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The Sixth Circuit Dropped the Ball: An Analysis of *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n* in Light of the Supreme Court's Recent Trends in State Action Jurisprudence

I. INTRODUCTION

If you ask any junior high or high school student what they most like about school, a significant number of them will unblinkingly respond, "Playing sports."¹ For the most part, this is a uniquely American phenomenon because, unlike many countries where organized sports "are tied to community-based athletic clubs," organized sports in the United States are primarily tied to schools.² These schools, in turn, have ties to the state, and it is from actions by the state that students are protected by the Constitution.

The Constitution is limited, however, in its ability to shield state-sponsored interscholastic sports. Despite the best contentions of "Johnny or Jane," their parents, or their coaches that "Johnny and Jane" have a right to play football or cheer for the squad, no court has ever recognized such a right. In fact, all federal circuit courts that have considered this contention have consistently held that there is no such thing as a constitutional right to participate in interscholastic athletics.³ Furthermore, because high school athletics are inextricably tied to the several states' education programs and not to any federal program, it is state law and policy, rather than constitutional or federal law, which guides these programs. Therefore, the only effective way a person can make out a federal issue when attempting to protect their school "sports rights" is either through the indirect path of

1. See generally FRANK L. SMOLL & RONALD E. SMITH, CHILDREN AND YOUTH IN SPORT: A BIOPSYCHOSOCIAL PERSPECTIVE 37-39 (1996) (noting participation rates in interscholastic athletics by sport, gender, age, and race).

2. ROBERT S. GRIFFIN, SPORTS IN THE LIVES OF CHILDREN AND ADOLESCENTS: SUCCESS ON THE FIELD AND IN LIFE 69 (1998).

3. See, e.g., *Alerding v. Ohio High Sch. Athletic Ass'n*, 779 F.2d 315 (6th Cir. 1985); *Niles v. Tex. Univ. Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983); *Hebert v. Ventetuolo*, 638 F.2d 5 (1st Cir. 1981); *Moreland v. W. Pa. Athletic Ass'n*, 572 F.2d 121 (3d Cir. 1978); *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976).

the incorporation doctrine of the Fourteenth Amendment⁴ to the states or through the Civil Rights Act of 42 U.S.C. § 1983.⁵ It must be emphasized that the individual rights and liberties that the Constitution and its amendments protect apply *only* to “state actions” or, in other words, only to the actions of any federal, state, or local government.⁶ To put it another way, neither the Constitution nor any of its amendments provides any protections against private conduct no matter how unfair or egregious that conduct may be⁷ unless that action can be traced back to some source of state action.

Recently, the Sixth Circuit held that Tennessee’s Secondary School Athletic Association (“TSSAA”), which traditionally makes all of the rules and guidelines that govern high school athletics for that state, is *not* a state actor.⁸ This is groundbreaking. Every federal circuit court and every state’s highest court that has ever entertained the issue of whether state high school athletic associations are state actors has nodded in the affirmative.⁹ Therefore, these athletic associations have always had to scrupulously watch that they do not step

4. The Fourteenth Amendment provides, in pertinent part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law” U.S. CONST. amend. XIV, § 1.

5. 42 U.S.C. § 1983 (1994) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Furthermore, whether an aggrieved party seeks a remedy under either the Fourteenth Amendment or under § 1983, any court’s “state action” analysis is the same because “[t]he ‘under color of law’ in Section 1983 means the same as the ‘state action’ requirement under the Fourteenth Amendment.” See *Pearson v. Ind. High Sch. Athletic Ass’n*, No. IP 99-1857-C-T/G, 2000 U.S. Dist. LEXIS 11913, at *17 n.6 (S.D. Ind. Feb. 8, 2000); see also *United States v. Price*, 383 U.S. 787, 794 n.7 (1966), *overruling recognized in* *Gresham Park Cmty. Org. v. Howell*, 652 F.2d 1227 (5th Cir. 1981).

6. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 758 (3d ed. 1999).

7. See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). The one exception being the Thirteenth Amendment, “which abolishes the institution of slavery, [and which] is directed [] to controlling the actions of private individuals.” ROTUNDA & NOWAK, *supra* note 6, at 758.

8. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 180 F.3d 758, 766 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 1156 (2000), *rev’d*, No. 99-901, 2001 U.S. LEXIS 964 (Feb. 20, 2001).

9. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 190 F.3d 705, 706-07 (6th Cir. 1999), *denying reh’g to* 180 F.3d 758 (6th Cir. 1999).

on anyone's constitutional toes—always until now. The *Brentwood* decision has set off a tremor in this formerly stable area of state action law.

Although the Sixth Circuit's *Brentwood* court understandably interpreted the Supreme Court's relevant state action cases to effectively limit, if not eliminate, finding state action in the actions of many private entities, the Sixth Circuit went too far when it held that the actions of the TSSAA are not state actions. Consequently, this decision unduly expands the several states' legal authority, through their athletic associations to slight, if not trample, the constitutional protections traditionally afforded students and schools engaged in states' interscholastic athletic programs.

First and foremost, this Note discusses why the Sixth Circuit wandered off the state actor charts in its *Brentwood* holding. Part II provides the necessary background for understanding the *Brentwood* court's analysis by explicating (1) the three prominent tests in the "state actor" field; (2) the pivotal *Blum* Trilogy of cases; and (3) the other federal circuits' respectively unanimous holdings that state interscholastic athletic associations are state actors. Part III examines the factual specifics that underlie the *Brentwood* decision. Part IV focuses on the *Brentwood* court's analysis, particularly the court's troubling analysis rooted in its interpretation of the Supreme Court's *Tarkanian* Footnote 13. Part V critiques not only the *Brentwood* court's analysis but also calls for a re-examination of the Supreme Court's recent analysis in this area of state action. Part V also offers a solution on how to correct this area of the law, which, of late, has elevated form over substance. Part VI offers a brief synthesis, and because the Supreme Court reversed and remanded *Brentwood* back to the Sixth Circuit while this Note neared the final phases of the editing process prior to publication, Part VII provides a necessary post-script, though certainly not the last word in this gaping gray area of constitutional law.¹⁰

10. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, No. 99-901, 2001 U.S. LEXIS 964 (Feb. 20, 2001). Although the Supreme Court's decision ultimately decided some of the narrower issues pertinent only to the *Brentwood* case, the 5-4 Court, if anything, continued to muddy the waters of state action jurisprudence. See *infra* Parts V and VII.

II. BACKGROUND

The Supreme Court began applying the Fourteenth Amendment to the states with the *Civil Rights Cases*.¹¹ In these cases, the Court's majority held that restricting Blacks from accessing public accommodations or public conveyances is not unconstitutional because it is merely a harm between private persons; therefore, there is no constitutional remedy.¹² In some instances where a person's constitutional rights or liberties have been harmed, it is clear that the alleged wrongdoer is (or is not) a state actor and, therefore, it is clear whether the courts may (or may not) afford a remedy. However, the governmental status of the wrongdoer is frequently unclear, despite claims that it is a non-state actor and, therefore, incapable of violating the Constitution.¹³ Over the course of the recent century, the Supreme Court has developed the following tests to determine whether these seemingly private actors may actually be ascribed as state actors: (1) the *Public Function*¹⁴ test; (2) the *Nexus*¹⁵ test; and (3) the *Mutual Contacts*¹⁶ test.¹⁷

11. 109 U.S. 3 (1883). See David J. Pierguidi, Note, *Absent Strong Connections to a State Government, a High School Athletic Association Cannot Be Construed as a State Actor: Brentwood v. Tennessee Secondary School Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999), cert. granted, 120 S. Ct. 1156 (2000), 10 SETON HALL J. SPORTS L. 457, 458-59 (2000).

12. See ROTUNDA & NOWAK, *supra* note 6, at 766-67.

13. See *id.* at 759.

14. See, e.g., *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 371 (1974); *Marsh v. Alabama*, 326 U.S. 501, 506-07 (1946).

15. Or state compulsion/coercion test. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982); *Lugar v. Edmondson Oil Co.*, 456 U.S. 922, 941 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

16. Or licensing, symbiotic, subsidies, "catch-all," or other joint action or entanglement test. See ROTUNDA & NOWAK, *supra* note 6, at 796-817. Mutual contacts is really Nowak and Rotunda's "catch-all" category for all the various direct and indirect means the Supreme Court has used to determine the level of relationship between so-called private actors and the state. See, e.g., *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 175 (1972).

17. The author has chosen these italicized state action test labels because many legal scholars in the field prefer them. Moreover, the author has not placed the additional state action labels in the footnotes to confuse the reader but to provide a sample list of synonymous names and descriptions that may connect with many readers.

