Recent Developments in Suits Against the NCAA: Has the NCAA Become a State Actor that Receives Federal Funding?

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Introduction

The National Collegiate Athletic Association ["NCAA"] is an association of approximately 1,200 colleges and universities, including "most of the public and private universities and four-year colleges that conduct major athletic programs in the United States."[1] Although nominally a private organization, the NCAA is governed by its member institutions, many of which are public.[2] The NCAA has been categorized as the "predominant governing body in college sports."[3]

While student-athletes and coaches have been able to sue their own institutions, it has been very difficult for them to sue the NCAA. Most suits against the NCAA have been unsuccessful. Courts have seemed reluctant to take claims involving student-athletes as seriously as they might for other civil rights violations. This has been a particular issue in claims related to participation in athletic programs.[4]

The Supreme Court created two main barriers to suits against the NCAA. First, the Court ruled that the NCAA is not a state actor. That decision effectively barred suits against the NCAA using Section 1983.[5] Second, the Court ruled that the NCAA is not the recipient of federal funding. That decision effectively barred suits using statutes such as Title IX[6] and Title VI.[7] Recently, however, a Supreme Court decision has raised hope that those barriers might come down.

This paper discusses the barriers, the recent decision, and the outlook for future suits

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[1] Cureton v. National Collegiate Athletic Ass'n, 37 F. Supp. 687, 690 (E.D.Pa. 1999).

[2] The policies, bylaws, and operating procedures of the NCAA are drafted, revised, and accepted by its member institutions. The NCAA is governed by its Council, which is composed of a president, secretary-treasurer, and 44 representatives from its member institutions. See Brief of amici curiae Michael Bowers in support of Respondent Smith at n. 10, National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) (No. 98-84) (stating also that the 44 institutions are composed of 22 from Division I, 11 from Division II, and 11 from Division III).

[3] See Bowers v. National Collegiate Athletic Ass'n, 9 F. Supp.2d 460, 467 (D.N.J. 1998). The NCAA only began formal consideration of the inclusion of women's intercollegiate sports in its programs in 1978—as a tactical maneuver to fend off potential gender discrimination suits in the wake of the 1972 enactment of Title IX. See Brief of amici curiae Michael Bowers in support of Respondent Smith at n. 10, National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) (No. 98-84), citing Don Yaeger, **Undue Process: The NCAA's Injustice for All** 11 (1991).

[4] See W. Burlette Carter, Student-Athlete Welfare in a Restructured NCAA, 2 **Va. J. Sports & L.** 1, 71-72 (2000) (stating that student-athletes have faced a "miserable time challenging NCAA action" and that even apart from the serious practical hurdles that students face in finding representation, the courts have seemed to consider participation as a privilege, not a right).

[5] 42 U.S.C. § 1983 (1988). Section 1983 creates a civil cause of action against a private party for violating the constitutional rights of an injured party. One of the requirements of Section 1983 is that the conduct complained of must have been committed by a person acting under color of state law—i.e., state action. See Wintehn K.T. Park, National Collegiate Athletic Assoication v. Tarkanian: The End of Judicial Review of the NCAA, 12 **U. Haw. L. Rev.** 383, 383-84 (1990).

[6] 20 U.S.C. §§ 1681-1688 (1994). Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §§ 1681(a) (1994).

[7] Title VI states: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

against the NCAA. Part I discusses the landmark NCAA v. Tarkanian case that created the barrier of state action, and offers the suggestion that the case was wrongly decided. Part II discusses NCAA v. Smith and other cases that created the barrier of federal funding and suggests that the Supreme Court failed to consider the Congressional intent behind Title IX and other anti-discrimination acts. Part III discusses the recently decided Brentwood Academy case that promises to open new possibilities for suits against the NCAA, and provides the new arguments that attorneys are using to strengthen their cases. The paper concludes by offering the opinion that the possibility of successful suits against the NCAA will shortly be much improved, and that the NCAA will need to be far more cognizant of the civil rights implications of its actions when creating and enforcing the rules that govern intercollegiate athletics.

I. IS THE NCAA A STATE ACTOR?

A. NCAA v. Tarkanian

In National Collegiate Athletic Association v. Tarkanian,[8] the Supreme Court, in a 5-4 decision, held that the NCAA was a private entity and therefore was not required to extend constitutional due process to its members. In a footnote, however, the Supreme Court provided hope for future suits against other athletic associations by proclaiming, "The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign."[9]

Jerry Tarkanian was the basketball coach at the University of Nevada, Las Vegas ("UNLV"). The NCAA cited Tarkanian and UNLV for thirty-eight NCAA rule violations.[10] The NCAA proposed a two-year probationary period and ordered UNLV to show cause why further penalties should not be imposed if UNLV refused to sever ties with Tarkanian.[11] After pursuing administrative appeals, UNLV pondered its options and chose to "[r]ecognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters . . ."[12] UNLV notified Tarkanian that it was going to suspend him.[13]

Tarkanian filed a Section 1983 action in Nevada state court against UNLV, alleging a due process deprivation.[14] The state trial court permanently enjoined Tarkanian's suspension. After appeals, the addition of the NCAA as a party, and removal to federal court, the federal district court concluded that the NCAA's conduct constituted state action.[15] The court reaffirmed an earlier injunction barring UNLV from disciplining Tarkanian, and also enjoined the NCAA from

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[8] National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

[9] Tarkanian, 488 U.S. at 194 n. 13 (explaining that the NCAA is an organization independent of any State). See infra notes 21-22 and accompanying text.

