

## COMMENT

### A COMMENT ON THE SUPREME COURT'S MACHIAVELLIAN APPROACH TO GOVERNMENT ACTION AND THE IMPLICATIONS OF ITS RECENT DECISION IN *BRENTWOOD ACADEMY v. TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION*

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#### I. INTRODUCTION

The right to be free from racial discrimination is such an important right that the Supreme Court will go to almost any length to protect it, even if it means manipulating the law to obtain a desired result. The Court's recent decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*<sup>1</sup> suggests that the Court has added the First Amendment to the limited class of rights that it will preserve regardless of the means necessary to do so.

The rights guaranteed by the United States Constitution are protected from actions taken by only the local, state, and federal governments, and not from the actions of private individuals.<sup>2</sup> As

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In loving memory of my grandparents, Lillian Ortmayer, Susie & Sal Petronella, and Mildred & Joseph DeGrange.

1. 531 U.S. 288 (2001).

2. Craig R. Ducat, *Constitutional Interpretation* 1257 (7th ed., West 2000).

a result of the Constitution's limited reach, for a private party to be held accountable to constitutional standards, the private party's conduct must amount to government action.<sup>3</sup> A private party will be considered a government actor when the private party's alleged infringement of constitutional rights is "fairly attributable to the State."<sup>4</sup> The Supreme Court has identified several tests that it purports to use to determine whether a private party's actions constitute government action, but always with the proviso that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."<sup>5</sup> The effect of this caveat is that, in reality, the government-action issue is decided after examining the plaintiff's underlying complaint, irrespective of any particular government-action test. The government-action doctrine gives the Court a mechanism for prohibiting private discrimination when the private party has at least some connection to the government. The Court rarely finds government action by a private party unless the underlying complaint is racial discrimination, which demonstrates that racial equality is at the forefront of the rights the Court most wants to protect.

Before its recent decision in *Brentwood Academy*, the Supreme Court found that a private party was a government actor only when the private party's conduct amounted to racial discrimination, with two distinct exceptions.<sup>6</sup> However, the

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3. Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, *Constitutional Law* 1468 (Little, Brown & Co. 1986).

4. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

5. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (finding that a private restaurant was a government actor and, therefore, could not discriminate against its patrons based on their race because the restaurant leased space in a publicly-owned building, and the revenues from the restaurant lease were used to pay off the public bond that made construction of the building possible, thus resulting in a symbiotic relationship between the private restaurant and the government).

6. *Lebron v. Natl. R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding that when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment"). The only other time that the Court is willing to find government action without an underlying racial-discrimination complaint is when the challenged conduct consists of enforcement of local, state, or federal laws by government officials, admitted government actors, who are themselves parties to the alleged unconstitutional conduct. *Lugar*, 457 U.S. 922 (holding that, because Edmondson Oil Company had acted together with, and obtained significant aid from, state officials because the prejudgment-attachment statute required judicial action to be enforced, there was enough government

Supreme Court's decision in *Brentwood Academy* added First Amendment violations to the list of infringements that it would not tolerate by private parties who have at least a colorable relationship to the government. As a result, the Court will now apparently find government action if the underlying complaint is either racial discrimination or a First Amendment violation.

The Court held in *Brentwood Academy* that Tennessee Secondary School Athletic Association, a private organization, was a government actor in its relationship with Brentwood Academy, a private high school.<sup>7</sup> The underlying complaint by the plaintiff, Brentwood Academy, was that the defendant had violated its First Amendment rights by enforcing a recruiting rule.<sup>8</sup> To reach its conclusion, the Supreme Court found it necessary to develop a new test for finding government action by a private organization: the entwinement test.<sup>9</sup> The Court defined the entwinement test as "when [the private party] is 'entwined with governmental policies' or when government is 'entwined in [the private party's] management or control.'"<sup>10</sup> Several prior Supreme Court cases might have had opposite results had they been decided under the broad, new entwinement theory of government action.<sup>11</sup>

The Constitution requires only government actors to comply with its terms, but not private parties. Therefore, the Constitution does not prohibit private parties from engaging in racial discrimination or suppression of speech and ideas. The Supreme Court employs the government-action doctrine to overcome the Constitution's limited reach. Through the use of the government-action doctrine, the Court is able to prohibit private parties, who have at least some government connection, from infringing on those rights that the Supreme Court most wants to

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involvement to conclude that Edmondson Oil Company was a government actor). This Comment does not include analysis of cases decided under a public-function test of government action.

7. 531 U.S. at 302.

8. *Id.* at 293. The recruiting rule prohibited "undue influence" in recruiting athletes. *Id.*

9. *Id.* at 302. Although many of the tests for government action, other than the public-function test, consider the entanglement between the government and the private party as a factor in the government-action analysis, there was no specific government-action test based solely on entwinement before *Brentwood Academy*. *Id.* at 312 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

10. *Id.* at 296 (quoting *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966)).

11. For a discussion of these cases, see *infra* part IV(C).

protect. Based on an analysis of the government-action cases prior to *Brentwood Academy*, the Court most wanted to protect racial equality. With its decision in *Brentwood Academy*, the Court has added First Amendment rights to this limited class of highly-protected rights. By finding government action when the underlying complaint is racial discrimination or a First Amendment violation, the Court is able to hold private parties, who have at least some link to the government, responsible for constitutional violations, without exceeding the Constitution's limited reach. Although racial equality and First Amendment rights are freedoms well deserving of protection, the Supreme Court should not be allowed to use means that the Constitution does not authorize to obtain the results it desires. Due to the Machiavellian manner<sup>12</sup> in which the Court applies the government-action doctrine, its use in determining when a private actor should be held accountable to constitutional standards should be abolished.<sup>13</sup>

Part II of this Comment will explain the facts and holding in *Brentwood Academy*. The history and theories of government action will be discussed in Part III. Part IV of this Comment will address both the Court's legal analysis and the implications of its decision in *Brentwood Academy*. In particular, Part IV will analyze the Court's prior rejection of an entwinement test of government action, the consequences of an entwinement test of government action on prior case law, and the Machiavellian manner in which the government-action doctrine is being applied. Part V will provide suggestions for possible courses of action in the wake of the abolishment of the government-action doctrine.

## II. FACTUAL SYNOPSIS AND HOLDING OF

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12. Niccolo Machiavelli was of the political opinion that,

[I]n the actions of men, and especially of princes, from which there is no [court of] appeal, the end justifies the means. Let a prince therefore aim at conquering and maintaining the state, and the means will always be judged honourable and praised by every one, for the vulgar is always taken by appearances and the issue of the event; and the world consists only of the vulgar, and the few who are not vulgar are isolated when the many have a rallying point in the prince.

Niccolo Machiavelli, *The Prince* Ch. XVIII, 66 (Random House, Inc. 1950).

13. The Author is advocating the abolishment of government action only in those cases decided under a type of "entanglement" theory of government action, not those decided under the "public function" theory of government action.

*BRENTWOOD ACADEMY v. TENNESSEE SECONDARY  
SCHOOL ATHLETIC ASSOCIATION*

Brentwood Academy, a private high school, sued Tennessee Secondary School Athletic Association (TSSAA), a private entity organized to regulate interscholastic sports among private and public high schools in Tennessee, for allegedly violating its First Amendment right to free speech.<sup>14</sup> Brentwood Academy alleged that TSSAA's recruiting rule, which prohibited member schools from using undue influence to secure a student for athletic reasons, violated Brentwood Academy's right to free speech, and was applicable to TSSAA via the Fourteenth Amendment.<sup>15</sup> TSSAA argued that it could not be sued for constitutional violations because it was a private organization, not a government actor, and because the First and Fourteenth Amendments apply only to government actors.<sup>16</sup> Brentwood Academy argued that although TSSAA was a private

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14. *Brentwood Acad.*, 531 U.S. at 291–293. A school has First Amendment rights because the wording of the First Amendment does not limit its application only to individuals, it applies to entities as well. U.S. Const. amend. I. “There are no qualifications to the guarantee of freedom of speech in the text of the First Amendment.” Jerome A. Barron & C. Thomas Dienes, *Constitutional Law in a Nutshell* 293 (3d ed., West 1995). The only limitation on the First Amendment is that it can only be enforced against government actors. Ducat, *supra* n. 2, at 1257. Brentwood Academy contends that “by prohibiting school representatives from contacting a student before the student has attended the representative’s school for three days, the Recruiting Rule violates the First Amendment on its face, and as applied in this case.” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn.*, 13 F. Supp. 2d 670, 686 (M.D. Tenn. 1999), *rev’d*, 180 F.3d 758 (6th Cir. 1999), *rev’d*, 531 U.S. 288 (2001).

15. *Brentwood Acad.*, 531 U.S. at 293. TSSAA’s Recruiting Rule states that “[t]he use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.” *Brentwood Acad.*, 13 F. Supp. 2d at 673. “The principle underlying the Supreme Court’s First Amendment jurisprudence is that ‘each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.’” *Id.* at 687 (quoting *Turner Broad. Sys., Inc. v. Fed. Commun. Commn.*, 512 U.S. 622, 641 (1994)). “Laws 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.’” *Id.* (quoting *Turner Broad. Sys., Inc.*, 512 U.S. at 641). “Laws that regulate the content of the message in this way are subjected to the ‘most exacting scrutiny.’” *Id.* (quoting *Turner Broad. Sys., Inc.*, 512 U.S. at 642). Therefore, because of the First and Fourteenth Amendments, if TSSAA is considered a government actor, it cannot enact rules that restrict speech based on its content unless those rules can survive the “most exacting scrutiny” by the Court.

