

THE NCAA AS STATE ACTOR:
TARKANIAN, BRENTWOOD, AND DUE PROCESS

JAMES POTTER[†]

The NCAA would like the American public to believe that only a few schools ever break the rules, and it is never one of their golden programs. But other than making billions off of unpaid kids, has the NCAA ever made you confidently think they know anything about anything?

Former college basketball coach Jerry Tarkanian¹

It almost seems impossible that, in the freest country in the world, we tolerated an organization like the NCAA. Is it because we were indifferent, intimidated, uninformed, selfish, loyal to the system, left out, or didn't know how to change a system that has failed in its mission?

Former college basketball coach Dale Brown²

If the NCAA and those who lead at the institutional and conference levels are unable to maintain academic values in the face of economics and related pressures, the government may be less than a proverbial step away.

Law professor Rodney K. Smith³

Formed one hundred years ago at the behest of President Theodore Roosevelt,⁴ the National Collegiate Athletic Association (NCAA)

[†] J.D. Candidate 2007, University of Pennsylvania Law School; Ph.D. 1998, Northwestern University; M.A. 1989, University of North Carolina; B.S. 1985, Ohio University. I would like to thank Professors Ted Ruger, Nate Persily, and Seth Kreimer for their help in providing focus early in my writing process. Thanks are also due to my Comment Editors and other colleagues at the *University of Pennsylvania Law Review*. And finally, thanks to my wife, Kirsten Potter, for her abundant encouragement, patience, and passion for college basketball, all qualities that I have come to expect from her. I have received help from many, but all errors are my own.

¹ JERRY TARKANIAN WITH DAN WETZEL, RUNNIN' REBEL: SHARK TALES OF "EXTRA BENEFITS," FRANK SINATRA, AND WINNING IT ALL, at xvi (2005).

² Dale Brown, *Foreword* to DON YAEGER, UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL, at vi (1991).

³ Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 22 (2000).

⁴ See JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE 70-71 (2003) (noting President Roosevelt's concerns regarding the injuries suffered by college athletes, and his support for "the principle of amateurism"); see also YAEGER, *supra* note 2, at 1-6 (describing how a single on-field death—one of eighteen suffered by college football players during the

exists today “to govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount.”⁵ The NCAA is a private organization, made up of over one thousand active member institutions—colleges and universities representing widely divergent student bodies, educational missions, and athletic budgets.⁶ Over the last three decades, due in large part to the growing popularity of college sports on television,⁷ the NCAA has become increasingly powerful, such that the degree to which it now serves its own stated purpose regarding the “paramount” nature of the educational experience may be seriously questioned.⁸ Because of its private status, however, NCAA enforcement proceedings are not governed by the kinds of constitutional protections to which federal, state, and local governments must adhere. No matter how ubiquitous the NCAA has become, and no

1905 season—became a well-publicized spur toward rules reform, including the adoption of the forward pass).

⁵ NCAA, Our Mission, http://www2.ncaa.org/portal/about_ncaa/overview/mission.html (last visited Mar. 23, 2007).

⁶ See NCAA, Composition of the NCAA, http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.htm (last visited Mar. 23, 2007) (noting that, as of December 1, 2006, the total membership count was 1279 institutions, including conference and affiliated members). An estimated 384,742 student-athletes currently participate in NCAA-governed intercollegiate athletics. NCAA, Fact Sheet, http://www.ncaa.org/about/fact_sheet.pdf (last visited Mar. 23, 2007).

⁷ See, e.g., Darren Rovell, *Once an Afterthought, the Dance Is Now Big Business*, ESPN.COM, Oct. 10, 2005, <http://proxy.espn.go.com/espn/print?id=2186638&type=story> (noting that rights to telecast the NCAA Division I basketball tournament—now popularly known as “March Madness” or “The Big Dance”—that sold for less than \$1.2 million in 1973, now bring in an average of \$545 million per year to the NCAA, leading to an increase in its operating budget from \$21 million in 1989-1990 to \$480 million in 2004-4-2005). See generally *The NCAA and Conference Affiliation*, in *THE BUSINESS OF SPORTS* 459-67 (Scott R. Rosner & Kenneth L. Shropshire eds., 2004) (breaking down recent NCAA budgets by sport, conference, source of revenue, and more). For further information regarding the economic impact of the NCAA, see *infra* notes 139-141 and accompanying text.