[10] Id. at 180-81 (stating that the violations were mostly for recruiting and refusal to cooperate with an NCAA investigation of UNLV's athletic programs).

[11] Id. at 186.

[12] Tarkanian, 488 U.S. at 187.

[13] See id. at 180.

[14] Tarkanian, 488 U.S. at 187.

[15] "Under color of state law" and "state action" have very similar meanings and are often treated as being equivalent. See Diane Heckman, Women & Athletics: A Twenty Year Retrospective on Title IX, 9 **U. Miami Ent. & Sports L. Rev.** 1, 35 (1992).

conducting any further proceedings against the university.[16] The Nevada Supreme Court affirmed the trial court's injunction, again holding that "the NCAA had engaged in state action"[17] and could therefore be sued under Section 1983.

The case eventually came before the United States Supreme Court, which agreed that UNLV was a state actor, but reiterated that the main question was whether UNLV's adherence to NCAA rules and recommendations converted the NCAA into a state actor. The Court looked at the rulemaking relationship between the NCAA and its member institutions. Even though UNLV, acting for the State of Nevada, had some input into the NCAA rules, the Supreme Court believed that the NCAA rules were the rules of the collective NCAA membership rather than the law of one particular state. Additionally, the Court stated that Nevada was not required to adopt the rules of the NCAA and could have instead attempted to amend the NCAA rules or create its own rules. As evidence that there was no partnership between the two, the Court looked at their antagonistic legal relationship. [18]

Tarkanian argued that the NCAA engaged in state action because UNLV had delegated investigative and enforcement powers to the NCAA. The Court recognized that under certain conditions such a delegation could convert a private actor into a public one, but did not believe that UNLV had instituted such a delegation here.

The dissent, authored by Justice White, argued that the NCAA engaged in state action because it acted jointly with state officials—UNLV—who engaged in state action. As an example, in the membership agreement, the parties agreed that the NCAA would conduct investigations and hearings when violations of the NCAA rules were alleged and that UNLV would be bound to the NCAA's findings. The dissent believed that UNLV had no choice under the agreement but to comply with the NCAA's recommendation to suspend Tarkanian. Withdrawing from the NCAA was not a viable option.[19]

The Supreme Court concluded that the NCAA was not a state actor. The decision essentially meant that future Section 1983 constitutional challenges against the NCAA policies would have very little chance of success. It insulated the actions of the NCAA from judicial review, thus leaving the constitutional rights of student-athletes, coaches, and other individuals unprotected from infringement by the NCAA.[20]

There was, however, a slight opening for individuals whose athletic endeavors were governed by other athletic associations. The Supreme Court implied in a footnote ("Footnote 13") that athletic associations with a different membership composition, particularly public institutions within the same State, might be held to be state actors.[21] Footnote 13 became very important for later cases involving high school athletic associations, including the Brentwood Academy case discussed later.[22]

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[16] Id. at 188-89. Tarkanian then filed a Section 1988 petition for attorney's fees and was awarded almost $196,000, ninety percent of which was to be paid by the NCAA. See 42 U.S.C. § 1988 (1994 & Supp. I 2000) (mandating that the defendant pay attorney's fees to a party that has prevailed when bringing an action under one of a set of specific civil rights statutes); Tarkanian, 488 U.S. at 189.

[17] Id. at 190.

[18] Id. at 196 (concluding that the NCAA was conducting an investigation of UNLV on behalf of the NCAA members, not on behalf of UNLV).

[19] Id. at 202-03 (White, J., dissenting).

[20] See Park, supra note 5, at 403.

[21] See Tarkanian, 488 U.S. at 194, n.13.

[22] See infra section III.A.

B. Tarkanian was Wrongly Decided

The Supreme Court examined the theoretical relationship between the NCAA and its members but did not take into account the actual relationship. The Court's basic premise was that membership in the NCAA is voluntary and that any of its members can disassociate from it at any time if they disagree with any of its directives or other actions. In actuality, however, this premise is wrong. NCAA membership provides great competitive and financial rewards for its member schools.[23] With 1,200 members[24] and three competitive divisions,[25] NCAA membership is necessary if a school desires the financial benefits that come with a local, regional, or national presence in intercollegiate athletics. Membership in the NCAA does not merely improve the athletic programs of a university but enhances its overall prestige as well.[26]

This concentration on the theoretical, rather than the actual, relationship caused the Court to believe that UNLV could have withdrawn from the NCAA.[27] In reality, however, withdrawing essentially was impossible; UNLV could not have withdrawn because it no longer could have been the type of university it wanted to be. Because it could not realistically withdraw, UNLV essentially became "a mere conduit through which the NCAA enforced its decisions."[28]