16. *Brentwood Acad.*, 531 U.S. at 293.

organization, its actions could be fairly attributed to the state because TSSAA was made up mainly of public schools, and because TSSAA's board of directors at the time of the alleged violation consisted entirely of public-school employees.<sup>17</sup> TSSAA countered this argument by asserting that its actions were not taken under color of state law; rather, its enforcement of the recruiting rule against Brentwood Academy was "a function of the contract Brentwood Academy voluntarily and freely entered into with TSSAA, and not a product of any right, privilege, or power conferred upon TSSAA by state law."<sup>18</sup> Additionally, TSSAA argued "[t]he State of Tennessee did not create the TSSAA . . . does not fund the TSSAA . . . does not pay its employees . . . does not permit the TSSAA to use state-owned facilities for a discounted fee, and it does not exempt the TSSAA from state taxation."<sup>19</sup> Finally, TSSAA argued that, based on the tests customarily utilized by the courts for finding government action, or on the decision in *National Collegiate Athletic Association v.*

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17. Reply to Br. of Respt. at 10, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn.*, 531 U.S. 288 (2001). Public schools make up eighty-four percent of TSSAA's membership and private schools make up the remaining sixteen percent. *Brentwood Acad.*, 531 U.S. at 291.

TSSAA's rules are enforced not by a state agency but by its own board of control, which comprises high school principals, assistant principals, and superintendents. . . . However, each board member acts in a representative capacity on behalf of all the private and public schools in his region of Tennessee, and not simply his individual school.

*Id.* at 306–307 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting). "At times relevant to this action, the Board was comprised exclusively of public high school administrators, although private high school administrators are equally eligible for election to the board." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn.*, 180 F.3d 758, 762 (6th Cir. 1999), *rev'd*, 531 U.S. 288 (2001).

18. Br. of Respt. at 3, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn.*, 531 U.S. 288 (2001).

There is no authority anywhere in the Tennessee Code authorizing the state to conduct interscholastic athletics or to empower another entity to conduct such athletics on its behalf. Although a State Board of Education rule in effect from 1972 to 1995 "designated" TSSAA to conduct interscholastic athletics, that rule has since been repealed. The current rule states that public schools in Tennessee are authorized to join TSSAA, but are also authorized to withdraw from membership if they so choose.

*Brentwood Acad.*, 180 F.3d at 762. Private schools are also not forced to join TSSAA, but may do so if they so choose. *Brentwood Acad.*, 531 U.S. at 291.

19. *Brentwood Acad.*, 531 U.S. at 307 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting). "[O]nly 4% of the TSSAA's revenue comes from the dues paid by member schools; the bulk of its operating budget is derived from gate receipts at tournaments it sponsors." *Id.*

*Tarkanian*,<sup>20</sup> there could be no finding of government action by TSSAA.<sup>21</sup>

Utilizing the traditional theories of government action, the United States District Court for the Middle District of Tennessee found that TSSAA was a government actor in its relationship with Brentwood Academy.<sup>22</sup> The district court based its finding of government action on the symbiotic relationship between the State of Tennessee and TSSAA, on Tennessee's significant encouragement of the operation of TSSAA, and on the traditionally public function performed by TSSAA.<sup>23</sup>

The United States Court of Appeals for the Sixth Circuit reversed the district court's opinion, and held that TSSAA was not a government actor because its actions did not come within the ambit of any traditional government-action test.<sup>24</sup> As a result, Brentwood Academy, which had voluntarily associated with TSSAA, could bring no constitutional claim against TSSAA.<sup>25</sup>

The United States Supreme Court, in a 5-4 decision, reversed the appellate court and found that TSSAA was a government actor because of its entwinement with the State of Tennessee.<sup>26</sup> The Court did not decide whether TSSAA had violated Brentwood Academy's First Amendment right, but remanded the case for further proceedings consistent with the Court's determination that TSSAA was a government actor.<sup>27</sup>

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20. 488 U.S. 179 (1988) (holding that the National Collegiate Athletic Association was not a state actor because it acted under color of its own policies, not those of the state).

21. Br. of Respt. at 13-16, *Brentwood Acad.*, 531 U.S. 288.

22. *Brentwood Acad.*, 13 F. Supp. 2d at 685. The Middle District of Tennessee also found that TSSAA's recruiting rule violated Brentwood Academy's First Amendment right to free speech. *Id.* at 694.

23. *Id.* at 673-685.

24. *Brentwood Acad.*, 180 F.3d at 762-766.

25. *Id.* at 766.

26. *Brentwood Acad.*, 531 U.S. at 305. With its decision in *Brentwood Academy*, the Supreme Court has determined that, in addition to racial discrimination, the Court will not tolerate First Amendment violations by private parties. *Id.* Therefore, the Court will rule in a Machiavellian manner to stop both racial discrimination and First Amendment violations by finding government action when the underlying complaint is either racial discrimination or a First Amendment violation.

27. *Id.*

### III. HISTORY OF THE GOVERNMENT-ACTION DOCTRINE<sup>28</sup>

The United States Constitution, with one exception, protects individuals from actions taken only by the local, state, and federal governments.<sup>29</sup> To successfully sue a private defendant for an alleged constitutional violation, the plaintiff must demonstrate that the private party's actions constitute government action.<sup>30</sup> If the private party's actions do not constitute government action, constitutional provisions are not implicated.<sup>31</sup> In the typical government-action case, a private party alleges that one of his constitutional rights has been violated by the actions of another seemingly private party.<sup>32</sup> The Supreme Court must then decide whether the private defendant has sufficient connections with the government to subject its actions to constitutional limitations.<sup>33</sup>

The rationale behind the government-action doctrine is that it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed."<sup>34</sup> The question generally asked in determining whether a private party will be considered a government actor is whether "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State."<sup>35</sup>

#### A. Origins of the Government-Action Doctrine

The applicability of constitutional restrictions and congressional legislation to private conduct was not an issue until after the enactment of the Thirteenth and Fourteenth Amendments,

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28. Although usually called the "state action" doctrine, this terminology is a misnomer because the doctrine applies to actions by local, state, and federal governments. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law Substance and Procedure* vol. 2, § 16.1(a), 760 (3d ed., West 1999). Therefore, this Comment will refer to what is commonly known as "state action" as "government action."

29. Rotunda & Nowak, *supra* n. 28, at 760. Only the Thirteenth Amendment, which abolished slavery, applies to actions by both private individuals and government entities. *Id.*

30. *Id.* at 758-759.

31. *Id.* at 758.

32. *Id.* at 770.

33. *Id.*

34. *Lugar*, 457 U.S. at 936.

35. *Id.* at 937. A broader, more encompassing term for "State" in this quote would be "government."



also known as the Civil War amendments.<sup>36</sup> During the same time period as the proposal and ratification of the Civil War amendments, Congress passed the Civil Rights Act of 1875, which was designed to protect blacks against discriminatory actions by both government and private actors.<sup>37</sup> The Civil Rights Act of 1875, passed March 1, 1875, entitled “An act to protect all citizens in their civil and legal rights,” prohibited anyone from denying a citizen

the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement . . . applicable alike to citizens of every race and color, regardless of any previous condition of servitude.<sup>38</sup>

In each of five cases heard by the Supreme Court in 1883, known collectively as “*The Civil Rights Cases*,” African Americans were denied access to establishments covered by the Civil Rights Act, because of their race.<sup>39</sup> In the *Civil Rights Cases*, the Supreme Court held that the actions of a private person or corporation were only private wrongs that had no relationship to the deprivation of rights prohibited by the Fourteenth Amendment, which applied only to the state governments.<sup>40</sup> The Supreme Court also rejected the idea that the scope of the Thirteenth Amendment, which abolished slavery and applied directly to actions by private parties, permitted Congress to prohibit private discrimination.<sup>41</sup> Because the Court held that neither the Thirteenth nor Fourteenth Amendment vested Congress with the authority to enact Sections one and two of the Civil Rights Act of 1875, the Court declared these Sections of the Act

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36. Rotunda & Nowak, *supra* n. 28, at 766; Stone et al., *supra* n. 3, at 1468.

37. Rotunda & Nowak, *supra* n. 28, at 766.

38. *The Civil Rights Act of 1875*, 18 U.S. Stat. 335 §§ 1–2 (1875).

39. *The Civil Rights Cases* (*U.S. v. Stanley*; *U.S. v. Ryan*; *U.S. v. Nichols*; *U.S. v. Singleton*; *Robinson v. Memphis & Charleston Ry.*), 109 U.S. 3, 3 (1883).

40. *Id.* at 17–19.

41. *Id.* at 23–24. The Supreme Court reasoned that the act of refusing accommodations based on race had nothing to do with slavery or involuntary servitude. *Id.* Therefore, the Thirteenth Amendment, although applicable to the conduct of private persons in regards to the abolishment of slavery, did not grant Congress the authority to prohibit racial discrimination. *Id.* However, more recently, the Supreme Court has held that Congress has the authority, pursuant to the Thirteenth Amendment, to enact legislation that prohibits racial discrimination in the making and enforcing of private contracts. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

unconstitutional.<sup>42</sup>

The Supreme Court did not modify its strict position concerning government action until the 1940s, beginning with its landmark decision in *Shelley v. Kraemer*.<sup>43</sup> Starting with *Shelley*, the Court began construing the doctrine of government action more broadly to find violations of the Fourteenth Amendment by “private” individuals when there was some link, even though not a formal one, to the state.<sup>44</sup> From the 1940s to the present, the Supreme Court has developed a series of theories to determine when a private person can be deemed a government actor.<sup>45</sup>

## B. Theories of Government Action

### 1. Public-Function Theory<sup>46</sup>

When a private person engages in an activity that is traditionally reserved for the government, the courts will find government action.<sup>47</sup> Only those activities that are traditionally associated with government, and that are almost exclusively run by governmental entities will be considered to be public functions.<sup>48</sup> Just because a private party engages in an activity that could be performed by a government entity does not, in itself, make the private party a government actor.<sup>49</sup> The rationale behind the public-function theory of government action is that the government cannot absolve itself of constitutional restrictions merely by delegating to private parties those functions traditionally reserved to the government.<sup>50</sup> An example of the public-function theory of government action is a private corporation that runs a company town, such as in *Marsh v.*

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42. *The Civil Rights Cases*, 109 U.S. at 25.