⁸ The threat of federal intervention in the operations of the NCAA has recently become more salient. See, e.g., Pete Thamel, *Brand Defends N.C.A.A. Tax Status*, N.Y. TIMES, Oct. 31, 2006, at D4 (recounting NCAA President Myles Brand’s effort to defend the Association’s tax-exempt status in light of “corporate sponsorships, lucrative TV deals and coaches with lavish contracts and no academic duties”); Editorial, *College Sports Get a Warning*, N.Y. TIMES, Nov. 6, 2006, at A20 (commenting on a recent “tough-minded letter” to the NCAA from the House Ways and Means Committee, seeking explanation of how athletic departments, some with budgets “growing two to three times faster than higher education as a whole,” function on campuses across the country). It is an open question whether the new Democratic majorities in Congress may prove more demanding of explanations regarding the NCAA’s academic mission.

matter how much is at stake in its rulings, in some ways the NCAA remains untouchable by even the most basic requirements of fairness that our legal system has embraced. This Comment asks whether, at its most fundamental level, such an arrangement makes any sense. As the opening quotations imply, the answer offered here is a resounding “no.”

For a private organization like the NCAA to be bound by Fourteenth Amendment standards of due process, the organization must be deemed a “state actor” for constitutional purposes.⁹ While the United States Supreme Court has explicitly held that the NCAA does not qualify as a state actor,¹⁰ this Comment will argue that the Court’s decision in *NCAA v. Tarkanian* warrants reevaluation,¹¹ and that there are a number of reasons why the NCAA should be held to the same due process standards that apply to governmental organizations.¹²

Part I traces the history of state action doctrine, from its birth in the post-Civil War era through its expansion under the Warren Court and eventual retraction during the Burger/Rehnquist years. This is

⁹ See generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 885-926 (15th ed. 2004) (delineating key moments in the evolution of “state action” from 1883 to the present day).

¹⁰ *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988).

¹¹ Because this Comment argues for an adjustment away from Supreme Court precedent, issues of stare decisis must be acknowledged. However, as will become clear throughout the Comment, the Court has employed so many different tests and standards to assess state action that the doctrine itself has proven to be unusually pliable and fact dependent. The change I advocate is one of degree, not of kind, and it is my contention that the Court could move further toward a flexible, case-by-case approach without necessarily overruling prior holdings.

¹² While this Comment differs from previous work by explicitly calling for a revision of the doctrine expressed in *Tarkanian* in light of *Brentwood Academy vs. Tennessee Secondary School Ass’n*, 531 U.S. 288 (2001), legal scholarship has addressed the state action question as it applies to athletic associations. See, e.g., Megan M. Cooper, Note, *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, 951-62 (2002) (tracing state action doctrine from *Tarkanian* through *Brentwood*); Lisa Mastrogiovanni, Casenote, *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 12 SETON HALL CONST. L.J. 711, 728-40 (2002) (providing a close reading of the majority and dissent in *Brentwood*); Robin Petronella, Comment, *A Comment on the Supreme Court’s Machiavellian Approach to Government Action and the Implications of Its Recent Decision in Brentwood Academy v. Tennessee Secondary School Athletic Association*, 31 STETSON L. REV. 1057, 1072-81 (2002) (discussing *Brentwood* and ultimately criticizing it as an overextension of the state action doctrine).

not a well-settled area of the law,¹³ and at least two distinct notions of how to determine what constitutes state action survive to the present day.¹⁴ Part I further develops these dueling conceptions, examining their underlying premises to identify the interests served by each. Part II looks closely at two relatively recent Supreme Court decisions—*NCAA v. Tarkanian*¹⁵ and *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*¹⁶—and argues that the line of reasoning adopted by the Court with respect to a state high school association in *Brentwood* should be applied to the NCAA’s behavior on the intercollegiate level, and is therefore preferable to the reasoning employed in *Tarkanian*. Part III concludes by advancing substantive justifications for holding a private association like the NCAA to standards of fundamental fairness.

I. STATE ACTION DOCTRINE THROUGH THE YEARS

A. A Restrictive Beginning

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, in part, that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”¹⁷ This provision came into play in the *Civil Rights Cases*,¹⁸ in which the Supreme Court invalidated sections of the Civil Rights Act of 1875¹⁹ by expressly

¹³ See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting) (“[O]ur cases deciding when private action might be deemed that of the state have not been a model of consistency.”); Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 25 (2004) (“As modern state action doctrine has made all too clear, exactly where the line between private and public is to be drawn is, at best, elusive.”).