*A. A Brief Preview of the State Action Tests**1. The Public Function test*

When using the public function test to determine whether a seemingly private actor has assumed state actor status, the courts consider whether the private actor's activity is one that government has traditionally done (e.g., holding elections).¹⁸ For example, in *Jackson v. Metropolitan Edison Co.*,¹⁹ a private utility company terminated a woman's electrical service.²⁰ She called state action theory into play when she noted that the state licensed this private utility to have a statewide monopoly, and she further noted that since the utility company had failed to provide any notice or hearing regarding the termination of her utilities, her rights to due process had been abused.²¹ The Supreme Court used the Public Function test to limit such an extension of state action upon licensed monopolies when it stated that only activities that were traditionally reserved to state authority (e.g., *education*, fire and police protection, tax collection, etc.) fall within the ambit of public function.²²

2. The Nexus test

Under this test, the Supreme Court measures the quantity and quality of a governmental entity's encouragement, coercion, and direction aimed at a private entity.²³ For example, in *Shelley v. Kraemer*,²⁴ state courts held enforceable the restrictive covenants that prevented minority Blacks from owning certain homes.²⁵ The Supreme Court later rejected this reasoning and held that the state courts had, in effect, encouraged or directed racial discrimination²⁶ and thereby violated the Fourteenth Amendment's Equal Protection Clause.²⁷ As this Note contemplates, the Court has recently been in-

18. ROTUNDA & NOWAK, *supra* note 6, at 764.

19. 419 U.S. 345 (1974).

20. *See id.* at 347.

21. *See id.* at 347-48.

22. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 163-64 (1978).

23. *See* Pierguidi, *supra* note 11, at 460-61.

24. 334 U.S. 1 (1948).

25. *See id.* at 4-8.

26. *See id.* at 19-20.

27. *See id.* at 23; ROTUNDA & NOWAK, *supra* note 6, at 785-86; *see also* Pierguidi,

creasingly unwilling to find the requisite nexus between state entities and private entities.²⁸

3. *The Mutual Contacts or "catch-all" tests*

Under this type of analysis, the Court basically examines the number and type of relationships between the state and the alleged wrongdoer.²⁹ Specifically, the Court, on a case-by-case basis, weighs such items as (1) state licensing and regulation of the private entity; (2) state subsidies or aid to the private entity; (3) the amount of "symbiosis" or "entanglement" between the state and the private entity; and (4) the amount of "joint action" attributable to the state and the private entity.³⁰

Perhaps the best example of applying these "catch-all" tests occurs in the *Blum* Trilogy³¹ itself and its wake of subsequent cases. In the next section, this Note will examine the *Blum* Trilogy cases one at a time; therefore, the reader may more appropriately note the application of this Mutual Contacts or "catch-all" test momentarily. Suffice it here to say that *Blum* essentially established a high-water mark under this third test (and arguably under the second or Nexus test). It is this high-water mark that undoubtedly paved the way for the *Brentwood* court to stray from the unanimity³² of state supreme court and federal circuit court decisions which held that state high school athletic associations were state actors; and which, until *Brentwood*, uniformly triggered all of the implications and ramifications of the Fourteenth Amendment and § 1983 onto state interscholastic athletics programs.

supra note 11, at 461.

28. See Pierguidi, *supra* note 11, at 461-62; see also *infra* Part V.A (discussing the significance of the *Blum* Trilogy and its aftermath).

29. See 2 ROTUNDA & NOWAK, *supra* note 6, at 796.

30. See *supra* notes 14-17 and accompanying text.

31. See *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). These cases have become collectively known as the *Blum* Trilogy. See *infra* Part II.B.1-3 for a more in-depth analysis of the *Blum* Trilogy cases.

32. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999), *reh'g denied*, 190 F.3d 705, 706 (6th Cir. 1999).

B. THE *BLUM* TRILOGY

To understand the Sixth Circuit's reasoning in *Brentwood*, it is useful to consider the analysis followed in the *Blum* Trilogy, upon which the *Brentwood* Court relied heavily. The *Blum* Trilogy itself does not directly address state athletic association issues. This trilogy, however, is essentially the Supreme Court's latest word on state action law. As will be ultimately evident, the *Blum* Trilogy, when examined on a general level of abstraction, stands for the proposition that the Supreme Court is increasingly reluctant to find "state action" even though the Court may have more easily done so under its previous tests.

1. Blum

In *Blum v. Yaretsky*,³³ a class of Medicaid patients in private New York nursing homes challenged whether they could be "demoted" from skilled care to standard care facilities without any form of due process or hearing.³⁴ The Supreme Court considered the issue of whether the state of New York may be held responsible for the decision to "demote" or downgrade the status of these patients' care.³⁵ Despite the extensive regulatory overlap between decision-making physicians and New York's bureaucratic implementation of Medicaid,³⁶ and despite the fact that the state subsidized more than 90% of the care of the Medicaid patients in these care facilities,³⁷ the Court held that these nursing homes were not acting under the influence of the state, and therefore were not state actors.³⁸

33. 457 U.S. 991 (1982).

34. *See id.* at 993.

35. *See id.*

36. *See id.* at 1004.

37. *See id.* at 1011.

38. *See id.* at 1012. The Court's majority arrived at this conclusion because "demoting" the Medicaid patients' standard of care "ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 1008. The dissenting opinion determined, however, that in this case the physician's role is far from independent and is, in fact, relegated to simply that of a "scorer," tabulating the necessary care according to predetermined standards established by the state. *See id.* at 1022-23 (Brennan, J., dissenting). Justice Brennan further added that these predetermined state standards that expeditiously "demote" Medicaid patients' level of care are, indeed, less about what the majority terms professional "decisionmaking" and more about the state's desire to save money. *See id.* at 1014-15. In *Blum*, therefore, the dissent not only conceptually notes that

2. Rendell-Baker

In *Rendell-Baker v. Kohn*,³⁹ Kohn, the director at a private school for troubled youth, fired one vocational counselor and five teachers when these faculty members supported a joint student-staff proposal for changes at the school.⁴⁰ Ms. Rendell-Baker (and the others) alleged that they had been dismissed without due process because she had simply exercised her First Amendment speech rights.⁴¹ Of course, at issue in this case was whether a private school, which derives most of its income from the public and which is regulated by the public, is a state actor when it discharges its employees.⁴²

Basically following the same three tests outlined above,⁴³ the Court first rejected state actor status under the Public Function test because education is not an exclusive prerogative of the state where private schools have often fulfilled this public need.⁴⁴

Moving directly to the Mutual Contacts or “catch-all” test, this Court’s same *Blum* majority held that significant subsidies and heavy regulation are not enough to confer state actor status. Just as the nursing home in *Blum* received significant state subsidies,⁴⁵ Kohn’s school received 90 to 99% of its funds from the state.⁴⁶ Not only did the Court dismiss this potential “entanglement,” the *Rendell-Baker* Court’s majority clearly limited the Mutual Contacts test when it declared that just because a private entity depends on state contracts to build roads, dams, ships, etc. for the government does not make that private entity a state actor.⁴⁷

Justice Marshall, in dissent, took issue with this limitation of the Mutual Contacts approach and volleyed back that this school, unlike

form has been elevated over substance, but concretely advances the argument that state *forms* themselves have been elevated over the substance of what is materially going on in these nursing homes.

39. 457 U.S. 830 (1982).

40. *See id.* at 831.

41. *See id.* at 834.

42. *See id.* at 831.

43. *See supra* Part II.A.1–3.

44. *See Rendell-Baker*, 457 U.S. at 842.

45. *See supra* note 37 and accompanying text.

46. *See Rendell-Baker*, 457 U.S. at 840–41.

47. *See id.*

the majority's state-contracted construction work, is much more closely regulated and, furthermore, that this school is performing a statutory duty of the state.⁴⁸ Justice Marshall conceded that under this Mutual Contacts test, perhaps the subsidy money and heavy regulatory schemes in and of themselves may not be enough, but taken together with several other indicia of state action in the same factual circumstances,⁴⁹ the case merits more than mere lip service to the Mutual Contacts test. In sum, Marshall stated that the majority's decision appeared to signal "a return to empty formalism in state action doctrine."⁵⁰

3. Lugar

In *Lugar v. Edmondson Oil*,⁵¹ Edmondson Oil, to recover on a debt, sought a prejudgment attachment against Lugar. The clerk subsequently issued the writ of attachment, which the county sheriff executed.⁵² Lugar sued under § 1983 because Edmondson "had acted jointly with the state [the court and its officers] to deprive him of his property without due process of law."⁵³ The Supreme Court held that this joint action caused the county court to be a state actor.⁵⁴ Considering the narrowness of this decision's applicable holding (i.e., exclusive to prejudgment attachments), not even this case's outcome—that the Court's majority actually found state action where a private actor had acted⁵⁵—really appears relevant for evaluating many subsequent state action cases.

C. Status Quo of the Federal Circuits Prior to Brentwood

After the Sixth Circuit held that the TSSAA is not a state actor and subsequently denied rehearing, Justice Merritt of that circuit understandably lamented that what had been crystal clear in the law

48. See *id.* at 851 (Marshall, J., dissenting).

49. See *id.* at 848 n.1.

50. See *id.* at 852.

51. 457 U.S. 922 (1982).

