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## Entwinement: Why Sororities and Fraternities Should Be Subject to the Constitution

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# ENTWINEMENT: WHY SORORITIES AND FRATERNITIES SHOULD BE SUBJECT TO THE CONSTITUTION

## INTRODUCTION

A legal entity's character is determined neither by its expressly private characterization in statutory law, nor by the law's failure to acknowledge its inseparability from recognized government officials or agencies . . . [rather] entwinement with government will support the conclusion that ostensibly private organization ought to be charged with public character and judged by constitutional standards.<sup>1</sup>

Approximately nine million college students across the country join fraternities and sororities each year.<sup>2</sup> At the core of these organizations are professional networking opportunities, academic support, a sense of community, and leadership development.<sup>3</sup> Of these 9 million college students, 85% of them later go on to work for Fortune 500 companies, and others have become presidents, lawyers, doctors, and actors.<sup>4</sup> As student interest in Greek life has spiked, universities have not only increased the number of chapters on their campuses, but they have also engaged Greek organizations in ways that have blurred their status between a merely private student organization and the university itself.<sup>5</sup>

Sororities and fraternities are commonly referred to as "private organizations."<sup>6</sup> Their status as such has allowed them to trespass on the constitutional rights of their members without constitutional scrutiny.<sup>7</sup> This becomes troublesome when these organizations often serve a university function but remain immune from constitutional regulations. As the number of students

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<sup>1</sup> Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 296, 302 (2001).

<sup>2</sup> *What Percentage of Students Belong to a Sorority or Fraternity?*, GREAT VALUE COLLEGES, <https://www.greatvaluecolleges.net/faq/what-percentage-of-students-belong-to-a-sorority-or-fraternity> (Last visited Mar. 12, 2019).

<sup>3</sup> *Id.*

<sup>4</sup> Nicholas Glass, *Examining the Benefits of Greek Life*, USA TODAY (May 8, 2012, 10:41 AM), <https://www.usatoday.com/story/college/2012/05/08/examining-the-benefits-of-greek-life/37392651>.

<sup>5</sup> Jamie Giller, *Growing Greek Life on Campus*, FIU NEWS (May 30, 2014, 9:18 AM), <https://news.fiu.edu/2014/05/growing-greek-life-on-campus/78203>.

<sup>6</sup> Elizabeth A. Armstrong, *How Fraternities Dominate College Life*, THE N.Y. TIMES (May 6, 2011, 1:32 AM), <https://www.nytimes.com/roomfordebate/2011/05/05/frat-guys-gone-wild-whats-the-solution/the-threat-to-young-women>.

<sup>7</sup> See Tyler Kingkade, *30 Frats Shut Down In The Past Month As Colleges Respond To Misconduct More Aggressively*, HUFFINGTON POST (Apr. 7, 2015, 6:43 PM), [https://www.huffingtonpost.com/2015/04/07/frats-shut-down-hazing\\_n\\_7001492.html](https://www.huffingtonpost.com/2015/04/07/frats-shut-down-hazing_n_7001492.html); See also Press Release, National Panhellenic Conference, Sororities, Fraternities, Students File Federal and State Suits That Challenge Harvard's Ban on Single-Sex Organizations (Dec. 3, 2018) (on file with author).

joining sororities and fraternities continues to grow, this concern becomes increasingly significant.<sup>8</sup>

Part I of this Note explores the historical progression of the Supreme Court's state action doctrine by examining the *Blum* Trilogy. Part II of this Note analyzes *Brentwood*, one of the Supreme Court's most recent applications of the state action doctrine. Part III of this Note argues that based on the Court's analysis in *Brentwood*, the relationship between universities and sororities and fraternities is such that these Greek Organizations should be deemed State actors and thus are subject to constitutional restraint. Part IV of this Note discusses factors, outside of the *Brentwood* analysis, that strengthen the argument that sororities and fraternities are State actors. Lastly, Part VI illustrates how classifying sororities and fraternities as State actors would affect the operations of these organizations.

## I. STATE ACTION

### A. *Pre-Brentwood*

Society can be divided into two spheres: private and public.<sup>9</sup> With each classification comes a variation of constitutional protections and regulations.<sup>10</sup> A fundamental issue that comes with this dynamic is how to draw a line between public and private action. This becomes particularly difficult when public and private responsibilities are entwined. The difficulty of drawing this fine line has caused courts to create a laundry list of rules but no consistent standard as to what actions are within the reach of constitutional protections.<sup>11</sup>

The United States Constitution allows for and restricts certain kinds of government power.<sup>12</sup> The provisions in the Constitution do not extend to the actions of private individuals and organizations, no matter how egregious the actions may be.<sup>13</sup>

When the government oversteps its authority and infringes on an individual's

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<sup>8</sup> Kelly Heyboer, *Fraternity and Sorority Numbers Climbing Amid Concerns About Bad Publicity*, NJ.COM (Mar. 29, 2015), [https://www.nj.com/education/2015/03/fraternity\\_and\\_sorority\\_membership\\_climbing\\_amid\\_c.html](https://www.nj.com/education/2015/03/fraternity_and_sorority_membership_climbing_amid_c.html).

<sup>9</sup> Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L.J. 1379, 1386-1387 (2006) (discussing the private and public dichotomy).

<sup>10</sup> *Id.*

<sup>11</sup> *See Brentwood Acad.*, 531 U.S. 288, 295-296 (2001).

<sup>12</sup> *U.S. v. Stanley*, 109 U.S. 3, 25-26 (1883).

<sup>13</sup> *See Stanley* 109 U.S. at 25-26.

constitutionally-protected freedom, the Constitution provides a cause of action.<sup>14</sup> Individuals are only entitled to recover when the person who visited the constitutional harm was a State actor.<sup>15</sup> This concept is known as the state action doctrine.<sup>16</sup>

The birth of the state action doctrine is rooted in the *Civil Rights Cases*.<sup>17</sup> In these five cases, the Court established that purely private action is not subject to the regulations imposed by the Fourteenth Amendment.<sup>18</sup> Instead, only state action can trigger constitutional protections.<sup>19</sup> This was articulated by Justice Joseph Bradley, writing for the majority, when he stated:

It is proper to state that civil rights, such as are granted by the Constitution against State aggression and cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual.<sup>20</sup>

Initially, the state action doctrine was rather narrow. State actors were only those employed by the federal government.<sup>21</sup> The Supreme Court, in 1833, believed that the United States Constitution was “established by the people of the United States for themselves, for their own government, and not for the government of the individual states.”<sup>22</sup> If during this time period, a state official in Georgia violated the constitutional rights of an individual, the state official would not be in violation of the Constitution. It was not until 1908, in *Twining v. New Jersey*, that the Supreme Court established the Incorporation Doctrine.<sup>23</sup> Under this doctrine, the Court held that certain rights enumerated in the Bill of Rights applied to the states through the Due Process Clause of the Fourteenth Amendment.<sup>24</sup>

Over the next century, the Supreme Court of the United States declared that most portions of the first ten amendments to the United States Constitution were

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<sup>14</sup> See 42 U.S.C. § 1983.

<sup>15</sup> *Id.*

<sup>16</sup> Stephen K. Wirth, *State Action, Government Speech, and the Narrowing Spectrum of Private, Protected Speech*, 99 CORNELL L.J. 485, 485, (2014) (discussing State action doctrine).

<sup>17</sup> *Id.* at 486.

<sup>18</sup> *Stanley*, 109 U.S. 3, 10-11 (1883).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 25-26.

<sup>21</sup> Huhn, *supra* note 9 at 1387.

<sup>22</sup> *Barron v. Balt.*, 32 U.S. 243, 247 (1833).

<sup>23</sup> *Twining v. N.J.*, 211 U.S. 78, 113-114.

<sup>24</sup> *Id.*

applicable to the states.<sup>25</sup> Of the first ten amendments, the following have been fully incorporated: First, Second, and Fourth Amendment.<sup>26</sup> Those partially incorporated include: The Fifth, Sixth, and Eighth Amendment.<sup>27</sup> As such, both federal and state actors have been placed under the umbrella term of State actor.<sup>28</sup>

Although the state action doctrine appears to provide clarity between private and public action, scholars have deemed it a “conceptual disaster area.”<sup>29</sup> The doctrine becomes less clear as the government continues to expand into the private sector.<sup>30</sup> In these instances, certain behaviors by private individuals or entities should be fairly attributable to the state.

In 1982, the United States Supreme Court decided three state action cases that are collectively known as the *Blum* trilogy. In *Rendell-Baker v. Kohn*, *Blum v. Yaretsky*, and *Lugar v. Edmondson Oil Co.*, the Court established three principles by which a court could analyze state action claims.<sup>31</sup> These principles are: the symbiotic relationship test, the public function test, and the state compulsion test.<sup>32</sup> To have found State action under the symbiotic relationship test, the plaintiff must have shown that “a high level of mutual interdependence [existed] between the private group and the state.”<sup>33</sup> The public function test required that the private entity engage in an action that was traditionally performed by that of the state.<sup>34</sup> The state compulsion test found State action when the state encouraged or coerced a private entity to engage in actions which were left exclusively to the states.<sup>35</sup>

Since the *Blum* trilogy, the Court has altered its state action test by focusing on the relationship between the state and the private entity, rather than looking exclusively to the state’s involvement in the action itself.<sup>36</sup> Even though the

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<sup>25</sup> *Incorporation Doctrine*, CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/incorporation\\_doctrine](https://www.law.cornell.edu/wex/incorporation_doctrine) (last visited Mar. 12, 2019).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See* *Adamson v. California*, 332 U.S. 46, 51.

