University of Richmond Law Review

Volume 35 | Issue 4 Article 6

2002

A Matter of Normative Judgment: Brentwood and the Emergence of the "Pervasive Entwinement" Test

Michael A. Culpepper
University of Richmond

CASENOTES

A MATTER OF NORMATIVE JUDGMENT: *BRENTWOOD* AND THE EMERGENCE OF THE "PERVASIVE ENTWINEMENT" TEST

"When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then [one] . . . is apt to forget the social forces which mold the law."[1]

I. INTRODUCTION

The Fourteenth Amendment remains the great Rorschach test of one's underlying jurisprudential beliefs. For those of a "progressive" bent, the amendment is a "sweeping mandate,"[2] while those more inclined toward powdered wigs and judicial formalism criticize the amendment as an instrument of "freewheeling [judicial] lawmaking."[3] It is a philosophical impasse, one that centers around the apparently ambiguous prohibition against depriva-

1. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

2. JOHN HART ELY, DEMOCRACY AND DISTRUST 32 (1980).

3. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (1997).

tions of due process and denials of equal protection.[4] Unfortunately, the strictures from the high court and Congress remain equally ambiguous—particularly in the realm of state action. Metaphors, such as "winks and nods,"[5] "sifting facts and weighing circumstances"[6] and "under color of any statute,"[7] guide the analysis. The result is not merely a meandering precedent of inconsistent verdicts,[8] but a serious epistemological quandary that leaves one to wonder what values are to be assigned to "close nexus" and "entwinement," and how future jurists should apply such precedent.

In the United States Supreme Court's latest pronouncement of the state action doctrine, *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,[9] the Court stated that "[w]hat is fairly attributable [to the state] is a matter of normative judgment."[10] In so doing, the Court scored one for those of the "sweeping mandate" persuasion by introducing the new metaphor of "pervasive entwinement" into the state action lexicon.[11] The test, which relies on an ostensibly virgin judicial concept, emerged from the "state nexus" litany of cases. This line of cases seeks to identify a close relationship between state and private parties to satisfy the "under color of state law" requirement of 42 U.S.C. § 1983 and the "state action" requirement of the Fourteenth Amendment.[12] However, this proves a dubious jurisprudential pedigree.

---

4. U.S. CONST. amend. XIV, § 1.

5. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 301 (2001).

6. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

7. 42 U.S.C. § 1983 (1994).

8. As Justice O'Connor noted in a dissenting opinion, "our cases . . . have not been a model of consistency." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting).

9. 531 U. S. 288 (2001).

10. *Id.* at 295.

11. *Id.* at 291.

12. United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."). *See generally* Sheldon H. Nahmod, *The Prima Facie § 1983 Case*, *in* SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983 1, 2 (Mary Massaron Ross ed., 1998) ("Section 1983 is best understood as a federal statute that creates a Fourteenth Amendment action for damages. Its functions include regulation of official conduct and the compensation of persons suffering constitutional deprivations.") *Id.*

The purpose of this note is to identify the factors of the state nexus prong, and illustrate how *Brentwood* expanded the scope of the state action doctrine to include "pervasive entwinement." Part II briefly examines the historical development of state action, the nexus prong, and variations of nexus inquiry. Part III examines the *Brentwood* decision and the test of "pervasive entwinement." Part IV flirts with a formalist reading of *Brentwood*, illustrating first that "pervasive entwinement" is little more than a camouflage for a less-restrictive "symbiosis" test. Part V scrutinizes the semantic ambiguity of the Court's usage of metaphors, concluding that such ambiguity sufficiently muddies the inquiry so as to license judicial invention. Of course, what that invention entails remains "a matter of normative judgment."[13]

II. THE BIRTH OF STATE ACTION AND THE NEXUS FACTOR

A. *"In all fairness"*

The *Civil Rights Cases*[14] of 1883 held that protections afforded by the Fourteenth Amendment applied solely to states.[15] However, in *Smith v. Allwright*,[16] the Supreme Court expanded the scope of the amendment to include private actors who engage in government functions. This determination (whether private acts may constitute state action) has since evolved into the judicially-constructed state action doctrine.[17] The doctrine "explores the 'essential dichotomy' between the private sphere and the public sphere, with all its attendant constitutional obligations."[18] The extent to which private entities implicate the attendant obligations of the doctrine depend primarily on their relationship with state actors.[19]

---

13. *Brentwood*, 531 U. S. at 295.

14. 109 U.S. 3 (1883).

15. *Id.* at 11 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.").

16. 321 U.S. 649 (1944).

17. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.1, 502–03 (6th ed. 2000).

18. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (citing Moose Lodge No. 107 v. Irris, 407 U.S. 163, 172 (1972)).

19. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

Until the 1980s, the Supreme Court conducted its state action inquiry with a two-part disjunctive analysis: (1) whether the private entity performed a traditional government function; or (2) whether the circumstances "entangled" the private entity with the state.[20] In 1982, however, the Court in *Lugar v. Edmondson Oil Co.*[21] recast the issue with broader scope. The Court's primary inquiry hinged on whether the conduct may be fairly characterized as state action.[22] Therefore, the Court left future courts with the responsibility of shaping criteria for state action by "restat[ing] the state action question in general terms."[23]

Later decisions in *Edmonson v. Leesville Concrete Co.*[24] and *Georgia v. McCollum*[25] identified three basic factors to be considered in the determination of whether private acts could be described "in all fairness" as state action: (1) whether the private act involved a traditional government function; (2) whether the private actors received government assistance and benefits; and (3) whether the injury was "aggravated in a unique way by the incidence of government authority."[26] Somewhat surreptitiously, the *Brentwood* Court later included another factor: whether the government was "entwined in [the] management or control" of the private entity.[27] Nevertheless, the Court's precarious judicial novelty may be partly forgiven on the grounds that courts typically construe the factors under the pre-*Lugar* dichotomy.[28] Thus, factors two and three are subsumed under the generic title of "state nexus," and judges pose a series of rationales to bridge state and private action. These rationales include coercive power and sig-

20. NOWAK & ROTUNDA, *supra* note 17, §12.1 at 505–06.

21. 457 U.S. 922 (1982).

