement," and therefore their termination involved significant rights.[77] In the course of the majority's reasoning, the Court made note to the fact that there is a "brutal need" when it comes to the needs of welfare recipients.[78] As such, the Court established that the "statutory entitlement" was equivalent to a property interest.[79] Therefore, a "new property" emerged, which included among other things, welfare benefits. The Supreme Court held that a hearing was thus required before the termination of any welfare benefits.[80]

In 1972, the Court in *Board of Regents of State Colleges v. Roth*[81] had to decide whether there was a property interest in an assistant professor position.[82] In denying the existence of a property interest, the majority, in an opinion authored by Justice Stewart, rejected Roth's contention that the failure of the University to give him an opportunity for a hearing violated his Fourteenth Amendment rights to due process of the law.[83] The Court concluded that Roth's position, as assis-

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[73] *Id.*

[74] *Id.*

[75] 397 U.S. 254 (1970).

[76] *Id.* at 260.

[77] *Id.* at 262.

[78] *Id.* at 261.

[79] *Id.*

[80] *Id.*

[81] *Roth*, 408 U.S. at 564.

[82] *Id.* The professor, David Roth, was only hired for a one-year term, and did not have tenure under state law. *Id.* at 566.

[83] *Id.* at 569-70.

tant professor did not provide him with an interest in re-employment for the following year.[84] The Court stated that while Roth had an "abstract" interest in being rehired, it was not a property interest.[85]

Courts tend to apply a framework to situations where due process is asserted. First, courts look to see if there is an interest within the Fourteenth Amendment's protection of liberty and property.[86] Where property is involved, the court must discern whether it is dealing with common law property or new property. Where interests in entitlements are concerned, the recipient must demonstrate a legitimate and reasonable expectation that the benefit will continue, and a reasonable reliance thereon.[87] Because the Fourteenth Amendment Due Process protections are directed at state laws, the court must determine whether a state actor or private entity is terminating or regulating the interest.[88] Lastly, the courts have to determine what process is actually due.[89]

C. STATE ACTION

Before ruling on issues arising under the Fourteenth Amendment, courts must determine whether the actions complained of are state action or private action. "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be."[90] In deciding whether the Association's regulations violated either the First Amendment or Fourteenth Amendment of the Constitution, the Court first addressed the initial question whether or not the Association is a "state actor" subject to constitutional limitations under § 1983.[91]

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[84] *Id.* at 578.

[85] *Id. Cf. Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that recipients of welfare benefits have a property interest in the benefits, and therefore are entitled to a fair hearing prior to termination under due process of the law).

[86] *Roth*, 408 U.S. at 571.

[87] *Id.* at 577.

[88] *Brentwood Academy*, 121 S. Ct. at 924.

[89] *Id.*

[90] Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[91] *Brentwood Academy*, 121 S. Ct. at 928.

Where actions are held to be conduct of private organizations rather than state actors, § 1983 does not provide any protection to the parties affected by the actions or regulations.[92] Under § 1983, a party only has a legitimate cause of action for a deprivation of a constitutional right where the source of the deprivation is a state law.[93]

The district courts in Tennessee have consistently held that association's similar to the association in *Brentwood Academy* are subject to the constitutional limitations of the Fourteenth Amendment.[94] The United States Court of Appeals for the Sixth Circuit has not been as consistent in attributing the Association's actions to the state. For example, in *Yellow Springs v. Ohio High School Athletic Association*,[95] the court of appeals found that the Ohio School Athletic Association's actions were state actions because of the organization's "symbiotic relationship" with the state.[96] However, in *Burrows v. Ohio High School Athletic*

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[92] Mineo v. Transp. Mgmt. of Tennessee, Inc., 694 F. Supp. 417, 423 (M.D. Tenn. 1988).

[93] 42 U.S.C. § 1983 (2001).

[94] *Brentwood Academy*, 13 F. Supp.2d at 679. In *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County*, the court looked to several factors before concluding that the Association's functions were "so closely identified with state activities" that the Association had to be viewed as a state actor. *Kelley*, 293 F. Supp. 485, 491 (M.D. Tenn. 1968). The court in *Brentwood Academy* took into account the facts that the Association was organized to perform as a public function, the majority of the member schools were public schools, the composition of the board and legislative council were public school principal and superintendents, and most of the athletic games were played in state buildings. *Id.* at 491. Similarly, in the case of *Crocker v. Tennessee Secondary Schools Athletic Association*, the district court stated that the Association was a state actor also because of its composition of a majority of public schools, and because of Tennessee's delegation of authority over to the Association regarding the regulations of interscholastic athletics. *Crocker*, 735 F. Supp. 753, 755 (M.D. Tenn. 1990), *aff'd*, 908 F.2d 972 (6th Cir. 1990). However, in *Graham v. Tennessee Secondary School Athletic Association*, the court's holding that the Association was a state actor was based upon the Supreme Court's application of the "state compulsion test." No. 1:95-cv-044, 1995 U.S. Dist. LEXIS 3211 (E.D. Tenn. 1995) (citing *Blum*, 457 U.S. at 993). Under the state compulsion test, a party must demonstrate that the state exercises coercive power or provides either overt or covert significant encouragement to the extent that the choice of the private actor is believed to be that of the state. *Id.* at 3212-13. Judge Edgar found this exercise of state power in the state's delegation of authority and in the makeup of the Association. *Id.* at 3213-14.

[95] 647 F.2d 651 (6th Cir. 1981).

[96] *Yellow Springs*, 647 F.2d at 653. The court stated that the symbiotic relationship was reflected in the association's use of public facilities, the predominance of public schools involved, and its ability to place sanctions on state schools for violations of its rules. *Id.*

Association,[97] and in *Graham v. National Collegiate Athletic Association*,[98] the Sixth Circuit held that similar athletic associations were not acting under the color of state law.[99] The court in *Graham* based its decision on the fact that the association was a national athletic association rather than a state association.[100] The distinction in *Burrows* is not as clear. The court in *Burrows* relied upon *Graham*, although *Burrows* was distinguishable from *Graham* in that the conflict did not involve a national association.[101] Significantly, numerous other courts have held associations and their actions as being attributable to the state.[102]

In order to have a § 1983 claim, the claimant must demonstrate that the action complained of involved state law. "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the alleged wrongdoer is clothed with the authority of state law.'"[103] In 1982, in an attempt to establish some kind of framework to use in formulating what constitutes state action, the Supreme Court enunciated three tests to use in a § 1983 inquiry.[104] The three cases that created this framework are often referred to as the "Blum trilogy,"[105] and the three tests are the following: (1) the public function

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[97] 891 F.2d 122 (6th Cir. 1989) (holding that the association not subject to the limitations of the Fourteenth Amendment because the association was not acting under the color of state law).