<sup>29</sup> Huhn, *supra* note 9 at 1380.

<sup>30</sup> *See Id.*

<sup>31</sup> Megan M. Cooper, *Casenote: Dusting Off the Old Play Book: How the Supreme Court Disregarded the Blum Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Ass’n.*, 35 CREIGHTON L. REV. 913, 936-937 (2002).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 914-915. [Rather than relying so heavily on this author’s interpretation of the case law, you should go directly to the cases and present your analysis directly. You can then cite others for support, contrast, etc.]

Court expanded its area of analysis in this manner, the court still used the three tests established by the *Blum* trilogy as a basis for finding state action.<sup>37</sup>

## II. *BRENTWOOD*

The Supreme Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association* introduced yet another test to determine state action.<sup>38</sup> Beyond the state-action tests introduced through the *Blum* trilogy, the Court in *Brentwood* held that entwinement was an additional way to establish state action.<sup>39</sup> The Court held that entwinement occurs when there is a “close [enough] nexus between the State and the challenged action” that seemingly private behavior “may be fairly treated as that of the State itself.”<sup>40</sup> The Court emphasized that the entwinement test focuses on all facts and circumstances that makeup the states relationship with the private entity.<sup>41</sup>

While complex, state action doctrine plays a fundamental role in balancing interests that are vital to Western democracy.<sup>42</sup> Courts utilize the state action doctrine to strike a balance between individual autonomy and governmental interests.<sup>43</sup> The limited scope of the state action doctrine works to ensure that individuals may prosper without governmental constrains and Congress and the states can have the primary authority to regulate the conduct of individuals.<sup>44</sup>

### A. *Facts of Brentwood*

In 2001, the U.S. Supreme Court decided *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass’n*. At issue before the court was whether, “a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regulated as engaging in state action when it enforces a rule against a member school.”<sup>45</sup> Tennessee Secondary School Athletic Association (TSSAA), a not-for-profit corporation that regulated high school sports, placed one of its members, Brentwood Academy, on a four-year probation after the academy broke TSSAA’s recruiting rule 21.<sup>46</sup>

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<sup>37</sup> *Brentwood*, 531 U.S. 288 at 304. [seems odd to cite to *Brentwood* for the proposition in the text.]

<sup>38</sup> *Id.* at 295.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Brentwood*, 531 U.S. 288 at 290.

<sup>46</sup> *Id.* at 293.

Rule 21 forbid schools from unduly influencing the recruitment of athletes.<sup>47</sup>

Brentwood Academy was a private college-preparatory school located outside Nashville.<sup>48</sup> The Academy was a member of TSSAA.<sup>49</sup>

TSSAA was a not-for-profit membership corporation that regulated interscholastic sports among both private and public schools in Tennessee.<sup>50</sup> TSSAA membership included 290 public schools (84% of the Association's membership) and 55 private schools.<sup>51</sup> TSSAA's legislative council was comprised of high school principals and superintendents from member schools.<sup>52</sup> The legislative council was responsible for regulating TSSAA's member recruiting activities.<sup>53</sup>

In 1925, the Tennessee State Board of Education ("Board of Education") officially recognized TSSAA.<sup>54</sup> Formal recognition occurred when the Board of Education provided TSSAA with regulations, standards, and rules that explicitly involved the interscholastic competitions of Tennessee public schools.<sup>55</sup> Additionally, in 1972, the Board of education officially appointed TSSAA as the organization to supervise and regulate interscholastic secondary sports in Tennessee's public high schools.<sup>56</sup> That same year, the Board of Education approved TSSAA's rules and regulations but required that the Board retain the ability to amend these rules and regulations if it so chose.<sup>57</sup> In 1996, the Board of Education revoked the official designation given to TSSAA in 1972, and instead simply recognized the role of TSSAA through the use of a statement.<sup>58</sup>

On August 23, 1997, TSSAA determined that Brentwood Academy violated section 21 of its Recruiting Rule when the academy wrote to incoming students and their parents about spring football practice.<sup>59</sup> Recruiting Rule 21 forbid schools from unduly influencing the recruitment of athletes.<sup>60</sup> As a result, TSSAA placed Brentwood Academy's entire athletic program on a four-year

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 296.

<sup>49</sup> *Id.* at 290.

<sup>50</sup> *Id.* at 291.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 292.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 292-293.

<sup>59</sup> *Id.* at 293.

<sup>60</sup> *Id.*

probation.<sup>61</sup> TSSAA also held that the academy's football and boys' basketball teams were ineligible to compete in TSSAA's playoffs for the next 2 years.<sup>62</sup> Lastly, TSSAA imposed a three thousand dollar fine on the academy.<sup>63</sup>

In response, Brentwood Academy sued TSSAA in the United States District Court for the Middle District of Tennessee.<sup>64</sup> Brentwood Academy argued that Recruiting Rule 21 violated the Academy's First Amendment right of free speech and its Fourteenth Amendment due process rights.<sup>65</sup> On June 1, 1998, Brentwood Academy moved for a permanent injunction and partial summary judgement.<sup>66</sup> The district court denied TSSAA's ensuing motion for summary judgment.<sup>67</sup>

The district court denied TSSAA's motion for summary judgment upon finding that a symbiotic relationship existed between TSSAA and its member schools.<sup>68</sup> In reaching its decision, the district court noted that TSSAA only organized high school athletic events, which the court deemed a service to the public.<sup>69</sup> The district court also focused on the fact that TSSAA had the ability to sanction schools that violated its rules, TSSAA received a significant amount of its yearly revenue from fees generated at tournaments that involved TSSAA's member schools, and TSSAA's employees were eligible for the states retirement system.<sup>70</sup> The district court granted summary judgment in favor of Brentwood Academy that TSSAA Rule 21 violated the Academy's First Amendment rights.<sup>71</sup> Thus, the court held that TSSAA was a state actor and as a result, TSSAA appealed the district court's decision.<sup>72</sup>

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the district court's decision to grant summary judgment on in favor of Brentwood Academy's First Amendment claim.<sup>73</sup> Additionally, the Sixth Circuit held that TSSAA was not a state actor.<sup>74</sup> In reaching its decision that

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 293.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 294.

<sup>74</sup> *Id.*



TSSAA was not a state actor, the Sixth circuit applied the public function, state compulsion, and symbiotic relationship tests.<sup>75</sup> The court reasoned that Brentwood Academy failed to prove that TSSAA's action were fairly attributable to that of the State of Tennessee.<sup>76</sup>

Upon reversal by the Sixth Circuit, Brentwood Academy petitioned for a rehearing en banc by the Sixth Circuit.<sup>77</sup> The Sixth Circuit denied this petition. As a result, Brentwood Academy filed a petition for writ of certiorari with the United States Supreme Court.<sup>78</sup> The Court granted certiorari.<sup>79</sup> At issue was whether a statewide organization created to regulate interscholastic athletic tournaments among public and private high schools engaged in state action when it sanctioned a member school for violating a recruitment related rule.<sup>80</sup>

### 1. *The Court's Reasoning in Brentwood*

The court in *Brentwood* held that one way to define an individual or an entity as a "state actor" under the Fourteenth Amendment is through establishing entwinement.<sup>81</sup> This is done under a two-step process.<sup>82</sup> First, the court must find a "close nexus between the State and the challenged action."<sup>83</sup> To find this nexus, a court may look to factors indicating a close connection between the private entity's activity and the government.<sup>84</sup> Although some factors may be more compelling than others, the Court in *Brentwood* emphasized that "no one fact can function as a necessary condition across the board for finding state action."<sup>85</sup>

The Supreme Court in *Brentwood* rejected its previous practice of drawing a clear line between private action and State action because, in the Court's view, continuing the bright-line practice would eventually lead to the displacement of the Fourteenth Amendment.<sup>86</sup> Instead, the court held that a totality of the circumstances approach would align better with the principles of the state action

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 290.

<sup>81</sup> *Id.* at 302.

<sup>82</sup> *Id.* at 298.

<sup>83</sup> *Id.* at 295.

<sup>84</sup> *Id.* at 290.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 295.

doctrine.<sup>87</sup> The Court emphasized that the purpose of the two-step process is “to assure that constitutional standards are invoked ‘where it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.’”<sup>88</sup>

The particular factors that the court in *Brentwood* looked to were: (1) significant encouragement of the private action by the State; (2) the State’s exercise of coercive power; (3) willful participation by the private actor in joint activities with the State or its agents; (4) delegation of a public function by the State to the private entity; and (5) government entwinement in the private entity’s management or control.<sup>89</sup> As illustrated, the Court in *Brentwood* employed a laundry-list approach to establish the actions of a private actor to be state action.