43. 334 U.S. 1 (1948) (finding government action after a state court enforced private, racially restrictive covenants.)

44. Ducat, *supra* n. 2, at 1262; Rotunda & Nowak, *supra* n. 28, at 770.

45. Rotunda & Nowak, *supra* n. 28, at 770; Stone et al., *supra* n. 3, at 1467–1468.

46. Rotunda & Nowak, *supra* n. 28, at 771; Stone et al., *supra* n. 3, at 1521. The Author does not suggest the abolishment of the very narrow, firmly rooted “public function” theory of government action.

47. Rotunda & Nowak, *supra* n. 28, at 771; Stone et al., *supra* n. 3, at 1524.

48. Rotunda & Nowak, *supra* n. 28, at 771.

49. *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) (holding that the operation of a public utility by a private company did not constitute a public function where the state law imposed no duty on the state to furnish utility services); Rotunda & Nowak, *supra* n. 28, at 771.

50. Rotunda & Nowak, *supra* n. 28, at 771; Stone et al., *supra* n. 3, at 1524.

*Alabama.*<sup>51</sup>

The remaining theories of government action, encompassing those cases not decided under a public-function theory, are based on the relationship between the government and the activities of the private defendant.<sup>52</sup> There is no formal test that provides what amount of contact with the government will turn a private actor into a government actor.<sup>53</sup> The Court has been consistently unwilling to commit to a formal test and insists instead on determining government action on a case-by-case basis by “sifting facts and weighing circumstances.”<sup>54</sup> However, certain factors can be isolated that trigger the Court’s determination of government action in a specific activity.<sup>55</sup>

## 2. *Government Enforcement or Encouragement of Private Activities*<sup>56</sup>

The Supreme Court will find government action when a government agent, meaning one employed by the government, such as a judge or a sheriff, is the party who actually enforces a private agreement that, if entered into by the government, would violate the Constitution.<sup>57</sup> In other words, there could be no legal

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51. 326 U.S. 501 (1946) (holding that government action exists when a private corporation is performing a function that is almost exclusively performed by the government, such as running a company town that provides municipal services and functions). Other examples of functions that are traditionally reserved to the government are voting and the electoral process. *Terry v. Adams*, 345 U.S. 461 (1953) (holding that a private political organization could not exclude African Americans from its primaries on racial grounds because it was performing a function traditionally reserved to the government and was, therefore, a government actor under the public-function theory).

52. Rotunda & Nowak, *supra* n. 28, at 783.

53. *Id.*

54. *Burton*, 365 U.S. at 722; Rotunda & Nowak, *supra* n. 28, at 783.

55. Rotunda & Nowak, *supra* n. 28, at 783.

56. *Id.*; Stone et al., *supra* n. 3, at 1499–1500. This category is sometimes called the “state compulsion test.” *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992). “[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.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

57. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (holding that “[t]he involvement of a state official in such a conspiracy [between the private restaurant’s employee and a policeman to deprive plaintiff of her rights by refusing to serve her because she was accompanied by African Americans] plainly provides the state action essential to show a direct violation of [plaintiff’s] Fourteenth Amendment equal protection rights. . . . Moreover, a private party involved in such a conspiracy . . . can be liable under § 1983. It is enough that he is a willful participant in joint activity with the State or its agents.”)

enforcement of the private agreement but for the intervention of the government. For example, in *Shelley v. Kraemer*, the Supreme Court found government action because the Missouri Supreme Court upheld an injunction prohibiting an African-American family from moving into a neighborhood with a racially-restrictive covenant.<sup>58</sup> The covenant existed to keep African Americans from buying homes in the neighborhood.<sup>59</sup> Had the Missouri Supreme Court not upheld the injunction, the white property owner who had attempted to sell his property to an African-American family would have been able to go forward with the sale regardless of the restrictive agreement that was intended to keep minorities out of the neighborhood.<sup>60</sup>

In *Lugar v. Edmondson Oil Company*,<sup>61</sup> the Clerk of a state court and the County Sheriff, as government agents, enabled a creditor to obtain the property of its debtor without due process, a constitutional requirement.<sup>62</sup> In *Lugar*, pursuant to state law, a creditor sought prejudgment attachment of some of its debtor's property.<sup>63</sup> The procedure for obtaining a prejudgment attachment required only that the creditor "allege, in an *ex parte* petition, a belief that [the debtor] was disposing of or might dispose of his property in order to defeat his creditors."<sup>64</sup> Based on the creditor's petition, "a Clerk of the state court issued a writ of attachment, which was then executed by the County Sheriff."<sup>65</sup> The Supreme Court held that, because the prejudgment-attachment statute could not be enforced without judicial action, there was enough government involvement to conclude that the creditor was a government actor, and was thus subject to the constitutional requirement of due process, before it would be allowed to seize its debtor's property.<sup>66</sup>

The Supreme Court does not always find government action

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(quoting *U.S. v. Price*, 383 U.S. 787, 794 (1966)); Rotunda & Nowak, *supra* n. 28, at 785; Stone et al., *supra* n. 3, at 1488.

58. 334 U.S. at 6.

59. *Id.* at 4-5.

60. *Id.* at 5-6.

61. 457 U.S. 922 (1982).

62. *Id.* at 924.

63. *Id.*

64. *Id.*

65. *Id.* In accordance with the statute, a hearing was conducted over a month later to determine the propriety of the attachment and levy, and the attachment was dismissed for the creditor's failure to establish the proper statutory grounds. *Id.*

66. *Id.* at 941-942.

when admitted government actors enable constitutional violations. In *National Collegiate Athletic Association v. Tarkanian*, the University of Nevada at Las Vegas (UNLV), an admitted government actor, suspended its basketball coach for violating National Collegiate Athletic Association (NCAA) rules based on an investigation and recommendation by the NCAA, a private organization.<sup>67</sup> The manner in which the NCAA conducted its investigation, which led to the suspension of UNLV's basketball coach, did not comport with due process.<sup>68</sup> However, only government actors must comply with due process, and the Supreme Court held that the NCAA was not a government actor because it acted under color of its own policies, not those of the government.<sup>69</sup>

Government encouragement or facilitation of private activities that violate the Constitution can be enough to turn a private actor into a government actor.<sup>70</sup> For example, in *Reitman v. Mulkey*,<sup>71</sup> California repealed a state statute prohibiting racial discrimination and attempted to amend its state constitution to prohibit the government from interfering with a private individual's right to discriminate in the sale or lease of residential land.<sup>72</sup> The Supreme Court found that the repeal of the state statute was government action and struck down the new amendment because such an amendment would encourage private discrimination.<sup>73</sup> The Court has also found government action when a private attorney in a civil action used a peremptory challenge in a racially-discriminatory manner, because the state provided the judicial forum that allowed such discrimination, thereby facilitating it.<sup>74</sup>

### *3. Mutual Contacts:<sup>75</sup> Government Regulations, Symbiotic and*

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67. 488 U.S. 179, 181.

68. *Tarkanian v. Natl. Collegiate Athletic Assn.*, 741 P.2d 1345, 1350 (Nev. 1987), *rev'd*, 488 U.S. 179 (1988).

69. *Natl. Collegiate Athletic Assn.*, 488 U.S. at 199.

70. Rotunda & Nowak, *supra* n. 28, at 784.

71. 387 U.S. 369 (1967).

72. *Id.* at 374.

73. *Id.* at 381.

74. *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

75. Rotunda & Nowak, *supra* n. 28, at 796.

*Financial Relationships, and Government Subsidization*<sup>76</sup>

The cases decided under a “mutual contacts” theory of government action examine the relationship and types of contacts between the government and the private defendant.<sup>77</sup> These cases can be separated into three categories.<sup>78</sup> The first category consists of cases in which the government extensively regulates the private actor.<sup>79</sup> The second category comprises cases in which there is a mutually beneficial or symbiotic relationship between the private actor and the government.<sup>80</sup> Finally, cases in which the government subsidizes or provides direct aid to the private party make up the third category.<sup>81</sup> Often, an individual case will fall into more than one category.<sup>82</sup>

The Supreme Court failed to find government action in *Jackson v. Metropolitan Edison Company*<sup>83</sup> even though Metropolitan Edison Company, a private company, held a certificate of public convenience issued by the Pennsylvania Public Utility Commission authorizing it to deliver electricity to a specified service area, and even though the certificate was contingent upon extensive regulation by the Commission, a division of the Commonwealth of Pennsylvania.<sup>84</sup>

The Supreme Court has found government action when a mutually beneficial relationship exists between the government and the private actor.<sup>85</sup> In *Burton v. Wilmington Parking*

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76. *Id.*; Stone et al., *supra* n. 3, at 1499.

77. Rotunda & Nowak, *supra* n. 28, at 796.

78. *Id.*

79. *Id.* at 796–797.

80. *Id.* at 797.

81. *Id.*

82. *Id.*

83. 419 U.S. 345 (1974).