22. *Id.* at 924; *see also* NOWAK & ROTUNDA, *supra* note 17, §12.1 at 504. As the authors admit, courts typically utilize the issue as the second part of a two-part test. In cases such as *Edmonson*, courts determine first whether the injury resulted from the exercise of a right or privilege having its source in state authority. The authors criticize this first inquiry as "of little practical importance," as "it is unlikely that the private actor will be subject to a suit that centers on whether he had state action when he caused the harm." *Id.*

23. G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 354 (1997).

24. 500 U.S. 614 (1991).

25. 505 U.S. 42 (1992).

26. NOWAK & ROTUNDA, *supra* note 17, §12.1, at 505.

27. *Brentwood*, 531 U.S. at 296 (quoting Evans v. Newton, 382 U.S. 296, 301 (1966)).

28. Buchanan, *supra* note 23, at 354.

nificant encouragement, joint action, agency control, symbiosis and entwinement.[29]

B. *Metaphorically Speaking: The Criteria for Determining Whether a Nexus Exists*

While the determination of whether a private actor has performed a public function may be "easily justified,"[30] justification in state nexus cases takes on an amorphous, metaphorical quality. The Court personifies close relationships between actors with phrases that re-emerge in distinguishable contexts throughout the cases. The state nexus cases cited by *Brentwood* evidence subtle distinctions between the theories.[31]

1. Coercive Power and Significant Encouragement

In *Blum v. Yaretsky,*[32] the Court determined that a state may be liable for the actions of a private party where the state "has exercised coercive power or has provided such significant encouragement."[33] While either overt or covert coercion is sufficient, mere approval or acquiescence is not.[34] Though the *Blum* Court concluded that no such coercion existed where a nursing facility received state-channeled Medicaid funds, the case solidified the viability of the doctrine.[35]

The facts of *Blum* illustrate what *would have been* sufficient to find coercive power. The plaintiffs argued that the state "affirmatively command[ed]" private nursing facilities to transfer and discharge residents.[36] In support of this claim, the plaintiffs pointed to a state-required form which physicians used to assess the

29. *See Brentwood,* 531 U.S. at 296; *see also id.* at 305 (Thomas, J., dissenting).

30. NOWAK & ROTUNDA, *supra* note 17, §12.2, at 510.

31. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); West v. Atkins, 487 U.S. 42 (1988); Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Evans v. Newton, 382 U.S. 296 (1966); Pennsylvania v. Bd. of Dirs. of City Trusts, 353 U.S. 230 (1957) (per curiam).

32. 457 U.S. 991 (1982).

33. *Id.* at 1004.

34. *Id.*

35. *Id.* at 1008.

36. *Id.* at 1005.

medical needs of applicants.[37] Individuals who did not necessitate "more extensive care" according to the form's criteria were denied access to "skilled nursing facilities" ("SNF").[38] The Court pointed out that the form did not pertain to discharges and transfers, but admittance into the SNF. Consequently, the Court held that the physician's discretion—and not the state requirement—determined the success of the applicant.[39]

Next, the plaintiffs argued that state regulations "impose[d] a range of penalties on nursing homes that fail to discharge or transfer patients whose continued stay [was] inappropriate."[40] The statutes mandated that care providers serving patients "substantially in excess" of the need be excluded from its program, and also imposed fines on facilities that did not abide by regulations.[41] Again, the Court found that the regulations had nothing to do with the facility's decision to deny service.[42] After rejecting the plaintiffs' contention that the private facilities acted jointly with the state and that the nursing homes conducted a public function, the Court held that the plaintiffs failed to prove state coercion sufficient to merit a Fourteenth Amendment violation.[43] Thus, had the forms or regulations left doctors with no alternative but to reject the patients, the state *would have* exercised coercive power.

2. Joint Action

The *Brentwood* Court also listed "joint participation" as a factor that could lead to state action.[44] This facet of state nexus bridges the gap between private and state actors by finding the private actor to be a "willful participant in joint activity with the State or its agents."[45] In joint action cases, the private entity typically relies on the incidence of government authority to complete a dis-

37. *Id.*

38. *Id.* at 994. Denied applicants could still receive "less extensive, and generally less expensive" care in a "health related facility." *Id.*

39. *Id.* at 1006–08.

40. *Id.* at 1009.

41. *Id.* at 1010 (citing 42 C.F.R. § 420.101(a)(2) (1981)).

42. *Id.*

43. *Id.* at 1012.

44. *Brentwood*, 531 U.S. at 296.

45. *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982)).

criminatory act.[46] Such was the case in *Lugar v. Edmondson Oil Co.*[47] In *Lugar*, a creditor successfully retained a prejudgment writ of attachment against the debtor's property.[48] The debtor brought suit against the creditor under § 1983 alleging a violation of due process.[49] The debtor claimed, and the Court agreed, that his reliance on procedures created by the state constituted joint activity sufficient to confer state authority on the private actor.[50]

Joint action is differentiated (subtly) from coercion in that state actors, acting in their capacity as state actors, perform the actions that cause the constitutional deprivation at the behest of private parties.[51] The private participant need only act willfully to set the acts in motion.[52] Coercion, however, encourages private actors to perform the acts. [53] Other factors include the common goals of the state and private entities, the pressure that the private actor exerted over the state actor, and whether the state actively participated in the alleged discrimination.[54]

3. Agency Control

Quite simply, a nominally private actor that is controlled by an agency of the state may be considered a state actor.[55] In *Pennsylvania v. Board of Directors of City Trusts*,[56] the Court employed the approach in a concise and decidedly un-metaphorical syllogism: "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was

---

46. *See, e.g.*, Georgia v. McCollum, 505 U.S. 42 (1992) (holding that the Constitution prohibits criminal defendants from purposefully using pre-emptory challenges in a racially discriminatory manner); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (holding that the Constitution prohibits private litigants in civil cases from using pre-emptory challenges in a racially discriminatory manner).

47. 457 U.S. 922 (1982).

48. *Id.* at 924.

49. *Id.* at 925.

50. *Id.* at 941–42.

51. *Compare id.* at 942 (holding that court procedures caused the constitutional deprivation), *with* Blum v. Yaretsky, 457 U.S. 991, 1006–08 (1982) (analyzing whether the state form caused private doctors to make health care decisions).

52. Buchanan, *supra* note 23, at 421.

53. *Blum*, 457 U.S. at 1004.

54. Buchanan, *supra* note 23, at 421. The commentator lists factors that may lead to an "intelligent resolution" of the joint action issue.