¹⁴ See Martin A. Schwartz, *New Issues Arising Under Section 1983*, 18 Touro L. Rev. 641, 646 (2002) (describing two strands of state action jurisprudence—one structured according to tests, the other more ad hoc in nature—the unpredictability of which “puts litigators and lower court judges in a very difficult position”).

¹⁵ 488 U.S. 179 (1988).

¹⁶ 531 U.S. 288 (2001).

¹⁷ U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment’s Equal Protection Clause adds that a state may not “deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

¹⁸ 109 U.S. 3 (1883).

¹⁹ Ch. 14, 18 Stat. 335. The Civil Rights Act of 1875 had been passed, in part, to provide equal access to public accommodations for newly freed slaves. “The [*Civil Rights Cases*] grew out of exclusions of blacks from hotels, theaters and railroads.”

holding Fourteenth Amendment protections to be valid only against state actors.²⁰ At its most basic level, the decision shielded admittedly “wrongful” acts from due process and equal protection requirements, so long as the acts were committed by private entities, not by an arm of the government. The Court reached this decision over a stinging dissent by Justice Harlan, who asserted, *inter alia*, that places of public accommodation *are* state actors:

In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation.²¹

Despite Justice Harlan’s prescient argument, which was nearly a century ahead of its time in terms of eventual Supreme Court rulings regarding public accommodations,²² in the *Civil Rights Cases* the Court adhered to a restrictive conception of state action. This was arguably due at least in part to the immediate post-Civil War historical context, in which issues of federalism were particularly salient. But while the racial issues at the heart of the Reconstruction era found the Court guarding *against* excessive federal involvement, in the twentieth century racial discrimination would become a catalyst for the *expansion* of state action doctrine.²³

SULLIVAN & GUNTHER, *supra* note 9, at 888.

²⁰ See *The Civil Rights Cases*, 109 U.S. at 17 (“[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings.”).

²¹ *Id.* at 58-59 (Harlan, J., dissenting).

²² In the aftermath of the Court’s landmark school desegregation decision *Brown v. Board of Education*, 347 U.S. 483 (1954), a series of cases eventually ruled that public accommodations could not be divided along racial lines. See, e.g., *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam) (observing in 1963 that it was “no longer open to question that a State may not constitutionally require segregation of public facilities”).

²³ See SULLIVAN & GUNTHER, *supra* note 9, at 892 (“Most of the [state action] cases from the 1940s to the 1960s involved claims of racial discrimination (and most found the 14th Amendment applicable).”).

B. *The Doctrine Expands*

1. "Public Function" Analysis

In the so-called "White Primary Cases,"²⁴ the Court prohibited political parties, and states themselves, from limiting participation in primary elections on the basis of race. While these cases more directly implicated the Fifteenth Amendment's prohibition on race discrimination in the voting context,²⁵ they extended Fourteenth Amendment protections as well. This is especially true of state efforts to delegate power to nongovernmental parties: after the White Primary Cases, states could no longer achieve impermissibly discriminatory goals simply by giving a private actor authority to perform a *public function* that is *governmental in nature*. By invalidating such efforts, the Court proved willing to extend Fourteenth Amendment protections even when a strict, formalist approach might have allowed for the opposite result. Subsequent cases have often turned on the question of whether a given function in a particular case was deemed to be "public" or "governmental."

In *Marsh v. Alabama*,²⁶ the Court followed the spirit of Justice Harlan's dissent in the *Civil Rights Cases* by holding that the town of Chickasaw, Alabama, which was owned by a shipping corporation, could not prohibit a Jehovah's Witness from distributing religious literature, because that violated the First Amendment guarantee of religious freedom under the Free Exercise Clause.²⁷ In extending the public function prong²⁸ within state action doctrine, the Court in *Marsh* held that "[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his

²⁴ These cases include *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (holding that the Democratic Party's exclusion of blacks from its primary constituted racial discrimination by the State of Texas); *Smith v. Allwright*, 321 U.S. 649, 663 (1944) (holding that the power to determine qualifications for participation in elections is a state function and that anyone who exercises it, though in the guise of a private party, is in reality an agent of the state); and *Terry v. Adams*, 345 U.S. 461, 484 (1953) (Clark, J., concurring) (declaring that a private party may not control "the uncontested choice of public officials" without adhering to state action safeguards).

²⁵ U.S. CONST. amend. XV, § 1 provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

²⁶ 326 U.S. 501 (1946).