52. See *id.* at 924–25.

53. *Id.*

54. See *id.* at 941–42.

55. See *id.* In sum, under a "joint participation" element of the Mutual Contacts test, the Court held that when the County Clerk and Sheriff acted on Edmondson Oil's prejudgment attachment, the state acted "jointly" with a private person to take away Lugar's property without due process of law under the Fifth and Fourteenth Amendments. See *id.*

was now clouded.⁵⁶ Specifically, Merritt did not understand how his court could reasonably deny a petition for an *en banc* rehearing when he considered that each and every circuit that had ever inquired as to whether state high school interscholastic athletic associations were state actors had, in fact, held that they were. And what troubled him most about his fellow justices' denial of rehearing was that they had "created an unnecessary conflict in the circuits on an important question of constitutional law . . . [which] will have to be remedied now by the Supreme Court."⁵⁷

Prior to the Sixth Circuit's *Brentwood* decision, all other federal circuits consistently held that high school interscholastic athletic associations were state actors.⁵⁸ The following is a sampling of how some of these circuits reached their respective conclusions that state athletic associations are indeed state actors. For the most part, these circuit cases stand for the proposition that holding state interscholastic athletic associations as state actors was essentially a foregone conclusion. No circuit seriously entertained the possibility that these associations were anything but state actors.

1. Foregone conclusion analysis among the circuits

In the Seventh Circuit's *Griffin High School v. Illinois High School Ass'n*,⁵⁹ Griffin, a private religious school, sued the state athletic association under § 1983, alleging the Illinois High School Association ("IHSA") "discriminated against private schools in violation of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment."⁶⁰ Griffin based its contention upon a

56. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, *reh'g en banc denied*, 190 F.3d 705, 706–07 (6th Cir. 1999) (Merritt, J., dissenting). In particular, Merritt asserted that the Sixth Circuit was essentially acting irresponsibly because this circuit's holding (1) contradicted uniform case law; (2) contradicted the clearly established constitutional theory of "state action" held in all other circuits and all state supreme courts; and (3) trounced (potentially) the expectations of how almost all fifty states should conduct their high school interscholastic athletic associations. *Id.* at 706.

57. *Id.* at 707–08 (Merritt, J., dissenting). The Supreme Court has since granted certiorari. See 120 S. Ct. 1156 (2000).

58. See, e.g., *Griffin High Sch. v. Ill. High Sch. Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987); *In re United States ex rel. Mo. State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982); *Moreland v. W. Pa. Interscholastic Athletic League*, 572 F.2d 121, 125 (3d Cir. 1978); *Okla. High Sch. Athletic Ass'n v. Bray*, 321 F.2d 269, 273 (10th Cir. 1963).

59. 822 F.2d 671 (7th Cir. 1987).

60. *Id.* at 672–73.

new student transfer rule, which enabled high school athletes to transfer from private schools to public schools with impunity, but which compelled athletes that transferred from public schools to private schools to sit out one whole year before being eligible to play.⁶¹ The court upheld the transfer rule under its rational basis test.⁶² Of course, for this court to reach its rational basis analysis, it first entertained the pertinent issue of whether the IHSA was a state actor.⁶³ Apparently both parties conceded this issue because neither party disputed whether IHSA was a state actor,⁶⁴ and the court essentially, like so much of its prior precedent, “assum[ed] without deciding the question, that the IHSA [was] an arm of the state for Fourteenth Amendment purposes” because “the overwhelming public nature of the IHSA membership [was] sufficient to confer state action”⁶⁵

The Eighth Circuit’s case of *In re United States ex rel. Missouri State High School Activities Ass’n*⁶⁶ is another high school athlete transfer rule case.⁶⁷ Furthermore, just as the Seventh Circuit held IHSA a state actor, this court simply held that the Missouri State High School Activities Association (“MSHSAA”) was a state actor “[b]ecause MSHSAA [was] an association comprised primarily of public schools, its rules [were] state action governed by the [F]ourteenth [A]mendment.”⁶⁸

2. A hint of change

By the early 1990s, one circuit hinted at a potential shift. The Fifth Circuit’s case of *Habetz v. Louisiana High School Athletic*

61. *See id.*

62. *See id.* at 675. A discussion of such would be beyond the scope of this Note.

63. *See id.* at 674.

64. *See id.*

65. *See id.*

66. 682 F.2d 147 (8th Cir. 1982).

67. *See id.* at 149–50.

68. *Id.* at 151. The Tenth Circuit’s *Oklahoma High School Athletic Ass’n v. Bray*, 321 F.2d 269 (10th Cir. 1963), is yet another high school athlete transfer rule case that required the Tenth Circuit court to determine whether the Oklahoma High School Athletic Association (“OHSAA”) was a state actor for purposes of Bray’s § 1983 suit. *See id.* at 273. Although the court conceded that the OHSAA is a voluntary association, created by contract of its composite schools rather than legislation, its rules still “ring with authority and are enforced as against an individual in the name of the public interest, under color of the laws of the State of Oklahoma” *Id.*

*Ass'n*⁶⁹ probably provides the best hint of a bridge between the federal circuits' past practice of consistently holding that state high school athletic associations were state actors and the Sixth Circuit's current break from the pack with *Brentwood*. In *Habetz*, a female high school student desired to play on the baseball team, but she was forbidden due to a Louisiana High School Athletic Association ("LHSAA") rule, which prevented girls from playing on boys' teams.⁷⁰ Actually, only attorney's fees were at issue in this case⁷¹ because the girl's claim became moot when the LHSSA amended its rule, thereby allowing "a girl to participate in boys sports if the particular school does not offer a comparable girls sport [e.g., If no girl's softball is offered, then girls may play baseball]."⁷² Since the plaintiff's case-in-chief—which consisted of § 1983 and Fourteenth Amendment claims—was no longer at issue, the court did not need to decide whether the LHSSA was a state actor. The court, however, noted that the district court had determined that the LHSAA was not a "state actor" when it applied the *Blum* Trilogy's "fairly attributable" theory.⁷³ The court foreshadowed the *Brentwood* court's problematic dealing with *Tarkanian*⁷⁴ footnote 13 when it declared, "[w]hether *St. Augustine*⁷⁵ remains controlling in this circuit after [the *Blum* Trilogy], and *Tarkanian* and its footnote 13 is a question we need not decide."⁷⁶ After hinting at a potential gap in recent state actor precedent, the Fifth Circuit dodged this one. But ten years later, the Sixth Circuit picked up where the Fifth Circuit left off and blazed into uncharted state actor jurisprudence.

III. BRENTWOOD ACADEMY

Because the Tennessee Secondary School Athletic Association ("TSSAA") has a recruiting rule that prohibits TSSAA member schools from "[t]he use of undue influence . . . to secure or retain a

69. 915 F.2d 164 (5th Cir. 1990).

70. See *id.* at 165. Of course, mixed doubles in tennis was excepted. *Id.*

71. See *id.* at 167.

72. *Id.* at 165.

73. See *id.* at 166–67.

74. NCAA v. Tarkanian, 488 U.S. 179, 191 (1988); see *infra* Part IV.B.

75. La. High Sch. Athletic Ass'n v. St. Augustine High Sch., 396 F.2d 224 (5th Cir. 1968) (holding that LHSAA was a state actor). This case was arguably cited as persuasive precedent by the Supreme Court in *Tarkanian*'s footnote 13. See *infra* Part IV.B.3.a.

76. *Habetz*, 915 F.2d at 167.

student for athletic purposes,”⁷⁷ Brentwood Academy alleged (among other claims) that the TSSAA had violated its First Amendment⁷⁸ right to free speech as incorporated upon the states by the Fourteenth Amendment.⁷⁹ Before the court, therefore, could address the merits of Brentwood’s claims, the court had to first determine the issue of whether the TSSAA was a state actor.⁸⁰

A. The Events Leading up to the Lawsuit

Brentwood Academy is a private Christian school located in Brentwood, Tennessee.⁸¹ Brentwood is considered to be what is commonly regarded as a high school “football powerhouse.”⁸² Brentwood has been nationally ranked by *USA Today*, it has compiled a 310-43 record over the past twenty-eight years (as of March 1998), and it has racked up seven state championship titles.⁸³

The other party to this action, the TSSAA, was incorporated in 1925 as a voluntary association⁸⁴ to oversee interscholastic athletic programs in Tennessee’s secondary schools. By the late 1990’s, 290 public schools and fifty-five private schools comprised TSSAA’s membership.⁸⁵

In 1997, various rival coaches, apparently tired of both losing and of the bitterness of sour grapes, alleged that Brentwood had violated some TSSAA rules.⁸⁶ TSSAA investigated and found (among other infractions) that the Brentwood football coach had sent a letter to already-accepted, incoming ninth graders to join the team’s spring practice while in the eighth grade.⁸⁷ According to TSSAA, this action

77. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 180 F.3d 758, 761 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 1156 (2000), *rev’d*, No. 99-901, 2001 U.S. LEXIS 964 (Feb. 20, 2001) (citing TSSAA Bylaws, art. II, § 21).

78. The First Amendment provides, in pertinent part: “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I.

79. See *supra* note 4 and accompanying text.

80. *Brentwood*, 180 F.3d at 760.