55. Pennsylvania v. Bd. of Dirs. of City Trusts, 353 U.S. 230, 231 (1957) (per curiam).

56. 353 U.S. 230.

acting as a trustee, its refusal to admit [appellants] to the college because they were Negroes was discrimination by the State."[57]

Perhaps a more illuminating example of the agency control theory of state nexus is *Public Utilities Commission v. Pollak.*[58] In *Pollak,* passengers of Capitol Transit's streetcars grew perturbed with the music of the car's newly installed radios.[59] When management ignored their complaints, the passengers sought judicial redress.[60] Since the streetcar company was a federally-regulated monopoly in the District of Columbia, the passengers looked to the due process clause of the Fifth Amendment.[61]

The Court considered the plaintiffs' due process complaint, finding "a sufficiently close relation between the Federal Government and the radio service."[62] In doing so, the Court expressly avoided the public function doctrine, relying instead on Capitol Transit's relationship with the Commission.[63] The Court stated: "[w]e rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort, and convenience were not impaired thereby."[64] The Court concluded that the agency's close relationship with the private company constituted a sufficient relationship to justify the imposition of the due process claim.[65]

4. Symbiosis

The dissent in *Brentwood* stated that "[u]ntil today, we have found a private organization's acts to constitute state action only when the organization performed a public function; was created,

---

57. *Id.* at 231.
58. 343 U.S. 451 (1952).
59. *Id.* at 456.
60. *Id.* at 456–57.
61. *Id.* at 461–62.
62. *Id.* at 462.
63. *Id.* at 462. ("In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility. . . . Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation.").
64. *Id.*
65. *Id.* at 462–63.

coerced, or encouraged by the government; or acted in a symbiotic relationship with the government."[66] Although the majority in *Brentwood* neglected to include this symbiotic relationship factor, its legitimacy is evidenced by the Court's continued reliance on "symbiotic relationships."[67] Sometimes restated as a "multiple or joint contacts" analysis,[68] private/state symbiosis relies on a system of "benefits mutually conferred" on both parties, where the state is "integral" to the existence of the private entity.[69] Unlike the nexus cases where the action sprang from the relationship of the parties, the action in symbiosis is incidental to the relationship; thus, the state is constructively liable.[70]

In "[t]he classic 'joint-contact—symbiotic relationship' case,"[71] *Burton v. Wilmington Parking Authority*,[72] a restaurant located inside a Delaware-owned parking garage refused to serve an African-American patron solely because of his ethnicity.[73] The patron brought suit under the Fourteenth Amendment, alleging a denial of equal protection.[74] By "sifting facts and weighing circumstances," the Court undertook a detailed analysis of the contacts between the shop and the state, including the public ownership of the facility, the restaurant's leasehold interest in the property, the shop's integral relationship with the rest of the parking garage, and the public maintenance of the facility.[75] The Court determined that both parties benefited from the arrangements.[76] First, "the commercially leased areas . . . constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit."[77] Fur-

66. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 305 (2001) (Thomas, J., dissenting).

67. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (rejecting the idea of a symbiotic relationship between a state and private school because of a fiscal relationship); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding a leasor/leasee relationship sufficient to subject the private actor to constitutional restraints).

68. NOWAK & ROTUNDA, *supra* note 17, § 12.4(b), at 531.

69. *Burton*, 365 U.S. at 724.

70. *Id.* at 725 (describing the State's "insinuat[ion]" into a "position of interdependence.").

71. NOWAK & ROTUNDA, *supra* note 17, § 12.4(b), at 532.

72. 365 U.S. 715 (1961).

73. *Id.* at 716.

74. *Id.*

75. *Id.* at 722–25.

76. *Id.* at 724.

77. *Id.* at 723–24.

thermore, proceeds of rental and parking services conferred substantial benefit upon the state.[78] Reciprocally, the restaurant received the benefit of the facility, parking and an assurance that "there [was] no possibility of increased taxes."[79] Given the mutuality, the Court found the discrimination an "irony amounting to grave injustice."[80]

Thus, the prevailing feature of the symbiotic relationship analysis is the mutual dependency of the actors.[81] Furthermore, the existence of the private entity is predicated on the existence of the state.[82] *Burton* illustrates the literal manifestation of this relationship—where a private entity is physically attached to the state building—providing and receiving benefits such that the actions of the coffee shop may be said to be the actions of the state.[83]

5. Entwinement?

The Court in *Brentwood* stated that "a challenged activity may be state action when . . . it is 'entwined with governmental policies' or when government is 'entwined in [its] management or control.'"[84] Without expressly defining "entwinement," the Court relied on *Evans v. Newton*,[85] which held that where a "tradition of municipal control had become firmly established," a city cannot circumvent the mandate of the Fourteenth Amendment by transferring ownership to a trustee.[86] Therefore, a city could not simply transfer a public park to private owners in order to maintain discriminatory policies.[87]

78. *Id.* at 723.

79. *Id.* at 724.

80. *Id.*

81. NOWAK & ROTUNDA, *supra* note 17, § 12.4(b), at 533 ("When the activities of the government and private actor become so intertwined for their mutual benefit, the private party has no basis for complaint when his decisions are subjected to constitutional limitations in the same manner as those of the government.").

82. *Id.*

83. *Burton*, 365 U.S. at 723–24.

84. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001) (citing Evans v. Newton, 382 U.S. 296, 299–301 (1966)).

85. 382 U.S. 296 (1966).

86. *Id.* at 301.

87. *Id.* at 301–02.

The Court in *Evans* cited three factors that "entwined" the city in the management and control of the park.[88] The Court found that the park (1) "was an integral part of the City of Macon's activities;"[89] (2) "was swept, manicured, watered, patrolled and maintained by the city;"[90] and (3) acquired the momentum of state control from the city's past ownership.[91]

The public function branch of the state action doctrine also influenced the Court, which likened the park's character to that of the "fire department or police department . . . municipal in nature."[92]

Perhaps motivated by the blatant end-around of the Georgia Supreme Court, the Court did not examine the private and public contacts with the precision required by *Burton*. Nevertheless, the Court's first and second factors clearly echoed the *Burton* factors.[93] Both Courts found significance in the integral role of the private actor in the state or state activity, and in the state's maintenance of the private facility.[94] For the third factor, the Court employed the metaphor of "momentum" as a means to undermine the legitimacy of the transaction.[95] The Court stated that "[t]he momentum it acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees."[96]

Thus, absent *Evans's* somewhat questionable import of state momentum, the same factors that dictated the existence of a state nexus in *Burton* also entwined the parties in *Evans*.[97] Yet the Court did not address symbiosis, perhaps because of the conceptual problems the metaphor presented. While the Court characterized the park as integral to the city's activities, this importance may not rise to the *physically* integral relationship of

88. *Id.* at 301.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 302.
93. *Compare id.* at 301 (citing the "integral" relationship and city maintenance), *with* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (citing the "integral relationship" and other "arrangements").
94. *See supra* note 93.
95. *Evans*, 382 U.S. at 301.
96. *Id.*
97. *See supra* note 93.