A second major area of concern with the Tarkanian decision is that the Court stated in overbroad terms that the NCAA was not a state actor. Section 1983 requires a case-by-case analysis of the facts.[29] Here, however, the Court did not restrict itself to the specific facts related to the issue, but instead examined the general characteristics of the NCAA. This resulted in a decision that has generally been considered by the courts to mean that the NCAA is never a state actor, rather than the more appropriate holding that the NCAA is not a state actor for the

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[23] See Park, supra note 5, at 393-94 (concluding that the Supreme Court's analysis in Tarkanian disregards the economic impact of NCAA membership); Brief as amici curiae in support of Respondent Smith at n. 7, National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) (No. 98-84) [hereinafter Smith Amici Brief] (stating that the NCAA has "unmitigated control over college athletics" and that "[t]he NCAA's prestige and the commercial opportunities it offers are powerful incentives for schools to obtain (and avoid losing) NCAA membership.").

[24] At the time of the Tarkanian case the NCAA had 960 members. See Tarkanian, 488 U.S. at 183.

[25] The three divisions are Division I, II, and III. Football divides Division I into Division I-A and I-AA. See Division I, II and III Membership Criteria, (visited March 5, 2001) **NCAA Home Page**, < http://www.ncaa.org>. For all issues related to liability of the NCAA, the Division that the school is a member of is a factor. See W. Burlette Carter, Student-Athlete Welfare in a Restructured NCAA, 2 **Va. J. Sports & L.** 1, 71-72 (2000) (stating that Division I schools are the most vulnerable to charges that they delegated their state powers to the NCAA and that Division III schools are least vulnerable).

[26] The National Association of Intercollegiate Athletics ("NAIA") is an organization similar to the NCAA. However, its member schools are less prestigious and the governance is much looser. See **NAIA Home Page**, (visited March 8, 2001) < http://www.naia.org>; see also Moving from the NAIA to NCAA Division III: Frequently Asked Questions, (visited March 8, 2001) <http://www.transy.edu/homepages/athletics/NCAAFAQ.htm> (indicating that almost all of the most well regarded schools are NCAA members including 111 of the top 113 national liberal arts colleges).

[27] The Supreme Court indicated that withdrawing would be difficult but not impossible. See Tarkanian, 488 U.S. at 198 n. 19.

[28] See Park, supra note 5, at 395.

[29] See id. at 394-95 (stating that a court's analysis needs to involve "sifting facts and weighing circumstances"), citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

narrow circumstances of the Tarkanian suspension.[30]

The third major area of concern was that the Court did not adequately consider the practical consequences of its decision. Its holding effectively dissolved the injunction from the Nevada Supreme Court, and meant that the NCAA was free to impose additional sanctions against UNLV if UNLV did not suspend Tarkanian. On the other hand, the Court had already acknowledged that Tarkanian could sue UNLV if UNLV suspended him. UNLV was thus left in a lose-lose predicament. It would face a lawsuit if it suspended Tarkanian or would face NCAA sanctions if it did not.[31] UNLV was fortunately spared the dilemma because Tarkanian agreed to resign at the end of the 1991-92 basketball season.[32]

II. IS THE NCAA THE RECIPIENT OF FEDERAL FUNDING?

A. NCAA v. Smith

In National Collegiate Athletic Association v. Smith,[33] the Supreme Court held that the NCAA, even though it accepted membership dues from institutions that receive federal funding, was not itself a recipient of federal financial assistance and therefore could not be sued under Title IX. However, the Court hinted that Smith's alternative arguments, although barred in that case, might be used in a future case to subject the NCAA to Title IX liability.[34]

Renee Smith played volleyball for St. Bonaventure University for two years. She graduated early from St. Bonaventure, enrolled in a postgraduate program at Hofstra University for one year, and then a year later enrolled in another postgraduate program at the University of Pittsburgh. During both years at Hofstra and Pittsburgh, she attempted to play volleyball but was denied eligibility by the NCAA.[35] The NCAA's Postbaccalaureate Bylaw[36] only allowed postgraduate athletes to compete at the same university that awarded their undergraduate degrees.

Smith brought suit against the NCAA alleging that its refusal to allow her to play intercollegiate athletics at Hofstra and Pittsburgh was discrimination based on sex—because the NCAA granted more postgraduate waivers to men than to women—and therefore a violation of Title IX.[37] The NCAA argued that it was not subject to Title IX because it was not a recipient of

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[30] See Park, supra note 5, at 394-95

[31] See Betty Chang, Coercion Theory and the State Action Doctrine as Applied in NCAA v. Tarkanian and NCAA v. Miller, 22 **J.C. & U.L.** 133, 140 (1995).

[32] See Chang, supra note 31, at n. 74, citing Douglas Lederman, Peace at Last in Las Vegas?, **Chron. Higher Educ.**, May 4, 1994, at A42.

[33] National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999).

[34] See Smith, 525 U.S. at 469-70; see discussion infra notes 41-43 and accompanying text.