81. See *id.*

82. See *id.*

83. See *id.*

84. See *id.* at 762.

85. See *id.*

86. See *id.* at 760.

87. See *id.* at 760–61. The TSSAA also found that the Brentwood football coach had provided free tickets to a Brentwood football game for a middle school coach and two middle school athletes. TSSAA’s penalty for this violation of the “recruiting rule” was not a contested

itself violated the TSSAA's "recruiting rule" which states:

The 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 retain a student for athletic purposes shall be a violation of the recruiting rule.⁸⁸

By August of 1997, TSSAA declared (1) that Brentwood, as a result of violating these rules, would be ineligible to participate in TSSAA football and basketball tournaments for one year, and (2) that all Brentwood programs would be on probation for two years.⁸⁹ Naturally, Brentwood appealed this decision as part of TSSAA's internal appeals process. But, by the end of Brentwood's second appeal, TSSAA actually *increased* Brentwood's penalties. TSSAA declared (1) that Brentwood would be ineligible to participate in tournaments for two years, (2) that all Brentwood programs would be on probation for four years, and (3) that Brentwood would pay a fine of \$3000.⁹⁰

At this juncture, a critical point must be clarified. Under its "recruiting rule," TSSAA is not punishing Brentwood Academy for holding a football spring practice (which it could do under the TSSAA rules), but rather punishing the program because *the football coach contacted* the already admitted, incoming freshman to let them know just when that legitimate spring practice program would begin. As the district court found, Brentwood's true violation lay in Brentwood Academy's football coach's, or rather Coach Flatt's *invitation*⁹¹ to attend the football practice, not in the practice itself. Fur-

issue in Brentwood's future state action lawsuit. The TSSAA further found that the basketball coach had impermissibly held an off-season practice. However, because that coach had violated the "off-season practice rule" rather than the "recruiting rule," it did not implicate any First Amendment free speech rights, which Brentwood attempted to vindicate with its lawsuit against the TSSAA. *Id.*

88. *Id.* at 761 (citing TSSAA Bylaws, art. II, § 21).

89. *See id.*

90. *See id.*

91. The full text of the invitation reads:

Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.

Spring practice will begin May 1, 1997 and conclude on May 14, 1997. Practice begins at 3:30 and will be finished by 4:45. Due to the inconvenience to your parents,

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thermore, Coach Flatt's subsequent telephone calls to students, which were prompted by a parent's concerned inquiry about what to do if his child's middle school activity conflicted with Brentwood's spring football practice, further violated the "recruiting rule" even though the substance of Coach Flatt's telephone message actually discouraged the boys from attending practice if it in any way conflicted with activities at their respective middle schools.⁹²

B. Brentwood Files Suit

On December 12, 1997, Brentwood, after exhausting the TSSAA's appeals process, filed suit against TSSAA.⁹³ Brentwood sought injunctive relief against enforcement of the TSSAA's "recruiting rule" primarily because it allegedly violated 42 U.S.C. § 1983.⁹⁴ Brentwood's § 1983 claim charged that TSSAA's "recruiting rule" deprived Brentwood of its First and Fourteenth Amendment rights under color of state law⁹⁵ because the TSSAA, as an alleged state actor, prohibited Brentwood's football coach from communicating to Brentwood's incoming freshman and punished the program for sending a letter to and telephoning these incoming freshman. The United States District Court granted summary judgment to Brentwood when it held that the TSSAA's "recruiting rule," on its face, violated the First Amendment.⁹⁶ TSSAA, arguing that it was not a state actor for purposes of § 1983 and the Fourteenth Amendment, brought this appeal to the Sixth Circuit.⁹⁷

please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.

In the near future, you will receive a letter outlining our summer workout program.

If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are certainly glad that you decided to become an *Eagle*.

Your Coach,

/s/ Carlton Flatt

Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 13 F. Supp. 2d 670, 676 (M.D. Tenn. 1998), *rev'd*, 180 F.3d 758 (6th Cir. 1999), *rev'd*, No. 99-901, 2001 U.S. LEXIS 964 (Feb. 20, 2001).

92. *Id.* at 676. Coach Flatt chose to individually "telephone the students because there was not enough time before the start of spring practice to send another letter." *Id.*

93. *See Brentwood*, 180 F.3d at 761.

94. *See id.* *See supra* note 5 for pertinent text of 42 U.S.C. § 1983.

95. *See Brentwood*, 180 F.3d at 761.

96. *See Brentwood*, 13 F. Supp. 2d at 695.

97. *See Brentwood*, 180 F.3d at 761.

C. TSSAA Appeals

Maintaining the district court's holding of state action, therefore, was critical to Brentwood Academy in TSSAA's appeal to the Sixth Circuit because the Fourteenth and First Amendments and "§1983 erect[] no shield against merely private conduct, no matter how discriminatory or wrongful."⁹⁸ In other words, "[t]o prevail on a First Amendment claim, [Brentwood] must first make a showing that [TSSAA] is a 'state actor.'"⁹⁹

In order to determine whether TSSAA is a "state actor," the Sixth Circuit must first analyze the TSSAA itself before looking to binding and precedential rules of law. The Sixth Circuit essentially found the following seven core factors regarding TSSAA's characteristics to aid in its determination of whether TSSAA was a state actor: (1) TSSAA was founded in 1925 as a voluntary association; (2) TSSAA was composed of 290 public and 55 private schools; (3) TSSAA's administrative authority consisted of nine elected Board of Control members (elected by member schools) who are either school principals or superintendents, and at all times relevant to this case, these nine elected board members all came from public schools; (4) TSSAA received no state funding, rather all of its revenues came from tournament gate receipts; (5) TSSAA scheduled only tournaments and not the state's majority of athletic contests, and in fact, when the TSSAA scheduled tournaments at public (e.g. school) facilities, TSSAA entered into a paying contract with the state to do so; (6) nothing in the Tennessee Code authorized the state to conduct interscholastic events or empowered the TSSAA to do so;¹⁰⁰ and finally (7) membership in TSSAA was voluntary.¹⁰¹

The sixth factor listed above—the Tennessee State Board of Education's 1972 "designation" to conduct interscholastic events—received greater attention in the district court than in the Sixth Circuit's review. This is consistent with that district court's approach of weighing substance and with the Sixth Circuit's approach of weighing form. To illustrate, the district court found it significant that in

98. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

99. *See Brentwood*, 180 F.3d at 761–62.

100. In spite of the seeming lack of authority, the Tennessee State Board of Education "designated" TSSAA to conduct interscholastic events from 1972 until 1995, when this "designation" was repealed. *See id.*

101. *See id.* at 762.

1972, the Tennessee State Board of Education, clearly a “state actor,” designated TSSAA as “the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis.”¹⁰² The district court, furthermore, deemed it significant that from 1972 until 1993, the Tennessee State Board of Education, itself, reviewed and approved TSSAA rules on several occasions and even found opportunity to review the “recruiting rule.”¹⁰³ Finally, the district court noted that the 1995 Tennessee State Board of Education suspiciously repealed its “designation” of TSSAA as the organization regulating interscholastic athletics in the wake of Tennessee lawsuits continually holding that the TSSAA is a state actor.¹⁰⁴ Again, the district court noted that after 1995, the *forms* regarding the relationship between the Tennessee State Board of Education had changed, but the district court accepted as material fact that the underlying *substantive* relationship remained the same.¹⁰⁵ Of significant note, the Sixth Circuit did not address this issue in its *de novo* review.

IV. BRENTWOOD ANALYSIS—BLUM TRILOGY FRAMEWORK IN ACTION

After evaluating the facts, procedural history, and standard of review, the Sixth Circuit’s *Brentwood* court concluded that the TSSAA was clearly not a direct arm of the state and, therefore, plunged directly into *Blum* Trilogy application of the three general tests outlined above.¹⁰⁶ The circuit court apparently determined that the *Blum* Trilogy lens would shed more light on these general “state actor” tests than its own, other circuits’, or even state supreme courts’ unanimous holdings that secondary school interscholastic athletic associations, such as the TSSAA, are state actors for purposes of the Fourteenth Amendment and § 1983 analysis.

102. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 13 F. Supp. 2d 670, 675 (M.D. Tenn. 1998) (citing Tenn. Bd. of Educ. Rule 0520-1-2.26 (later moved to Rule 0520-1-2.08)).

103. *See id.*

104. *See id.* at 675, 681–82. *See generally* *Crocker v. Tenn. Secondary Sch. Athletic Ass’n*, 735 F. Supp. 753 (M.D. Tenn. 1990), *aff’d*, 908 F.2d 972 (6th Cir. 1990) (holding the TSSAA to be a “state actor”); *Graham v. Tenn. Secondary Sch. Athletic Ass’n*, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995) (same).

105. *See Brentwood*, 13 F. Supp. 2d at 681–82.

106. *See supra* Part II.A.

A. *Analysis of the Sixth Circuit's Application of the State Action Tests*

As noted, the Sixth Circuit recognized the three general state action tests. The court, however, used different labels than the author has chosen.¹⁰⁷ From its prior precedents, the court recognized (1) the Public Function test; (2) the Nexus [or state compulsion/coercion] test; and (3) the Mutual Contacts "catch-all" [or Symbiotic] test.¹⁰⁸

1. *The Public Function test*

Under its conceptualization of the Public Function test, the court sought to determine whether "the private entity [TSSAA] exercised power which was traditionally exclusively reserved to the state, such as holding elections, or eminent domain."¹⁰⁹ In quick fashion, the court concluded that "neither the conduct nor the coordination of amateur sports ha[d] been a traditional government function."¹¹⁰

2. *The Nexus test*

Next, the court delved into the Nexus [or state compulsion/coercion] test. Under this test, the court required that a party, such as Brentwood Academy, must "prove that the state has so coerced or encouraged a private entity to act that the choice of that entity [TSSAA] must be regarded as the choice of the state."¹¹¹ When applying this test to the facts of *Brentwood*, the court unequivocally stated in abrupt conclusory fashion, "the state of Tennessee's interaction with TSSAA has been minimal,"¹¹² even in light of the State Board of Education's decision to no longer "designate" the TSSAA

107. the author chose to use labels noted in the main text rather than the bracketed labels the Sixth Circuit employs not to confuse the reader, but to be more consistent with the Supreme Court and leading scholars.

108. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 763 (6th Cir. 1995); see also *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992).

109. *Brentwood*, 180 F.3d at 763 (quoting *Wolotsky*, 960 F.2d at 1335).

110. *Id.* at 763 (quoting *S.F. Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 545 (1987) (first alteration in the original)).

111. *Id.* (citing *Wolotsky*, 960 F.2d at 1335).

112. *Id.*

to conduct interscholastic activities.¹¹³ As noted above,¹¹⁴ this conclusion flies in the face of the lower court's conclusion that Tennessee and TSSAA have had significant interaction because, as a matter of undisputed fact, the Board of Education had reviewed and approved TSSAA rules.¹¹⁵ The lower court, in its view, characterized this recent Board of Education's repeal of the TSSAA's "designation" status as a reduction as to form, but not in substance.¹¹⁶ Subsequently, this difference in characterization led the lower court to hold that TSSAA even violated the Nexus test and not just the "catch-all" test;¹¹⁷ whereas, the overturning circuit held that it had not.¹¹⁸

Not only did the circuit court in *Brentwood* downplay the factual record, but it also analogized TSSAA's athletic situation to that of a heavily regulated utility monopoly in Pennsylvania.¹¹⁹ Here, the court blatantly invoked an "apples and oranges" analogy. This is problematic because, first of all, the *Metropolitan Edison*¹²⁰ case was fought on Public Function test grounds, which this court rightly determined as inapplicable to the situation in *Brentwood*. Therefore, the court mixed inapplicable Public Function analysis with Nexus analysis. Secondly, the court disregarded the fact that *Metropolitan Edison* involved a monopoly experimentally engaging in public utility services while *Brentwood* involved a monopoly engaging schools, which are obligated to fulfill their state's statutorily educational duties.

113. *See id.*

114. *See supra* Part III.C.

115. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 681 (M.D. Tenn. 1998).

116. *See id.* (finding that the conduct of the Tennessee State Board of Education and TSSAA had not materially changed simply because the Board had reacted by "fixing" its "delegation" language in the face of two recent district court cases that had also held the TSSAA to be a "state actor"); *see also* Pierguidi, *supra* note 11, at 470. *See generally* Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 735 F. Supp. 753 (M.D. Tenn. 1990); Graham v. Tenn. Secondary Sch. Athletic Ass'n, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. 1995) (referring to the two recent district court cases that held the TSSAA to be a "state actor").

117. *See Brentwood*, 13 F. Supp. 2d at 685.

118. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 764 (6th Cir. 1995).

119. *See id.*; Jackson v. Metro. Edison Co., 419 U.S. 345 (1974); *supra* Part II.A.1.

120. 419 U.S. 345 (1974).

3. *Mutual Contacts* or “catch-all” test

The Mutual Contacts “catch-all” [or Symbiotic] test, presents some challenges for the Sixth Circuit, especially in light of the Sixth Circuit’s cases which hold that these interscholastic athletic associations are state actors. The court, however, avoided these “controlling” precedent cases, which held interscholastic athletic associations as state actors, by relegating these cases to the status of *dicta*.¹²¹ In its analysis, the court essentially sidestepped the Mutual Contacts “catch-all” [Symbiotic] test when, rather than using this test’s catch-all catch phrases such as state aid, state subsidies, regulation, entanglement, etc., the court simply restated the higher standard of the Nexus test’s language. Specifically, the court stated that to find state action, an athletic association such as TSSAA must be “controlled or directed by the state or its agencies. This, Brentwood has failed to do in the present case.”¹²² Controlling or directing actions are not standards under the Mutual Contacts test, but rather under the Nexus or coercion test.¹²³ At least the Supreme Court’s dismissive analysis of the Mutual Contacts “catch-all” test in its *Blum* Trilogy remained true to that test’s traditional standard. Ultimately, after dodging its “controlling” state athletic association precedents and “applying” the three traditional state action tests, the *Brentwood* court was finally ready to address the Supreme Court’s only direct hint at how it would treat state athletic associations—*Tarkanian*’s hint in footnote 13.

121. See *Brentwood*, 180 F.3d at 764–66 (distinguishing as mere dicta the prior state athletic association holdings of *Burrows v. Ohio High Sch. Athletic Ass’n*, 891 F.2d 122, 125 (6th Cir. 1989); *Alerding v. Ohio High Sch. Athletic Ass’n*, 779 F.2d 315, 316 n.1 (6th Cir. 1985); *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass’n*, 647 F.2d 651, 653 (6th Cir. 1981)).

122. *Brentwood*, 180 F.3d at 764. Of worthy note, it would be quite oversimplistic to characterize the Sixth Circuit’s reversing the lower court’s holding that TSSAA is a “state actor” because the lower court failed to apply the *Blum* test. Significantly, the Sixth Circuit’s reversal appears to turn on its application of *Blum* to more selective factors; whereas the lower court listed a plethora of factors showing the entwined nature of the state and TSSAA and noting that “[c]ertainly the conduct of the TSSAA and the State meet the ‘significant encouragement’ and ‘fairly attributable’ [or, Nexus] tests of *Blum*.” *Brentwood*, 13 F. Supp. 2d at 685.

123. See *supra* Part II.A.2–3.

B. Testing the Circuit's Broad Dicta Brush of Tarkanian Footnote 13

In its last few sentences of analysis, the *Brentwood* court dismissed the Supreme Court's statement in *NCAA v. Tarkanian*¹²⁴ that a high school athletic association might be a state actor as pure dicta.

1. The footnote's background

In *Tarkanian*, Coach Tarkanian initially sued his employer—University of Nevada Las Vegas (“UNLV”)—for firing him in violation of 42 U.S.C. § 1983 when UNLV, at the NCAA's behest, deprived him of his coaching position (or, in other words, deprived him of his property and liberty rights) without due process of law.¹²⁵ The NCAA became initially involved in this case's circumstances after it found recruiting violations in Coach Tarkanian's program.¹²⁶ Subsequently, the NCAA was joined as a necessary party to Tarkanian's suit because the NCAA placed “constraints” on UNLV to clean up the Tarkanian program by clearing out Tarkanian himself.¹²⁷ Ultimately, a divided 5-4 United States Supreme Court reversed the Nevada Supreme Court's holding that the NCAA was a state actor.¹²⁸ More specifically, the Supreme Court held that the NCAA's source institutions (public *and* private), which make and enforce its rules, do not act under color of Nevada state law. Rather the NCAA's “collective membership[] speak[s] through an organization that is independent of any particular state.”¹²⁹

2. Controversial text of footnote 13 itself

Specifically, the Supreme Court's majority qualified the last sentence in the preceding paragraph by adding in a footnote that:

124. 488 U.S. 179 (1988).

125. *See id.* at 187–90.

126. *See id.* at 184–87.

127. *See id.* at 186.

128. *See id.* at 199.

129. *Id.* at 193. Of course, on the other side of the Supreme Court's narrow majority, the dissenters (and the Nevada Supreme Court) determined that UNLV's adherence to NCAA rules and recommendations converted the NCAA into a state actor under a “jointly engaged” theory of either the Nexus or Mutual Contacts test. *See id.* Factually, however, the Majority claimed the upper hand on this so-called “jointly engaged” theory because, in reality, the NCAA and UNLV were at odds throughout this entire ordeal since UNLV wanted to keep Tarkanian, but the NCAA wanted him out. *See id.* at 196.

[t]he 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. See *Clark v. Arizona Interscholastic Association*, 695 F.2d 1126 (CA9 1982), *cert. denied*, 464 U.S. 818 (1983); *Louisiana High School Athletic Association v. St. Augustine High School*, 396 F.2d 224 (CA5 1968). 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. See *post*, at 202, n. 2.¹³⁰

3. *Two sentences at issue*

Footnote 13 may appropriately be best understood when it is broken into its two composite parts—sentence one with a supporting string cite and sentence two with a supporting reference to the dissent's opinion.

a. Sentence one. As will be discussed later,¹³¹ the *Brentwood* court ignored the import of the relevant first sentence, which addresses the intrastate-association membership question. The court only narrowly addressed the irrelevant second sentence, which, in the interests of shorthand may be deemed the private-institution-as-majority/joint action question. Notably, the court also chose to ignore the import of the two supporting, favorably cited circuit court decisions which clearly held that state interscholastic athletic associations are state actors.

For example, in the Supreme Court's favorably cited case of *Louisiana High School Athletic Ass'n* ("LHSAA") *v. St. Augustine High*

130. *Id.* at 193 n.13 (1988). The dissent's footnote 2 is as follows:

The Court notes that the United States Courts of Appeals have, since our decisions in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982) [the *Blum* Trilogy], held unanimously that the NCAA is not a state actor. *Ante*, at 182 n.5. See *McCormack v. NCAA*, 845 F.2d 1338, 1346 (CA5 1988); *Karmanos v. Baker*, 816 F.2d 258, 261 (CA6 1987); *Graham v. NCAA*, 804 F.2d 953, 958 (CA6 1986); *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021-1022 (CA4 1984). In none of those cases, however, did the courts address the theory before us here. *E.g.*, *McCormack*, *supra*, at 1346. Indeed, in *Arlosoroff*, on which the subsequent decisions principally rely, the plaintiff was challenging the actions of Duke, a private university. The issue of joint action between the NCAA and a public university would never have arisen in that case.