Burton.[98] Furthermore, the notion that park maintenance may satisfy the city's sole benefit to the trustees may not be persuasive. Clearly, the more utilitarian justification—momentum—outweighed the significance of entwinement.

The *Evans* Court's reliance on *Pennsylvania v. Board of Directors of City Trusts* is an "obvious example" of private conduct entwined with government policy.[99] As evidenced by the brief opinion in *Pennsylvania v. Board of Directors of City Trusts*, however, that Court relied on an agency theory of state action to impose state status on college trustees.[100] In *Evans*, momentum attributed agency status upon the new private class of trustees.[101] Thus, *Evans* does not make apparent entwinement's viability as an independent criterion for state action. Rather, entwinement merely provided a literary description of something akin to symbiosis and agency.

C. *Just a Footnote*

One case that illuminated issues unique to nominally private athletic associations, and thus foreshadowed *Brentwood*, is *National Collegiate Athletic Ass'n v. Tarkanian*.[102] In *Tarkanian*, the NCAA investigated the University of Nevada Las Vegas ("UNLV") and basketball coach Jerry Tarkanian for alleged recruiting violations.[103] The investigation culminated in four days of hearings, after which the NCAA found Tarkanian guilty of ten violations.[104] The NCAA subsequently placed UNLV on probation and ordered the state-funded public school to show cause why Tarkanian should not be removed from the program.[105] Though UNLV disagreed with the findings of the investigation, the school abided by the NCAA's recommendations and removed Tarkanian.[106] Tarkanian fired back, however, with a § 1983 suit

98. In *Burton*, the leasehold estate was located in a state building. *Burton*, 365 U.S. at 716.

99. *Evans*, 382 U.S. at 299.

100. Pennsylvania v. Bd. of Dirs. of City Trusts, 353 U.S. 230, 231 (1957) (per curiam).

101. *Evans*, 382 U.S. at 299.

102. 488 U.S. 179 (1988).

103. *Id.* at 185.

104. *Id.* at 185–86.

105. *Id.* at 186.

106. *Id.* at 186–87. The NCAA presented UNLV with three options: (1) retain Tar-

against UNLV and the NCAA, in which he alleged due process violations.[107] Specifically, Tarkanian claimed that UNLV delegated its rulemaking function to the NCAA, making the NCAA a state actor for purposes of the Fourteenth Amendment.[108]

The Court framed the issue differently, however. While it acknowledged that the publicly-funded UNLV was "without question"[109] a state actor, the Court determined that UNLV's termination was secondary to the source of the sanctions—the NCAA.[110] "[S]tep[ping] through [an] analytical looking glass," the Court determined that *Tarkanian* posed a mirror image of traditional nexus analysis.[111] Rather than determining whether state status may be attributed to private actors, the Court addressed the issue of whether state actors altered the nature of private conduct to encompass state action.[112] That is, whether UNLV's removal turned the NCAA's enforcement proceedings into state action.[113]

Despite the inverted fact-pattern, the Court followed the state nexus template of analysis by examining the relationship between the NCAA and the state of Nevada.[114] Since over 960 schools from across the United States participated in the NCAA, the Court characterized UNLV's role in policymaking as minor.[115] The Court noted that UNLV failed to adopt non-NCAA standards or amend existing standards.[116]

Further, the Court rejected Tarkanian's contention that UNLV delegated powers to the NCAA, and that the two acted as partners.[117] The facts indicated that "the NCAA and UNLV acted much more like adversaries than like partners" throughout the investigation, as evidenced by the school's reluctance to terminate

---

kanian and risk heavier sanctions; (2) remove Tarkanian; or (3) pull out of the NCAA. *Id.* at 187.

107. *Id.* at 187.
108. *Id.* at 192.
109. *Id.*
110. *Id.* at 193.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 194–95.
117. *Id.* at 195–96.

Tarkanian.[118] Clearly, then, the parties did not willfully engage in state action to attain mutual goals.[119] The Court gave a cursory glance dismissing Tarkanian's assertion that the NCAA's power to discipline was so great that the state had no choice but to comply. [120] The Court then ruled that UNLV acted under NCAA policy—not state law.[121] Similarly, the Court rejected the contention that the regulation of interscholastic sports is a "traditional public function."[122] Thus, the Court found the nexus insufficient to support the § 1983 claim.[123]

Tarkanian altered the traditional approach to nexus analysis in two ways. First, the case demonstrated the significance of commonality of interests. The Court cited the divergent goals of the two actors in response to both the joint activity and delegated authority arguments.[124] Second, the Court employed a slight derivation of traditional coercion to accommodate the different fact pattern. While the state would typically serve as the coercive party furthering private action, in *Tarkanian* the private entity's regulations prompted the action.[125]

While these two modifications emerged again in *Brentwood*, another element of the *Tarkanian* decision provided a more salient justification for finding state action in a slightly different context: "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."[126] In *Brentwood* the situation was, of course, different.

118. *Id.* at 196.
119. *See id.*
120. *Id.* at 198–99.
121. *Id.*
122. *Id.* at 197–98 n.18.
123. *Id.* at 199.
124. *Id.*
125. *Id.* at 192–93.
126. *Id.* at 193 n.13.