[98] 804 F.2d 953 (6th Cir. 1986) (holding that a university's action of canceling student athletic scholarships without any hearing was not a state action).

[99] *Burrows*, 891 F.2d at 122; *Graham*, 804 F.2d at 953.

[100] *Id.* at 958. Since the association was a national association, the court reasoned that its conduct was thus not exclusively the state's concern. *Id.*

[101] *Burrows*, 891 F.2d at 125. Moreover, the Ohio School Athletic Association was already deemed a state actor in *Yellow Springs*. *Yellow Springs*, 647 F.2d at 653.

[102] *See supra* note 18 and accompanying text.

[103] West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). In *West*, an inmate at a North Carolina state prison brought suit under 42 U.S.C. § 1983 against a physician who rendered services to him at the prison claiming that he should have had the right to seek a different physician and to be free from cruel and unusual punishment. *Id.* at 44-46. The Supreme Court faced the issue of whether the physician, who was a private physician, but who had contracted with the state to provide medical services to inmates on a part-time basis, was acting under state law. *Id.* at 45-46. The Court held that the physician was acting under the color of state law. *Id.* at 57.

[104] Blum v. Yaretsky, 457 U.S. 991 (1982).

test; (2) the state compulsion test; and (3) the symbiotic relationship test.[106] Each matter before courts regarding state versus private action must be handled on a case-by-case basis, and no one test is more persuasive than another.[107]

The public function test requires that a private entity exercise powers that are "traditionally exclusively" reserved to the state.[108] The state compulsion test necessitates a showing that a state exercise "such coercive power or provide such significant encouragement" that the actions of the private entity are considered that of the state.[109] Under the symbiotic relationship test, which is also known as the nexus test, a "sufficiently close nexus" must be proved between the state and the private actor.[110]

In *Blum*, plaintiffs Yaretsky and Cuevas were patients in a nursing home and Medicaid recipients.[111] The nursing home decided to relocate plaintiffs to a lower level nursing home because they did not need the level of care that they were receiving.[112] Once the Medicaid program was notified of the planned trans-

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[105] *See* Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982). *See supra* note 14. The Blum trilogy is further summarized in Wolotsky v. Huhn, 960 F.2d 1331, 1339 (6th Cir. 1992).

[106] *See Wolotsky*, 960 F.2d at 1335. In *Wolotsky*, plaintiff was a social worker for a nonprofit mental health center who was terminated because of allegations that he had performed homosexual acts on a patient. *Id.* at 1333-34. A fourteen-member board of trustees governed the center, and neither the state nor the county had any influence in the appointment of the trustees. *Id.* at 1333. The United States Court of Appeals for the Sixth Circuit applied the "Blum trilogy" to reach the conclusion that the mental health center was not a state actor. *Id.* at 1335. Under the public function test, the plaintiff could not prove that the mental health care center exercised powers that were traditionally reserved to the state. *Id.* The plaintiff also could not provide evidence that the state supplied either covert or overt significant encouragement in the administration of the center; therefore, the center failed the state compulsion test. *Id.* Moreover, the center could not be found to be a state actor under the symbiotic relationship test because there was no close nexus between the state and the center. *Id.*

[107] *Lugar*, 457 U.S. at 939.

[108] *Wolotsky*, 960 F.2d at 1335.

[109] *Id.*

[110] *Id.*

[111] *Blum*, 457 U.S. at 995. Congress established the Medicaid program under 42 U.S.C. § 1396 *et seq.*, which provides federal financial assistance to states that reimburse the poor for their medical costs. *Id.* at 993. To obtain Medicaid, an individual must meet both income standards and must be seeking necessary services. *Id.* at 994.

[112] *Id.* at 995.

fer, the program chose to discontinue the plaintiffs' benefits unless they agreed to comply with the transfer.[113] As such, plaintiffs brought suit alleging that the actions of the Medicaid program violated their due process rights under the Fourteenth Amendment.[114] Due to the fact that the Fourteenth Amendment creates no shield against private conduct,[115] the issue before the Court was whether the nursing home's transfer of patients to other nursing homes could be attributable to the state.[116]

In order to demonstrate that the nursing home was a state actor, the Supreme Court first required that the plaintiffs show that there was a "close nexus" between the state and the action of the nursing home.[117] The Court stated, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[118] The Court concluded that the nexus would be acceptable for a Due Process claim where the powers employed by the actor were powers reserved to the state.[119]

Applying the following principles to the facts, Justice Rehnquist found that the nursing home's transfers did not constitute state action.[120] Justice Rehnquist reasoned that being subject to state regulation did not create a close enough nexus between the state and private actor.[121] Additionally, the Court held that the state's support through the Medicaid payments was also insufficient to establish

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[113] *Id.*

[114] *Id.* Plaintiffs brought a class action suit on behalf of all Medicaid-eligible residents in New York nursing homes, which included all those patients who have been forced or will be threatened to leave their nursing homes and have their Medicaid benefits reduced or terminated. *Id.* at 996 n.6.

[115] U.S. CONST. amend. XIV, § 1.

[116] *Blum*, 457 U.S. at 1003.

[117] *Id.* at 1004 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974). The Court believed that the purpose in requiring a "close nexus" was to make certain that the state was definitely responsible for the actions complained of before invoking constitutional protections. *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 1012.