Id. at 202 n.2 (White, J., dissenting).

131. See *infra* Part IV.B.4.

School,¹³² St. Augustine, a private school comprised of black students sought to enjoin LHSAA's practice of maintaining a "White" and "Negro" system of interscholastic athletic competition.¹³³ The Fifth Circuit held that it had no substantial doubt that LHSAA actions are state actions because (1) 85% of LHSAA's member schools are public schools; (2) LHSAA received money from gate receipts; and (3) LHSAA's events are held in state facilities, etc.¹³⁴

Furthermore, the Fifth Circuit anticipated the argument that state athletic associations such as LHSAA do not impact *private* schools such as St. Augustine (or, by logical extension, to Brentwood Academy). Specifically, this court stated that St. Augustine's status as a private school was immaterial because LHSAA elected to allow private schools to participate in state activity, and, therefore, LHSAA, which "become[s] amenable to Fourteenth Amendment requirements[,] must extend commensurate benefits consistent with constitutional standards to private schools."¹³⁵

Finally, with the *St. Augustine* court perhaps anticipating the desire for courts to succumb to the temptation to conservatively apply form over substance in this area of state actor jurisprudence, the court added that "for the state [of Louisiana] to devote so much time, energy, and other resources to interscholastic athletics and then to refer coordination of those activities to a separate body cannot obscure the real and pervasive involvement of the state in the total program."¹³⁶

b. Sentence two. Rather than address that pertinent first sentence, the *Brentwood* court, notably, zeroed in on the second sentence of *Tarkanian's* footnote 13.¹³⁷ From the language of sentence two, the court seems to deem it significant "that even if an athletic association is a state actor when dealing with a *public* school, it 'was not acting under color of state law in its relationships with *private* universities.'"¹³⁸ As noted above, the Fifth Circuit, in its late 1960's

132. 396 F.2d 224 (5th Cir. 1968).

133. See *id.* at 225.

134. See *id.* at 227.

135. *Id.* at 229.

136. *Id.* at 228 (quoting *St. Augustine High Sch. v. La. High Sch. Athletic Ass'n*, 270 F. Supp. 767, 773 (E.D. La. 1967)) (emphasis added).

137. See *supra* note 130 and accompanying text; see also *infra* Part IV.B.4.

138. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 766 (6th Cir. 1995) (quoting *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988)).

St. Augustine case, perceptively anticipated that such public/private distinctions might come into play in this area of state actor analysis. The very notion, however, that private school athletes may not have remedies against the state's athletic association but that these athletes' public school competitors may have remedies is incongruous at best. It makes no sense to make the type of school the dispositive issue. Clearly, the Sixth Circuit has lost focus in state actor analysis when it scrutinizes only the *aggrieved party's* actions rather than the respective actions of the alleged *wrongdoer*—specifically in this case, the actions of the athletic association and the state. As will be evident, there are more problems to *Brentwood's* analysis of footnote 13 than this.

4. *Controlling yet unpersuasive within its own Sixth Circuit: The fallout of Brentwood's treatment of footnote 13*

Within a few months after the *Brentwood* decision, a district court within the Sixth Circuit determined that Michigan's high school athletic association was a state actor. In *Communities for Equity* ("Equity") v. *Michigan High School Athletic Ass'n* ("MHSAA"),¹³⁹ a group of female athletes, citing forms of alleged discrimination, brought a class action against the MHSAA. Naturally, this was a Title IX case, and, therefore, the *Equity* court's analysis focused on whether the MHSAA was a federal fund recipient. (Such analysis is beyond the scope of this Note.) The court, however, did engage in state actor analysis for Equal Protection and § 1983 purposes, which is within the scope of this Note. To determine whether the MHSAA was a state actor, the district court naturally applied the controlling three tests.¹⁴⁰ Despite the binding precedent of the Sixth Circuit in *Brentwood*, this lower district court held that the MHSAA was a state actor (1) because the MHSAA failed both the Nexus test¹⁴¹ and the weakened, but still intact, Mutual Contacts or "catch-all" test;¹⁴² (2) because a vast majority of circuit

139. 80 F. Supp. 2d 729 (W.D. Mich. 2000).

140. See *id.* at 739. See *supra* Part II.A for a refresher on the three dominant tests applied to find state action.

141. See *id.* at 739 (holding that the state coerced or encouraged the MHSAA because the MHSAA acts at the will of its representative local districts, which are governed primarily by state employees).

142. See *id.* at 739–40 (holding that there was a sufficiently close nexus of action between the state and the MHSAA because (1) the MHSAA is made up primarily of public

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courts had so held;¹⁴³ and (3) because, in its view, *Brentwood's* analysis was irreconcilable with the Supreme Court's *Tarkanian* footnote 13.¹⁴⁴

To show how irreconcilable the *Brentwood* court's treatment of *Tarkanian's* footnote 13 was, the *Equity* district court explained that:

[t]he *Tarkanian* case required the Supreme Court to examine two independent state actor questions. First, the Supreme Court was required to briefly analyze in what instances an athletic association might be considered a state actor because its members controlled the association and those members were state actors. ("The membership question"). Second, the Supreme Court examined in what instances an athletic association should be considered a state actor when it engages in joint activity with the state. ("The joint action question"). With these independent inquiries in mind, Footnote 13 appears to stand for three propositions. First, an athletic association made up of schools from across the country, the majority of which are private schools, is not a state actor because no one state controls the policy of the association. Second, if an association were made up of schools from the same state, and the majority of those schools were public, the association might well be a state actor. Third, while "joint action" between a public school and a private association might render the private association a state actor, joint action between a private school and a private association would not.¹⁴⁵

Ultimately, the court in *Equity* factually distinguished the case before them from the pertinent facts that were presented to the *Brentwood* court. Because *Brentwood* was a private school, rather

schools (617 public and 114 private), (2) public employees oversee the MHSAA, (3) school employees who serve on the MHSAA Representative Council must have approval from their principal or superintendent, (4) the Michigan Superintendent of Public Instruction is ex-officio member of the Representative Council, and (5) the MHSAA influences and controls interscholastic rules and policies).

143. *See id.* at 742.

144. *See id.*

145. *Id.* Less than one month later, in Michigan's neighboring state of Indiana, the Seventh Circuit's United States District Court for the Southern District of Indiana, which, of course, was not bound by the Sixth Circuit's *Brentwood* decision, agreed with the *Equity* court's persuasive characterization of *Brentwood's Tarkanian* analysis when it stated that "there appears to be a serious disconnect between *Tarkanian* and the Sixth Circuit's reasoning in *Brentwood Academy*." *Pearson v. Ind. High Sch. Athletic Ass'n*, No. IP 99-1857-C-T/G, 2000 U.S. Dist. LEXIS 11913 (S.D. Ind. Feb. 8, 2000) (citing *Communities for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729 (W.D. Mich. 2000)).

than a public school as in *Equity*, the Sixth Circuit's holding and analysis was strictly limited to only the circumstances of "a private school alleging that a state athletic association is a state actor when it regulates that private school . . ." ¹⁴⁶ The students in *Equity*, however, attended a public school that was alleging that a state athletic association is a state actor when it regulates that *public* (not private) school.

This factual distinction highlights a dangerous turn in state actor jurisprudence. Rather than scrutinizing the traditional characteristics and actions of the alleged private entity/state actor (e.g., the state athletic association, or in the *Blum* case, the nursing homes) the Sixth Circuit's *Tarkanian* reliance appears to be embracing a broader scope of inquiry that unduly focuses on the party complaining of some wrongdoing (e.g., students and staff at Brentwood Academy, or by implication in the *Blum* case, the Medicaid patients). Under the *Brentwood* court's application of *Tarkanian* footnote 13, we are presented with the inequitable potentiality that a state athletic association such as TSSAA could discriminate against private school athletes on the basis of race, gender, or religion while these same associations could not so discriminate at public schools. Clearly, the focus on the type of school attended obscures the real object of inquiry—that of the alleged private entity/state actor.

V. BRENTWOOD GONE AWRY: WHERE STATE ACTION JURISPRUDENCE FAILS

The most glaring gap in the Sixth Circuit's analysis lies in the fact that the opinion never addresses or even gives lip service to all the other federal circuits that have always come out on the other side of this issue. Of course, this court is only bound by its own and the Supreme Court's precedent; however, this court's unwillingness to even distinguish its analysis from the other circuits shows a lack of analytical depth. Perhaps its lacking, however, is more appropriately placed squarely on the shoulders of its play caller—the Supreme Court.