²⁷ *Id.* at 508. Under the Free Exercise Clause, "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

²⁸ See SULLIVAN & GUNTHER, *supra* note 9, at 894-901.

property for use by the public in general, the more his rights become circumscribed by the statutory and constitutional rights of those who use it.”²⁹ In *Marsh*, the Court conceptualized town ownership as a governmental function; this characterization brought First Amendment rights into play, even though the town was owned by a private corporation. This is the paradigm for public function analysis of state action: private entities that act in ways and for purposes typically associated with governmental functions are held to the same constitutional standards as government entities themselves.

2. “State Nexus” Analysis

Two terms after *Marsh*, the Court further extended its concept of state action in *Shelley v. Kraemer*,³⁰ in which Chief Justice Vinson’s majority opinion held that, while it may not be unlawful for private individuals to *enter into* racially restrictive housing covenants,³¹ the State may not *enforce* such covenants, because to do so would constitute state action in violation of the Fourteenth Amendment.³² While private discrimination remained beyond the scope of Fourteenth Amendment protections, *Shelley* remade the dividing line between private and public, so that a private agreement, though in and of itself permissible, could become unconstitutional when enforced if the agreement in question relied sufficiently upon the government for its enforcement. That a state’s mere “involvement” in a private agreement could, in some circumstances, lead to state action represented a broad extension of the doctrine.³³

Because of *Shelley*’s far-reaching implications, scholars have suggested that the case cannot be read literally for precedential purposes, and that it was probably decided in such broad terms because the par-

²⁹ *Marsh*, 326 U.S. at 506.

³⁰ 334 U.S. 1 (1948).

³¹ “[The Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful.” *Id.* at 13 (citations omitted).

³² See *id.* at 19 (finding “no doubt that there has been state action in these cases in the full and complete sense of the phrase” and that “but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint”). Future Justice Thurgood Marshall, who would become a committed expansionist in terms of state action doctrine upon his ascendance to the Court, served as co-counsel for the petitioners in *Shelley*. *Id.* at 2.

³³ See SULLIVAN & GUNTHER, *supra* note 9, at 903 (“Some seemingly ‘neutral’ state nexus with a private actor can almost always be found: at least by way of the usual state law backdrop recognizing exercises of private choices.”).

ticular practices in the cases before the Court were especially objectionable.³⁴ Nonetheless, *Shelley* represented a further example of the Court expanding its conception of state action in order to combat discriminatory practices at the state level.

*Burton v. Wilmington Parking Authority*³⁵ provided another such extension of the state action doctrine, this time at the local level. In *Burton*, a municipal parking garage in Wilmington, Delaware, leased space to a restaurant. When that restaurant refused to serve African-American patrons, a lawsuit was filed under the Equal Protection Clause of the Fourteenth Amendment.³⁶ The Supreme Court of Delaware held that the restaurant was acting in “a purely private capacity,”³⁷ and was therefore insulated from equal protection requirements. But the U.S. Supreme Court reversed that ruling, relying on the symbiotic relationship between the city-owned garage and the discriminatory behavior of its lessee, the restaurant. Emphasizing the need to look at “the peculiar facts or circumstances present” in each case, the Court held that “when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.”³⁸

Burton’s recognition that the precise boundaries of state action are necessarily fact-specific determinations—the Court called the act of defining those boundaries an “‘impossible task’ which ‘[t]his Court has never attempted’”—marks it as perhaps the zenith of a progressive conception of state action. Here the Court took a close look at the totality of the circumstances involved and determined that Fourteenth Amendment protection was appropriate, even though, as in *Shelley* before, the connection between the discriminating party and the state itself was arguably somewhat tenuous. With *Burton*, the

³⁴ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 527-29 (3d ed. 2006) (describing the breadth of *Shelley*’s logical implications, but noting that “the Court only rarely has applied *Shelley* as a basis for finding state action”).

³⁵ 365 U.S. 715 (1961).

³⁶ See *id.* at 716.

³⁷ *Wilmington Parking Auth. v. Burton*, 157 A.2d 894, 902 (Del. 1960), *rev’d*, 365 U.S. 715 (1961).

³⁸ *Burton*, 365 U.S. at 726.

³⁹ *Id.* at 722 (quoting *Kotch v. Bd. of River Port Pilot Comm’rs*, 330 U.S. 552, 556 (1947)).

Court extended the state action doctrine as far as it had ever gone before, and further than it has ventured since.⁴⁰

State nexus analysis in cases like *Shelley* and *Burton* provided the mechanism for the Court to extend protection against racial discrimination, moving closer to the ideal for which the Fourteenth Amendment was passed in the first place. Historically speaking, these two cases fit within the gradual, halting movement toward racial equality that characterized much of American social and political life in the aftermath of World War II.