84. *Id.* at 345, 358 (holding that although Metropolitan Edison Company was extensively regulated by the Commonwealth, held a partial monopoly in providing electrical services, and terminated the plaintiff's service in a manner approved by the Pennsylvania Public Utility Commission, there was not a sufficient nexus between Metropolitan Edison Company's termination of plaintiff's service and the Commonwealth of Pennsylvania to make Metropolitan Edison Company a government actor). The Supreme Court also failed to find government action in *Moose Lodge Number 107 v. Irvis*, 407 U.S. 163, 177 (1972) (holding that although the State issued Moose Lodge, a private organization, a liquor license, there was not enough of a connection between the State and the private organization to hold that Moose Lodge was a government actor that could be prohibited from discriminating).

85. *Burton*, 365 U.S. at 724–725.

*Authority*,<sup>86</sup> the Supreme Court found government action when a private coffee shop, located in a public parking garage constructed with money from a public bond, refused to serve a person because of his race.<sup>87</sup> The relationship between the coffee shop and the government was symbiotic because revenues from the coffee shop lease were used to pay off the public bond, and the guests of the coffee shop were granted a convenient place to park their cars, which may, in turn, have increased the demand for the use of the public parking facility.<sup>88</sup> Additionally, the coffee shop paid for repairs and upkeep with public money, and potential tax benefits were granted to the coffee shop.<sup>89</sup>

The Court, in *Norwood v. Harrison*,<sup>90</sup> prohibited the State of Mississippi from supplying textbooks to students in racially-discriminatory private schools, concluding that “[a] State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.”<sup>91</sup> Compare this decision with *Rendell-Baker v. Kohn*,<sup>92</sup> in which the Court found no government action even though a private school received ninety to ninety-nine percent of its aid from the government and was subject to extensive governmental regulation.<sup>93</sup> However, the underlying complaint in *Rendell-Baker* was not one of racial discrimination, but rather an allegation that the private school had discharged several of its employees “because of their exercise of their First Amendment right of free speech and without the process due them under the Fourteenth Amendment.”<sup>94</sup> The Court also found

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86. 365 U.S. 715 (1961).

87. *Id.* at 716, 725.

88. *Id.* at 724.

89. *Id.* at 720, 724.

90. 413 U.S. 455 (1973).

91. *Id.* at 466.

92. 457 U.S. 830 (1982).

93. *Id.* at 832–833, 843. The Author is eternally indebted to Professor Ronald D. Rotunda for his suggestion regarding the juxtaposition of these two cases. Ronald D. Rotunda, *Modern Constitutional Law Cases and Notes* 576 (6th ed., West 2000).

94. *Rendell-Baker*, 457 U.S. at 837. The only feasible explanation for the difference in the outcome of the two cases is that, until its decision in *Brentwood Academy*, the Court found government action only when the underlying complaint was racial discrimination. Although the government was much more involved with the school in *Rendell-Baker* than it was with the school in *Norwood*, the underlying complaint in *Norwood* was racial discrimination, and the underlying complaint in *Rendell-Baker* was a due-process claim. Therefore, the Court found government action only in *Norwood* because it contained a racial-discrimination claim, while the claim in *Rendell-Baker* did not.

no government action in *Blum v. Yaretsky*<sup>95</sup> even though the government reimbursed private nursing homes for the reasonable costs of services for Medicaid patients, but only if the private nursing home followed federal regulations.<sup>96</sup> The plaintiffs in *Blum* alleged a violation of their due-process rights because they had not been given adequate notice of the reasons behind the decisions made to transfer them to a lower level of care or “of their right to an administrative hearing to challenge those decisions.”<sup>97</sup>

Although the Court refuses to find government action just because the government extensively regulates a private actor,<sup>98</sup> a different situation arises when

the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, [because then] the corporation is part of the Government for purposes of the First Amendment.<sup>99</sup>

Under these circumstances, the corporation has itself been considered a federal entity.<sup>100</sup> The question of whether the corporation is subject to constitutional requirements, because, although it is a private entity, it is closely connected to the government, is not addressed.<sup>101</sup>

#### IV. LEGAL ANALYSIS AND IMPLICATIONS OF BRENTWOOD ACADEMY

In reaching its conclusion that TSSAA was a government actor, the Court first noted that the criteria for finding government action “lacks rigid simplicity”<sup>102</sup> and that “no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.”<sup>103</sup> The Court then listed the

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95. 457 U.S. 991 (1982).

96. *Id.* at 993–995, 1012.

97. *Id.* at 995–996.

98. *Jackson*, 419 U.S. at 350.

99. *Lebron*, 513 U.S. at 400.

100. *Id.*

101. *Id.*

102. *Brentwood Acad.*, 531 U.S. at 295.

103. *Id.* at 295–296.



traditional tests for finding government action and included among them the entwinement test: the private entity is “entwined with governmental policies” or when government is “entwined in [the private party’s] management or control.”<sup>104</sup> In explaining the entwinement test, the Court did not define “entwined,” but rather, gave only the above examples of when the test would be met.

The Court began its analysis with a discussion of its decision in *National Collegiate Athletic Association v. Tarkanian*, which held that the NCAA, a private organization that comprised almost all public and private universities with major athletic programs, was not a government actor even though it maintained a very close contractual relationship with UNLV, a state university.<sup>105</sup> Of course, it was not compliance with the strict holding in *Tarkanian* that led to the conclusion that TSSAA was a government actor, because the NCAA was found not to be a government actor.<sup>106</sup> However, a footnote in *Tarkanian* “pointed to a contrary result on facts like [those in *Brentwood Academy*], with an organization whose member public schools are all within a single State.”<sup>107</sup> The Court pointed out that footnote 13 of *Tarkanian* stated that, “The 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.”<sup>108</sup>

The Court further reasoned that, because public schools made up eighty-four percent of TSSAA’s membership and TSSAA was controlled by a board composed of all public school officials acting in their official capacity,<sup>109</sup> only the sixteen percent

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104. *Id.* at 296 (quoting *Evans*, 382 U.S. at 299, 301).

105. 488 U.S. at 183–187, 199.

106. *Brentwood Acad.*, 531 U.S. at 297.

107. *Id.* at 298.

108. 488 U.S. at 193.

109. *Brentwood Acad.*, 531 U.S. at 298–300. The Court stated that,

Although the findings and prior opinions in this case include no express conclusion of law that public school officials act within the scope of their duties when they represent their institutions, no other view would be rational, the official nature of their involvement being shown in any number of ways.

*Id.* These ways included the fact that interscholastic athletics played an integral part in public education in Tennessee, so that by allowing TSSAA to regulate interscholastic competitions, the public schools, which were members, could meet their responsibilities by providing interscholastic competition to its students. *Id.* Additionally, since TSSAA generated the majority of its revenue from gate receipts at competitions between member schools, TSSAA “enjoy[ed] the schools’ moneymaking capacity as its own.” *Id.* at 299.

membership of the private schools prevented the complete entwinement of the State of Tennessee and TSSAA.<sup>110</sup> In addition to what the Court called “entwinement of public school officials with [TSSAA] from the bottom up,” the Court stated, “the State of Tennessee has provided for entwinement from top down.”<sup>111</sup> The Court explained that the entwinement from top down was illustrated by the fact that members of the State Board of Education were allowed to sit on the board of control,<sup>112</sup> and the association’s employees, who were not state employees, were nonetheless “eligible for membership in the state retirement system.”<sup>113</sup> Additionally, the Court noted that, although TSSAA was no longer designated by the State Board of Education as the organization to regulate interscholastic athletics, the statutory removal of this designation “affected nothing but words.”<sup>114</sup> The Court held that due to the entwinement from both the bottom up, and the top down, TSSAA was a government actor.<sup>115</sup> The Court further found it irrelevant that other tests of government action would not have led to the same result, because government action was found under the “criterion of entwinement.”<sup>116</sup>

The dissent in *Brentwood Academy* criticized the majority’s finding of government action “upon mere ‘entwinement.’”<sup>117</sup> The dissent noted that, until the decision in *Brentwood Academy*, the Court had found government action by a private organization only when that “organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government.”<sup>118</sup> Under any of the traditional tests of government action, TSSAA would not have been found a government actor.<sup>119</sup> The majority obviously agreed

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110. *Id.* at 300.

111. *Id.*

112. *Id.* Albeit, they were allowed to sit only as nonvoting members. *Id.* at 301.

113. *Id.* at 300. However, as the dissent noted,

[A]lthough the TSSAA’s employees . . . are allowed to participate in the state retirement system, the State does not pay any portion of the employer contribution for them. The TSSAA is one of three private associations, along with the Tennessee Education Association and the Tennessee School Boards Association, whose employees are statutorily permitted to participate in the state retirement system.

*Id.* at 307 n. 1 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

114. *Id.* at 301 (majority opinion).

115. *Id.* at 302.

116. *Id.*

117. *Id.* at 305 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

118. *Id.*

119. *Id.* at 308–312.

with the dissent's conclusion on this point, or it would have been unnecessary to develop a new "entwinement" test to find government action on the part of TSSAA.