The second step of the process is that a court must deem the seemingly private behavior “fairly treated as that of the State itself.”<sup>90</sup> Actions taken by private actors who are deemed to have a close nexus with the State are fairly attributable to the State.<sup>91</sup> When defining what actions are fairly attributable to the State, the *Brentwood* Court held that this inquiry is based on normative judgment and lacks rigid simplicity.<sup>92</sup>

*a. Close Nexus*

*i. Significant Encouragement, of Private Action, by the State*

One area that *Brentwood* analyzed to determine if state action existed, was whether there was encouragement of the private action by the State.<sup>93</sup> When the State “provides significant encouragement, either over or covert,” this specific action becomes state action.<sup>94</sup>

Encouragement arises when the State actor acknowledges the private action.<sup>95</sup> In *Brentwood*, the court emphasized the Tennessee’s State Board of Education’s decision to acknowledge the association’s role in regulating interscholastic competition in public schools.<sup>96</sup> For the *Brentwood* Court,

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* [emphasis in original?]

<sup>89</sup> *Id.* 290.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 295-296.

<sup>93</sup> *Id.* at 303.

<sup>94</sup> *Id.* at 296. (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004).

<sup>95</sup> *Id.* at 292.

<sup>96</sup> *Id.*

Tennessee's State Board of Education and TSSAA began to overlap identities when the State adopted language that highlighted the relationship between the association and the board.<sup>97</sup> Specifically, in 1972, Tennessee adopted a rule that expressly stated that TSSAA was "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools in Tennessee participate on an interscholastic basis."<sup>98</sup> The rule required that the State's Board's chairman designate a person to serve on the TSSAA's governing board.<sup>99</sup> As a result, the State's Board reviewed, approved, and reaffirmed the recruiting rules of TSSAA.<sup>100</sup>

*Brentwood* went further to liberally define encouragement. For the *Brentwood* Court, mere recognition is enough to satisfy the encouragement factor in the state action analysis.<sup>101</sup> In 1996, Tennessee removed rule 0520-1-2-.08 and instead replaced this rule with a statement "recognizing the value of participation in interscholastic athletics and the role of [the Association] in coordinating interscholastic athletic competition."<sup>102</sup> The fact that Brentwood Academy initially created a formal rule that designated TSSAA as the official organization to regulate interscholastic sports and then replaced this rule with a mere statement of recognition was of no significance in the Court's decision to find encouragement on behalf of Tennessee.<sup>103</sup> For the *Brentwood* court, the removal of rule 0520-1-2-.08 "affected nothing but words."<sup>104</sup>

When a State exploits the resources of private entities to satisfy established State requirements, the State is encouraging the actions of the private entity.<sup>105</sup> In *Brentwood*, Tennessee allowed its students to satisfy its physical education requirements by complying with the standards laid out by TSSAA.<sup>106</sup> Tennessee's decision to deem TSSAA's requirements as satisfactory helped legitimize the association's regulations and the association as a whole.<sup>107</sup>

*Brentwood* also found encouragement when the private entity utilized the resources of the State.<sup>108</sup> In *Brentwood*, a bulk of the association's basketball

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See Id.* at 301.

<sup>102</sup> *Id.* at 293.

<sup>103</sup> *Id.* at 301.

<sup>104</sup> *Id.*

<sup>105</sup> *See Id.* at 301.

<sup>106</sup> *Id.*

<sup>107</sup> *See Id.*

<sup>108</sup> *See Id.* at 299.

and football tournaments were held in public arenas rented by the association. Additionally, TSSAA used Brentwood Academy as a resource in and of itself.<sup>109</sup> A majority of TSSAA revenue came from gate receipts at the association's tournaments.<sup>110</sup> For the Court, the mere fact that TSSAA "enjoy[ed] the school's money-making capacity as its own" was sufficient to find encouragement of TSSAA on behalf of Brentwood Academy.<sup>111</sup>

*b. The State's Exercise of Coercive Power*

When the State exercises its coercive power over a private entity, it adopts responsibility for the private entity's actions.<sup>112</sup> As established by the *Blum* Court and applied in *Brentwood*, "a state normally can be held responsible for a private decision only when it has exercised coercive power... that the choice must in law be deemed to be that of the state."<sup>113</sup> A State excretes coercive power when it has the ability to enforce restrictions upon the private entity.<sup>114</sup> In *Brentwood*, TSSAA was comprised of nine-person committees.<sup>115</sup> These committees had the power to vote on membership rules and regulations.<sup>116</sup> As per TSSAA's bylaws, the voting membership of these committees were reserved for high school principals, assistant principals, and superintendents that were elected by the member schools.<sup>117</sup> Since 84% of TSSAA's members were public schools, a majority of these committees contained State actors.<sup>118</sup> The *Brentwood* Court also highlighted the fact that public school administrators, who served on these committees, typically attended meetings during regular school hours.<sup>119</sup> As a result, the members of these committees played a role in enacting and enforcing TSSAA'S recruiting rules.<sup>120</sup>

*c. Willful Participation, By the Private actor, in Joint Activities with the State or its Agents*

When the State and a private entity jointly participate in activities, this

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *See Id.* at 303.

<sup>113</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

<sup>114</sup> *Brentwood*, 531 U.S. 288 at 299.

<sup>115</sup> *Id.* at 291.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 290.

<sup>119</sup> *Id.* at 291.

<sup>120</sup> *Id.*

participation can cause the private entity's actions to be deemed state action.<sup>121</sup> As the Court held in *Brentwood*, the challenged activity may be considered state action "when a private actor operates as a 'willful participant in joint activity with the State or its agents.'"<sup>122</sup> In *Brentwood*, joint participation between TSSAA and the State was found in the makeup of TSSAA's membership. 84% of the association's members were public high schools.<sup>123</sup> For the court, it was significant that the number of public high schools far outnumbered the fifty-five private schools that were members of TSSAA.<sup>124</sup> The court gave no weight to the fact that TSSAA did not require that public schools constitute a set percentage of its membership.<sup>125</sup>

Another form of joint participation between a private entity and the State is a State's payment to engage in activities put on by the private entity.<sup>126</sup> In *Brentwood*, the court emphasized that a portion of TSSAA's funding came from membership dues paid by the State.<sup>127</sup> To result in state action, the payments given to engage in private activities is what is important; the monetary amount of these payments is not necessarily significant.<sup>128</sup> A finding that 4% of TSSAA funding came from public school membership dues did not dissuade the Court from holding that TSSAA was a State actor.<sup>129</sup>

*d. Delegation of a Public Function by the State to the Private Entity*

Delegation of State authority to a private entity can give rise to a finding of state action.<sup>130</sup> States provide their residents with many goods and resources that lead to the overall well-being of the community. However, there are instances when the State passes on its authority to a private entity, and thus the private entity is the one who provides the State's residents with the goods and resources.<sup>131</sup>

To the state of Tennessee, and the *Brentwood* Court, interscholastic sports served a public function.<sup>132</sup> In *Brentwood*, the court stressed that interscholastic

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<sup>121</sup> *Id.* at 296.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 290.

<sup>124</sup> *Id.* at 291.

<sup>125</sup> *Id.* at 306.

<sup>126</sup> *Id.* at 290-291.

<sup>127</sup> *Id.* at 299.

<sup>128</sup> *Id.* at 307.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 296.

<sup>131</sup> *See Id.* [some examples would be helpful.]

<sup>132</sup> *Id.* at 299.

athletics played an “integral part” in the public education of Tennessee.<sup>133</sup> Since virtually every public high school in Tennessee spent money on sport competitions, there was a sizeable need for an Association to regulate the interscholastic sports amongst high schools.<sup>134</sup> To the *Brentwood* Court, “by giving these jobs to the Association, the 290 public schools of Tennessee belonging to it can sensibly be seen as exercising their own authority to meet their own responsibilities.”<sup>135</sup>

The State does not have to create the private entity for the private entity to serve a public function on behalf of the state.<sup>136</sup> In *Brentwood*, the State did not create TSSAA.<sup>137</sup> The association was a private not-for-profit corporation that was organized to regulate interscholastic sports among private and public high schools.<sup>138</sup> A state’s mere recognition and encouragement of a private entity can allow the state to delegate its authority to provide a public function to a private entity.<sup>139</sup>

*e. Government Entwinement in the Private Entity’s Management or Control*

When the State is entwined in the management or control of the private entity, the Supreme Court has found it reasonable to find state Action.<sup>140</sup> Entwinement, as the *Brentwood* Court holds, supports a conclusion that an ostensibly private organization should be charged with a public character and thus, judged by constitutional standards.<sup>141</sup> The *Brentwood* Court calls attention to “entwinement from the top down.”<sup>142</sup> This form of entwinement occurs when the State holds positions on the managing board of the private entity.<sup>143</sup> In *Brentwood*, State board members served on TSSAA’s board of control and legislative council. The *Brentwood* Court emphasized that “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

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 307.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 291.

<sup>139</sup> *See Id.* at 292.

<sup>140</sup> *Id.* at 290. (citing *Evans v. Newton*, 382 U.S. 296, 299).

<sup>141</sup> *Id.* at 302.

<sup>142</sup> *Id.* at 300.