[121] *Id.* at 1004.

state action under any of the three principles.[122]

In the case of *Lugar v. Edmondson Oil*,[123] Edmondson Oil sought prejudgment attachment of Lugar's property to satisfy an outstanding debt.[124] Lugar alleged that this violated his Fourteenth Amendment due process rights because the state was acting jointly with the oil company in depriving him of his property.[125] In determining whether the deprivation was fairly attributable to the state, the Supreme Court focused on a two-part approach. First, the deprivation had to be caused by a state law or by a rule that is imposed by a person under the responsibility of the state.[126] Second, the party against whom the action is being brought must be deemed to be a state actor.[127] Because the attachment required judicial action, the Court held that there was a sufficient nexus between the state and the actions.[128] Thus, the Supreme Court found that the deprivation involved state action thereby triggering Fourteenth Amendment due process protection.[129]

In contrast, in *Rendell-Baker*,[130] the Supreme Court found that there was no state action on the part of a school operated by a private corporation when it discharged its teachers.[131] The school at issue was founded as a private institution, on private property, and public administrators had nothing to do with the selection of its board of directors.[132] However, the school was funded by the public as long as it complied with regulations that were set up the by state.[133]

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[122] *Blum*, 457 U.S. at 1005.

[123] 457 U.S. 922 (1982).

[124] *Lugar*, 457 U.S. at 924.

[125] *Id.*

[126] *Id.* at 937.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] 457 U.S. 830 (1982).

[131] *Rendell-Baker*, 457 U.S. at 839.

[132] *Id.* at 831-32. The school is a school for children who suffer from behavioral problems, drug and alcohol problems, and those who have other special needs. *Id.* at 832. Nevertheless, the public school committee approves all diplomas issued by the subject school. *Id.*

[133] *Id.* at 832. At least 90% of the school's funds came from the state. *Id.* The regula-

Rendell-Baker, a teacher at the school, was discharged in January of 1977 for exercising her First Amendment rights when she so advised the board of directors that she supported a petition regarding the student-staff council.[134] Rendell-Baker brought suit for violations of her First, Fifth, and Fourteenth Amendment rights under 42 U.S.C. § 1983.[135] Justice Burger, writing for the majority, turned to the principles discussed in *Blum*, and applied them to the issue of whether the discharge was attributable to the state.[136]

In formulating the opinion, Justice Burger found that the termination of employment had nothing to do with state regulation.[137] The Justice opined that even though the state funded the tuition of many of the students, this funding did not affect the relationship between the school and its teachers.[138] The Justice considered whether the education of these troubled students was a matter reserved to the state.[139] Admitting that providing services for such students is a concern of the state, the Justice nonetheless determined that the education of these students was not a matter "exclusively" reserved to the state.[140] The Court also rejected the argument of an existence of a symbiotic relationship between the state and the school holding that the school's financial relationship with the state was equivalent to contractors simply performing services for the government.[141] Therefore, the majority found that there was no state action involved in the discharges, and thus, no violations of the First, Fifth, or Fourteenth Amendments.[142]

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tions imposed by the state included maintaining written job descriptions and statements describing personnel standards. *Id.* at 833. In addition, the school had a contract with the public school committee under which it stated that school employees were not city employees. *Id.*

[134] *Id.* at 834. The director of the board was against the petition and therefore, was against Rendell-Baker's position. *Id.*

[135] *Id.*

[136] *Id.* at 840-41.

[137] *Rendell-Baker*, 457 U.S. at 841-42.

[138] *Id.* at 841.

[139] *Id.* at 842.

[140] *Id.*

[141] *Id.* at 843.

[142] *Id.*

The determinations in *Blum*, *Lugar*, and *Rendell-Baker* make it clear that when courts consider what conduct may be attributable to the states, there is no single test to be applied.[143] The reasoning employed by the Supreme Court in these decisions demonstrates that there is a fine line drawn between action subject to the Fourteenth Amendment and private conduct that is not.[144]

IV. OPINION

A. JUSTICE SOUTER'S MAJORITY OPINION

Writing for the majority,[145] Justice Souter began the Court's examination of whether a statewide athletic association's enforcement of its regulations and rules may be deemed state action, and therefore subject to the strictures of the Fourteenth Amendment pursuant to § 1983.[146] The Court reasoned that the issue as to whether an entity is subject to a lawsuit under § 1983 is the same as the issue in Fourteenth Amendment violation claims.[147] Justice Souter stressed that in

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[143] *Brentwood Academy*, 121 S. Ct. at 929.

[144] *Id.* (citing *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)).

[145] Justice Souter delivered the opinion of the *Brentwood Academy* Court, in which Justices Stevens, O'Connor, Ginsburg, and Breyer respectively joined. *Id.* at 926. Justice Thomas filed a dissent, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined. *Id.* at 935 (Thomas, J., dissenting).

[146] *Id.* at 927.

[147] *Lugar*, 457 U.S. at 935. Specifically the Supreme Court stated, "[i]f a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes." *Brentwood Academy*, 121 S. Ct. at 930 (quoting *Lugar*, 457 U.S. at 935).

The pertinent part of the Fourteenth Amendment 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 shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

order for an organization to be treated as a state actor, there must be a "close nexus between the State and the challenged action." [148] Justice Souter began the majority's analysis by examining prior cases decided by the Supreme Court that set forth facts that could weigh in favor of a finding of state action.[149] Noting that no one fact could serve as a definitive requirement,[150] the Court referenced several factors that led to state action, including challenged activities that derived from a state's coercive power,[151] activities where the state provided significant encouragement,[152] and activities where there was entwinement with governmental management.[153]

Next, Justice Souter set the stage for the Court's analysis by highlighting

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[148] *Brentwood Academy*, 121 S. Ct. at 930 (quoting *Jackson*, 419 U.S. at 351). In *Jackson*, plaintiff brought an action against a privately owned utility company because the utility company, Metropolitan Edison Company ("Metropolitan"), cut off plaintiff's electrical services for nonpayment of her bills. *Id.* Metropolitan held a certificate of convenience, which subjected the company to regulation by Pennsylvania's Public Utility Commission, however, the certificate also granted Metropolitan the right to cut off services to those who did not pay their bills. *Id.* at 346. Plaintiff brought a lawsuit seeking Fourteenth Amendment rights of notice, a hearing, and an opportunity to pay the amounts due. *Id.* at 347. In deciding whether the termination of the electrical services was private conduct, the Supreme Court emphasized that being subject to state regulation alone does not change a private business's actions into state actions for purposes of the Fourteenth Amendment. *Id.* at 350 (citing Public Utilities Commission v. Pollak, 343 U.S. 451, 462 (1952)). Rather, the Court focused on the need for a close nexus to be found between the state and the entity. *Jackson*, 419 U.S. at 350-51. In this matter, the Court concluded that even though Metropolitan was subjected to state regulation and enjoyed a partial monopoly of electrical services, there was no state action because there was not a sufficiently close nexus. *Id.* at 352-57. Consequently, plaintiff's complaint was dismissed. *Id.* at 358-59.