C. *The Conservative Retrenchment*

The end of Chief Justice Warren's tenure marked an ideological turning point for the Supreme Court on several fronts. President Nixon's appointment of Chief Justice Burger in 1969 and, especially, of then-Associate Justice Rehnquist in 1972, ushered in an era of backlash against some of the Warren Court's more progressive holdings. In the state action realm, cases like *Shelley* and *Burton* remained on the books; however, the Court would soon begin to narrow its definition of state action.

In *Moose Lodge No. 107 v. Irvis*,⁴¹ the Court declined to find state action in the case of a private club's racially discriminatory policy. In rejecting the argument that the club's state-granted liquor license was sufficient to bind the private actors to Fourteenth Amendment standards of equal protection, Justice Rehnquist wrote for the 6-3 majority:

The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases* . . . and adhered to in subsequent decisions.⁴²

⁴⁰ See LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 251 (1985) (characterizing *Burton* as "the high-water mark in a tide of state action doctrine that has since been almost constantly at ebb").

⁴¹ 407 U.S. 163 (1972).

⁴² *Id.* at 173. The majority in *Moose Lodge* included all four of President Nixon's new appointees, with Chief Justice Burger, Justice Powell, and Justice Blackmun joining Justice Rehnquist's opinion. *Id.* at 164.

The opinion, which explicitly distinguished both *Shelley* and *Burton*,⁴³ remains bound in spirit to the Reconstruction-era cases from nearly a century before. The refusal to insist on precise criteria to define state action had allowed the more progressive Vinson and Warren Courts to extend the doctrine, whether via public function or state nexus analyses, as circumstances dictated. In *Moose Lodge* the Court embraced a mirror-image approach, limiting the scope of state action and ruling in a more restrictive manner. By reclaiming additional turf on the “private” side of the public/private divide, *Moose Lodge* raised the bar on the state nexus prong of state action doctrine: connections between the private actor and the state would now have to be more substantial in order for Fourteenth Amendment protections to apply. While the landmark extensions of the previous decades may not have been overturned, the Burger and Rehnquist Courts would prove much more likely to absolve private actors from constitutional requirements. The fact-specific approach that previously led to an expansion of the state action doctrine was now being employed to rein it in.

Justice Rehnquist, writing again for the same 6-3 majority as in *Moose Lodge*, continued this process of distinguishing expansionist precedents while embracing restrictive ones in *Jackson v. Metropolitan Edison Co.*⁴⁴ As the above quote from *Moose Lodge* explicitly anticipated, the majority in *Jackson* found that a private supplier of electricity was not a state actor.⁴⁵ Rejecting the argument that, because electricity is an essential item, the termination of its service must meet due process restrictions, Justice Rehnquist summarized the Court’s holding:

All of petitioner’s arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent’s action so as to make the latter’s conduct attributable to the State for purposes of the Fourteenth Amendment.⁴⁶

⁴³ *Id.* at 172.

⁴⁴ 419 U.S. 345 (1974).

⁴⁵ *Id.* at 358-59.

⁴⁶ *Id.* at 358.

Justice Douglas, in dissent, argued that the majority failed to take a cumulative look at the facts, which pointed to “a monopolist providing essential public services as a licensee of the State and within a framework of extensive state supervision and control.”⁴⁷ Indeed, *Jackson* was arguably a case in which the private actions were “sufficiently intertwined with those of the State”⁴⁸ to an even greater degree than in both *Shelley* and *Burton*. The state action doctrine was now being reargued almost completely anew, with only cursory attention paid to its development over the previous century; the *Civil Rights Cases* seemed to provide the only precedent that the Burger Court was unwilling to distinguish. Justice Marshall’s *Jackson* dissent, which complained of the majority’s unwillingness to add together the various factors that might lead toward a finding of state action, would prove prophetic: “Today the Court . . . adopts a stance that is *bound to lead to mischief* when applied to problems beyond the narrow sphere of due process objections to utility terminations.”⁴⁹

Whereas prior to *Jackson* the Court seemed to look at the totality of circumstances in assessing whether state action should be imputed in a given case, two decisions handed down on the same day in 1982 found the Court replicating its “sequential” *Jackson*-style analysis.⁵⁰ In *Rendell-Baker v. Kohn*,⁵¹ the Court considered whether a private school’s discharge of certain employees fell under the purview of Fourteenth Amendment protections. Despite the facts that ninety percent of the school’s operating budget came from the government, the school was subject to extensive state regulation, and it served a public function by educating maladjusted students, the Court ruled that those discharged by the school were not entitled to constitutional standards of due process.⁵²

In *Blum v. Yaretsky*, the Court followed a similar path, ruling that a private nursing home’s transfer or discharge of Medicaid patients “without notice or an opportunity for a hearing”⁵³—decisions that re-

⁴⁷ *Id.* at 362 (Douglas, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.* at 366 (Marshall, J., dissenting) (emphasis added).