[35] See Smith, 525 U.S. at 464 (stating additionally that at Smith's request, both Hofstra and Pittsburgh had petitioned the NCAA to waive the restrictions but the NCAA refused).

[36] NCAA Bylaw 14.1.8.2, **NCAA Manual** 1993-94.

[37] See Smith, 525 U.S. at 464-65. Smith also involved a Sherman Antitrust Act claim. The Third Circuit stated that Smith had no valid antitrust claim since the applicability of antitrust law focuses on commercial activities. See Smith v. National Collegiate Athletic Association, 139 F.3d 180, 186 (3d Cir. 1998), vacated by 525 U.S. 459 (1999). The court thus distinguished Smith from the 1998 case of Law v. National Collegiate Athletic Association, 134 F.3d 1010 (1998), cert denied 525 U.S. 822 (1998), which, employing the rule of reason, held that an NCAA rule on "restricted-earnings" basketball coaches was unlawful under antitrust laws. See generally Stephanie M. Greene, Regulating the NCAA: Making the

federal financial assistance, as required by Title IX. Smith argued that the NCAA was subject to Title IX because the NCAA governs the federally funded intercollegiate athletic programs of its member schools, that those programs are educational, and that the NCAA benefits economically from its members' receipt of federal funds.[38]

The district court agreed with the NCAA and dismissed the case. The case was ultimately appealed to the Supreme Court to determine the question of whether a private organization that receives payments from entities that receive federal funding, but does not itself receive federal funding, is subject to Title IX.[39] The Supreme Court held that dues payments from recipients of federal funds were not sufficient to render the NCAA subject to Title IX.[40]

The Court, however, indicated that Smith had presented two alternative arguments that, even though not allowed here because they had not been raised in the district court, could possibly work if raised again later. The first was that the NCAA receives federal financial assistance through the National Youth Sports Program[41] ("NYSP") it operates. The second was that an organization that assumes control over a federally funded program is subject to Title IX even if it itself is not a recipient.[42] The Court cited two district court cases that had found that the NYSP creates an issue of fact regarding the NCAA's status as a recipient of federal funds.[43]

B. Cureton v. NCAA

Cureton v. National Collegiate Athletic Association[44] was one of the cases cited by the Supreme Court in Smith as raising a potentially valid alternative argument regarding federal

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Calls under the Sherman Antitrust Act and Title IX, 52 Me. L. Rev. 81, 85-88 (2000). Jerry Tarkanian never brought an antitrust claim, but the Law decision indicates that today, if a coach with facts similar to Tarkanian brought an antitrust claim, there might be a chance of success.

[38] See Smith, 525 U.S. at 464.

[39] See id. at 465. The Supreme Court had first addressed the Title IX indirect funding issue in Grove City College v. Bell, 465 U.S. 555 (1984). Grove City did not directly receive federal financial assistance but did enroll students who received grants under a federal educational program. See id. at 559. The Court held that the assistance to the students was sufficient to subject Grove City to Title IX, but limited the scope of its ruling by adopting a "program-specific" approach that subjected only the program that was benefited by the financial aid—here the financial aid department—to Title IX liability. See id. at 570-76, 556. In response to the program-specific approach adopted by the Supreme Court, Congress passed the Civil Rights Restoration Act of 1987 ("CRRA"). Pub.L. No. 100-259, 102 Stat. 28 (1988). This Act overturned the limited approach of Grove City and extended liability to an entire organization as long as any part of it operated an educational program and received federal financial assistance. The Act applied to Title IX, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964. See id.; see generally Matthew P. Hamner, Bump, Set, Spiked: Determining Whether the National Collegiate Athletic Association is a Recipient of Federal Funds under Title IX, 65 **Mo. L. Rev.** 773, 778 (2000).

[40] See Smith, 525 U.S. at 462.

[41] The National Youth Sports Program is a youth enrichment program that provides summer education and sports instruction. See Cureton, 198 F.3d at 110.

[42] See Smith, 525 U.S. at 469-70.

[43] See Smith, 525 U.S. at 469, citing Bowers v. National Collegiate Athletic Ass'n, 9 F. Supp. 2d 460, 494 (D.N.J. 1998), Cureton v. National Collegiate Athletic Ass'n, No. Civ. A. 97-131, 1997 WL 634376, at *2 (E.D. Pa., Oct. 9, 1997). For a further discussion of these cases, see infra Sections II.B & II.C.

[44] Cureton v. National Collegiate Athletic Association, 37 F. Supp. 2d 687 (E.D.Pa. 1999), rev'd, 198 F.3d 107 (3d Cir. 1999).

funding. The Third Circuit held that, even though the NCAA did receive federal funds through its relationship with the NYSP, it was not liable under Title VI because Title VI was program-specific. Therefore only the NYSP could be liable.