[149] *Brentwood Academy*, 121 S. Ct. at 924 (citing *Blum*, 457 U.S. at 1004; *Lugar*, 457 U.S. at 941; Pennsylvania v. Board of Directors of City Trusts of Philadelphia, 353 U.S. 230, 231 (1957); and Evans v. Newton, 382 U.S. 296, 299-301 (1966)).

[150] *Id.* at 930 (citing *Tarkanian*, 488 U.S. at 193-95; Polk v. Dodson, 454 U.S. 312 (1981)).

[151] *Id.* (citing *Blum*, 457 U.S. at 1004).

[152] *Id.* (citing *Lugar*, 457 U.S. at 941).

[153] *Id.* (citing *Evans*, 382 U.S. at 299, 301). Similar to *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, in *Evans*, a tract of land, to be used as a park for white people only, was devised to the mayor of a city in Georgia, and managed by a state board. *Evans*, 382 U.S. at 297-98. To avoid state association, the mayor resigned the city as the trustee for the park. *Id.* at 298. Nevertheless, Justice Douglas, writing the opinion for the majority of the Court, stated that due to the public nature of the park, it had to be regarded as a public entity subject to the strictures of the Fourteenth Amendment. *Id.* at 302.

situations where agencies of a state exerted control over a private entity, thereby rendering the private entities state actors subject to the Fourteenth Amendment.[154] Justice Souter repeated the Court's familiar principle that "the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies."[155]

In reviewing *National Collegiate Athletic Association v. Tarkanian*,[156] Justice Souter noted the rationale that there was no state action on the part of the NCAA.[157] The majority reasoned that the policies were not produced only by

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[154] *Id.* (citing *Board of Directors*, 353 U.S. at 231). Focusing on the state's control over a private entity, the Supreme Court held that a private college was an agency of the state where the "Board of Directors of City Trusts of the City of Philadelphia" operated the college. *Board of Directors*, 353 U.S. at 231. In this case, a trust fund was left for the creation of a college in Philadelphia for poor white male orphans. *Id.* Suit was subsequently brought against the college by two African Americans who alleged that the college violated their Fourteenth Amendment rights by excluding them from admission because of their race. *Id.* The Supreme Court concluded that the discrimination was a violation of the Fourteenth Amendment to the Constitution because the Board that operated the school was an agency of the state, thereby attributing the actions to the State of Pennsylvania. *Id.*

[155] *Brentwood Academy*, 121 S. Ct. at 302 (citing Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995)). The *Lebron* Court was faced with the issue of whether Amtrak, a National Railroad Passenger Corporation, was limited in its activities because of the constraints of the First Amendment of the Constitution. *Lebron*, 513 U.S. at 374. The petitioner, Michael Lebron, created a billboard to be displayed in the Amtrak Railroad Station upon the approval of the company that managed the leasing of Amtrak Station's billboards and Amtrak. *Id.* at 376. Amtrak, however, did not approve of the advertisement for the billboard because of its political content. *Id.* at 377. Consequently, Lebron brought an action against Amtrak claiming that Amtrak's refusal to approve the billboard violated his First Amendment rights to free speech. *Id.* In order for Lebron's First Amendment claim to prevail, the Supreme Court had to first find that Amtrak was a state actor, and to make this decision Justice Scalia had to turn to the history of Amtrak. *Id.* at 383-84. Despite the fact that Amtrak was organized as a private corporation, after reviewing the nature and history of the corporation, Justice Scalia held that it was a state actor for the purposes of the First Amendment of the Constitution because it was also created to satisfy governmental objectives. *Lebron*, 513 U.S. at 386-87.

[156] 488 U.S. 179 (1988).

[157] *Id.* at 932-33 (citing National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 199 (1988)). In *Tarkanian*, the National Collegiate Athletic Association (NCAA) suspended Jerry Tarkanian, the head basketball coach for the University of Nevada (UNLV). *Tarkanian*, 488 U.S. at 181. Thereafter, Tarkanian brought suit against UNLV and the NCAA alleging that his Fourteenth Amendment rights to due process had been violated. *Id.* The Supreme Court was confronted with making the decision as to whether the NCAA's regulations violated the Fourteenth Amendment because the rules constituted state action. *Id.* at 182. In order to reach a just conclusion, the majority began by exploring the relationship between the

UNLV, rather, many institutions located outside of the State of Nevada were also involved with their creation.[158] This analysis is what is so critical to the *Brentwood Academy* Court's analysis. The Court specifically stated in dictum, "[t]he situation would, of course, be different if the [Association's] membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign."[159] This converse situation presented itself to the Court in *Brentwood.* Consequently, the Court believed that the Association's conduct in *Brentwood* had to be characterized as state action that violated the Fourteenth Amendment.[160]

Justice Souter, proceeded to develop the Court's opinion by focusing on the pervasive entwinement between the State of Tennessee and the Association.[161]

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parties. *Id.* The Court found that the following facts were significant in classifying the NCAA as either a private or state entity: Jerry Tarkanian was a tenured professor at UNLV, UNLV was a state-funded university that acted under the color of state law, and the NCAA was a private organization with both public and private members, all of whom agreed to follow the rules and regulations produced by the Council of the NCAA. *Id.* at 183.

[158] *Id.* (citing *Tarkanian*, 488 U.S. at 194). This fact pattern is the exact opposite of the *Brentwood* case, where all of the members were located within the State of Tennessee. *Id.* at 931.