III. *BRENTWOOD*: A PERSONAL FOUL TRIGGERS STATE ACTION

A. *Similar Violations, Different Results*

In 1997, the Tennessee Secondary Schools Athletic Association ("Association") conducted an investigation of recruitment policies at Brentwood Academy, a private college-preparatory school.[127] The Association had received three initial complaints: (1) that the Brentwood Academy football coach provided free game tickets to a middle school coach and two students; (2) that the coach contacted students from other schools who had previously signed agreements to attend Brentwood and encouraged them to attend spring football practice; and (3) that the basketball coach conducted an off-season practice in violation of Association policy.[128] On July 29, 1997, the Executive Director of the Association, Ronnie Carter, informed Brentwood Academy that the Association found six violations of its rules.[129] In conformance with the Association's two-step appellate procedure, Brentwood appealed the decision twice.[130] As a consequence of the second appeal, the Board of Control—composed solely of public high school principals—reduced the number of violations to three.[131] The Board imposed five penalties on Brentwood, including a four-year probation, a suspension from participation in the next two playoff seasons, and a $3,000 fine.[132]

Having exhausted the Association's administrative appeals, Brentwood Academy filed a § 1983 action on December 12, 1997.[133] The complaint alleged that the Association's sanctions violated Brentwood's right to free speech, substantive and procedural due process rights, as well as other state and antitrust claims.[134] In the district court proceeding, the court found that the Association's dependence on public school systems evidenced a

127. Brentwood Acad. v. Tenn. Secondary Schs. Athletic Ass'n, 13 F. Supp. 2d 670, 675 (M.D. Tenn. 1998).
128. *Id.*
129. *Id.* at 676.
130. *Id.* at 677.
131. *Id.*
132. *Id.* at 677–78.
133. *Id.* at 678.
134. *Id.*

symbiotic relationship with the state.[135] Further, the court noted that the close identification between the state's traditional function of education and the Association's extracurricular function forged a sufficient nexus.[136] As a consequence, the court proceeded with the remaining claims and granted summary judgment in favor of Brentwood Academy under the First Amendment claim.[137]

The Sixth Circuit Court of Appeals reversed, however, examining the facts under the public function, state compulsion, and symbiotic relationship tests.[138] The court first dispensed with the public function test by relying on *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*,[139] stating that "neither the conduct nor the coordination of amateur sports has been a traditional government function."[140] Second, the court determined that minimal interaction between the state and the Association warranted a finding that the state had exerted compulsion upon the Association to act in a certain manner.[141] Under the symbiotic relationship test, the court distinguished between two previous Sixth Circuit cases that found another high school athletic association to be a state actor.[142] In *Yellow Springs v. Ohio High School Athletic Ass'n*,[143] the court held that a symbiotic relationship existed between a state athletic association and Ohio.[144] However, since the case concentrated on Title IX rather than the Fourteenth Amendment, the *Brentwood* court disregarded the precedent as dicta.[145] Similarly the Sixth Circuit distinguished *Alerding v. Ohio High School Athletic Ass'n*,[146] which held the Ohio High School Athletic Association ("OHSAA") subject to state status on the grounds that the state had implicitly delegated its authority.[147] The *Brentwood* court found this argument unper-

135. *Id.* at 685.

136. *Id.*

137. *Id.* at 694.

138. Brentwood Acad. v. Tenn. Secondary Schs. Athletic Ass'n, 180 F.3d 758 (6th Cir. 1999).

139. 483 U.S. 522 (1987).

140. *Brentwood*, 180 F.3d at 763 (quoting San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 545 (1987)).

141. *Id.* at 764.

142. *Id.*

143. 647 F.2d 651 (6th Cir. 1981).

144. *Id.* at 653.

145. *Brentwood*, 180 F.3d at 765.

146. 779 F.2d 315 (6th Cir. 1985).

147. *Brentwood*, 180 F.3d at 765 (citing Alerding v. Ohio Sch. Athletic Ass'n, 779 F.2d

suasive, given the state's legislated disassociation with the appellant.[148]

B. *Entwinement: A New Extension of an Old Metaphor*

Upon review, the United States Supreme Court declared the state action doctrine "a matter of normative judgment."[149] With that, the Court broke from the rigid simplicity of precedent and identified "a host of facts" that "bear on the fairness" of attributing state action to a private entity.[150] These factors include the state's "coercive power" or "significant encouragement," a state agency's control over a nominally private entity, a state's delegation of powers, a private actor's "willful participation in joint activity," and lastly, the "entwined" nature of private policies or state controls.[151]

According to the Court, four cases framed the inquiry.[152] In *Lebron v. National Railroad Passenger Corp.*,[153] the Court attributed state status to Amtrak, which the *Brentwood* Court acknowledged "was organized under federal law to attain governmental objectives, and was directed and controlled by federal appointees."[154] Similarly, in *Board of Directors of City Trusts,* a private college was held to be a state actor because the college's board of directors was established by state law.[155] Along with *Evans*, the Court, without elaboration, found the cases significant in light of the Association's past relationship with the state of Tennessee, determining that the decisions foreshadowed the case at bar.[156] Also, the Court noted that *Tarkanian* anticipated the *Brentwood* scenario, and pointed toward a finding of state action.[157] While the "strict holding" of *Tarkanian* did not resolve

---

315, 316 n.1 ("OHSAA is a state actor for purposes of § 1983 because Ohio has implicitly delegated to OHSAA its power to regulate and organize interscholastic athletic activities.")).

148. *Id.* at 765–66.

149. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

150. *Id* at 296.

151. *Id.*

152. *Id.*

153. 513 U.S. 374 (1995).

154. *Brentwood,* 531 U.S. at 296.

155. Pennsylvania v. Bd. of Dirs. of City Trusts, 353 U.S. 230, 231 (1957) (per curiam).

156. *Brentwood,* 531 U.S. at 297.

157. *Id.* at 298.

Brentwood, the majority found dicta in the 1988 decision persuasive.[158] The Court harkened back to a footnote in *Tarkanian*[159] that would have resolved the issue for the Court, finding that when most of the public schools existed within the state, state action would be found.[160]

Illustrating the state-like character of the Association, the Court acknowledged that the Association was a private not-for-profit membership corporation that regulated athletic events for 290 public high schools and 55 private schools.[161] Unlike the NCAA, each member school resided within the confines of the same state, with public schools comprising eighty-four percent of the Association's voting membership.[162] Furthermore, the Court noted that statutory language that had once bound the Association to the state was dropped by the Board in 1996.[163] Thereafter, the state authorized public schools to maintain strictly voluntary membership.[164]

The Court employed two distinct inquiries to determine the existence of entwinement.[165] First, the Court examined the relationship between the private actor and the state "from the bottom up."[166] This approach analyzed the composition of the Association's membership. For the Court, this examination resembled a numbers game: because public schools comprised eighty-four percent of the Association's membership, the Association would fail to exist without public control.[167] Second, the Court took a "top down" approach, examining the administrative personnel and procedures.[168] The Court identified three relevant facts: (1) State Board members sat in a non-voting capacity on the Association's

158. *Id.*

159. *See supra* note 126 and accompanying text.

160. *Brentwood*, 531 U.S. at 298.