Plaintiffs Tai Kwan Cureton and Leatrice Shaw[45] were African-Americans who were stars on their high school track teams, earning both academic and athletic honors. They exceeded the NCAA minimum grade point average ("GPA") requirement but failed to achieve the minimum Scholastic Aptitude Test ("SAT") score. The failure to achieve the minimum SAT score would mean that they could not qualify under NCAA rules ("Proposition 16") to participate in intercollegiate athletics during their freshman years. They filed suit against the NCAA. Cureton alleged that the NCAA rule caused NCAA Division I schools that had recruited him with offers of scholarships to stop recruiting him after he failed to obtain the qualifying SAT score. He subsequently enrolled at an NCAA Division III school. Shaw alleged that, although she did receive a scholarship from a Division I school, she was prevented from participating in her freshman year.[46]

This is a Title VI case, which, like Title IX, has a federal funding requirement.[47] While the district court agreed that the factors decided by Smith did not qualify the NCAA as the recipient of federal funds, the court did find other reasons to qualify it. The court held that the NCAA's complete control of the NYSP, which received federal funding, and the member schools' ceding of control of their athletic programs to the NCAA subjected the NCAA to Title VI and that Proposition 16 had an unjustified disparate impact against African-Americans.[48]

The Third Circuit reversed. For its analysis, the court assumed, without deciding, that the NCAA did, in fact, receive federal funds through its relationship with the NYSP, and then based its decision on the language of Title VI. It considered Title VI to be program-specific and not subject to the CRRA,[49] meaning that recipients of federal aid are prohibited from discriminating under Title VI only in those programs that receive the aid. Consequently, the NCAA could not be held liable under Title VI; only the NYSP could be held liable.[50]

C. Bowers v. NCAA

Bowers v. National Collegiate Athletic Association[51] was the other case that the Supreme Court in Smith cited as raising a potentially valid alternative argument regarding federal funding. Because the district court believed that there were many facts that could indicate the NCAA received federal funding, the court denied the NCAA's motion for partial summary judgment on the issue of whether the NCAA received federal funding because of its relationship with the NYSP. The court also clarified and distinguished the ruling of Cureton.

Michael Bowers was a high school football player who was being recruited by NCAA

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[45] Two other minority students were also plaintiffs. See Cureton, 198 F. Supp. at 110.
[46] See Cureton, 198 F. Supp. at 109-10.
[47] See supra, note 7. Title IX was patterned after Title VI and has almost identical language with the exception of the benefited class. "The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been . . . ." Cannon v. University of Chicago, 441 U.S. 677, 694-96 (1979).
[48] See Cureton, 37 F. Supp. 2d at 689.
[49] See Cureton, 198 F.3d 115 (holding that the actual terms of Title VI would have had to be modified in order for the CRRA to affect it).
[50] See id. at 114-15; Bowers v. National Collegiate Athletic Ass'n, 118 F. Supp. 2d 494, 526 (D.N.J. 2000) (analyzing the decision in Cureton).
[51] Bowers v. National Collegiate Athletic Ass'n, 118 F. Supp. 2d 494 (2000).

Division I schools. He alleged that those schools stopped recruiting him when they learned that his learning disability would likely result in the NCAA declaring him ineligible to play.[52] Bowers sued the NCAA under the Americans with Disabilities Act ("ADA"),[53] section 504 of the Rehabilitation Act,[54] and a State disability act.[55] Among other claims, Bowers alleged that the NCAA discriminated against the learning disabled through its eligibility requirements.[56] Regarding the federal funding issue that the Supreme Court had referred to, the court in Bowers denied summary judgment to the NCAA on its claim that it was not a recipient of federal funding under the Rehabilitation Act.[57]

The court commented on the Cureton ruling that only the NCAA program that received the funding—the NYSP—could be liable. Cureton was based on a disparate impact claim rather than an intentional discrimination claim and therefore the court's ruling was based on the implementing regulations. Bowers, however, had a claim for intentional discrimination and could base its decision on the institution-wide liability established by the Civil Rights Restoration Act of 1987.[58]

The court found itself bound by the Cureton court rejection of the argument that the NCAA received federal funding because the NCAA members had conceded "controlling authority" to it, but ultimately provided other reasons that it felt the NCAA could be the recipient of federal funding.[59] It stated that, most importantly, the inclusion of NCAA officials in the governance of the NYSP was a significant indication of the NCAA's influence on NYSP's use of federal funding.[60] The court found those relationships to be sufficient to deny the motion for summary judgment.

D. Smith was Wrongly Decided

The Supreme Court did not take adequate account of the Civil Rights Restoration Act.[61] The Court briefly mentioned the importance of the CRRA by stating, "[I]f any part of the NCAA received federal assistance, all NCAA operations would be subject to Title IX,"[62] but then failed to discuss whether the NCAA met the CRRA's definition of a "program or activity" that receives federal funds. The CRRA lists inter alia state governments, local governments, and

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[52] The NCAA had indicated to the schools that a number of his high school courses had been designated special education classes and would not satisfy the NCAA core course requirement. See Bowers, 118 F.Supp at 499.

[53] 42 U.S.C. §§ 12101 et. seq.

[54] 29 U.S.C. § 794(a). As with Title IX and Title VI, the Rehabilitation Act only applies to programs that receive federal funding. See Bowers, 118 F. Supp. at 526.

[55] New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

[56] See Bowers, 118 F. Supp. at 499.