[159] *Id.* (citing *Tarkanian*, 488 U.S. at 194). Two earlier cases highlight the Court's rationale in *Tarkanian. See e.g.,* Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), *cert. denied,* 464 U.S. 818 (1983); Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968). In *Clark,* a state athletic association adopted a policy that barred boys from playing on girls' volleyball teams. *Clark,* 695 F.2d at 1128. Students of the affected schools who alleged that their Fourteenth Amendment equal protection rights were violated brought the challenge to the policy. *Id.* Thus, the question of whether the association was to be considered a state actor arose. *Id.* The Ninth Circuit found that the association was a state actor because the association was substantially intertwined with the state. *Id.* The court's determination was based on the fact that all of the member schools, both public and private, were located within the state and played a role in developing the policies of the association. *Id.*

Similarly, in *Louisiana High School Athletic Ass'n,* the association was treated as a state actor. *Louisiana High School Athletic Ass'n,* 396 F.2d at 225. The association refused to accept a parochial school's membership into the association because the association had established a racially segregated membership system. *Id.* at 226-27. Once again, the court was faced with an association made up of the majority of the state's public schools who headed the association. *Id.* at 227. As such, the Fifth Circuit concluded that the facts demonstrated a substantial entwinement between the state and the association. *Id.* at 229.

[160] *Brentwood Academy*, 121 S. Ct. at 932.

[161] *Id.*

The Court noted that despite the private characterization of the Association, the entwinement was so substantial that it outweighed the Association's private nature.[162] The Justice based the Court's finding of pervasive entwinement on several factors.[163] As a result, the Court determined that the constitutional limitations of the Fourteenth Amendment could not be avoided.[164] First, the Court commented that the Association's public school members made up eighty-four percent of the organization, and because each member had a vote in the makeup of the council and the board of control, control of the council and board was in the state's hands.[165]

Second, the Court considered the Association's role in the education of the students of the public schools of Tennessee.[166] The majority declared that the Association's role was vital in providing a systematized, competitive athletics program for these students.[167] The majority also noted that the public schools could use the Association to their advantage in that half of the Association's meetings of the board occurred during school hours and the public schools charged admission to the sports events of which the revenues went directly to the Association.[168]

Third, Justice Souter illustrated an additional contributor to the principle of pervasive entwinement. [169] Justice Souter maintained that while the public officials' relationship with the Association was demonstrative of entwinement from the bottom up, there was also complimentary entwinement from the top down.[170] The Justice claimed that this complimentary entwinement was evident in the

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[162] *Id.*

[163] *Id.* The factors the Court relied upon included the following: The State Tennessee exercised power over the Association, Tennessee provided significant encouragement to the Association, the Association operated in joint activity with the State, and the Association and the State were entwined in the control and management of the Association. *Id.*

[164] *Id.*

[165] *Id.* Justice Souter acknowledged that even though there is no law holding that public officials definitely act in their public capacity when representing their schools, it is a valid, rational belief. *Id.* at 932.

[166] *Brentwood Academy*, 121 S. Ct. at 932.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

state's employees, who were serving on the board of control and legislative council, and who were eligible for membership in the state's retirement fund.[171]

Fourth, the Court noted that because of the degree of entwinement, the removal of the language in the Association's bylaws wherein the state expressly delegated regulatory authority over to the Association was insignificant.[172] In support of this position, Justice Souter stated, "[b]ut the removal of the designation language from Rule 0520-1-2-08 affected nothing but words."[173] The majority reiterated that the close relationship between the State of Tennessee and the Association demonstrated pervasive entwinement, thereby holding that the private Association was state oriented in character, and thus subject to the Fourteenth Amendment.[174] Lastly, the majority used the pervasive entwinement argument to rebut the Association's position that it is a private organization.[175] The Court dismissed the public function test advanced by the Association by concluding that it was an inappropriate measure for *Brentwood Academy* because of the entwinement involved.[176]

Additionally, the Supreme Court rejected the contention that "coercion" and "encouragement" were required by the State of Tennessee.[177] The Court instead provided that coercion, encouragement, and entwinement were alike, and that no one of the notions need be necessarily present.[178] Therefore, the Court said that the presence of any one of these elements was deemed sufficient to attribute actions to a state, and there was no subsequent need to look for the presence of any of the other concepts.[179]

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[171] *Id.* at 932-33.

[172] *Brentwood Academy*, 121 S. Ct. at 933. Such delegation of authority lends itself to evidence of the state compulsion test as set forth in *Blum*. *Blum*, 457 U.S. at 991.

[173] *Brentwood Academy*, 121 S. Ct. at 933.

[174] *Id.*

[175] *Id.* at 934. The Supreme Court undermines the other criteria set forth in previous cases, such as the public function test, by asserting that the other tests are beside the point where the criterion of entwinement is present. *Id.* at 934-35.

[176] *Id.*

[177] *Id.* at 934. The requirements of "coercion" and "encouragement" were put forth in prior cases, and became known as the state coercion test. *See* Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992).

[178] *Brentwood Academy*, 121 S. Ct. at 934.

[179] *Id.*

The Court made it clear, however, that there were circumstances where the public nature of an entity and its actions could be outweighed by certain issues.[180] The Court gave the example of where a full-time employee of the state may be deemed a private actor where he is an adversary to the state.[181] Considering the Court's analysis, Justice Souter concluded by stating that the finding of state action on the part of the Association "portends nothing more than the harmony of an outlying Circuit with precedent otherwise uniform."[182] The Supreme Court held that the pervasive entwinement of the state actors involved in the conduct of the Association was sufficient to attribute the actions to the state, and thereby render them void under the Fourteenth Amendment of the Constitution.[183]

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[180] *Id.* (citing Polk County v. Dodson, 454 U.S. 312 (1981)). In *Polk*, the issue before the Court was whether a public defender was a state actor for purposes of his or her representation of an indigent defendant in a criminal proceeding. *Id.* at 314. The case was brought to the Supreme Court by a suit filed by Richard Dodson, who alleged that the public defender representing him for criminal charges failed to adequately represent him. *Id.* There was no question that the public defender was an employee of the state. *Id.* However, Justice Powell found that the functions of the public defender were not dependent on state authority. *Id.* at 317. The majority reasoned that even though lawyers are viewed as officers of the court, a defense attorney opposes the representatives of the state; therefore, the defense lawyer serves the public, not the state. *Id.* at 319. In holding that a public defender is not a state actor, the Court looked to the function of the public defender rather than the employment relationship. *Id.* Justice Powell reasoned that this approach was acceptable because the states are to "respect the professional independence" of public defenders. *Id.* at 322.

[181] *Id.* (citing *Polk*, 454 U.S. at 323).

[182] *Id.* at 935.