A. *The Supreme Court and the Blum Trilogy*

Although the Supreme Court appears to apply three tests to determine whether a private entity is state actor, in reality, it only ap-

146. *Equity*, 80 F. Supp. 2d at 742–43.

plies two tests. The third test—Mutual Contacts or “catch-all” (or, in Sixth Circuit vernacular, Symbiotic) test—has no bite. For example, in both *Blum* and *Rendell-Baker*¹⁴⁷ the Supreme Court continued to outline this test’s factors such as (1) state licensing and regulation of the private entity; (2) state subsidies or aid to the private entity; and (3) the amount of “symbiosis” or “entanglement” between the state and the private entity. Then the Court’s majority whittles away the significance of these factors, and, in the end, dismisses any or all of them as inconsequential. Just in *Blum*, for example, the Court accepted that New York (1) heavily regulated the nursing care industry; (2) heavily subsidized over 90% of the care in this industry with its Medicaid program; and (3) generally recognized that there was a heavy dose of symbiosis between the physicians and the state program. However, this was not enough to trigger this third and lowest standard test. When one considers the Supreme Court’s treatment of this test, it is no wonder the *Brentwood* court felt compelled to only give lip service to it.

Although the first test (the Public Function test) does not apply in the *Brentwood* case, it too has inherent limitations that the Supreme Court has yet to address. First of all, it is so narrow in scope, it is no wonder that it does not apply to *Brentwood*: it can rarely apply to anything. When one considers just how narrow the Court has construed this test (e.g., running elections and police and fire protection), it is no small wonder that the 1940’s New Deal programs and the 1960’s social welfare programs such as Medicaid do not reach the Court’s conception of this test. This test, in effect, is frozen in the traditional government of the nineteenth century, and no matter how increasingly intrusive the state may, through private entities, act in our lives, the judiciary has given the state license to do so with its “frozen” concept of state action. The Public Function test is so frozen in the last century that even each of the fifty state’s *statutory duty* to provide each citizen’s constitutionally recognized property interest in a free and appropriate education is not enough to trigger this public function test.¹⁴⁸

Thus, in short, the Supreme Court is encouraging the Courts of Appeals to, in practical effect, only apply one test—the Nexus Test. Worthy of note, however, is just how much this test has effectively

147. See *supra* Part II.B.1-2.

148. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

been limited. It takes a government entity's covert or overt encouragement or coercion aimed at a private entity to trigger the characterization of that targeted private entity as "state actor."¹⁴⁹ Given how the Supreme Court worked around the Second Circuit's holding of state action in *Blum* by re-characterizing the facts underlying its holding,¹⁵⁰ it should come as no surprise that the Sixth Circuit does the same. As you may recall, the district court, when it held that the actions of TSSAA constituted state action, found it significant that the Tennessee State Board of Education still substantially influenced the TSSAA. The Sixth Circuit simply ignored this potentially condemning fact under this second test, which measures coercion, encouragement, or even direction. This head-in-the-sand approach appears to be consistent with the *Brentwood* court's *modus operandi* at distinguishing itself from all the other persuasive circuits—it just ignores them.

B. Lack of Predictability

Lack of predictability is another troubling hallmark in state action law. Essentially, because the courts have these three flexible tests that they shape around the facts on a case-by-case basis, the state action area of the law is quite unpredictable and confusing. To highlight this confusion, consider the United States District Court for the District of Massachusetts' dilemma in its respective dispositions of the *Blum* Trilogy's *Rendell-Baker* case.¹⁵¹

Before the terminated vocational teacher's and the other five teacher's respective cases were joined, they were tried as two separate cases. In the vocational teacher's case, the district judge granted summary judgment to the defendant school because he found no requisitely close nexus between the school and the state.¹⁵² On the other hand, "[n]ine days earlier . . . a different judge of [the same court] reached a contrary conclusion on the same question in the case brought by the other five petitioners."¹⁵³ This judge denied summary judgment to the defendant school because its dependency

149. See *supra* Part II.A.2.

150. See *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982), for specifics on how the Supreme Court narrowed the scope of the lower court's factual findings to avoid finding state action.

151. See *supra* Part II.B.2 for more background on this case.

152. See *Rendell-Baker*, 457 U.S. at 835–36.

153. *Id.* at 836.

on state funds and state regulation, “although . . . not a uniquely public function, [] [was] primarily a public function.”¹⁵⁴ So, in short, one judge failed to see how this private vocational school could be considered a state actor under the lowest test bar, while another judge, on the same court, held this same school under the very same factual pattern to be a state actor under the highest test bar. In other words, predictability, *schmadictability*.¹⁵⁵

C. The Hands-off or Judicial Restraint Approach

In its last few analytical sentences, the *Brentwood* court permits an insightful glimpse into just why it, perhaps, has so narrowly (or, arguably not at all) applied the state action tests to TSSAA in two words—judicial restraint. Specifically, the court states: “[w]e are not super referees over high school athletic programs . . . [even though such] competition may loom large in the eyes of youths, even parents. . . these issues are not of constitutional magnitude.”¹⁵⁶ The court goes on to recognize Brentwood Academy’s legitimate concern that vague TSSAA rules (i.e., “undue influence”) may lead to arbitrary enforcement, but the court states that such concerns should be resolved among the TSSAA’s compositional membership and not in the federal courts.¹⁵⁷

As a general practice, it may be praiseworthy for the courts to exercise judicial restraint in the area of education. Keeping judicial intervention at a minimum because schools themselves are better equipped at devising rules¹⁵⁸ is, perhaps, a noble stance. Because of this stance, the *Brentwood* court basically “remanded” this decision back to TSSAA when it suggested that TSSAA membership should resolve this issue.¹⁵⁹ Upon “remand,” however, what remedy may Brentwood Academy realistically expect from TSSAA? Private

154. *Id.*

155. See *infra* Part VII.B.2 for additional analysis explaining why the Supreme Court’s resolution of the *Brentwood* case will further decrease predictability in state action law.

156. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 180 F.3d 758, 766 (6th Cir. 1995) (citing *Hardy v. Univ. Interscholastic League*, 759 F.2d 1233, 1235 (5th Cir. 1985)). See, e.g., Pierguidi, *supra* note 11, at 493 (noting the significance of the federal judiciary’s hands-off approach in athletics).

157. See *Brentwood*, 180 F.3d at 766.

158. See *In re United States ex rel. Mo. State High Sch. Activities Ass’n*, 682 F.2d 147, 153 (8th Cir. 1982).

159. See *Brentwood*, 180 F.3d at 766.

schools have little, if any, political influence on TSSAA, especially since the Board is exclusively comprised of public school administrators.¹⁶⁰ If anything, these same public school administrators, who sought to level the playing field by enforcing the recruiting rule against the Academy, now have judicial license to arbitrarily or discriminatorily make any rules no matter how egregious or unfair they may be. Ultimately, TSSAA is a monopolistic entity (like so many of its sister organizations in Tennessee's sister states), and if Brentwood wants to play in interscholastic athletics, it will just have to keep taking TSSAA's hits, no matter how capricious TSSAA's rules may be. Unless, of course, this term's Supreme Court rules otherwise.¹⁶¹

D. A Possible Solution

Rather than gambling with these state action tests, which more often than not tend to smack of outcome determinative judgments, perhaps the courts should adopt one test. At the very least, the courts should adopt one test that offers judges an opportunity to show what they are weighing behind their application of these three limited state action tests. One such approach is a balancing test.¹⁶²

If judges were to implement a balancing test, they would weigh two items—rights against practices. If the value of a legitimate right (e.g., First Amendment, Due Process, etc.) outweighs the value of the private entity's challenged practice (e.g., athletic rule making, Medicaid implementing, etc.) then the practice violates the constitutional amendment at issue, and the state (either covertly or overtly) is allowing the practice to limit this right when it should not. Conversely, if the value of a right is not clearly greater than the challenged practice's value, then the practice does not violate the amendment at issue, and the state is not allowing a practice to continue that it should not.¹⁶³ As critics of the three-test approach have noted:

While the balancing has nothing to do with finding a minimum quantum of state activity, the process of sorting out proscribed ac-

160. *See id.* at 762.

161. The Supreme Court heard oral arguments on Oct. 11, 2000. *See* Jeff Lockridge, *Football Started Free Speech Case: Brentwood Academy Case Moves to Supreme Court*, TENNESSEAN, Oct. 8, 2000, at 12W.

162. *See* 2 ROTUNDA & NOWAK, *supra* note 6, at 819.

163. *Id.*

tivities has occurred under the guise of a formulistic search for an undefined minimum of state acts. In practice, when the challenged practice deserved state protection the Court has ruled that state action is lacking, declaring in effect that the practice is compatible with the Fourteenth Amendment. [Ruling the other way,] the Court has found sufficient state action, which made easy a final ruling of unconstitutionality.¹⁶⁴

In other words, when courts desire to protect a right, they bend the analysis to find state action. And, of course, they bend the analysis the other way to protect a private entity's state practice. Judges are informally weighing these rights-versus-practices items while they contemporaneously "apply" the three traditional tests anyway. Rather than doing so under the guise of these formulaic tests, judges, under a balancing approach, would weigh openly what they are weighing privately. Of course, this approach may not totally eliminate the lack of predictability problem. Nevertheless, it is a step in the right direction; over time, practitioners would necessarily get a sense of just how heavily courts weigh some rights versus others.