[57] Pub.L. No. 100-259, 102 Stat. 28 (1988); see Bowers, 118 F. Supp. at 526.

[58] See Bowers, 118 F. Supp. at 527 n. 24.

[59] The Bowers court used the Cureton court statement that it assumed, without deciding, that the NCAA did receive federal funds through its relationship with the NYSP. It is unclear how that statement entered into the court's decision. See id. at 526.

[60] For instance, the NYSP Board of Directors was populated by employees of the NCAA, the Executive Director and Assistant Executive Director of the NCAA were members of the NYSP Board, and the Executive Director of the NCAA was the President of the NYSP. See Bowers, 118 F. Supp. at 528-29.

[61] See CRRA, supra note 39.

[62] See Smith, 525 U.S. at 466.

universities as covered programs. It even lists a corporation or other private organization, but only "if assistance is extended as a whole" or if they are principally engaged in the business of providing education. But in addition to those, the CRRA also has a catch-all provision that places coverage on any entity that is established by two or more of the specifically covered entities.[63] Thus, the NCAA would seem to be covered either directly as a private organization that provides education or by the catch-all provision that it was established by universities. Further, Congress enacted the CRRA over the veto of President Reagan, who had wanted it to have a narrow interpretation of "program." CRRA as enacted had a very broad interpretation.[64]

The Court also did not take adequate account of the Congressional intent behind Title IX. Congress has repeatedly rejected attempts to weaken Title IX's application to intercollegiate athletic programs.[65] Congress continues to recognize the need for continued enforcement of Title IX and realizes that the full potential of Title IX has not yet occurred. As one example, schools have pointed to NCAA scholarship rules as creating barriers to the removal of sex-based inequities.[66] Placing the NCAA itself under Title IX is essential to achieving Title IX's purposes.[67] Any other decision would frustrate the intent of Congress to eliminate sex discrimination in athletics. By ruling as it did in Smith, the Supreme Court frustrated that intent.[68]

III. WHAT IS THE IMPACT OF BRENTWOOD ACADEMY?

A. Brentwood Academy v. TSSAA

Footnote 13 of the Tarkanian case provided a basis for suits against state high school athletic associations. The footnote seemed to indicate that a state athletic association consisting of schools located exclusively in that state should be deemed a state actor.[69]

Brentwood Academy is a private parochial high school member of the Tennessee Secondary School Athletic Association ("TSSAA"). TSSAA determined that Brentwood had violated the TSSAA rule against exerting undue influence in the recruitment of athletes because it had sent recruiting letters and free game tickets to eighth-graders—inviting them to join the

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[63] See 20 U.S.C. § 1687; Smith Amici Brief, supra note 23 (arguing that the NCAA clearly falls under Title IX according to the CRRA and that the Cureton and Bowers courts both decided that the NCAA falls under the CRRA definition).

[64] See Brief as amici curiae in support of Respondent Smith by U.S. Dept. of Justice at s. I.A., National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) (No. 98-84).

[65] See, e.g., S.2106, 94th Cong., 121 Cong. Rec. 22,778 (1975) (rejecting a bill trying to exempt revenue-producing sports).

[66] See Smith Amici Brief, supra note 23, at s. III.A., citing Jim Naughton, Focus of Title IX Debate Shifts from Teams to Scholarships, **Chron. Of Higher Educ.**, May 29, 1998, at A45.

[67] Congress specifically indicated that any entity with controlling authority over a covered program would be subject to Title IX. It provided the example of a private operator that ran a parking garage in a university-owned building financed with federal funds, not itself a direct recipient of federal funds, and concluded that the operator would be subject to Title IX liability. See Smith Amici Brief, supra note 23, at s. III.A.

[68] See Oct. 30 Smith Brief, at 5, citing H.R. Rep. No. 98-829, pt. 2, at 32 (1984).

[69] See Tarkanian, 488 U.S. at 194 n. 13 (stating that the analysis "would, of course, be different if the membership consisted entirely of institutions located within the same State").

team for spring training.[70] As a result of its violation, Brentwood was barred from TSSAA tournaments for two years, placed on probation for four years, and fined $3,000. Brentwood sued TSSAA under Section 1983, claiming that TSSAA violated the First and Fourteenth Amendments by enforcing the rule prohibiting undue influence in recruiting.

The district court held that TSSAA was a state actor. The Sixth Circuit reversed. The Supreme Court in Brentwood Academy v. Tennessee Secondary School Athletic Association[71] held that TSSAA was a state actor when it was enforcing a rule against a member school. It stated that there was "pervasive entwinement"[72] of state officials in the structure of TSSAA. The Court looked at "entwinement" as the key to the entire case[73] and stated that whether there is sufficient entwinement between any association and its member schools is a matter of degree.[74] TSSAA was a statewide organization incorporated to regulate interscholastic athletic competition among public and private secondary schools. It included most public schools in Tennessee. It acted through the representatives of the schools, drew its officers from the schools, and received much of its funding from the schools. Historically TSSAA had been seen to regulate in lieu of the State Board of Education.[75]