Furthermore, the dissent asserted that the majority's use of a new "entwinement" test for government action was not supported by the Court's government-action jurisprudence.<sup>120</sup> The majority relied on *Lebron v. National Railroad Passenger Corporation*<sup>121</sup> and *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*<sup>122</sup> to support its new "entwinement" test of government action, but neither case used the word "entwinement."<sup>123</sup> *Lebron* dealt with the status of Amtrak — a corporation created by Congress, and over which Congress retained permanent authority — to meet the government objective of providing passenger train service in the U.S.<sup>124</sup> The Court in *Lebron*, without ever mentioning entwinement, held that when

the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.<sup>125</sup>

Likewise, in *City Trusts*, the Court "did not consider entwinement when [it] addressed the question whether an agency established by state law was a state actor."<sup>126</sup> In *City Trusts*, "the Pennsylvania legislature passed a law creating a board of directors to operate a racially segregated school for orphans."<sup>127</sup> The board was a government actor because it was a state agency.<sup>128</sup>

Although the final case on which the majority relied to support its "entwinement" theory of government action, *Evans v. Newton*,<sup>129</sup> at least used the word "entwined," entwinement was

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120. *Id.* at 312–313.

121. 513 U.S. 374 (1995).

122. 353 U.S. 230 (1957).

123. *Brentwood Acad.*, 531 U.S. at 312 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

124. *Id.* (citing *Lebron*, 513 U.S. at 383, 386).

125. *Id.* (quoting *Lebron*, 513 U.S. at 400).

126. *Id.* (citing *City Trusts*, 353 U.S. at 231).

127. *Id.* (citing *City Trusts*, 353 U.S. at 231).

128. *Id.* (citing *City Trusts*, 353 U.S. at 231).

129. 382 U.S. 296 (1966).

not considered a distinct concept, nor even a factor sufficient to turn a private actor into a government actor.<sup>130</sup> Rather, the finding of government action in *Evans* was based on the fact that the park at issue served as a public function,<sup>131</sup> and therefore, even if turned over by the city to private trustees, the private trustees still would be considered government actors.<sup>132</sup>

Because the majority unnecessarily expanded the government-action doctrine by developing the entwinement test of government action, the dissent feared that “other [private] organizations that are composed of, or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties” could be considered government actors.<sup>133</sup>

Although ill-defined by the *Brentwood Academy* majority, the entwinement test of government action appears to be taken out of context from *Evans*, which held that a private party’s actions may be attributed to the State when the private party is “entwined with governmental policies’ or when government is ‘entwined in [its] management or control.’”<sup>134</sup>

#### A. Until Its Decision in *Brentwood Academy*, the Supreme Court Had Rejected the Idea of Finding Government Action Based on Mere “Entwinement”

Until its decision in *Brentwood Academy*, the Supreme Court had criticized the use of mere entwinement as a basis for finding government action. As recently as 1999, the Court expressed its dissatisfaction with an entwinement test of government action in *American Manufacturers Mutual Insurance v. Sullivan*.<sup>135</sup> The Court, in *American Manufacturers*, admonished the United States Court of Appeals for the Third Circuit for “throw[ing] up

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130. *Brentwood Acad.*, 531 U.S. at 312 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

131. *Id.* (citing *Evans*, 382 U.S. at 301–302). A public-function theory of government action is satisfied when a private party engages in an activity that is traditionally reserved for the state. Rotunda & Nowak, *supra* n. 28, at 771; Stone et al., *supra* n. 3, at 1524. The Court later held in *Flagg Bros. Inc., v. Brooks* that parks are not an “exclusively public function.” 436 U.S. 149, 159 n. 8 (1978).

132. *Brentwood Acad.*, 531 U.S. at 313 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

133. *Id.* at 314. Perhaps an example of such a private organization would be the Police Benevolence Association.

134. *Id.* at 296 (majority opinion) (quoting *Evans*, 382 U.S. at 296, 299, 301).

135. 526 U.S. 40 (1999).

its hands and fall[ing] back on language . . . in *Burton v. Wilmington Parking Authority*<sup>136</sup> when the Court of Appeals held that “[t]he Pennsylvania system . . . inextricably entangles the insurance companies with the Commonwealth such that they become an integral part of the State in administering the statutory scheme.”<sup>137</sup> The Court of Appeals had found government action based on “joint participation” because of the entanglement between the Commonwealth of Pennsylvania and the private insurance companies.<sup>138</sup> The Supreme Court denounced this result, stating that “*Burton* was one of our early cases dealing with ‘state action’ under the Fourteenth Amendment, and later cases have refined the vague ‘joint participation’ test embodied in that case.”<sup>139</sup>

Due to the entanglement of the Commonwealth of Pennsylvania and the private insurance companies, the Court of Appeals found that the Commonwealth and the insurance companies were joint participants, so that the private insurance companies could be deemed government actors.<sup>140</sup> Yet, the Supreme Court rejected the Court of Appeals’ use of the vague “joint participation” test of government action.<sup>141</sup> The word “entangle” means “to wrap or twist together.”<sup>142</sup> The word “entwine” means “to become twisted or twined.”<sup>143</sup> There is virtually no difference in the meanings of the two words, “entangle” and “entwine.” Therefore, a finding of government action based on joint participation because of the entanglement between the State and the insurance companies would mean a finding of government action based on joint participation because of the entwining between the State and the insurance companies. By rejecting the method for finding government action in the first instance, the Supreme Court also implicitly rejected

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136. *Id.* at 57.

137. *Id.* (quoting *Am. Mfg. Mut. Ins. Co. v. Sullivan*, 139 F.3d 158, 170 (3d Cir. 1998), *rev’d*, 526 U.S. 40 (1999)).

138. *Sullivan*, 526 U.S. at 57.

139. *Id.* It is interesting to note that, in *Burton*, the gravamen of the plaintiff’s complaint was racial discrimination, which suggests why the Court was willing to use such a vague test: to make sure government action was found so that the private discrimination could be prohibited.

140. *Id.*

141. *Id.* at 58.

142. *Merriam Webster’s Collegiate Dictionary* 386 (10th ed., Merriam-Webster, Inc. 1993).

143. *Id.* at 387.

the idea of an entwinement test for government action in the second instance.

The Supreme Court also impliedly rejected an entwinement test of government action in *Tarkanian*.<sup>144</sup> In that case, the Court acknowledged that “UNLV’s conduct [which caused the alleged constitutional violation] was influenced by the rules and recommendations of the NCAA, the private party.”<sup>145</sup> The Court then proceeded to say,

Thus the question is not whether UNLV [a government actor] participated to a critical extent in NCAA’s activities, but whether UNLV’s actions in compliance with the NCAA rules and recommendations turned the NCAA’s conduct into state action.<sup>146</sup>

The entwinement test developed by the Court in *Brentwood Academy* appears to ask the same question that the Court in *Tarkanian* said not to ask.<sup>147</sup> Although it could be argued that the reason for not asking “whether UNLV participated to a critical extent in the NCAA’s activities”<sup>148</sup> was because of the “mirror image presented in [*Tarkanian* that] requires [the Court] to step through an analytical looking glass to resolve the case,”<sup>149</sup> such reasoning does not hold up after a careful inquiry into the government-action cases. As the *Tarkanian* dissent noted, cases factually similar to *Tarkanian*, in which the harm is perpetrated by an admitted government actor, had never before required the Court to “step through an analytical looking glass”<sup>150</sup> to determine whether the private party was a government actor.<sup>151</sup> For example, in *Dennis v. Sparks*,<sup>152</sup> the trial judge, an admitted

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144. According to the Court, the *Tarkanian* case “uniquely mirrors the traditional state-action case” because *Tarkanian*’s constitutional claim stemmed from the conduct of UNLV, an admitted government actor, not from a private entity. 488 U.S. at 192.

145. *Id.* at 193.

146. *Id.*

147. The *Brentwood Academy* Court defined the entwinement test as “when [the private party] is ‘entwined with governmental policies’ or when government is ‘entwined in [the private party’s] management or control.’” 531 U.S. at 296 (quoting *Evans*, 382 U.S. at 299, 301).

148. *Tarkanian*, 488 U.S. at 193.

149. *Id.*

150. *Id.* at 200 (White, Brennan, Marshall & O’Connor, JJ., dissenting).

151. *Id.*

152. 449 U.S. 24 (1980) (holding that a private party was acting under color of state law when it corruptly conspired with a judge, an admitted government actor, to get an injunction issued, which deprived the plaintiff of property without due process). *Dennis*,

government actor, caused the constitutional deprivation when the judge illegally granted an injunction after conspiring with the private parties seeking the injunction.<sup>153</sup> The Court held that the private parties were government actors because they were “willful participant[s] in joint action with the State or its agents.”<sup>154</sup> The *Tarkanian* Court’s reason for not asking “whether UNLV participated to a critical extent in the NCAA’s activities”<sup>155</sup> was due to the need “to step through an analytical looking glass,”<sup>156</sup> a requirement never before necessary, even when the harm was caused by the admitted government actor and not the private party. Because it was unnecessary for the Court “to step through an analytical looking glass” to decide the government-action issue, it appears that the Court was rejecting an entwinement test in all instances by finding it unnecessary to question the extent of the government actor’s, UNLV’s, involvement with the private party, the NCAA. At a minimum, the Court seemed to reject an entwinement test when the admitted government actor, acting in concert with a private party, causes the constitutional violation.

#### B. Footnote 13 in *Tarkanian*

The Supreme Court indicated that its decision in *Tarkanian* foreshadowed its conclusion in *Brentwood Academy* that TSSAA was a government actor.<sup>157</sup> Of course, it was “not the strict holding in *Tarkanian*,”<sup>158</sup> because the NCAA was not deemed a government actor.<sup>159</sup> Rather, it was dictum that suggested a contrary result in a situation like the one in *Brentwood Academy*, in which all the public-school members of the private organization were located in one state.<sup>160</sup> The *Tarkanian* Court thought it was important “that the source of the legislation adopted by the NCAA [was] not Nevada but the collective

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like *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), is an example of the Court’s second exception to finding government action even though the underlying complaint is not racial discrimination: when there could be no constitutional violation but for the involvement of and enforcement by a government official, an admitted government actor.