Some observers have noted that the Supreme Court, in the interests of flexibility, already applies an informal or "unprincipled"¹⁶⁵ balancing test. For instance, when the Court searches for the presence of state action in a fundamental equal protection case, "such as the right to buy property asserted in *Shelley*, the Court will go to great lengths to find state action."¹⁶⁶ When the Court, however, searches for the presence of state action in a due process case, particularly a due process case that might modify the property rights of businesspersons, the Court is reluctant to find state action "even in the face of formal links between the state and the private actor."¹⁶⁷

VI. CONCLUSION

For the purposes of predictability, unfortunately, the *Brentwood* case does not fit squarely into the Court's informal equal protection-due process paradigm. With its high regard for flexibility still intact, however, the *Brentwood* court could, of course, apply the more

164. *Id.* at 819–20.

165. See Sue Davis, *The Supreme Court: Finding State Action . . . Sometimes*, 26 HOW. L.J. 1395, 1423 (1983).

166. *Id.* at 1422–23.

167. *Id.*

formal balancing approach that this observer advocates. If the Court adopted such an approach in the *Brentwood* case, the Court would weigh, among other factors, the value of Brentwood Academy's First Amendment right to send letters to or telephone its accepted students against the value of TSSAA's need to uniformly enforce its recruiting rule. After developing an appropriate level of factual inquiry and analyzing the value of the former's right against the value of the latter's challenged practice, the court could reach a conclusion which would informatively instruct just how the court values the competing interests in this area. This balancing approach would be consistent with the approach for which Justice Brennan opined when he declared, "[o]nly by *sifting facts and weighing* circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance."¹⁶⁸

Ultimately, this term's Supreme Court must sift, weigh, and determine if its *Blum*-Trilogy-dominated, state action tests' pendulum will continue to swing toward elevating form over substance. State interscholastic athletic associations and their public school and private school constituents await the Court's decision with interest.

VII. POSTSCRIPT: AWAIT NO LONGER

After this Note was accepted for publication and while it neared completion of the editing process, the Supreme Court, in a 5-4 decision, reversed the Sixth Circuit's *Brentwood* decision and held that TSSAA's "regulatory activity may and should be treated as state action owing to the pervasive *entwinement* of state school officials in the structure of the association"¹⁶⁹ Although the Supreme Court has ultimately resolved the circuit split on whether a state interscholastic athletic association may be sued for constitutional or § 1983 violations, the high Court muddies nearly as many issues as it clarifies.

A. A Sigh of Relief

At least for the moment, substance, albeit narrowly, has trumped over form in determining whether a private entity is a state actor.

168. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (emphasis added).

169. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, No. 99-901, 2001 U.S. LEXIS 964, at *6 (Feb. 20, 2001) (emphasis added).

Justice Souter, writing for the narrow majority,¹⁷⁰ essentially echoed this author's concern that the Court's recent failures to apply a Mutual Contacts (now denominated by yet another name—"entwinement"¹⁷¹) test with real teeth¹⁷² paves the way for empty formalistic measures to determine state action.¹⁷³ Unlike the four dissenters¹⁷⁴ who essentially followed the Sixth Circuit's formalistic approach,¹⁷⁵ Justice Souter's majority substantively recognized TSSAA as a state actor (1) because public schools comprised 84% of TSSAA's voting membership,¹⁷⁶ whose representatives met during school hours just as often as not;¹⁷⁷ (2) because the State Board of Education's 1996 removal of the Board's 1972 "designation" of TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis,"¹⁷⁸ "affected nothing but words [because] . . . [t]he most one can say . . . is that the State Board once freely acknowledged the Association's official character but now does it by *winks and nods*";¹⁷⁹ (3) because the Sixth Circuit gave such "short shrift to the language from *Tarkanian*"¹⁸⁰ when, in fact, the dictum in *Tarkanian* expressly pointed out the likelihood of finding state action where an organization's constituent members are public schools all within the same state;¹⁸¹ and (4) because the Court, in its first footnote, implicitly gave deferential consideration

170. Justice Souter, joined by Justices Stevens, O'Connor, Ginsburg, and Breyer, delivered the opinion of the Court. See *Brentwood*, 2001 U.S. LEXIS 964, at *5-*6. As in so many areas of constitutional law, it appears that Justice O'Connor again provides the swing vote, this time to the "liberal" side of the Court. See, e.g., Jeffrey Rosen, *The Day the Quotas Died: Affirmative Action's Posthumous Life*, NEW REPUBLIC, Apr. 22, 1996, at 21.

171. *Brentwood*, 2001 U.S. LEXIS 964, at *15-*30.

172. See *supra* Part V.A.

173. *Brentwood*, 2001 U.S. LEXIS 964, at *24 n.4.

174. Justice Thomas, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, wrote the dissenting opinion. See *id.* at *30.

175. See *id.* at *32-*41. See *supra* Part IV for a reminder on how the adoption of a more formalistic approach, explicitly and impliedly endorsed by the dissenters, creates a method of analysis which all but ignores the underlying realities between private and state actors.

176. *Id.* at *7, *19.

177. *Id.* at *21.

178. *Id.* at *9 (citing Tenn. Bd. of Educ. Rule 0520-1-2.26 (later moved to Rule 0520-1-2.08)).

179. *Id.* at *23-*24 (emphasis added).

180. *Id.* at *12.

181. See *supra* Part IV.B.

to the great weight of cumulative precedent that has consistently held state athletic associations to be state actors.¹⁸² In short, the majority's conception of the third state action test at least elevates substance or "underlying reality" over mere formality.¹⁸³

The dissent, on the other hand, applied basically the same cursory analysis that the Sixth Circuit applied.¹⁸⁴ When Justice Thomas, under the Mutual Contacts [or Symbiotic] test, inquired into the substance of the relationship between TSSAA and the state, he "analogously" relegated the role of TSSAA to that of "a vendor [that] could contract with public schools to sell refreshments at school events."¹⁸⁵ Naturally, TSSAA may take the form of a vendor at an athletic event; however, TSSAA, in substance, is much more than a common refreshment vendor when it comes to the underlying reality prevalent among Tennessee's interscholastic athletic programs. Again, similar to the Sixth Circuit's analysis, form trumped substance under the dissent's approach.

B. Some Lingering "Muddy" Issues

1. Entwinement

Justice Thomas, for the dissent, perhaps justifiably laments that the "majority does not define [its new] 'entwinement [test],' and the meaning of the term is not altogether clear."¹⁸⁶ As noted previously,¹⁸⁷ the sheer number of state action test labels tossed about in state action jurisprudence, particularly under the Mutual Contacts "catch-all" test, is unnecessary. With *Brentwood*, the Court adds yet one more theory into the mix. Moreover, "[b]ecause the majority never defines 'entwinement,' the scope of its holding is unclear."¹⁸⁸ The dissent hopes that this entwinement test's future is dim, and that, at best, its scope never grows beyond the fact-intensive applica-

182. See *Brentwood*, 2001 U.S. LEXIS 964, at *12 n.1.

183. See *id.* at *24 n.4.

184. Compare *id.* at *36-*41 (Thomas, J., dissenting) with *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 763-67 (6th Cir. 1995). See *supra* Part IV.

185. *Brentwood*, 2001 U.S. LEXIS 964, at *41 (Thomas, J., dissenting).

186. *Id.* at *42 (Thomas, J., dissenting).

187. See *supra* notes 14-17 and accompanying text.

188. *Brentwood*, 2001 U.S. LEXIS 964, at *47 (Thomas, J., dissenting).

tion it received in *Brentwood*'s state athletic association context.¹⁸⁹

Of course, the dissent's trouble with the term entwinement may only be a battle over parsing semantics because it may be asserted that the entwinement test is not a new test at all. Rather it is just one more denotation or synonym which may join all the other "catch-all" terms such as entanglement, symbiotic, joint action, etc., under the Mutual Contacts umbrella.¹⁹⁰ Just why the majority chose to use the term entwinement over other previously applied state action terms, such as entanglement, is unclear.

2. *Lack of predictability revisited*¹⁹¹

Although, on the whole, a Mutual Contacts test with real bite in its application is preferable to an empty, formalistic conception of the test, the Mutual Contacts test's detractors may now lament an even greater loss of predictability in state action law. For instance, despite all of its shortcomings, the developing *Blum* Trilogy¹⁹² trend had at least one redeeming virtue—budding predictability. Prior to *Brentwood*, only the limited Nexus [compulsion/coercion] test appeared to have any bite in its application because the Public Function test could only be applied in factually limited circumstances and because the Mutual Contacts test had all but been put to rest in the wake of the *Blum* Trilogy.¹⁹³ With *Brentwood*, the *Blum* Trilogy's predictability has been cut back. Just when the circuits were beginning to sense some stasis,¹⁹⁴ albeit heavily formalistic, the Supreme Court adds teeth to a test whose bite was all but gone. Held in the light of the past twenty or so years of *Blum* Trilogy application, the 5-4 *Brentwood* decision sends, at best, mixed state action signals to the lower federal courts. Ultimately, the Court fortuitously holds that substance should triumph over form in state action jurisprudence but at the expense of some measure of stasis. Perhaps the only sure thing in this area of constitutional law is uncertainty.

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189. *See id.*

190. *See supra* note 16.

191. *See supra* Part V.B.

192. *See supra* note 31.

193. *See supra* Part V.A.

194. *See supra* Part II.C.2.