<sup>143</sup> *Id.*

ministerial acts...”<sup>144</sup> By holding positions of power within the TSSAA, the State played a role in enforcing the association’s rules and participated in student recruitment.<sup>145</sup>

*ii. Fairness*

Once a close nexus between the State and the Private entity is found, *Brentwood* establishes that the behavior of the private entity is fairly attributable to the State.<sup>146</sup> In analyzing whether it was fair to attribute the actions of TSSAA to the State of Tennessee, the Court focuses on the fact that “the Association’s nominally private character [was] overborne by the pervasive entwinement of public institutions and public officials in its composition and workings.”<sup>147</sup> In the eyes of the court, there was no substantial reason that it would be unfair to hold TSSAA to constitutional standards.<sup>148</sup>

### III. ARGUMENT

Actions taken by Greek-life members that sit on their organization’s board can, at times, rise to the level of state action, subjecting these organizations to constitutional constraints. The state encourages the flourishing of Greek life, exercises its coercive power over its functions, and the Greek organizations willfully participate with the state.<sup>149</sup> The government is very much entwined in the management and control of Greek-life organizations. As such, there is a large range of activity taken by private Greek organizations which is fairly attributable to the State. This is true regardless of whether the Greek organization is located on a private or public campus; the organization itself is considered the State actor.

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<sup>144</sup> *Id.* at 290.

<sup>145</sup> *Id.* at 291.

<sup>146</sup> *Id.* at 298.

<sup>147</sup> *Id.* at 290.

<sup>148</sup> *Id.*

<sup>149</sup> *Sorority and Fraternity Affairs*, DIVISION OF STUDENT AFFAIRS UNIV. OF FLA., <https://www.studentinvolvement.ufl.edu/Sorority-Fraternity-Affairs> (last visited Mar.12, 2019); *Tomahawk Guide to Greek Life at Florida State*, FLA. ST. UNIV. OFFICE OF GREEK LIFE, <https://its.fsu.edu/sites/g/files/imported/storage/original/application/8952e9c17abac326b7a9bdf0a0fe81e.pdf> (last visited Mar.12, 2019); *Grade Policy for Sororities and Fraternities*, WESTERN ILL. UNIV., [http://www.wiu.edu/student\\_services/greek\\_life/forms\\_reports\\_and\\_policies/Grade%20Policy%20for%20Sororities%20and%20Fraternities%20-%202015.pdf](http://www.wiu.edu/student_services/greek_life/forms_reports_and_policies/Grade%20Policy%20for%20Sororities%20and%20Fraternities%20-%202015.pdf) (last visited Mar.13, 2019); Lauren Camera, *After Tragedies, a Call to Change Greek Life’s Culture*, U.S. NEWS, <https://www.usnews.com/news/education-news/articles/2018-01-12/sorority-organization-seeks-to-change-greek-life-culture> (last visited Mar.13, 2019).

### A. *Applying Brentwood to Fraternities and Sororities*

The ambiguous relationship between universities and sororities and fraternities demonstrates the difficulty with classifying actions taken by Greek entities. This ambiguity is troublesome as it allows sororities and fraternities to avoid their constitutional obligations to the students who make up their membership.<sup>150</sup> Scenarios like this are the very reason why *Brentwood* emphasized that the mere classification of an entity or individual does not define its legal obligations.<sup>151</sup> For these kinds of cases, *Brentwood* held it reasonable to find that actions taken by the private actors can rise to the level of State action and thus subject it to constitutional regulations.

In this section, I will apply *Brentwood* to the sorority and fraternity context. By doing this, I will illustrate how the relationship between universities and sororities and fraternities is such that these Greek organizations should be deemed State actors.

#### 1. *Close Nexus*

##### a. *State's Encouragement*

State encouragement was one factor that the Court in *Brentwood* used to determine that TSSAA was a State actor.<sup>152</sup> The court determined that the following facts were sufficient to show State encouragement of TSSAA by the Tennessee's State Board of Education: (1) the board acknowledged the association's role in regulating interscholastic competitions in public schools; and (2) the board allowed TSSAA to utilize the state's resources to hold its sports competitions.<sup>153</sup>

Public universities encourage the growth and development of sororities and fraternities.<sup>154</sup> The encouragement provided by public universities to sororities

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<sup>150</sup> Evan Cree Gee, *West Virginia Univ. Re-punishes Fraternities for Old Violations, Administrator Falsely Claims 'Student Organizations Do Not Have Due Process Rights'*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Dec. 11, 2018), <https://www.thefire.org/west-virginia-university-re-punishes-fraternities-for-old-violations-administrator-falsely-claims-student-organizations-do-not-have-due-process-rights>.

<sup>151</sup> *Brentwood*, 531 U.S. 288 at 290.

<sup>152</sup> *Id.* at 296.

<sup>153</sup> *Id.* at 293, 299.

<sup>154</sup> *Greek Life*, AUBURN UNIV., <http://greeklife.auburn.edu/panhellenic/life-as-a-new-sorority-member> (last visited Mar. 12, 2019); *Fraternity and Sorority Life*, FIU, <https://studentaffairs.fiu.edu/get-involved/sorority-and-fraternity-life/> (last visited Mar. 12, 2019); *Giving*, STUDENT LIFE UNIV. OF MICH., <https://giving.studentlife.umich.edu/greek-life> (last visited Mar. 12, 2019).



and fraternities has exacerbated the expansion of the Greek community.<sup>155</sup> One form of encouragement by public universities has been their decision to acknowledge the role that sororities and fraternities play in helping students enhance their college experience and forming social relationships.<sup>156</sup>

Similar to the encouragement in *Brentwood*, universities encourage students to participate in Greek life through acknowledgement and promotion.<sup>157</sup> One such way universities promote their Greek organizations is through social media.<sup>158</sup> It is rather common for universities to have a web page whose exclusive purpose is to provide information on the university's sororities and fraternities.<sup>159</sup> On the university's webpage, a student can typically obtain information including but not limited to: steps on how to join a Greek organization, the benefits of joining any such organization, photographs of members, and the contact information of staff members who serve in the university's office of Greek life.<sup>160</sup>

Another way that universities acknowledge and promote sororities and fraternities is by creating an image that Greek life is necessary to become a member of the university family.<sup>161</sup> Universities are adamant that it is through Greek life that students have an all-encompassing educational experience. For example, students who may be nervous about transitioning from high school to the University of Florida can go on the university's webpage for sorority and fraternity affairs and be assured that "by becoming a member of the Florida Greek community, you will experience an easier transition from high school to college and gain a 'home away from home.'"<sup>162</sup>

An additional mode of acknowledgment and promotion are university brochures.<sup>163</sup> Beyond exploring the webpages of various universities, a newly admitted student can learn about Greek life through university brochures. Florida State University's *Guide to Greek Life at Florida State University* is one example of how the university uses its resources to encourage students to join

<sup>155</sup> Kali Boyer & Elliot McDonald, *Social Media and Greek Organizations*, EASTERN WASHINGTON UNIV. (Jun.5, 2012), <https://sites.ewu.edu/cmst496-stafford/2012/06/05/social-media-and-greek-organizations/>.

<sup>156</sup> FIU, <https://studentaffairs.fiu.edu/get-involved/sorority-and-fraternity-life/> (last visited Mar. 12, 2019).

<sup>157</sup> *Greek Life*, *supra* note 154; *Fraternity and Sorority Life*, *supra* note 154; *Giving*, *supra* note 154.

<sup>158</sup> Boyer and McDonald, *supra* note 155.

<sup>159</sup> *Tomahawk Guide*, *supra* note 149.

<sup>160</sup> *Parent Information*, OHIO UNIV., <https://www.ohio.edu/involvement/greeklife/join/info.cfm> (last visited Mar. 12, 2019).

<sup>161</sup> *About*, UNIV. OF CENTRAL FLA., <https://fs1.sdes.ucf.edu/about/> (last visited 3/12/2019).

<sup>162</sup> *Sorority and Fraternity Affairs*, *supra* note 149.

<sup>163</sup> *Tomahawk Guide to Greek Life*, *supra* note 149.

Greek Life.<sup>164</sup> In this thirty-nine-page guide, students are first exposed to a welcome letter from the Office of Greek Life College explaining that “college is an amazing experience, but what makes it a unique and life-changing experience is becoming a part of a fraternity or sorority. We hope that you explore all of the incredible possibilities and experiences that Greek Life has to offer.”<sup>165</sup>

Universities also provide, and put on, information sessions for students who would like additional information on a university’s Greek community.<sup>166</sup> At the information sessions, such as those offered at the Towson University, students are encouraged to “come out to an information session to learn more about the different councils that make up Greek Life at TU.”<sup>167</sup> At these information sessions, it is common for the university to have current members of the Greek community speak on how their involvement in a sorority or fraternity has significantly impacted their undergraduate experience for the better.<sup>168</sup>

In *Brentwood*, the court held that the promotion and acknowledgment of TSSAA through the use of a mere statement was sufficient to label TSSAA a state actor.<sup>169</sup> Looking to the sorority and fraternity context, public universities not only make various statements acknowledging the importance of Greek organizations on their campuses but, they also utilize other marketing outlets.<sup>170</sup> Through the use of the internet, brochures, and informational sessions, public universities such as FSU and UF substantially exceeded the level of acknowledgment and promotion required by the *Brentwood* Court.<sup>171</sup> Thus, courts should find that sororities and fraternities are State actors.

Public universities allow Greek organizations to use their facilities to recruit new members.<sup>172</sup> It is common for a public university with a sizeable Greek

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Fraternity and Sorority Life*, UNIV. OF N. GA., <https://ung.edu/fraternity-sorority-life/index.php> (last visited on Mar.12, 2019).

<sup>167</sup> *Greek Life Information Session*, Towson Univ., [https://events.towson.edu/event/greek\\_life\\_information\\_session#.XIfjChKiU1](https://events.towson.edu/event/greek_life_information_session#.XIfjChKiU1) (last visited Mar.12, 2019).