153. *Id.* at 25.

154. *Id.* at 27.

155. 488 U.S. at 193.

156. *Id.*

157. *Brentwood Acad.*, 531 U.S. at 297.

158. *Id.*

159. *Id.*

160. *Id.* at 298.

membership, speaking through an organization that is independent of any particular State.”<sup>161</sup> In footnote 13 to this statement the Court stated, “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.”<sup>162</sup> According to the *Brentwood Academy* Court, this footnote paved the way for finding government action on the part of TSSAA.<sup>163</sup> This logic is flawed for two reasons. First, there is no functional difference between a state-wide organization, in which the legislation may be colored by that individual state’s laws, and an organization made up of many states, in which the legislation may be colored by many different states’ laws. If anything, there is more government action if more states are involved in the enactment of the private organization’s legislation. Second, the Court in *Brentwood Academy* failed to consider the second sentence of footnote 13 from *Tarkanian*. It reads, “The dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership.”<sup>164</sup> The footnote, read in its entirety, suggests that the situation might be different if many of the association’s members were “public institutions created by the same sovereign,”<sup>165</sup> unless the institution complaining of the constitutional violation was private. If the institution complaining of the constitutional violation were private, then there would be no government actor involved at all: the two parties involved would both be private, the private organization and the private school.

Instead of attempting to distinguish the second sentence of footnote 13 in *Tarkanian* from the situation in *Brentwood Academy*, the Court ignored the fact that it existed, even though, in *Tarkanian*, the same Court found it necessary to limit the scope of the first sentence of the footnote with the inclusion of the second sentence. The only readily-apparent reason for the Court to ignore the second half of footnote 13 was that it was unable to distinguish it from the facts presented by *Brentwood Academy*. Footnote 13 in *Tarkanian* does not suggest that TSSAA should be

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161. 488 U.S. at 193.

162. *Id.* at 193 n. 13.

163. 531 U.S. at 296–299.

164. *Tarkanian*, 488 U.S. at 193 n. 13.

165. *Id.*



deemed a government actor. To the contrary, it suggests that when Brentwood Academy, a private school, sues TSSAA, a private organization, TSSAA cannot be considered a government actor. Perhaps, had Brentwood Academy been a public school, the situation might have been different. But, because Brentwood Academy is a private school and TSSAA is a private organization, the facts of *Brentwood Academy* fit perfectly into the exception created by the second sentence of footnote 13 in *Tarkanian*. Inserting the *Brentwood Academy* parties into footnote 13 leads to the conclusion that, although the membership of TSSAA “consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign, . . . the [TSSAA] was not acting under color of state law in its relationships with private universities [such as Brentwood Academy].”<sup>166</sup>

### C. The Development of an Entwinement Test for Government Action Further Confuses the Application of the Government-Action Doctrine

The Supreme Court would have reached different results in at least four cases if those cases had been decided under an entwinement theory of government action.

#### 1. *National Collegiate Athletic Association v. Tarkanian*

UNLV, a public university, was a member of the NCAA, a private organization made up of approximately 960 members, including almost “all public and private universities and four-year colleges conducting major athletic programs in the United States.”<sup>167</sup> The NCAA required its members to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”<sup>168</sup> By joining the NCAA, each member agreed to abide by the NCAA’s rules.<sup>169</sup> The NCAA, after conducting its own investigation, found that UNLV’s personnel were responsible for thirty-eight violations of NCAA rules, including ten by Jerry Tarkanian, UNLV’s head basketball coach.<sup>170</sup> The NCAA put the

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166. *Id.*

167. *Id.* at 183.

168. *Id.*

169. *Id.*

170. *Id.* at 181.

UNLV basketball team on probation for two years “and ordered UNLV to show cause why the NCAA should not impose further penalties unless UNLV severed all ties during the probation between its intercollegiate athletic program and Tarkanian.”<sup>171</sup> Although UNLV conducted its own investigation of the charges and found them to be unfounded, the NCAA and UNLV agreed that the NCAA would conduct the hearing concerning violations of its rules.<sup>172</sup> Despite the fact that UNLV’s vice president

expressed doubt concerning the sufficiency of the evidence supporting [NCAA’s] findings, he concluded that “given the terms of our adherence to the NCAA we cannot substitute – biased as we must be – our own judgment on the credibility of witnesses for that of the [NCAA’s] infractions committee and the Council.”<sup>173</sup>

Based on this agreement, both UNLV and the NCAA accepted the findings of the NCAA’s investigation.<sup>174</sup> Consequently, to remain an NCAA member, UNLV was forced to sanction Tarkanian because UNLV had delegated its authority over athletic personnel decisions to the NCAA.<sup>175</sup> The Supreme Court stated, “Clearly UNLV’s conduct was influenced by the rules and recommendations of the NCAA.”<sup>176</sup> However, the Court went on to find that the NCAA was not a government actor because the NCAA’s conduct could not be fairly attributed to the State.<sup>177</sup>

Had *Tarkanian* been decided under an entwinement theory of government action, the NCAA would have been declared a government actor. UNLV, a government actor, was very much entwined with the NCAA, as were the many public-institution members who managed and controlled the NCAA. UNLV delegated to the NCAA the authority to conduct its own investigation of alleged violations of NCAA rules and to make

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171. *Id.*

172. *Id.* at 185–186.

173. *Id.* at 186–187.

174. *Id.*

175. *Id.* at 184–185, 187. The NCAA was not authorized to directly punish a member institution’s employees for violations of NCAA rules. UNLV could have refused to punish Tarkanian and risked additional sanctions by the NCAA, or UNLV could have voluntarily withdrawn from the NCAA. *Id.* at 197–198.

176. *Id.* at 193.

177. *Id.* at 199. The four-Justice dissent would have found government action on the part of the NCAA because “the NCAA acted jointly with UNLV.” *Id.* at 203 (White, Brennan, Marshall & O’Connor, JJ., dissenting).

findings based on the NCAA investigation, even when UNLV's own investigation reached opposite results.<sup>178</sup> Additionally, UNLV accepted the NCAA's findings, even though UNLV's vice president expressed doubts about the sufficiency of the evidence generated by the NCAA's investigation.<sup>179</sup> Finally, UNLV imposed on Tarkanian the punishment that was ordered by the NCAA.<sup>180</sup> UNLV was not given a realistic choice whether to accept the NCAA's findings and suggested punishment because intercollegiate athletics are a major source of income and acclaim for universities. If UNLV had chosen to end its membership with the NCAA, UNLV's basketball team would have been destroyed. Under an entwinement theory of government action, the NCAA and UNLV were so entwined that the NCAA ended up being clothed as a government actor in its relationship with UNLV, a public university.<sup>181</sup> In fact, the dissent in *Brentwood Academy* noted the following:

The majority's reference . . . to *Tarkanian* [as foreshadowing *Brentwood Academy*] [was] ironic because it [was] not difficult to imagine that application of the majority's entwinement test could change the result reached in that case, 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.<sup>182</sup>

## 2. *Blum v. Yaretsky*

The Supreme Court in *Blum* held that a private nursing home was not a government actor even though it was extensively regulated by the State of New York and received a significant portion of its funding from the federal government.<sup>183</sup> The *Blum* plaintiffs, Medicaid patients, alleged that the private nursing home in which they resided violated their due-process rights by failing to give them notice and reasons for a utilization review

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178. *Id.* at 185–187 (majority opinion).

179. *Id.* at 186–187.

180. *Id.* at 187.

181. At least if *Tarkanian* had been decided under an entwinement theory of government action, and the NCAA was deemed a government actor, unlike in *Brentwood Academy*, there would be an admitted government actor in the equation, UNLV, the public university.

182. 531 U.S. at 314 n. 7 (Thomas, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting).

183. 457 U.S. at 1011–1012.

committee's (URC) decision to transfer them to lower levels of care.<sup>184</sup> The Medicaid program provided

federal financial assistance to States that [chose] to reimburse certain medical costs incurred by the poor. . . . New York provide[d] Medicaid assistance to eligible persons who receive[d] care in private nursing homes, which [were] designated as either 'skilled nursing facilities' (SNF's) or 'health related facilities' (HRF's).<sup>185</sup>

New York directly reimbursed the private nursing homes that housed Medicaid patients for the "reasonable cost of health care services."<sup>186</sup> The private nursing home in *Blum* was reimbursed for the medical expenses of more than ninety percent of its patients through the Medicaid program, and was subsidized for almost all of its operating and capital costs by the State.<sup>187</sup> Federal regulations mandated that each nursing home establish a URC of physicians to ensure that each Medicaid patient was receiving the correct level of care.<sup>188</sup> The federal regulations imposed penalties "on nursing homes that fail[ed] to discharge or transfer patients whose continued stay [was] inappropriate."<sup>189</sup> The URC, in determining which level of care, if any, was appropriate, was required to use standards promulgated by the State.<sup>190</sup> The standards included "numerical scores for various resident dysfunctions."<sup>191</sup> To be admitted to an SNF, the patient needed a score of 180, and to be admitted to an HCF, the patient needed a score of sixty.<sup>192</sup> If a patient did not qualify under these standards, he could be

admitted only on the basis of direct approval by Medicaid officials themselves, or on the basis of a determination by the utilization review agent of the transferring facility – and, of

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184. *Id.* at 995–996.

185. *Id.* at 993–994. "[HRF's] provide less extensive, and generally less expensive, medical care than [SNF's]. *Id.* at 994.

186. *Id.*

187. *Id.* at 1011.

188. *Id.* at 994.

189. *Id.* at 1009.

190. *Id.* at 1020 (Brennan & Marshall, JJ., dissenting).