The Supreme Court noted that the line between conduct that is state action and that which is private conduct is not always clear and that any analysis is "necessarily fact-bound."[76] It concluded that the nominally private character of TSSAA was overborne by the pervasive entwinement of public institutions and public officials in its composition and workings. Even though there were private schools like Brentwood in TSSAA, eighty-four percent of the schools were public. It was an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. TSSAA would not exist without the public school officials, who overwhelmingly perform all but the purely ministerial acts by which TSSAA exists and functions.[77]

The Court disagreed with TSSAA's argument that a ruling of state action would "trigger an epidemic of unprecedented federal litigation." Nor did the Court believe that there was anything to be said for TSSAA's contention that a party could still sue an individual public school under Section 1983 rather than suing TSSAA.[78]

The dissent of Justice Thomas noted that Tennessee did not create TSSAA, that no Tennessee law authorized the State coordinate interscholastic athletics and that the State had no involvement in the particular action challenged in the case.[79] The dissent emphatically believed that the "entwinement test" stretched state action past its permissible limits and encroached on the individual freedoms that the state action doctrine was supposed to protect.[80]

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[70] See Brentwood Academy v. Tennessee Secondary School Athletic Association, 121 S.Ct. 924, 929 (2001).
[71] 121 S.Ct. 924 (2001).
[72] Id. at 927.
[73] Id. at 933-34 ("The facts justify a conclusion of state action under the criterion of entwinement.").
[74] See Brentwood, 121 S.Ct. at 933 ("[E]ntwinement to the degree shown here requires [state action].").
[75] See id. at 928-29.
[76] Id. at 932.
[77] See id. at 926-27.
[78] See Brentwood, 121 S.Ct. at 934.
[79] See id. at 936 (Thomas, J., dissenting).
[80] See id. at 935 (Thomas, J., dissenting) ("We have never [previously] found state action based upon mere 'entwinement'").

B. Comparison of Tarkanian and Brentwood

The majority in Brentwood compared its facts to those of Tarkanian and saw the two decisions as compatible because of the factual differences. It stated that in Tarkanian there had also been entwinement,[81] but it was not sufficient because UNLV was not the only public entity that shaped the NCAA's policies. The policies were "shaped not by [UNLV] alone, but by several hundred institutions, most of them having no connection with Nevada, and exhibiting no color of Nevada law."[82] That characteristic of collective membership had led the Tarkanian Court to believe that the NCAA's connection with Nevada was too insubstantial to ground a state action claim.[83] The Court pointed to Footnote 13 in Tarkanian as the distinguishing factual difference of Tarkanian and Brentwood.[84] "Just as we foresaw in Tarkanian, the 'necessarily fact-bound inquiry' leads to the conclusion of state action [in Brentwood]. The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings . . . ."[85]

It is the dissent however, that offers the best reconciliation of Tarkanian and Brentwood. The dissent states that the majority's reference to the Tarkanian Footnote 13 as foreshadowing Brentwood does not support the majority's conclusion.[86] "[I]t is not difficult to imagine that application of the majority's entwinement test could change the result reached in [Tarkanian], so that the National Collegiate Athletic Association's actions could be found to be state action given its large number of public institution members that virtually control the organization."[87] The dissent believed that Tarkanian and Brentwood should have reached the same conclusion.

C. The NCAA might now be a state actor that receives federal funding

Brentwood has the potential to be the landmark case for suits against the NCAA. Already, attorneys are amending their arguments to include Brentwood. For instance, the Smith case is currently back in the Third Circuit after being remanded by the Supreme Court. Briefs were filed in October and November of 2000. Brentwood was decided on February 20, 2001. Within two weeks, counsel for Smith had filed a Citation of Supplemental Authorities to indicate that new "pertinent and significant authorities" had come to their attention.[88] The court then requested both parties to file the amended briefs and both parties did file on April 2, 2001.[89] The

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[81] For example, UNLV had some part in setting the NCAA's rules, and UNLV had even delegated its traditionally exclusive public authority over personnel. See Brentwood, 121 S.Ct. at 931.
[82] Brentwood, 121 S.Ct. at 931.
[83] See id..
[84] See id. ("[D]ictum in Tarkanian pointed to a contrary result on facts like ours, with an organization whose member schools are all within a single State.").
[85] See Brentwood, 121 S.Ct. at 932.
[86] See id. at 940 (Thomas, J., dissenting).
[87] See id.
[88] See Fed. R. App. P. 28(j).
[89] See Smith v. National Collegiate Athletic Ass'n, Nos. 97-3346 & 97-3347 (3d Cir. Apr. 6, 2001); Telephone interview with Virginia A. Seitz, counsel of record for Renee Smith (Apr. 11, 2001). The NCAA confirmed that they are currently addressing the impact of Brentwood on the Smith, Cureton, and Bowers cases, but are unwilling to provide additional comments or copies of their briefs because of the ongoing litigation. Telephone conversations with Angie Grant, NCAA Office of General Counsel (most recent conversation on Apr. 12, 2001).