<sup>168</sup> Telephone Interview with Christie Schelhorn, sorority member, Pi Beta Phi (Feb. 20, 2019).

<sup>169</sup> *Brentwood*, 531 U.S. 288 at 288.

<sup>170</sup> *Sorority and Fraternity Affairs*, *supra* note 149; *Office of Welcome to Fraternity and Sorority Life*, FLA. ST. UNIV., <https://ofsl.union.fsu.edu/> (last visited 3/12/2019).

<sup>171</sup> *Id.*

<sup>172</sup> *2012 Formal Recruitment*, THE FSU PANHELLENIC ASS., <https://its.fsu.edu/sites/g/files/imported/storage/original/application/1b58c5f2477216aa6798b897dc7870fa.pdf> (last visited Mar.12, 2019); *Fall 2019 Sorority Recruitment*, UNIV. OF GA., [https://greeklife.uga.edu/content\\_page/sorority-recruitment-content-page](https://greeklife.uga.edu/content_page/sorority-recruitment-content-page) (last visited Mar.12, 2019).

community to have over two thousand women a year engage in the sorority recruitment process.<sup>173</sup> With such an immense number of women participating in recruitment, universities usually allow these Greek organizations to use various buildings throughout campus during rush. To illustrate, at FSU, all potential new members meet in the basketball stadium to begin the recruitment process.<sup>174</sup> It is during this time that each potential new member meets their recruitment counselor and is assigned to their recruitment group.<sup>175</sup> In addition to utilizing the basketball stadium at FSU, Greek organizations also use the computer labs at FSU during the recruitment process.<sup>176</sup> At the end of each day, each potential new member, also referred to as PNMs, is sent to the FSU computer lab where they are told to rank their favorite Greek organizations.<sup>177</sup>

In *Brentwood*, the court noted that the Tennessee Board of Education encouraged TSSAA by allowing TSSAA to use its facilities and other public facilities to hold sports competitions.<sup>178</sup> Like in *Brentwood*, public universities allow Greek organizations to utilize their facilities to recruit new members.<sup>179</sup> This form of encouragement by public universities allows Greek organizations to grow and develop. However, even if a university decides to charge these Greek organizations to use their facilities, this would still satisfy finding encouragement on behalf of the University. As established in *Brentwood*, the threshold for encouragement is low.<sup>180</sup> The university does not have to allow sororities or fraternities to use its resources for a court to find encouragement. The university simply has to allow the Greek community to “enjoy the schools money making capacity.”<sup>181</sup> Universities allow sororities and fraternities to enjoy their money-making capacity merely by being a university and bringing in students to become members of these Greek organizations.<sup>182</sup> This financial benefit is highlighted by alumni donations. “Fraternity men tend to be generous to their alma maters”<sup>183</sup> and as a result, “schools are beholden to donating

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<sup>173</sup> Ben Flanagan, *Alabama Bid Day 2017: See the photos of 2,338 women rushing to their new sororities*, AL.COM, [https://www.al.com/living/2017/08/alabama\\_bid\\_day\\_2017\\_see\\_the\\_p.html](https://www.al.com/living/2017/08/alabama_bid_day_2017_see_the_p.html) (last visited Mar.12, 2019).

<sup>174</sup> Telephone Interview with Christie Schelhorn, *supra* note 168.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Brentwood*, 531 U.S. 288 at 291.

<sup>179</sup> Telephone Interview with Christie Schelhorn, *supra* note 168.

<sup>180</sup> *Brentwood*, 531 U.S. 288 at 299.

<sup>181</sup> *Id.*

<sup>182</sup> *How Fraternities and Sororities Make Money*, SEATTLE PI, <https://education.seattlepi.com/fraternities-sororities-make-money-2629.html> (last visited Mar.12, 2019).

<sup>183</sup> Peter Jacobs, *Why Fraternities Will Never Disappear From American College Life*, BUSINESS INSIDER (Dec. 3, 2014), <https://www.businessinsider.com/why-fraternities-will-never-disappear-from-american-college->

alumni. When they try and do something counter to the fraternities' interests, they have to worry about money."<sup>184</sup>

*b. State's Exercise of Coercive Power*

For the *Brentwood* Court, the Tennessee State Board of Education's decision to exercise its coercive power over TSSAA weighed in favor of finding that TSSAA was a State actor.<sup>185</sup> Justice Souter, writing for the majority, emphasized that the Tennessee State Board of Education exercised its coercive power over TSSAA when it enforced restrictions on the association by serving on the 9 TSSAA committees.<sup>186</sup> It was through these committees that the high school principals, assistant principals, and superintendents were able to enact and enforce TSSAA recruiting rules.<sup>187</sup>

Universities exert coercive power over their Greek communities by creating and enforcing the standards that these organizations must abide by to remain in good standing with the university.<sup>188</sup> University requirements generally take the form of GPA thresholds, member training, event restrictions, and community service hours.<sup>189</sup>

Public universities exercise their coercive power over sororities and fraternities by requiring them to maintain a minimum GPA as defined by the university.<sup>190</sup> The average GPA requirement for a sorority and fraternity in the United States ranges from 2.0-3.0.<sup>191</sup> Upon joining a Greek organization, it is

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<sup>184</sup> *Id.*

<sup>185</sup> *Brentwood*, 531 U.S. 288 at 296.

<sup>186</sup> *Id.* at 291.

<sup>187</sup> *Id.*

<sup>188</sup> *Moving Forward Together The Future of Fraternity and Sorority Life at FSU*, OFFICE OF FRATERNITY AND SORORITY LIFE, [https://ofsl.union.fsu.edu/sites/g/files/upcbnu1526/files/media/documents/FSU-Moving-Forward-Together\\_Web.pdf](https://ofsl.union.fsu.edu/sites/g/files/upcbnu1526/files/media/documents/FSU-Moving-Forward-Together_Web.pdf) (last visited Mar.13, 2019); *Grade Policy for Sororities and Fraternities*, WESTERN ILL. UNIV., [http://www.wiu.edu/student\\_services/greek\\_life/forms\\_reports\\_and\\_policies/Grade%20Policy%20for%20Sororities%20and%20Fraternities%20-%202015.pdf](http://www.wiu.edu/student_services/greek_life/forms_reports_and_policies/Grade%20Policy%20for%20Sororities%20and%20Fraternities%20-%202015.pdf) (last visited Mar.13, 2019); Kristin Musulin, *Voices: The Positive, Underreported Aspect of Greek Life*, USA TODAY (Dec.17, 2014), <https://www.usatoday.com/story/college/2014/12/17/voices-the-positive-underreported-aspects-of-greek-life/37399335/>.

<sup>189</sup> *Id.*

<sup>190</sup> *Panhellenic Academics*, UNIV. OF GEORGIA, [https://greeklife.uga.edu/content\\_page/panhellenic-academics-content-page](https://greeklife.uga.edu/content_page/panhellenic-academics-content-page) (last visited on Mar.18, 2019); *What Qualifications Are Needed to Be in a Sorority in College?*, SEATTLEPI, <https://education.seattlepi.com/qualifications-needed-sorority-college-2144.html> (last visited on Mar.18, 2019).

<sup>191</sup> *Recruitment*, UNIV. OF CENTRAL FL. PANHELLENIC, <https://www.ucfpanhellenic.com/recruitment-2016> (last visited on Mar.18, 2019); *Greek Life Membership Recruitment / Intake Guidelines*, GEORGIA STAT. UNIV., <https://greeklife.gsu.edu/files/2015/04/Appendix-B-Recruitment-Intake-Guidelines-2.pdf> (last visited on

common for each member to read over a governing document, provided by the university, stating that the member must maintain the university's minimum GPA requirement.<sup>192</sup> To illustrate, Florida State University's *Moving Forward Together Plan*, a document which outlines the newly designed policies for FSU's Greek life, requires that "all chapters must maintain a 2.5 average GPA."<sup>193</sup> Chapters with a membership below a 2.5 GPA will be subject to appropriate intervention."<sup>194</sup> Another university that has established GPA requirements for the members of its Greek community is Ohio University.<sup>195</sup> For Ohio University, implementing an "Academic Requirement Policy and requiring a chapter development plan of proposed educational programs" allows the university to stimulate the university's and Greek organizations' goal of personal growth of its members.<sup>196</sup>

Also, it is common for universities to penalize students who fall below the GPA threshold.<sup>197</sup> Students in violation of the university's GPA requirement are typically placed on some form of academic probation.<sup>198</sup> As part of academic probation, the chapter can be prevented from engaging in certain activities such as intermural sports, social events, or conducting weekly chapter meetings. However, if the chapter's GPA continues to remain below the university's threshold, the chapter may be suspended.<sup>199</sup> As stated by Western Illinois University's Office of Student Activities, "if the chapter is consecutively under the 2.700 average GPA for two semesters, regardless of improvement, the chapter could face added expectations regarding academic improvements - up to and including loss of student organization recognition (Suspension)."<sup>200</sup>

Coercion by the State also occurs when universities require members of Greek organizations to complete educational training on topics designated by the university.<sup>201</sup> Of the various required educational training programs, three

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Mar.18,2019).

<sup>192</sup> Telephone Interview with Christie Schelhorn, sorority member, *supra* note 168.

<sup>193</sup> *Moving Forward Together*, *supra* note 188.