191. *Id.* at 1020–1021. "For example if the resident [was] incontinent with urine often, he receive[d] a score of 20; if seldom, a score of 10; if never, a score of 0." *Id.* at 1020. Similar ratings were used for stool incontinence, walking, dressing, alertness, judgment, and other impairments. *Id.*

192. *Id.* at 1021.

course, such agents [were] themselves clearly part and parcel of the statutory cost-control process.<sup>193</sup>

These reviews were required to be made regularly.<sup>194</sup>

The *Brentwood Academy* Court found government action on the part of TSSAA because of the “pervasive entwinement of public institutions and public officials in [TSSAA’s] composition and workings.”<sup>195</sup> The Court based this conclusion on the fact that eighty-four percent of TSSAA’s membership was made up of public schools “represented by their officials acting in their official capacity to provide an integral element [interscholastic sports] of secondary public schooling,”<sup>196</sup> and that TSSAA was funded by membership dues from the member schools and collected gate receipts from tournaments, thereby “enjoy[ing] the schools’ moneymaking capacity as its own.”<sup>197</sup> Additionally, the Court noted that the State of Tennessee “provided for entwinement from top down”<sup>198</sup> because State Board members sat on TSSAA’s board as nonvoting members, TSSAA’s employees could join the state retirement program, the State previously reviewed and approved TSSAA’s rules and regulations, and the State allowed students to satisfy their physical education requirement by participating in sports sponsored by TSSAA.<sup>199</sup> The factors that led to a finding of government action via entwinement in *Brentwood Academy* also were present in *Blum*. The State of New York in *Blum* chose to take advantage of the federal financial assistance offered by Congress through the Medicaid program.<sup>200</sup> In doing so, the State required the private nursing homes to establish periodic reviews for the appropriate level of care given to Medicaid patients, prescribed the standards to be used by the private nursing homes to determine the appropriate levels of care, reimbursed the private nursing homes for ninety percent of their residents, and subsidized the operating and capital expenses of the private nursing homes. The State of New York was so far entwined with the management and control of the private nursing home that, under an entwinement theory

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193. *Id.* at 1022 (emphasis omitted).

194. *Id.* at 1024.

195. *Brentwood Acad.*, 531 U.S. at 298.

196. *Id.* at 299–300.

197. *Id.* at 299.

198. *Id.* at 300.

199. *Id.* at 301.

200. 457 U.S. at 994.

of government action, the private nursing home would be a government actor in its relationships with Medicaid patients.

### 3. *Rendell-Baker v. Kohn*

The defendant in *Rendell-Baker* was a private school that specialized in educating students with special needs or problems.<sup>201</sup> Massachusetts law required that the State provide these students with “suitable educational programs.”<sup>202</sup> In the years just before the complaint, almost all students in the private school were referred to it by state agencies.<sup>203</sup> High school diplomas from the private school were certified by a state agency.<sup>204</sup> “[P]ublic funds have accounted for at least 90%, and in one year 99%, of [the] school’s operating budget.”<sup>205</sup> None of the approximately fifty students paid tuition during these heavily-subsidized years.<sup>206</sup> The school was required to comply with a variety of detailed regulations promulgated by the legislature that “cover[ed] almost every aspect of a private school’s operations.”<sup>207</sup> The school also was required to comply with the various requirements of the state agencies referring the students.<sup>208</sup> One of the plaintiffs, Rendell-Baker, was hired under a federal grant that required a state committee’s approval of the school’s hiring decision.<sup>209</sup> Rendell-Baker claimed that she was discharged by the school “without due process because she exercised her First Amendment rights.”<sup>210</sup> The Court held that the private school was not a government actor in its discharge of employees because the school’s decisions to discharge certain employees were not influenced by state regulations and no symbiotic relationship existed between the State and the private school.<sup>211</sup>

The Court found government action in *Brentwood Academy*

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201. 457 U.S. at 832.

202. *Id.*

203. *Id.* The state agencies that referred students to the school were the Brookline School Committee, Boston School Committee, and the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. *Id.*

204. *Id.* The Brookline School Committee certified the diplomas. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 846. (Marshall & Brennan, JJ., dissenting).

208. *Id.* at 833 (majority opinion).

209. *Id.*

210. *Id.* at 834.

211. *Id.* at 840–842.

because eighty-four percent of TSSAA's membership was made up of public schools "represented by their officials acting in their official capacity to provide an integral element [interscholastic sports] of secondary public schooling."<sup>212</sup> Additionally, the State in *Brentwood Academy* had previously reviewed and approved TSSAA's rules and regulations, and the State allowed students to satisfy the physical-education requirement by participating in sports sponsored by TSSAA.<sup>213</sup> In *Rendell-Baker*, the State was required by law to provide an education for special-needs students, just as the public officials in TSSAA were responsible for providing interscholastic sports to secondary school students.<sup>214</sup> The State in *Rendell-Baker* referred students to the private school designed to meet this requirement, regulated and funded virtually all of the private school's operations, and certified the diplomas issued by the private school.<sup>215</sup> Although the State in *Brentwood Academy* previously had reviewed and approved the regulations promulgated by TSSAA, the State in *Rendell-Baker* actually enacted the regulations the private schools were required to follow.<sup>216</sup> Finally, although the State in *Brentwood Academy* allowed students to satisfy the physical-education requirement by participating in sports sponsored by TSSAA, the State in *Rendell-Baker* was required by law to provide education to special-needs students.<sup>217</sup> The actions of the State in *Rendell-Baker* were so far entwined with the management and control of the private school that, under an entwinement theory of government action, the private school would have been deemed a government actor.

The entwinement test developed by the *Brentwood Academy* Court seems to open the same door that the Court had previously attempted to keep shut with its decision in *Rendell-Baker*. Chief Justice Warren E. Burger, who wrote the majority opinion in *Rendell-Baker*, implied that one of the reasons that the Court refused to find government action in *Rendell-Baker* was because then everyone with government contracts would become a government actor.<sup>218</sup>

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212. 531 U.S. at 299–300.

213. *Id.* at 301.

214. *Brentwood Acad.*, 531 U.S. at 299; *Rendell-Baker*, 457 U.S. at 832.

215. *Rendell-Baker*, 457 U.S. at 832–834.

216. *Brentwood Acad.*, 531 U.S. at 301; *Rendell-Baker*, 457 U.S. at 833.

217. *Brentwood Acad.*, 531 U.S. at 301; *Rendell-Baker*, 457 U.S. at 832.

218. *Rendell-Baker*, 457 U.S. at 840–841. In support of the Court's decision that the

#### 4. *Jackson v. Metropolitan Edison Company*

The Commonwealth of Pennsylvania granted the defendant, Metropolitan Edison Company, a private corporation, a certificate of public convenience allowing Metropolitan Edison Company to provide electricity to a designated area in Pennsylvania.<sup>219</sup> Metropolitan Edison Company was subject to extensive state regulations as a condition to holding the certificate and enjoyed at least partial monopoly status.<sup>220</sup> Metropolitan Edison Company cut off Jackson's electricity for alleged nonpayment of her electric bill, an act that, Jackson claimed, violated her Fourteenth Amendment due-process rights to notice and a fair hearing.<sup>221</sup> Metropolitan Edison Company's policy on terminating electricity was filed with the Commonwealth, and was not disapproved because the Commonwealth found the method of termination permissible under state law.<sup>222</sup> The regulations on termination of electricity "were made enforceable by the weight and authority of the State."<sup>223</sup> Additionally, "the State retain[ed] the power of oversight to review and amend the regulations if the public interest so require[d]."<sup>224</sup> However, a majority of the Supreme Court found "that the State of Pennsylvania [was] not sufficiently connected with [Metropolitan Edison Company's] action in terminating [Jackson's] service so as to" find that Metropolitan Edison Company was a government actor.<sup>225</sup>

The Court found government action in *Brentwood Academy* because of the pervasive entwinement between the State and TSSAA.<sup>226</sup> The Court said the entwinement was evidenced by the fact that the State had previously reviewed and approved the

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school should not be deemed a government actor, Chief Justice Burger reasoned,

The school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.

*Id.*

219. *Jackson*, 419 U.S. at 346, 351, 358.

220. *Id.* at 346, 358.

221. *Id.* at 347-348.

222. *Id.* at 354, 358.

223. *Id.* at 362 (Douglas, J., dissenting).

224. *Id.*

225. *Id.* at 358-359.

226. 531 U.S. at 302.



rules promulgated by TSSAA.<sup>227</sup> The Commonwealth in *Jackson* not only reviewed and approved the rules promulgated by Metropolitan Edison Company, but it also had the authority to amend Metropolitan Edison Company's regulations if so required by the public interest.<sup>228</sup> In particular, the Commonwealth imposed a requirement of "reasonable notice" in Metropolitan Edison Company's termination procedures.<sup>229</sup> The actions of the Commonwealth in regulating Metropolitan Edison Company were so entwined with the promulgation of regulations by Metropolitan Edison Company that it would be considered a government actor under an entwinement theory of government action.<sup>230</sup>

#### D. The Government-Action Doctrine Is Applied in a Machiavellian Manner

The government-action issue should be analyzed before considering the plaintiff's underlying complaint so that the doctrine can be applied consistently, as opposed to in a Machiavellian manner. The Supreme Court, however, has refused to let the government-action doctrine become an objective test. Rather, the Court has held that, "Faithful adherence to the 'state action' requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint."<sup>231</sup> "Only by sifting facts and weighing circumstances" can the Court determine whether government action is present.<sup>232</sup> These statements indicate that even the Court has found it necessary to point out that "[the Court's] cases deciding when private action might be deemed that of the state have not been a model of consistency."<sup>233</sup> The reason that the cases "have not been a model of consistency"<sup>234</sup> is that, until *Brentwood Academy*, the Supreme

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227. *Id.* at 301.