[183] *Id.* On remand from the Supreme Court's ruling that the Association was a state actor subject to constitutional challenges, the United States Court of Appeals for the Sixth Circuit reviewed the constitutionality of the Association's recruiting rule under the strictures of the First Amendment. Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, No. 98-6113, 2001 U.S. App. LEXIS 18999, at *1 (6th Cir. 2001). Judge Ronald Lee Gilman provided the opinion of the court. *Id.* at *1-2. Judge Gilman addressed the Association's argument that Brentwood Academy had waived its right to challenge the validity of the recruiting rule. *Id.* at *10-11. The Association contended that because Brentwood Academy voluntarily chose to become a member of the Association and voluntarily agreed to its rules and regulations, it thereby waived its rights to object to the rules. *Id.* To support its contention, the Association cited fives cases where the courts found that a party had waived its rights. *See e.g.*, Town of Newton v. Rumery, 480 U.S. 386 (1987); D.H. Overmyer Co., v. Frick Co., 405 U.S. 174 (1972); Lake James Comm. Volunteer Fire Dept. v. Burke County, 149 F.3d 277 (4th Cir. 1998); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985); Int'l Union v. Dana Corp., 697 F.2d 718 (6th Cir. 1983). Despite the Association's attempt to persuade the court, Judge Gilman distinguished all five cases from Brentwood Academy's case. *Brentwood Academy*, No. 98-6113, 2001 U.S. App. LEXIS 18999, at *11-14. Judge Gilman distinguished the cases on the basis that all the parties involved expressly waived their rights,

whereas in *Brentwood Academy*, the Association's regulations did not contain an express provision prohibiting a challenge of the rules. *Id.* at *12. Therefore, Judge Gilman concluded that Brentwood Academy did not waive its rights to challenge the recruiting rule under the First Amendment rights of free speech. *Id.* at *14.

Finally, Judge Gilman focused the court's attention on the First Amendment issue. *Id.* at *15. Judge Gilman set the stage for the court's analysis by reviewing the analytical frameworks applied to free speech challenges. *Id.* The court also acknowledged that the frameworks varied depending on whether they were applied to content-based regulations or content neutral regulations. *Id.* Looking first to content based restrictions, the court repeated that "[a] fundamental premise of First Amendment jurisprudence is that the 'government may not regulate speech based on its substantive content or the message it conveys.'" *Id.* (quoting Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995)). Consequently, the judge emphasized that content based restrictions must pass strict scrutiny analysis to survive constitutional challenge, that is, the regulations must further a compelling state interest and must be narrowly tailored to further those interests. *Id.* (citing Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)). Analyzing the nature of the recruiting rule, Judge Gilman reached the conclusion that the rule was not a content-based restriction. *Id.* The judge based his reasoning on the finding that the rule did not completely ban communications between the member schools and student athletes. *Id.* Instead, the court stated that the rule merely prohibited member schools from exercising undue influence on students to persuade them to participate in the schools' athletics programs. *Id.* at *17. According to Judge Gilman, the recruiting rule did not restrict the substantive content of the message; rather it restricted the manner in which the message could be conveyed. *Id.* To support the court's position, the judge referenced a letter written by Brentwood Academy's attorney, which detailed acceptable ways the academy could still put forth information about its athletics programs. *Id.* at *18.

Brentwood Academy argued that the rule was content based because it barred school representatives from discussing the "entire topic" of athletic programs, and it stopped incoming students from learning about their options in the athletic programs. *Id.* at *19. The court was not persuaded by the academy's argument however, and concluded that the recruiting rule was not a content-based regulation. *Id.* at *19-20. The court believed that the incoming students still had numerous other means of receiving information about the athletic programs, so the topic was not being restricted, only the channel by which it could be received was being regulated. *Id.* at *20. Therefore, Judge Gilman turned to the analysis for time, place, and manner restrictions. *Id.*

The Supreme Court has recognized that content neutral regulations could have an effect on the substance of speech, but are nevertheless, constitutionally valid. *Id.* at *23. The Sixth Circuit repeated, "'[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" *Id.* at *23 (quoting *Ward*, 491 U.S. at 791) (holding that noise level regulation in a public park was a valid content-neural restriction because it was the least intrusive means of furthering the government interest). Judge Gilman likened Brentwood Academy's recruiting rule to valid zoning ordinances that were found to be time, place, and manner restrictions. *Id.* at *22-23. The court cited *City of Renton v. Playtime Theatres, Inc.*, to support its position. *Id.* (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)). In *City of Renton*, a zoning ordinance provided that adult motion picture theaters could not be located within one thousand feet of any residential zone, church, park, or school. *Id.* (citing *City of Renton*, 475 U.S. at

B. JUSTICE THOMAS DISSENTS

Justice Thomas, in a dissenting opinion joined by the Chief Justice, Justice Scalia and Justice Kennedy, disagreed with the majority that state action could be found based upon pervasive entwinement.[184] Rather, Justice Thomas posited that the Court should consider the Fourteenth Amendment issue under the Blum trilogy analysis.[185] Further, Justice Thomas stated that the majority's holding

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43). In addressing the constitutionality of the ordinances, the Court determined that they were not content-based restrictions. *Id.* (citing *City of Renton*, 475 U.S. at 46-47). The Court described the zoning ordinance as a time, place, and manner restriction because it was aimed at the "secondary effects" of the theaters on the communities surrounding them, rather than on the content of the films. *Id.* (citing Tovar v. Billmeyer, 721 F.2d 1260, 1266 (9th Cir. 1983)). The Court stated that the zoning ordinance did not forbid the entire existence of the theaters; it merely regulated the locations for them, which was acceptable under the *O'Brien* test. *Id.* at *46 (citing United States v. O'Brien, 391 U.S. 367 (1968)). Similarly, Judge Gilman reasoned that the recruiting rule was not a complete ban on athletic opportunities. *Id.* at *22. The court then presented other examples of regulations that were comparable to the Association's rules and were upheld. *Id.* at *22-34. *See* Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) (holding that the state's injunction, which prevented the use of sound amplification equipment by protestors, was valid because it only restricted the use to certain hours and days); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (concluding that an ordinance that banned the conduct of posting signs on public property was acceptable because there were other still other means for posting the signs); Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (holding that the state could place a regulation on the distribution of religious materials where the state regulation required religious organizations to solicit from rental booths in designated areas at a state fair because the time, place, and manner restriction left open a channel for distribution). Consequently, the court subjected Brentwood Academy's recruiting rule to an intermediate scrutiny standard of review. *Brentwood Academy*, No. 98-6113, 2001 U.S. App. LEXIS 18999, at *24-25 (citing Watchtower Bible & Tract Soc'y of New York v. Vill. Of Stratton, Ohio, 240 F.3d 553, 560 (6th Cir. 2001)). In order to be upheld, the court said that the rule now has to be found to serve a "substantial government interest," and it cannot unreasonably limit "alternative avenues of communication." *Id.* at *2 (citing *City of Renton*, 475 U.S. at 47).