<sup>194</sup> *Id.*

<sup>195</sup> *Sorority and Fraternity Life at Ohio Univ.*, OHIO UNIV., <https://www.ohio.edu/involvement/greeklife/> (last visited Mar.13, 2019).

<sup>196</sup> *Id.*

<sup>197</sup> *Grade Policy for Sororities and Fraternities*, WESTERN ILL. UNIV., [http://www.wiu.edu/student\\_services/greek\\_life/forms\\_reports\\_and\\_policies/Grade%20Policy%20for%20Sororities%20and%20Fraternities%20-%20202015.pdf](http://www.wiu.edu/student_services/greek_life/forms_reports_and_policies/Grade%20Policy%20for%20Sororities%20and%20Fraternities%20-%20202015.pdf) (last visited Mar.13, 2019); *Moving Forward Together*, *supra* note 188.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Grade Policy for Sororities and Fraternities*, *supra* note 197; Camera, *supra* note 149.

<sup>201</sup> *Moving Forward Together*, *supra* note 188; *Programing Alcohol and Other Drug Education in Greek Affairs*, EDUC. ADVISORY BD., <http://www.slassessment.gatech.edu/sites/default/files/documents/custom/>

that are customary are alcohol, drug, and hazing training.<sup>202</sup> During these training sessions, members are obligated to learn harm reduction strategies and anti-hazing strategies. Additionally, chapter leadership is made aware of the consequences that each chapter will face as a result of not completing these requirements.<sup>203</sup> To illustrate, Florida International University Office of Student Conduct and Conflict Resolution “conducts hazing prevention and sanctioned workshops for Greek organizations.”<sup>204</sup> Additionally, at Florida State University for example, “a minimum of 75% of each Chapter’s members must complete the OFSL Leadership training, which includes topics such as hazing prevention...”<sup>205</sup>

Requiring Greek organizations to engage in community service is yet another form of university coercion with which Greek organizations must comply.<sup>206</sup> For example, the University of California Santa Barbara, as part of its Standards of Excellence Program, “requires each fraternity or sorority member to complete a minimum of 6 hours of community services per quarter.”<sup>207</sup> Upon completing these community service hours, each member must submit a form titled *Community Service Report Summary* at the end of each quarter. If a member of the chapter does not correctly complete this documentation and turn it into the Office of Student Life, the chapter’s standing within the University could be negatively affected.<sup>208</sup>

Another common area that universities exercise their coercive power is in regulating social events hosted by fraternities and sororities.<sup>209</sup> It is common for universities to require that any events put on by the Greek Organization satisfy criteria outlined by the University. These restrictions generally include but are not limited to: security at each social event, and registration of each event.<sup>210</sup> As

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programming\_alcohol\_and\_other\_drug\_education\_in\_greek\_affairs\_1.pdf (last visited Mar.13, 2019).

<sup>202</sup> *Hazing and Prevention*, FIU, <https://studentaffairs.fiu.edu/get-support/student-conduct-and-conflict-resolution/hazing-prevention/index.php> (last visited Mar.13, 2019).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Moving Forward Together*, *supra* note 188.

<sup>206</sup> *Id.*

<sup>207</sup> *Community Service*, UNIV. OF CAL. SANTA BARBRA, <http://osl.sa.ucsb.edu/fraternities-sororities/accreditation/community-service> (last visited Mar.13, 2019).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Chapter Recognition Policies*, NC ST. UNIV., <https://fsl.dasa.ncsu.edu/chapter-resources/rules-policies/>; *Sorority and Fraternity Affairs Event Guidelines for Social Sororities and Fraternities*, UNIV. OF FLA., <https://www.studentinvolvement.ufl.edu/Portals/1/Sorority%20and%20Fraternity%20Affairs/Policies/Event%20Guidelines%20Policy.pdf?ver=2017-09-29-094512-090&timestamp=1506692879336> (last visited Mar.13, 2019).

a standard procedure, many universities require that each chapter submit a completion of documentation before that chapter can schedule any social events.<sup>211</sup> One such university is the University of New Orleans.<sup>212</sup> As found in the Minimum Standards for Fraternities and Sororities section of the Greek life homepage, UNO requires that “at least 14 business days before events with alcohol, liability paperwork, event contracts, security contracts, and contact info for venue/security must be submitted to [greeklife@uno.edu](mailto:greeklife@uno.edu).”<sup>213</sup> If the chapter does not submit this paperwork at least fourteen business days before the event, the chapter will face disciplinary actions by the Office of Student Involvement and Leadership.<sup>214</sup>

Aside from providing universities with the proper documentation regarding social events, some universities clearly define the form of security that must be present at each event.<sup>215</sup> To illustrate, at Florida State University, if a Greek organization decides to host an event where alcohol will be present, “sworn law enforcement officers or security approved by FSUPD must be hired and present for the duration of the event.”<sup>216</sup> Thus, even if the Greek organization does not seek to utilize the university’s police department, the university still has the ultimate decision as to whom they may hire to provide security at their events.<sup>217</sup>

Universities have limited the number of events that Greek organizations may have.<sup>218</sup> One kind of event that is highly regulated by universities are recruitment related events. Universities have decided to crack-down on Greek organizations by defining how long the recruitment period can be and what type of actions can and cannot occur during this time period.<sup>219</sup> A recent rule that has been announced by Florida State University reduces the recruitment period for new members from 8 to 6 weeks.<sup>220</sup> Thus, each Greek organization at Florida State

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<sup>211</sup> *Minimum Standards for Fraternities and Sororities*, UNIV. OF NEW ORLEANS, [http://www.uno.edu/greek-life/Minimum\\_Standards\\_for\\_Fraternities\\_and\\_Sororities\\_Fall\\_2017.pdf](http://www.uno.edu/greek-life/Minimum_Standards_for_Fraternities_and_Sororities_Fall_2017.pdf) (last visited Mar.13, 2019).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Moving Forward Together*, *supra* note 188.

<sup>216</sup> Jeremy Bauer-Wolf, *Skepticism on New Greek Rules*, INSIDE HIGHER ED (Jan.31, 2018), <https://www.insidehighered.com/news/2018/01/31/new-rules-florida-state-sororities-fraternities-hard-enforce-experts-say> (last visited 3/13/2019).

<sup>217</sup> *Id.*

<sup>218</sup> *Moving Forward Together*, *supra* note 188.

<sup>219</sup> Jeremy Bauer-Wolf, *Skepticism on New Greek Rules*, INSIDE HIGHER ED (Jan.31, 2018), <https://www.insidehighered.com/news/2018/01/31/new-rules-florida-state-sororities-fraternities-hard-enforce-experts-say>.

<sup>220</sup> *Id.*

must formally initiate all of their new members within a 6-week period.<sup>221</sup>

Beyond exercising its coercive power in the form of regulations, universities also use their authority to reprimand those members of the Greek community that violate university requirements.<sup>222</sup> To illustrate, FSU has created a panel comprised of students, faculty, and staff who are responsible for hearing conduct cases involving Greek organizations.<sup>223</sup> As stated by Amy Hecht, FSU's Vice President for Student Affairs, members of the Greek community that violate any student organization codes of conduct will be subject to "sanctions, suspension and dismissal for both student and organizations ..."<sup>224</sup>

As in *Brentwood*, public universities have exercised their coercive power over sororities and fraternities by enforcing restrictions upon these Greek organizations. The main distinction between the power of the State in *Brentwood* and the power of the State in today's Greek communities is the amount of coercive power that is exercised. In *Brentwood*, the court held that members of the State who served on TSSAA governing boards exercised coercive power simply by having the ability to vote.<sup>225</sup> The state did not give any specific examples to illustrate that members of these committees actually used their voting abilities to impact the rules or regulations of the association.<sup>226</sup> In addition to the coercion found in *Brentwood*, universities also play an active role in regulating the activities of Greek organizations.<sup>227</sup> When given the opportunity, states have used their coercive power to monitor and control almost every aspect of sororities and fraternities.<sup>228</sup> Being that the amount of coercive power exercised by the State in the sorority and fraternity context substantially exceeds that found in *Brentwood*, the conduct of members of Sororities and Fraternities on university campuses should certainly rise to the level of State action.

*c. Delegation of a Public Function by the State to the Private Entity and*

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<sup>221</sup> *Id.*

<sup>222</sup> *Minimum Standards for Fraternities and Sororities*, *supra* note 211; *Policies and Procedures Handbook*, FRATERNITY AND SORORITY LIFE ARK. TECH UNIV., [https://www.atu.edu/fsl/docs/Fraternity%20and%20Sorority%20Life%20Policies%20and%20Procedures\\_Handbook.pdf](https://www.atu.edu/fsl/docs/Fraternity%20and%20Sorority%20Life%20Policies%20and%20Procedures_Handbook.pdf) (last visited Mar.13, 2019).

<sup>223</sup> Jeremy Bauer-Wolf, *Skepticism on New Greek Rules*, INSIDE HIGHER ED (Jan. 31, 2018), <https://www.insidehighered.com/news/2018/01/31/new-rules-florida-state-sororities-fraternities-hard-enforce-experts-say>.

<sup>224</sup> *Id.*

<sup>225</sup> *Brentwood*, 531 U.S. 288 at 291.

<sup>226</sup> *Id.*

<sup>227</sup> *Chapter Recognition Policies*, NC ST. UNIV., <https://fsl.dasa.ncsu.edu/chapter-resources/rules-policies/>; *Sorority and Fraternity Affairs Event Guidelines*, *supra* note 210.