228. 419 U.S. at 358, 362.

229. *Id.* at 361 (Douglas, J., dissenting).

230. In fact, in its interpretation of the Supreme Court's decision in *Brentwood Academy*, the United States Court of Appeals for the Third Circuit agreed that the entwinement test developed by the Court in *Brentwood Academy* "expand[ed] the nexus test announced in *Jackson v. Metropolitan Edison Co.*" *Chrissman v. Dover Downs Ent. Inc.*, 2001 U.S. App. LEXIS 11733 (3d Cir. June 5, 2001), *vacated*, 254 F.3d 467 (3d Cir. 2001) (vacated by the court on grant of rehearing en banc).

231. *Blum*, 457 U.S. at 1003.

232. *Burton*, 365 U.S. at 722.

233. *Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 632 (1991) (O'Connor, J., Rehnquist, C.J. & Scalia, J., dissenting).

234. *Id.*

Court, with two exceptions, found government action only when the underlying complaint was one of racial discrimination.<sup>235</sup> The Court in *Moose Lodge Number 107 v. Irvis*<sup>236</sup> suggested that it might have found government action if the state's regulation had in any way fostered or encouraged racial discrimination.<sup>237</sup> The Court in *Adickes v. S.H. Kress and Company*<sup>238</sup> indicated that it would try harder to find government action in cases where racial discrimination was involved.<sup>239</sup> Additionally, Justice Thurgood Marshall, in his dissent in *Jackson v. Metropolitan Edison Company*, did not "believe that [the] Court would hold that the State's involvement with [Metropolitan Edison Company] was not sufficient to impose upon the company an obligation to meet the constitutional mandates of nondiscrimination."<sup>240</sup> In only two situations has the Court found government action when the underlying complaint was not based on race, and these two exceptions from the Court's usual Machiavellian analysis of government action are easily distinguished.<sup>241</sup>

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235. See *supra* n. 6. After *Brentwood Academy*, the Court will apparently also find government action if the underlying complaint is a First Amendment violation.

236. 407 U.S. 163 (1972).

237. *Id.* at 176–177. Although the Court found no government action on the part of the private club in *Moose Lodge*, the Court did find that the plaintiff

was entitled to a decree enjoining the enforcement of § 113.09 of the regulations promulgated by the Pennsylvania Liquor Control Board [a conceded government actor] insofar as that regulation require[d] compliance by Moose Lodge [the private party] with provisions of its constitution and bylaws containing racially discriminatory provisions.

*Id.* at 179. Perhaps two other reasons, not addressed by the Court in its opinion, explain why the Court failed to find government action in *Moose Lodge*: because it did not want to infringe on the private club's constitutional right to free association, and because it feared opening the door to a flood of lawsuits if it held that government licensing of a private organization was enough to find government action.

238. 398 U.S. 144 (1970).

239. *Id.* at 190–191.

Accordingly, in the cases that have come before us this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken. These decisions represent vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination.

*Id.* at 191 (citations omitted).

240. 419 U.S. at 374 (Marshall, J., dissenting).

241. There is one other case in which the Court found government action where the underlying complaint was not one of racial discrimination. In *Public Utilities Commission of District of Columbia v. Pollak*, the Court found government action when the underlying complaint was one based on alleged violations of the First and Fifth Amendments. 343 U.S. 451, 462–463 (1952). However, the Court in *Jackson v. Metropolitan Edison Company* pointed out in reference to the government-action issue in *Pollack* that "[i]t is not entirely

The first exception to the Court's unwillingness to find government action without an underlying racial-discrimination claim arises when the challenged conduct consists of enforcement of local, state, or federal laws by government officials, admitted government actors, who are themselves parties to the alleged unconstitutional conduct.<sup>242</sup> The Court in *Lugar v. Edmondson Oil Company*, found government action even though the claim stemmed from an alleged violation of due process, and not racial discrimination.<sup>243</sup> However, in *Lugar*, the only way the prejudgment-attachment statute could be enforced was through judicial action.<sup>244</sup> The government opened the door for potential deprivations of property without due process with the enactment of the prejudgment-attachment statute, and then allowed the private party the benefit of the unconstitutional statute by legally enforcing it.<sup>245</sup> Additionally, the Court limited the holding in *Lugar* to the context in which it arose as follows:

The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of state-created attachment procedures. That holding is contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute.<sup>246</sup>

The second exception occurs when a private party is actually considered a government entity for constitutional purposes

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clear whether the Court alternatively held that Capital Transit's [the private party] action was action of the 'State' for First Amendment purposes, or whether it merely assumed, *arguendo*, that it was and went on to [find no First Amendment violation]." *Jackson*, 419 U.S. at 356.

242. *Lugar*, 457 U.S. at 924–925, 942; *Dennis*, 449 U.S. at 25–26; *U.S. v. Price*, 383 U.S. 787, 795 (1966) (holding that private persons were acting under color of law when they conspired with law enforcement officials — admitted government actors — to deprive civil rights activists of due process by pulling them over, arresting them, and later murdering them).

243. 457 U.S. at 924, 942 (holding that because Edmondson Oil Company, a private party, had acted together with and obtained significant aid from state officials since the prejudgment-attachment statute required judicial action to be enforced, there was enough government involvement to conclude that Edmondson Oil Company was a government actor).

244. *Id.* at 924.

245. *Id.* at 941–942.

246. *Id.* at 942.

because the government has created the private entity for governmental objectives, and controls the private entity.<sup>247</sup> In *Lebron*, one of the issues at the appellate level was whether Amtrak was a government actor.<sup>248</sup> However, the Supreme Court never reached the issue because it held that Amtrak, although a private corporation, was itself a federal entity.<sup>249</sup> Therefore, although the underlying complaint in *Lebron* was an alleged First Amendment violation and not racial discrimination,<sup>250</sup> the Court did not find that Amtrak was a government actor.<sup>251</sup> Rather, the Court held that,

[W]here, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.<sup>252</sup>

Another indication of the Court's Machiavellian application of the government-action doctrine is its conclusion in *Norwood v. Harrison*. Mississippi provided free textbooks to all children in both private and public schools.<sup>253</sup> Some private schools excluded students based on their race, and the Supreme Court held that Mississippi could not provide free textbooks to the students attending these racially discriminatory private schools.<sup>254</sup> The Court explained that,

[T]he Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the

247. *Lebron*, 513 U.S. at 397, 400 (providing an example of the exception).

248. *Id.* at 378–380, 402.

249. *Id.* at 383, 394, 400. Amtrak, the private corporation, was considered a federal entity based on the idea that

Government-created and controlled corporations are (for many purposes at least) part of the Government itself. . . . It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.

*Id.* at 397.

250. *Id.* at 380.

251. *Id.* at 383, 394, 400.

252. *Id.* at 400.

253. *Norwood*, 413 U.S. at 456, 457, 459.

254. *Id.* at 468.

type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce and support private discrimination.<sup>255</sup>

The State in *Norwood* was required to cease its financial assistance to the racially-discriminatory private schools; otherwise, the discriminatory actions of the private school would be attributed to the State, and would, therefore, be unconstitutional.<sup>256</sup> Yet, in *Rendell-Baker*, even though the State extensively regulated and provided ninety to ninety-nine percent of the private school's funding, the actions of the private school in discharging its employees were found not to be fairly attributable to the State.<sup>257</sup>

The State was much more involved in the operations of the private school in *Rendell-Baker* than it was in *Norwood*. The only feasible explanation for the contradictory conclusions in the two cases is that the underlying complaint in *Norwood* was racial discrimination, and the underlying complaint in *Rendell-Baker* was based on violations of the First and Fourteenth Amendments. The Court did not allow a finding of government action in *Rendell-Baker* because it was concerned that then everyone who contracted with, and was regulated by, the government would be considered a government actor.<sup>258</sup> However, had the plaintiff in *Rendell-Baker* been complaining of racial discrimination instead of a due-process violation, based on both *Norwood* and the history of the government-action cases, the Court would have been required to find government action.

#### V. CONCLUSION

As *Tarkanian*, *Blum*, *Rendell-Baker*, and *Jackson* indicate, the advent of the ill-defined entwinement theory of government action developed by the *Brentwood Academy* Court seemingly broadened the government-action doctrine sufficiently to cause any private corporation with contacts to the government to worry. A "catch-all" entwinement theory of government action will allow the Supreme Court to further manipulate facts and obscure precedent by calling on the new theory of government action when the underlying complaint is one the Court believes should

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255. *Id.* at 465–466.

256. *Id.* at 468.

257. 457 U.S. at 832.

258. *Supra* n. 218 and accompanying text (discussing Chief Justice Burger's opinion).

not go unpunished. In light of the Court's decision in *Brentwood Academy*, the Court will not tolerate racial discrimination or First Amendment violations by private parties, and will find government action to assure that such constitutional infringements are eradicated.

Because the Court is incapable of employing the government-action doctrine consistently, and instead applies it in a Machiavellian manner, the government-action doctrine should be abolished.<sup>259</sup> If a government official acts jointly with a private entity, enabling a constitutional violation, let the government official be held responsible, not the private party that utilized the seemingly constitutional government procedure. If a private party's actions are so egregious that they must be punished, let Congress and the state legislatures pass legislation to forbid the conduct of the private party.

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259. To reiterate, the Author is not advocating the abolishment of the government-action doctrine in those cases decided under a "public-function" theory of government action.