Cureton case was similar. On November 9, 2001, the Third Circuit had oral arguments for Cureton.[90] Two weeks after Brentwood, counsel for Cureton had filed a Citation of Supplemental Authorities based on the holding of Brentwood.[91]

For the remanded Smith case, the NCAA's position is that Brentwood adds nothing to Smith's argument that the NCAA has controlling authority over its federally-funded member institutions. In fact, the NCAA claims that Brentwood "confirms that the NCAA is not a state actor based on its alleged controlling authority over its members."[92] It argues that the issue of controlling authority was resolved definitively by the Third Circuit in Cureton, holding that the NCAA cannot be deemed a recipient of federal funds under the "controlling authority" theory.[93] It also claims that the Supreme Court left the Tarkanian decision undisturbed.[94]

Counsel for Smith, on the other hand, believes that Brentwood provides two new major arguments. First, the "pervasive entanglement" test in Brentwood is less restrictive than the "controlling authority" standard they had been trying to prove. The Smith counsel conclusion in its letter brief on the effects of Brentwood is that the Third Circuit should hold that 1) the NCAA is an entity that either exercises controlling authority over its member or is so pervasively entwined with its members that it should be deemed a recipient of federal funds.[95]

Second, counsel for Smith believes that the argument that the NCAA members are free to withdraw is even less of a valid argument after Brentwood, particularly in a case such as this where NCAA membership is "the only realistic option."[96] Counsel stated, "The NCAA's reading of Tarkanian as a holding that its voluntary nature by itself shielded it from either state actor status or liability under Title IX cannot survive the Supreme Court's decision in Brentwood."[97] Rather, "Brentwood makes plain that the fact that NCAA member institutions

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[90] The Third Circuit understands that Smith and Cureton have dependencies. See Cureton v. National Collegiate Athletic Ass'n, No. 00-1559 (3d Cir. Mar. 25, 2001).

[91] See id.; Telephone interview with Andre Dennis, counsel of record for Cureton (Apr. 12, 2001) (stating that the value of Brentwood to Cureton is not that Brentwood opens up a state action claim but that it shows that a language change in the relationship between the association and the state does not change the fundamental relationship. This applies to the NCAA because the NCAA has made changes in its relation to the NYSP). Bowers is again in district court. Telephone interview with Barbara Ransom, counsel of record for Bowers (Apr. 9, 2001).

[92] Letter Brief of Appellee NCAA, at 2, 525 U.S. 459 (1999) (Nos. 97-3346 & 97-3347, Mar. 30, 2001) [hereinafter Mar. 30 NCAA Brief] (responding to the request of the Third Circuit to provide a letter brief on the effect of Brentwood) (obtained from the office of Smith counsel of record Virginia A. Seitz on Apr. 13, 2001 [hereinafter Seitz Office]).

[93] Brief of Appellee NCAA at 3, 525 U.S. 459 (1999) (Nos. 97-3346 & 97-3347, Nov. 30, 2000) [hereinafter Nov. 30 NCAA Brief] (obtained from Seitz Office) (stating that Cureton and Bowers explicitly rejected the controlling authority argument as a basis for finding that the NCAA is a recipient of federal funding). Counsel for Smith, on the other hand, states that Cureton did not settle the issue of controlling authority and in fact was quite careful to leave the issue open. Brief of Appellant Smith, 525 U.S. 459 (1999) (Nos. 97-3346 & 97-3347, Oct. 30, 2000) [hereinafter Oct. 30 Smith Brief] (obtained from Seitz Office).

[94] See Mar. 30 NCAA Brief at 2.

[95] Mar. 27 Smith Brief, at 9.

[96] Letter Brief of Appellant Smith, at 2, 525 U.S. 459 (1999) (Nos. 97-3346 & 97-3347, Mar. 27, 2001) (responding to the request of the Third Circuit to provide a letter brief on the effect of Brentwood) (obtained from Seitz Office).

[97] Id. at 3.

have the 'option' of leaving the association is not dispositive of [the] state-action question."[98]

Conclusion

It should be far easier for student-athletes to sue the NCAA in the future. The two barriers placed by the Supreme Court in the cases of Tarkanian and Smith are now weakened by Brentwood. Attorneys for the statutorily created civil rights cases of Smith, Cureton, and Bowers are now using the Brentwood decision concerning federal funding as they continue through the courts on remand. Brentwood will also have an impact on future suits alleging Section 1983 violations because the "entwinement" test is an easier standard to meet than previous Supreme Court proclamations.

The NCAA has become too powerful and that power can be the single biggest factor for plaintiffs to use against it. The past Supreme Court premise that a school is free to leave the NCAA is simply wrong. Lower courts—and eventually the Supreme Court again—should now be able to see that the financial situations of schools have changed; it is now absolutely essential that any school seeking to be well regarded by prospective new students and alumni must be an NCAA member. Rather than rule that the NCAA cannot be sued, the courts should treat the NCAA the way the statutes intend. Once that occurs, the NCAA can move along the path of carrying-out the wishes of its members in ways that do not intrude on the civil rights of the student-athletes, coaches, and other individuals.

[98] See id. at 7.