<sup>228</sup> *Id.*



*the Private Entity's Willful Participation in this Delegation*

Delegation of a public function, by the Tennessee Board of Education, to TSSAA was yet another fact that the *Brentwood* used to determine that TSSAA was a State actor.<sup>229</sup> In *Brentwood*, the Court reasoned that TSSAA was serving a public function by regulating interscholastic sports among Tennessee high schools.<sup>230</sup> To the state of Tennessee, sports was integral to their public education system.<sup>231</sup> The *Brentwood* Court makes clear that actual delegation is not required.<sup>232</sup> Delegation can occur through actual delegation or by allowing a private entity to take on a task traditionally reserved for the State.<sup>233</sup>

Universities allow sororities and fraternities to take on the task of providing their students with public functions traditionally left to the State.<sup>234</sup> One such public function is student development. Many sororities and fraternities take on the task of helping their members personally develop throughout their undergraduate experience. It is common for these Greek organizations to create their mission statements around student development, as this goal is highly entwined in the way Greek organizations are run.<sup>235</sup> For example, Chi Omega's mission is comprised of career development, and scholarship excellence.<sup>236</sup> By committing to the ideals of a particular organization, students begin to engage in personal growth and development. One survey conducted by the University of Auburn showed that "the average sorority member has a higher GPA than the average undergraduate woman at Auburn."<sup>237</sup> The study also showed that this has been the case for over thirty years.<sup>238</sup>

Another public function provided by sororities and fraternities is community service.<sup>239</sup> While many universities are vocal about the benefits of community

<sup>229</sup> *Brentwood*, 531 U.S. 288 at 299.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Home*, UNIV. OF CENT. FLA., <https://fsl.sdes.ucf.edu/> (last visited Mar.13, 2019); *Fraternity and Sorority Life*, UNIV. OF CENT. FLA., <https://fsl.sdes.ucf.edu/about/> (last visited Mar.13, 2019); *Fraternity and Sorority Life*, *supra* note 154; *Why Join*, UCONN, <https://greeklife.uconn.edu/why-join/> (last visited Mar.13, 2019).

<sup>235</sup> *Mission and Vision*, UNIV. OF N. FLA., [https://www.unf.edu/fraternity-sorority/About\\_US/Mission\\_and\\_Vision.aspx](https://www.unf.edu/fraternity-sorority/About_US/Mission_and_Vision.aspx) (last visited Mar.13, 2019); *Moving Forward Together*, *supra* note 188.

<sup>236</sup> *What We Stand For*, CHI OMEGA, <http://chiomega.com/what-we-stand-for/> (last visited Mar.12, 2019).

<sup>237</sup> *Greek Life*, *supra* note 154.

<sup>238</sup> *Id.*

<sup>239</sup> Kristin Musulin, *Voices: The Positive, Underreported Aspect of Greek Life*, USA TODAY (Dec.17, 2014), <https://www.usatoday.com/story/college/2014/12/17/voices-the-positive-underreported-aspects-of-greek-life/37399335/>.

service, they usually leave it to students to get involved on their own. Given that each sorority and fraternity has an organization that they support, it is fairly common for each member to participate in philanthropy events to raise money for these organizations.<sup>240</sup> To illustrate, in 1999, Tri Delta officially adopted St. Jude Children's Research Hospital as its national philanthropic partner.<sup>241</sup> Since the adoption, the student members of Tri Delta have raised over fifty-five million dollars to support St. Jude patients.<sup>242</sup> Beyond hosting a yearly fundraising event, a normal practice among the Greek community is for each chapter to pre-pay for their members to engage in the community service events hosted by another chapter.<sup>243</sup>

Similar to TSSAA in *Brentwood*, sororities and fraternities serve a public function vital to both students and the education system of each state.<sup>244</sup> TSSAA served the public function of providing students with an association that regulates interscholastic sports.<sup>245</sup> Sororities and fraternities provide students with an organization that fosters personal development and contributes to the well-being of the community.<sup>246</sup> The fact that the State does not explicitly delegate its authority to Greek organizations is not dispositive; State action can still exist.<sup>247</sup> In *Brentwood*, the mere fact that the state allowed TSSAA to take on the role of regulating sports among high schools was sufficient to find that the state delegated this public function to TSSAA.<sup>248</sup> As in *Brentwood*, sororities and fraternities acquire the responsibility of providing students with various public functions not through formal designation but through the universities' decision to allow them to do so. Through continuing their relationship with universities, Greek organizations willfully participate with the State in providing a public function.

#### *d. Government Entwined in Management and Control*

Entwinement by the State in the management and control of a private entity

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<sup>240</sup> *13 Fraternities and Sororities Taking Philanthropy to the Next Level*, COLLEGE RAPTOR (Jan. 3, 2019), <https://www.collegeraptor.com/find-colleges/articles/student-life/13-fraternities-and-sororities-taking-philanthropy-to-the-next-level/>.

<sup>241</sup> *Tri Delta for St. Jude*, ST. JUDE CHILDREN'S RESEARCH HOSPITAL, <https://www.stjude.org/get-involved/school-fundraising-ideas/college/greek-organizations/tri-delta.html> (last visited Mar. 12, 2019).

<sup>242</sup> *Id.*

<sup>243</sup> Telephone Interview with Christie Schelhorn, *supra* note 168.

<sup>244</sup> *Home*, *supra* note 234; *Fraternity and Sorority Life*, *supra* note 234; *Fraternity and Sorority Life*, *supra* note 234; *Why Join*, *supra* note 234.

<sup>245</sup> *Brentwood*, 531 U.S. 288 at 299.

<sup>246</sup> *Mission and Vision*, *supra* note 235; *Moving Forward Together*, *supra* note 188.

<sup>247</sup> *Brentwood Acad.*, 531 U.S. 288 at 299.

<sup>248</sup> *Id.*

is another factor used by the *Brentwood* Court to conclude that TSSAA was a State actor.<sup>249</sup> According to the Court, The state was entwined in the management and control of TSSAA because state board members served on TSSAA’s board of control and legislative council.<sup>250</sup>

Analogous to *Brentwood*, universities are heavily involved in the management and control of sororities and fraternities.<sup>251</sup> One form of involvement by the universities is the creation of offices within the university to monitor and assist Greek organizations on campus.<sup>252</sup> These offices have been referred to as Office of Fraternity and Sorority Life, the Center for Student Activities and Involvement, Office of Greek Life, and much more.<sup>253</sup> These officers are charged with the responsibility of on-campus support to Greek organizations.<sup>254</sup> For example, at the University of Michigan, the Office of Fraternity and Sorority Life “supports the fraternity and sorority community at the University of Michigan and works with the four self-governing councils and their affiliated groups to provide support to students with recruitment, intake, event planning, educational programming, social, philanthropic, and logistical needs.”<sup>255</sup>

The university may even pay these employees with funds generated by the membership dues of each sorority or fraternity.<sup>256</sup> Upon the death of a fraternity member at FSU, President Thrasher declared the university will be adding 4 new employees to its Office of Fraternity and Sorority Life.<sup>257</sup> According to Ms. Hecht, the FSU’s Vice President for Student Affairs, the addition of these 4 employees will be “funded by new membership dues.”<sup>258</sup> Thus, the university is using funding by these private entities to pay its employees.

Beyond providing support to Greek organizations, the state is heavily

<sup>249</sup> *Id.* at 296.

<sup>250</sup> *Id.* at 291.

<sup>251</sup> *Fraternity and Sorority Life*, UNIV. OF WASH., <https://www.washington.edu/ofsl/> (last visited Mar.13, 2019); *Greek Graduate Initiative and STRIPES Program*, SAVANNAH ST. UNIV. DIVISION OF STUDENT AFFAIRS, <https://www.savannahstate.edu/student-affairs/documents/Greek-Life-Membership-Requirements.pdf> (last visited Mar.13, 2019); *About FSL*, UNIV. OF VA., <https://fsl.virginia.edu/about> (last visited Mar.13, 2019).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Giving*, STUDENT LIFE UNIV.OF MICH., <https://giving.studentlife.umich.edu/greek-life> (last visited Mar.13, 2019).

<sup>256</sup> Jeremy Bauer-Wolf, *Skepticism on New Greek Rules*, INSIDE HIGHER ED (Jan. 31, 2018), <https://www.insidehighered.com/news/2018/01/31/new-rules-florida-state-sororities-fraternities-hard-enforce-experts-say>.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

entwined in the management and control of these organizations because it regulates the recruitment of new members.<sup>259</sup> PNMs, must go through a formal recruitment process, traditionally known as “rush.”<sup>260</sup> However, the recruitment process may differ depending on the university.<sup>261</sup> Typically, at universities that have a profound Greek community, the recruitment process is highly regulated and has a formal structure. At universities with smaller Greek communities, recruitment may be more relaxed.<sup>262</sup>

University offices that regulate the recruitment of PNMs spend a substantial number of hours planning the recruitment process and ensuring that both members and recruitment counselors comply with university standards.<sup>263</sup> To illustrate, at Florida State University, the formal recruitment process for a sorority is a week-long.<sup>264</sup> Once an incoming student decides that they want to join FSU’s Greek community, the student must formally register through a link provided by the university.<sup>265</sup> Upon registering, the student must attend a week-long interview process where they are required to interview at each sorority house.<sup>266</sup> To prepare for this week-long process, university staff in the Office of Greek Life, work with students currently serving on the executive boards of these organizations to ensure that all students complete required tasks such as the orientation process, where members are introduced to the university’s expectations.<sup>267</sup>

At certain universities the recruitment counselors, who assist students during the recruitment process, are required by the university to comply with various obligations.<sup>268</sup> For example, at Florida State University, the process to become a recruitment counselor is highly regulated by the university’s Office of

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<sup>259</sup> *Policies and Procedures Handbook*, *supra* note 222; *Moving Forward Together*, *supra* note 188.