161. *Id.* at 299.

162. *Id.*

163. *Id* at 292.

164. *Id.* at 293.

165. *Id.* at 299–300.

166. *Id.* at 299.

167. *Id.* at 299–300. "There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms." *Id.* at 300.

168. *Id.* at 300–02.

board;[169] (2) Association employees remained eligible for state retirement benefits;[170] and (3) the close relationship failed to dissipate after the state formally severed ties with the Association.[171] The Court also noted that the close relationship was evidenced by the Association's continued enforcement of pre-1996 rules and the State Board's continued willingness to permit students to satisfy education requirements by participation in Association-sponsored athletic activities.[172]

Though the Association addressed each of the recognized state action criteria in its brief, only two of its arguments received treatment in the opinion.[173] First, the Court addressed the public function test.[174] While the Association argued that the supervision and regulation of interscholastic athletic activities "are [not] traditionally and exclusively reserved to the state,"[175] the Court assumed that it did not constitute a public function.[176] Nevertheless, the Court dismissed the argument, stating matter-of-factly that "this case does not turn on the public function test."[177] Similarly, the Court found that the state coercion criterion of state nexus analysis did not apply.[178] Noting the fact-sensitive nature of the inquiry, the Court found that "no one criterion must necessarily be applied."[179] Therefore, where the parties are entwined "to the point of largely overlapping identity,"[180] a different test need not be consulted absent a countervailing value.[181] The Court found no such countervailing value.[182]

---

169. *Id.* at 301.

170. *Id.*

171. *Id.*

172. *Id.* at 301–02.

173. Respondent's Brief, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (No. 99-901).

174. *Brentwood*, 531 U.S. at 302.

175. Respondent's Brief at 16, *Brentwood* (No. 99-901).

176. *Brentwood*, 531 U.S. at 302.

177. *Id.* at 303.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 304.

182. *Id.* The Association argued that holding the private athletic association liable as a state actor would trigger "unprecedented federal litigation" and would be unnecessary since public schools were already treated as state actors. The Court was not persuaded, finding that "the record raises no reason for alarm" as to the former, and the public school's responsibility as state actors has nothing to do with the Association's status as a

C. *The Dissent: A Reproach of Judicial Invention*

In his dissent, Justice Thomas took two divergent paths of analysis.[183] First, Justice Thomas applied a "common sense" approach.[184] In this strictly fact-based inquiry, Justice Thomas found four factors indicating that the complained action failed to meet the § 1983 requirements.[185] The factors included the Association's formation as a private organization, the voluntary nature of public school participation, the Association's self-rule and its largely self-financed operating budget.[186] Second, Justice Thomas referenced three specific factors of modern state action analysis. He found that the Association did not serve a traditional public function,[187] the state lacked coercive power over the Association,[188] and no symbiotic relationship existed between the two entities.[189]

Justice Thomas further criticized the majority's methodology. The dissent found fault with the "new theory,"[190] fearing the vague language and questionable precedential authority would lead to unwarranted extension of § 1983 claims to organizations composed of public officials.[191] Justice Thomas took issue with the semantics of entwinement, noting that the word only appeared in one of the majority's relied-upon precedents.[192] Because of the judicial novelty of the majority's rationale, Justice Thomas argued,

---

properly named defendant. *Id.*

183. *Id.* at 305 (Thomas, J., dissenting). Justice Thomas was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy.

184. *Id.* at 306 (Thomas, J., dissenting).

185. *Id.* at 306–07 (Thomas, J., dissenting).

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

187. *Id.* at 309 (Thomas, J., dissenting). Justice Thomas stated that "[t]he organization of interscholastic sports is neither a traditional nor an exclusive public function." *Id.* (Thomas, J., dissenting).

188. *Id.* at 310 (Thomas, J., dissenting) ("To be sure, public schools do provide a small portion of the TSSAA's funding through their membership dues, but no one argues that these dues are somehow conditioned on the TSSAA's enactment and enforcement of recruiting rules.").

189. *Id.* at 311 (Thomas, J., dissenting). The dissent analogized the fiscal relationship between the parties as "not different from" government and contractor. *Id.* (Thomas, J., dissenting) (citing Rendell-Baker v. Kohn, 457 U.S. 830, 843 (1982)).

190. *Id.* at 312 (Thomas, J., dissenting).

191. *Id.* at 314–15 (Thomas, J., dissenting).

192. *Id.* at 312 (Thomas, J., dissenting). Justice Thomas noted that the Court in *Evans v. Newton*, 382 U.S. 296 (1966), used the word "entwined," but not as a "distinct concept." *Brentwood*, 531 U.S. at 313 (Thomas, J., dissenting).

the scope of the majority's holding was unclear and therefore subject to the normative judgment of future decision-makers.[193] Justice Thomas thus claimed that the "pervasive entwinement" test "extends state-action doctrine beyond its permissible limits."[194]

IV. ANALYSIS AND DISCUSSION

A. *Entwinement: Dressed in the Cloak of a Symbiotic Relationship*

"When you use a metaphor, do not mix it up. That is, don't start by calling something a swordfish and end by calling it an hourglass."[195]

Under the traditional theories of state nexus analysis, courts treated private parties as the state when "the allegedly unconstitutional *conduct* is fairly attributable to the State."[196] Criteria such as coercion, joint action, and agency control evidenced state action.[197] Symbiosis differed because the discriminatory acts did not necessarily spring from the action of the state, but rather from the interdependent existence of the two parties.[198] The existence of a symbiotic relationship between the parties provided courts with the latitude to consider the state a constructive actor.[199] Thus, if the parties maintained sufficient contacts, then "the private individual takes on at least the appearance if not the actual authority of the state."[200]

As employed by the Court in *Brentwood*, "pervasive entwinement" performed a similar function. Without explicitly defining "entwinement," the Court held that "'the necessarily fact-bound inquiry' leads to the conclusion of state action here. The nominally private character of the Association is overborne by the per-

193. *Id.* at 314–15 (Thomas, J., dissenting).

194. *Id.* at 305 (Thomas, J., dissenting).

195. WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 81 (3d ed. 1979).

196. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (2000) (emphasis added).

197. *See* discussion *supra* Part II.B.1–3.

198. *See* discussion *supra* Part II.B.4.

199. See *Burton v. Wilmington Parking Auth.*, where the integral nature of the relationship made the discrimination an "irony *amounting to* grave injustice." 326 U.S. 715, 724 (1998) (emphasis added).