One other matter the court resolved was whether the recruiting rule was facially overbroad. *Id.* at *26. The Supreme Court stated that a regulation must be vague in all of its functions to be held overbroad. *Id.* at *29. In *Brentwood Academy*, the Sixth Circuit concluded that the recruiting rule was accompanied by questions, answers, and guidelines explaining and interpreting the rule. *Id.* at *32. In addition, the court reasoned that the Association's rules gave notice of exactly what was prohibited conduct. *Id.* at 32-33. Therefore, Judge Gilman held that the rule was not facially overbroad, and was a content neutral regulation subject to intermediate scrutiny. *Id.* at 33.

[184] *Brentwood Academy*, 121 S. Ct. at 935 (Thomas, J., dissenting).

[185] *Id.* Justice Thomas argued that one of the three tests of the *Blum* trilogy, either the public function test, the state coercion test, or the symbiotic relationship test had to be met besides a finding of entwinement. *Id.*

stretched the framework for state action beyond its limits.[186] The Justice asserted that consequently, the analysis infringed upon the value of federalism, which the Fourteenth Amendment's state action requirement sought to protect.[187]

The Court's finding of state action on the part of the Association, Justice Thomas first stressed, contradicted notions of federalism and even common sense.[188] In so arguing, the Justice turned to the history and nature of the Association.[189] The Justice emphasized that the Association was formed as a private organization, and that the members all signed a contract agreeing to the rights and regulations put forth by the Association.[190] Moreover, Justice Thomas dismissed the fact that all of the Association's board members were public officials by reasoning that there was no requirement that the board members had to be from public schools.[191] Other considerations Justice Thomas noted were that the Association was not created by the State of Tennessee, the Association was not funded by the State of Tennessee, the Association did not have the right to use state owned facilities at a discount, and the State did not pay the Association's employees.[192]

The dissent also questioned who the burden of persuasion was on to show the existence of state action.[193] The Justice maintained that the plaintiff had the burden of persuasion, not the defendant.[194] With the burden of persuasion placed upon the plaintiff, Justice Thomas then conducted an examination of the Blum

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[186] *Id.*

[187] *Id.* at 935-36 (Thomas, J., dissenting).

[188] *Id.* at 936 (Thomas, J., dissenting).

[189] *Id.*

[190] *Brentwood Academy*, 121 S. Ct. at 936. (Thomas, J., dissenting).

[191] *Id.*

[192] *Id.* While the State of Tennessee did not pay the salaries, the Association's employees were however, permitted to participate in the state's retirement plan. *Id.* at 928.

[193] *Id.* at 937 (Thomas, J., dissenting). While this examination was not part of the majority's analysis, Justice Thomas felt that the burden of persuasion was something that needed to be addressed. *Id.*

[194] *Id.* In placing the burden of persuasion upon the plaintiffs, Justice Thomas cited two cases two support this position. *See* American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1999); West v. Atkins, 487 U.S. 42 (1988).

trilogy as applied to *Brentwood Academy*.[195]

First, Justice Thomas argued that the Association's actions failed the public function test because they were not actions "'traditionally exclusively reserved to the State.'"[196] The Justice acknowledged that while the Association's conduct served the public, that was not enough to place it within the reservation of the state.[197] Next, the dissent concluded that the Association was not created for any governmental purpose, as was the case in *Lebron v. National Railroad Passenger Corporation*.[198] The Justice then reviewed the case to look for any coercive power exerted on behalf of the State of Tennessee in order to fairly attribute the Association's actions to the State.[199] Justice Thomas found that the State of Tennessee exerted no power over the Association however, and therefore, did not violate the state coercion test.[200] Finally, Justice Thomas concluded that there was no symbiotic relationship between the state and the Association.[201] The Justice disagreed with the majority's contention in opining that the Associa-

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[195] *Id.* at 937-38 (Thomas, J., dissenting).

[196] *Brentwood Academy*, 121 S. Ct. at 937 (Thomas, J., dissenting).

[197] *Id.* at 938 (Thomas, J., dissenting) (citing *Rendell-Baker*, 457 U.S. at 830). *See also* Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978). In *Flaggs Brothers*, the plaintiff brought suit for violations of her Fourteenth Amendment right to Due Process. *Flaggs Brothers*, 436 U.S. at 153-54. Plaintiff was evicted from her apartment, and her belongings were stored in Flaggs Brothers' warehouse. *Id.* at 153. When plaintiff failed to pay the charges for the storage facility, she received notice that her belongings would be sold in accordance with a state statute that provided for the enforcement of warehouse liens. *Id.* The Supreme Court held that Flaggs Brothers' actions were not fairly attributable to the state, and thus, they did not violate plaintiff's Fourteenth Amendment rights. *Id.* at 156. The Court found that the actions did not meet the required tests because the state's actions of providing ways to recover on liens did not compel the sale by Flaggs Brothers, nor did it interfere with it. *Id.* at 166.

[198] *Brentwood Academy*, 121 S. Ct. at 938 (Thomas, J., dissenting) (citing Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995) (holding that Amtrak was created for the purpose of fulfilling a governmental objective). Finding a governmental objective is sufficient to place a private organization within state control.

[199] *Brentwood Academy*, 121 S. Ct. at 938 (Thomas, J., dissenting). The coercive power could be either covert or overt and must be present to the extent of providing significant encouragement to the actor. Blum v. Yaretsky, 457 U.S. 991 (1982).