<sup>260</sup> Katie Lampert, *How Sororities Work*, HOW STUFF WORKS, <https://people.howstuffworks.com/sorority1.htm> (last visited Mar.13, 2019).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Frequently Asked Questions*, FLA. ST. UNIV. PANHELLENIC ASS., <https://www.floridastateph.com/faqs/> (last visited 3/13/2019).

<sup>264</sup> *Id.*

<sup>265</sup> *2017 FSU Sorority Guide*, FLA. ST. UNIV. PANHELLENIC ASS., [https://issuu.com/fsupanhellenic/docs/fsupanhellenic\\_recruitmentguide2017/](https://issuu.com/fsupanhellenic/docs/fsupanhellenic_recruitmentguide2017/) (last visited Mar.13, 2019); *2014 Formal Recruitment Guide for Potential New Members*, FLA. ST. UNIV. PANHELLENIC ASS., <https://gradschool.fsu.edu/sites/g/files/imported/storage/original/application/0e76e52b50db01bc3fb9bb8ae68080b4.pdf> (last visited Mar.13, 2019).

<sup>266</sup> *Id.*

<sup>267</sup> Telephone Interview with Christie Schelhorn, *supra* note 168.

<sup>268</sup> *2014 Recruitment Counselor Application*, FLA. ST. UNIV. PANHELLENIC ASS., <https://gradschool.fsu.edu/sites/g/files/imported/storage/original/application/4a037337942525340687650fbee104ca.pdf> (last visited Mar.13, 2019).

Fraternity and Sorority Life.<sup>269</sup> To become a recruitment counselor at FSU, the student must first interview with the Office of Fraternity and Sorority Life.<sup>270</sup> Upon completing the interview process, if selected, the recruitment counselor must register to complete a semester long course taught by a professor at the university on the university's campus.<sup>271</sup>

*e. Fairness*

The fairness analysis is rather narrow. In *Brentwood* fairness played no significant independent role in the state action analysis. Rather, *Brentwood* held it is fair to deem an individual or entity a State actor once a court determines that there is enough facts to support entwinement. With regard to Greek organizations, there are an ample amount of facts to support entwinement between the organizations and the state. Therefore, it is fair to render certain actions taken by Greek organizations as State action.

IV. FACTORS NOT DISCUSSED IN *BRENTWOOD* THAT ALLOW FOR FINDING STATE ACTION

Beyond satisfying the factors listed in *Brentwood*, the fact that Greek organizations typically lease their houses from the universities lends additional support to classifying certain actions taken by the organization as State action.<sup>272</sup> As outlined in *Burton v. Wilmington Parking Auth.*, a court can find State action in instances where an actor is private but acts on property he or she leases from the government.<sup>273</sup> In *Burton*, a coffee shop refused to serve an African American man because of his race.<sup>274</sup> The coffee shop was located in a parking building in Wilmington, Delaware owned by the Wilmington Parking Authority, an arm of the state of Delaware.<sup>275</sup> To raise money, the Parking Authority leased multiple spaces in the building to private business. One such business was the coffee shop.<sup>276</sup>

At issue before the Supreme Court was whether the coffee shop's activities

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<sup>269</sup> *Id.*

<sup>270</sup> Telephone Interview with Christie Schelhorn, *supra* note 168.

<sup>271</sup> *2014 Recruitment Counselor Application*, *supra* note 268.

<sup>272</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 716.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

could be considered state action.<sup>277</sup> The Court held in the affirmative.<sup>278</sup> Specifically, the Court stated that the nature of the relationship between the government and the coffee shop is such that the Constitution “must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.”<sup>279</sup> In its analysis, the most important factor the Court looked to was that the coffee shop leased the property from the government.<sup>280</sup> Beyond that, the court looked to a variety of factors to establish the restaurant as a state actor. The restaurant was in a building which was dedicated to “public uses” in performance of an “essential” government function.<sup>281</sup> The upkeep and maintenance of the building were handled by the government and were completed using public funds.<sup>282</sup> Lastly, both the government and the coffee shop benefited from their relationship.<sup>283</sup> The restaurant benefited from the location and access to parking. The parking authority benefited from the increase in the demand of parking.<sup>284</sup>

The relationship between Greek organizations and universities is similar to the arrangement between Eagle Coffee Shoppe and the Wilmington Parking Authority. Oftentimes Greek organizations lease their houses from the universities that they are associated with.<sup>285</sup> As in *Burton*, the arm of the state, universities, lease their property to private entities, Greek organizations.<sup>286</sup> For Example, Georgia State University leases its housing facilities to Greek organizations. One such contract between Georgia State University Housing Office and Sigma Nu, requires that the fraternity pay an annual fee payable in three installments with an eight-month term.<sup>287</sup> The university also reserves the right to control the rooming assignment of the house, assign a Resident Assistant to monitor the property and the behavior of the Greek members on the property, and may also terminate the agreement at any time.<sup>288</sup>

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<sup>277</sup> *Id.* at 716-717.

<sup>278</sup> *Id.* at 717.

<sup>279</sup> *Id.* at 726.

<sup>280</sup> *Id.* at 719.

<sup>281</sup> *Id.* at 723.

<sup>282</sup> *Id.* at 720.

<sup>283</sup> *Id.* at 724.

<sup>284</sup> *Id.*

<sup>285</sup> GEORGIA STAT. UNIV. SPECIAL INTEREST GREEK HOUSING CHAPTER LICENSE AGREEMENT, [https://greeklife.gsu.edu/files/2013/03/2013\\_2014\\_chapter\\_License\\_Agreement.pdf](https://greeklife.gsu.edu/files/2013/03/2013_2014_chapter_License_Agreement.pdf) (last visited Mar.18, 2019); CARNEGIE MELLON UNIV. GREEK HOUSING LEASE, <https://www.cmu.edu/housing/our-communities/housing-images-tours/Greek%20Housing/Greeks/Greek%20Lease.pdf> (last visited on Mar.18, 2019).

<sup>286</sup> *Id.*

<sup>287</sup> GEORGIA STAT. UNIV., *supra* note 285.

<sup>288</sup> *Id.*

Universities often maintain the properties that they own and lease out.<sup>289</sup> Like the parking authority in *Burton*, universities provide routine maintenance to the houses they lease to Greek Organizations.<sup>290</sup> For example, Carnegie Mellon University, which leases its property to Greek organizations requires that “only Carnegie Mellon’s Facilities Management Services (FMS) is authorized to perform maintenance work (including routine maintenance work) and capital improvement projects within the Facility.”<sup>291</sup> Within the Maintenance and Damages section of the lease, Carnegie Mellon University is responsible for everything from mechanical issues to aesthetic issues.<sup>292</sup>

Both the university and Greek organizations benefit from this landlord tenant relationship.<sup>293</sup> As in *Burton* where the government and the coffee shop enjoyed the benefits as lessor and lessee, Greek organizations and universities get access to more resources as a result of their housing-related relationship.<sup>294</sup> To illustrate, at Carnegie Mellon University, “on-campus Greek residents enjoy the combined benefits of on-campus amenities and conveniences as well as a sense of community offered through the lived experience in their chapter house.”<sup>295</sup> These benefits include but are not limited to: regular cleaning, common areas where each chapter can host events, and laundry facilities.<sup>296</sup> Allowing Greek organizations to lease their properties broadens the financial capabilities of universities. Upon entering into a lease agreement with Greek organizations, Georgia State University requires that the Greek organization maintain 100% occupant rate during fall and spring which demands that the organization fills up nine, sixteen, or nineteen beds depending on the size of the property for \$450, \$775, or \$900 a bed.<sup>297</sup> In addition to paying for a bed, each member who lives in the leased property, must also purchase the university meal plan which can run a student anywhere from \$1,833 to \$1,934.<sup>298</sup>

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<sup>289</sup> *Id.*, CARNEGIE MELLON UNIV., *supra* note 285.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Housing & Residential Education*, CARNEGIE MELLON UNIV., (last visited on Mar.18, 2019), <https://www.cmu.edu/housing/our-communities/greek-housing/index.html>.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> GEORGIA STAT. UNIV., *supra* note 285.

<sup>298</sup> *2018-2019 Academic Year Meal Plan Terms and Conditions*, GEORGIA STAT. UNIV., <https://dining.gsu.edu/academic-terms> (last visited on Mar.18, 2019).

## CONCLUSION

There is sufficient entwinement between Greek organizations and universities to fairly deem certain activity taken by some members as State action. Classifying these activities as State action would preclude Greek organizations from trespassing on the constitutional rights of their members. Even though Greek organizations would thus be subject to constitutional restraint, the mutually beneficial relationship they share with the universities they occupy justifies holding them to a constitutional standard.

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