200. NOWAK & ROTUNDA, *supra* note 17, § 12.4, at 528.

vasive entwinement of public institutions and public officials in its composition and workings . . . ."[201] As is evident, the Court did not rely on the state's coercive acts or joint actions. Rather, the Court relied on the ostensible action as constructed from a series of entwined relationships between the state and private parties.[202]

A reexamination of the contacts in light of the traditional nexus theories makes evident a normative justification for the development of a new test of state action. As stated previously, entwinement consisted of essentially four contacts: (1) the overwhelming percentage of public school members in the Association; (2) the ex officio members from the State Board who served on the Association's board of control; (3) the Association employees' access to state retirement benefits; and (4) the presence of a close relationship that failed to dissipate after formally separating with the state.[203] Even a cursory overview of the relationships makes evident a severely overweighted exchange of benefits favoring the Association. The Court belabored the Association's use of public facilities and its reliance on the gate receipts of public school venues and membership dues.[204] Retirement benefits constituted a significant element evidencing top-down contact between the parties.[205] The Court failed to acknowledge the presence of any state-received benefits, however.[206] Furthermore, although the Court borrowed freely from *Burton's* verbiage when it described the integral relationship between athletics and secondary public schools,[207] it refused to acknowledge its contribution to state action analysis—the symbiotic relationship.

---

201. *Brentwood*, 531 U.S. at 298 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982)).

202. *See* discussion *supra* Part II.B.

203. *See id.*

204. *Brentwood*, 531 U.S. at 299.

205. *Id.* at 300.

206. *See* Respondent's Brief at 21, *Brentwood* (No. 99-901).

> There is no evidence that the state somehow derives monetary benefit, as an occasional lessor of public property to TSSAA, from TSSAA's enforcement of its recruiting rule. The mere fact that TSSAA signs a contract with the state to use a publicly-owned facility for a tournament does not deliver the "symbiotic relationship" test to the Petitioner. Otherwise, a one-time lessee of public property could be sued under § 1983 for any alleged unconstitutional act, regardless of how unrelated that act might be to the lease of public property.

Id.

207. *Compare Burton*, 364 U.S. at 723–24 ("leased areas . . . constituted a physically

The Court's conscious omission of the symbiotic relationship test is relevant for several reasons. First, although the Court patterned its opinion upon the contacts analysis of *Burton* and its progeny,[208] it did not employ the symbiosis metaphor. Had the Court done so, it may have reached the same conclusion as the dissent—that the state *did not profit* from the enforcement of the Association's recruiting rules, and therefore did not constitute a symbiotic partner of the Association.[209] Second, it exposed the Court's furtive reason for the selection of entwinement as a state action criteria. Just as the Court did not posit a reason why the case "does not turn on a public function test," it also failed to address why the fact-sensitive inquiry precipitated the selection of entwinement.[210] The Court merely stated that "examples may be the best teachers," and then offered four distinguishable cases in support.[211] Clearly, the fact-based restrictions imposed by precedent prevented the majority from reaching its desired conclusion. By creating a new sub-category of entwinement, the Court freed itself from this imposition.

B. *The Role of Metaphor*

"The danger, when judges try to be literary, is not that they will make pompous fools of themselves . . . . It is that they will muddy the law."[212]

For some, the use of metaphor in judicial decision-making is an analytical necessity.[213] In a nomenclature supposedly devoid of concrete meaning, metaphor provides a "rock-bottom" truth by which to frame legal argumentation.[214] Fortunately for a common law that relies on categorical reasoning and sets of propositional

---

and financially integral . . . part of the State's plan . . . ."), *with Brentwood*, 531 U.S. at 299 ("Interscholastic athletics obviously play an integral part in the public education of Tennessee.").

208. *See* cases cited *supra* note 67.

209. *See Brentwood*, 531 U.S. at 311 (Thomas, J., dissenting).

210. *Id.* at 303.

211. *Id.* at 296–97; *see also supra* text accompanying notes 152–160.

212. RICHARD A. POSNER, LAW AND LITERATURE 279 (revised and enlarged ed. 1998).

213. *See* Joel R. Cornwell, *Legal Writing as a Kind of Philosophy*, 48 MERCER L. REV. 1091, 1110 (1997).

214. *Id.* (quoting CHRISTOPHER NORRIS, DESTRUCTION: THEORY AND PRACTICE 66 (1991)).

rules, this point of view does not predominate.[215] Nor should it. The difficulty in delineating precise boundaries to words like "joint-action," "coercion" and "encouragement" is a justification in itself. However, another justification that is precipitated by semantic ambiguity is semantic exploitation. By altering the meaning intended by precedent, *Brentwood* appropriated a seemingly innocuous metaphor of entwinement as a smell test for state action.

As *Evans* illustrated, the metaphor of entwinement served as simply that—a metaphor.[216] Used to describe the combination of agency control and symbiotic factors,[217] entwinement found little usage in judicial decision-making since its inception. No subsequent Supreme Court decision has relied upon entwinement, and few have employed the terminology.[218] The only majority opinion after *Evans* to utilize entwinement in conjunction with state action was *Gilmore v. City of Montgomery*.[219] Notwithstanding its use, the *Gilmore* Court relied not on entwinement, but on the singular relationship of a private entity subsidized by the state.[220] As a consequence, the entwinement cited by *Brentwood* rested upon almost no precedent, thus making its usage malleable.

However, the Court's usage of metaphor is not limited to "pervasive entwinement." Metaphor also constructs the argument, thus alleviating the necessity for doctrine. Borrowing from *Tarkanian* and *Jackson v. Metropolitan Edison Co.*,[221] the Court prefaced its analysis by stating that the Court has traditionally "tr[ied] to *plot a line* between state action . . . and private conduct."[222] "If the Fourteenth Amendment is not to be displaced," the Court continued, "its ambit cannot be a simple line between the States and people operating outside formally governmental

215. *See* Steven L. Winter, *The Meaning of "Under the Color of Law,"* 91 MICH. L. REV. 323, 331 (1992).

216. *See* Evans v. Newton, 382 U.S. 296, 299–301 (1966).

217. *See supra* notes 55–83 and accompanying text.

218. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 472 (1995) (O'Connor, J., dissenting); Rendell-Baker v. Kohn, 457 U.S. 830, 847 (1982) (Marshall, J., dissenting); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 553 (1980) (Blackmun, J., dissenting); Gilmore v. City of Montgomery, 417 U.S. 556, 566 (1974); Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 134 (1973) (Stewart, J., concurring).