[200] *Brentwood Academy*, 121 S. Ct. at 938 (Thomas, J., dissenting). This was evident in the fact that the state did not promulgate any of the regulations, especially the recruiting rule, and there was no joint participation in the enforcement of the rules. *Id.*

[201] *Id.*

tion's financial relationship with the State of Tennessee was no different than a private contractor providing services to the government.[202]

After applying the three tests of the Blum trilogy, Justice Thomas addressed the majority's new theory for attributing state action, entwinement.[203] Justice Thomas disagreed with the Court's application of pervasive entwinement, and commented that the first flaw with the majority's entwinement requirement was that the majority never defined entwinement.[204] Then, Justice Thomas explained that there was no support for such a theory in the Court's precedents.[205] According to Justice Thomas, there were no cases other than *Brentwood Academy* where the Supreme Court attributed private conduct to a state based upon entwinement without one of the three main tests of the Blum trilogy being satisfied.[206] Lastly, Justice Thomas discounted the Court's view that the *Tarkanian*

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[202] *Id.* Justice Thomas viewed the Association's conduct as the service of providing sports competitions in exchange for membership dues and fees, which according to the Justice does not convert the Association into a state actor. *Id.*

[203] *Id.* at 939 (Thomas, J., dissenting). Justice Thomas suggests that the majority had to devise this new theory because the there was no evidence of state action under the existing theories. *Id.*

[204] *Id.* The majority found entwinement based upon a combination of factors present in the case, however, the majority did not point out the necessity of each one in making an entwinement analysis. *Id.* Moreover, Justice Thomas recognized that the term "entwinement" is not even self-explanatory. *Id.*

[205] *Id.* Justice Thomas emphasized that out of the three cases asserted by the majority to support entwinement, two of those case do not even refer to it as "entwinement." *Id.* (Thomas, J., dissenting) (citing *Lebron*, 513 U.S. at 374; Pennsylvania v. Board of Directors of City Trusts of Philadelphia, 353 U.S. 230 (1957)).

[206] *Brentwood Academy*, 121 S. Ct. at 939 (Thomas, J., dissenting). One of the cases relied upon by the majority was *Lebron*. However, in *Lebron*, Amtrak was found to be a state actor because the company, while deemed private, was created to further a governmental purpose. *Lebron*, 513 U.S. at 383, 386. Justice Scalia did not even mention the concept of entwinement. *Id.* The majority also claimed that there was entwinement involved in *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*. *Brentwood Academy*, 121 S. Ct. at 931. Yet, Justice Thomas contended that entwinement was not considered in the holding that an agency established by state law was a state actor because the outcome turned on the fact that the board was an actual state agency. *Id.* at 939 (Thomas, J., dissenting). The third example presented by the majority was *Evan v. Newton*. *Id.* at 930. Nevertheless, Justice Thomas argued that even though the word "entwinement" was used in the case, it was not relied upon as the sole reason for the holding that private trustees who were placed in charge of a park were deemed state actors. *Id.* at 939-40 (Thomas, J., dissenting) (citing Evans v. Newton, 382 U.S. 296 (1966). Justice Thomas pointed out that in Evans, the public function test was satisfied. *Brentwood Academy*, 121 S. Ct. at 939-40 (Thomas, J., dissenting).

case foreshadowed the Court's holding in *Brentwood Academy*.[207]

In conclusion, Justice Thomas maintained that it is necessary to preserve the individual freedom that the state action requirement was meant to protect, and that to accomplish this goal, state action should only be extended to include actions of private entities where those actions are truly attributable to the state.[208] In determining what is truly attributable to a state, Justice Thomas posited that the Court should look to the Blum trilogy rather than entwinement because the scope of entwinement is ambiguous.[209]

V. CONCLUSION

Brentwood Academy's holding represents a return back to the traditional view of athletic associations in connection to Fourteenth Amendment issues and civil rights cases. Prior to *Brentwood Academy*, courts were moving away from prior precedents that found associations to be within the status of a state actor.[210] The holding of the Sixth Circuit in *Brentwood Academy* reflects this departure from subjecting athletic associations to constitutional standards.[211] The Sixth Circuit was reluctant in *Brentwood Academy* to determine issues regarding athletic associations because the court felt that such issues were not of "constitutional magnitude."[212]

The Court's decision to find state action based upon the entwinement theory leaves the door open to many unanswered questions. The majority never fully defined the notion of entwinement, therefore, its meaning is unclear. In addition, the cases cited to by the Supreme Court in support of entwinement do not discuss entwinement as a distinct concept, so they do little to expand upon and clarify entwinement. As a result, the scope of the theory is vague. There is no indication as to which organizations will be measured by the entwinement test, and no guidelines establishing which tests apply to different circumstances. Moreover, the pervasive entwinement theory lacks support in prior case history.

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[207] *Brentwood Academy*, 121 S. Ct. at 940 (Thomas, J., dissenting). Justice Thomas stated that the dictum in *Tarkanian* was merely "ironic." *Id.*

[208] *Id.*

[209] *Id.*

[210] *See Tarkanian*, 109 S. Ct. at 454.

[211] *Brentwood Academy*, 180 F.3d at 758.

[212] *Brentwood Academy*, 180 F.3d at 766 (quoting Hardy v. University Interscholastic League, 759 F.2d 122, 1235 (5th Cir. 1985)).

The Supreme Court has now reopened the constitutional protections to athletic associations and their members, and has taken a broad approach to applying the state action requirement to the underlying facts. As the Supreme Court found, the Association is a state actor and liable for violations of the Fourteenth Amendment because to hold otherwise would grant the Association almost limitless power in its enforcement role. However, the Supreme Court did not need to go beyond the standard three criteria promulgated in *Blum* and rest the decision on the theory of entwinement.

There were ample factors for the Court to rely on to find that there was a symbiotic relationship between the State of Tennessee and the Association. For example, the employees of the Association were provided with retirement benefits from the state, and the member schools, which were mostly state schools, paid dues to the Association, thereby imparting financial support. In addition, the Court could have found that there was a substantial nexus between the State of Tennessee and the Association based on the fact that the board and legislative council were comprised of all public school officials. Moreover, the Supreme Court even had the option of resting the holding on the dictum found in the *Tarkanian* case.

The abovementioned alternatives presented the Court with a safer, more conservative approach to the state action requirement. They would have prevented new organizations that may be composed of other types of public officials from being swept into the realm of state action. Nevertheless, *Brentwood Academy* extended the constitutional rights and liberties to athletic associations, and in doing so, furthered the evolvement of civil rights in this country.