219. 417 U.S. 556 (1974).

220. *See id.* at 566.

221. 419 U.S. 345 (1974).

222. *Brentwood*, 531 U.S. at 295 (emphasis added).

organizations."[223] Thus, the Court's line metaphor attempts to promote judicial discretion by blurring the scope of the inquiry. Clearly, as Justice O'Connor criticized, the Court has not reached consistent results in its state action analysis.[224] Nevertheless, the Court's use of the line metaphor further obscured the already fuzzy contours of state action as merely "a host of facts," rather than actual criteria.[225] The distinction is significant: whereas "criteria" denotes a "standard of judgment . . . a rule or principle for evaluating or testing something,"[226] a fact can, of course, be anything. Thus, the line metaphor "liberate[d] the author . . . from the demands of precision and clarity,"[227] allowing the latitude to rely upon a fact such as entwinement.

A more novel literary flourish is the Court's description of "bottom-up" and "top-down" contacts.[228] As described earlier, the distinct approaches represent the state's relationship with the Association as personified by the persons, money, and facilities that compose the Association, and the personnel and dictates of the Board that run the Association.[229] Although it is certainly a useful technique to create the illusion of pervasiveness, the metaphor bears the unfortunate characteristic of complete artificiality—giving credence to the contention of some that the contacts analysis is, "in reality, a 'catch all' which may have little, if any, substantive meaning."[230]

Completing the Court's explication of top-down contacts, the Court echoed another *Evans* metaphor—momentum.[231] The Court used "momentum" to elucidate the residual state relationship that survived the formal legislated separation of the parties.[232] This consisted not only of the remaining State Board members and retirement package, but was confirmed by the continued en-

223. *Id.*

224. *See supra* note 8.

225. *Brentwood*, 531 U.S. at 296.

226. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE—UNABRIDGED 477 (2d ed. 1993).

227. David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205, 1214–15 (1991) (book review).

228. *See Brentwood*, 531 U.S. at 288–302.

229. *See id.*

230. NOWAK & ROTUNDA, *supra* note 17, § 12.4(b), at 532.

231. *See Brentwood*, 531 U.S. at 301.

232. *See id.*

forcement of rules and regulations promulgated while under state control, as well as the State Board's willingness to allow students to substitute interscholastic activities for their physical education requirement.[233] The import of this device was to acknowledge the "winks and nods" exchanged between the state and the Association.[234] Like *Evans*, the appearance of state momentum allowed the Court to circumvent state formalities and discern the underlying reality.[235] However, the *Evans* Court found state action where a municipality transferred ownership to a private trustee so as to avoid racial desegregation.[236] The imposition of sanctions for high school football recruiting violations may not be so nefarious as to justify the disregard of legislative formalism.[237]

The Court accomplished much by utilization of metaphor. Through its invention of "pervasive entwinement," it achieved state action where other criteria of state nexus analysis would not support it. By erasing an already blurred line of demarcation, it succeeded in further obfuscating the criteria of state action analysis so as to avoid the "rigid simplicity" of case precedent.[238] In conceptualizing "bottom-up" and "top-down" contacts, the Court concocted a new measure of pervasiveness to provide future jurists the latitude to locate relationships in any number of directions.[239] Finally, by incorporating *Evans's* momentum, the Court evoked the equity of *Brown v. Board of Education*[240] for a football coach whose denial of due process consisted of a two-year play-off suspension.[241]

V. CONCLUSION: A DECISION OF NORMATIVE IMPLICATIONS

To anticipate the implications of pervasive entwinement, one must look no further than the Court's very words: "If Brentwood's claim were pushing at the edge of the class of possible defendant state actors, an argument about the social utility of expanding

233. *See id.* at 299–300.
234. *Id.* at 301.
235. *Id.* at 301 n.4.
236. *See Evans*, 382 U.S. at 301.
237. *See Brentwood,* 531 U.S. at 301 n.4 ("[I]f formalism were the sine qua non of state action, the doctrine would vanish.").
238. *Id.* at 295.
239. *Id.* at 288–302.
240. 347 U.S. 483 (1954).
241. *Brentwood*, 531 U.S. at 301.

that class would at least be on point, but . . . *we are nowhere near the margin in this case.*"[242] To state that the most far-reaching state action decision since *Evans* is "nowhere near the margin" of potential state actors might reveal the extent of the Court's "normative judgment" regarding the scope of the Fourteenth Amendment. Indeed, therein lies the social force that continues to manipulate due process and equal protection—a conception that the amendment *ought* to evolve with societal trends and encompass a more sweeping, undetailed aggregation of potential state actors.[243]

Again, this conception is partly forgivable on the grounds that the doctrine descends from a lamentable age. The utility of such a state action framework may be evident when one considers the discrimination committed by states under the guise of a private entity.[244] Nevertheless, such considerations must remain tempered by other values: the need for consistent verdicts, the exclusion of non-meritorious claims, and the avoidance of polemic debate of social issues in the courthouse.[245]

To suggest, however, that a private athletic association must *not* be a state actor for purposes of the Fourteenth Amendment is beyond the scope of this writing. It is immaterial to the continued vitality of the doctrine whether the state received an economic benefit or whether the actors shared common goals. Rather, what is significant is that values assigned to words in jurisprudential discourse remain fixed and consistent in application. The amorphous quality of metaphor lends itself to perpetual modification. Therefore, its usage must be reserved for descriptive rather than normative purposes. Else, "pervasive entwinement" is little more than a metaphor for what the Fourteenth Amendment ought to be, rather than what it is.

Michael A. Culpepper

---

242. *Id.* at 304–05 (emphasis added).

243. This notion is perhaps best expressed by Learned Hand, advising that judges "must be aware of the changing social tensions in every society . . . which demand new adaptation." William J. Brennan, Jr., *Landmarks in Legal Liberty, in* THE FOURTEENTH AMENDMENT 10 (Bernard Schwartz ed., 1970). Justice William J. Brennan, Jr. further lamented "[w]e know that social realities do not yet correspond with the law of the Fourteenth Amendment" and sought to "close the gap between promise and fulfillment." *Id.*

244. *See, e.g.*, Screws v. United States, 325 U.S. 91, 92–93 (1945) (describing a sheriff's brutal beating and killing of an African-American man against whom he held a grudge).

245. *See* Harry J. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985).

***