⁵⁰ See G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 405 (1997) (“The *Jackson* Court’s approach to state nexus analysis was duplicated in the Court’s 1982 decisions in *Rendell-Baker v. Kohn* and *Blum v. Yaretsky*.” (footnotes omitted)).

⁵¹ 457 U.S. 830 (1982).

⁵² *Id.* at 840-43.

⁵³ 457 U.S. 991, 993 (1982).

duced the patients' federal benefits—did not violate the Fourteenth Amendment, either.⁵⁴ Justice Brennan's dissent in *Blum* accused the majority of running afoul of *Burton* by "ignoring the nature of the regulatory framework presented by this case in favor of the recitation of abstract tests and a pigeonhole approach to the question of state action."⁵⁵

Cases like *Shelley* and *Burton* validate the idea that state action may be found lurking behind things as seemingly private as housing covenants or restaurant management decisions; the acknowledgement or discovery of government influence in such factual circumstances evolves out of the Court's flexible, cumulative approach, in which factors are combined to meet the threshold of state action. In contrast, the cases from *Moose Lodge* forward increasingly require much more overt state involvement, with the Court resolving ambiguities in favor of private actors. "After the twin decisions in *Blum* and *Rendell-Baker*, if the totality approach was not dead, it was at least gasping for breath."⁵⁶

The ongoing debates regarding state action may be explained by the fact that few legal doctrines engage the philosophical impulse as fully as do questions of due process or equal protection. The Fourteenth Amendment was passed quickly on the heels of the lengthy and destructive Civil War, and the breadth of the Amendment's application continues to divide scholars and Justices. Perhaps, as one commentator has argued, the doctrine cuts even deeper:

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," while those more inclined toward powdered wigs and judicial formalism criticize the amendment as an instrument of "freewheeling [judicial] lawmaking." . . . The result is not

⁵⁴ *Id.* at 1012.

⁵⁵ *Id.* at 1013-14 (Brennan, J., dissenting).

⁵⁶ Buchanan, *supra* note 50, at 406. Interestingly, a third state action opinion was also handed down on June 25, 1982. In that case, the Court did find state action, over dissents by Chief Justice Burger and Justice Rehnquist, the respective authors of the majority opinions in *Rendell-Baker* and *Blum*. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982) (finding state action in the joint participation by state and private parties in an attachment proceeding mandated by state law). Justices White, Blackmun, and Stevens, each of whom had declined to find state action in both *Rendell-Baker* and *Blum*, found the facts of *Lugar* more persuasive, and they constituted the *Lugar* majority with Justices Brennan and Marshall. The Court's posture in this era thus reflected strong adherents on both sides of the debate (with Chief Justice Burger and Justice Rehnquist least likely to find state action and Justices Brennan and Marshall most likely to find it), and a more pliable group of moderate Justices whose opinions were somewhat more "in play" on a case-by-case basis.

merely a meandering precedent of inconsistent verdicts, 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.⁵⁷

In recent years, the Supreme Court has welcomed intercollegiate and scholastic athletic associations into the state action thicket. Having traced the historical development of this contentious area through the early 1980s, the balance of this Comment will address how the doctrine has been applied in these athletic contexts, and will conclude by suggesting a course for future application.

II. ATHLETIC ASSOCIATIONS AND STATE ACTION

A. *Shark Hunting*

1. Background and Procedural History

In the world of college sports, where the most prominent players change every few years due to graduation, loss of eligibility, and professional opportunities, the real “stars” are usually the head coaches. Particularly in basketball, where top coaches’ careers can provide them with thirty or more years in the public spotlight, frequent media attention, and increasingly lucrative salaries and endorsement deals, in some ways the coaches define the sport.⁵⁸

⁵⁷ Michael A. Culpepper, Casenote, *A Matter of Normative Judgment: Brentwood and the Emergence of the “Pervasive Entwinement” Test*, 35 U. RICH. L. REV. 1163, 1163-64 (2002) (footnotes omitted).

⁵⁸ This status, long implicitly understood by college basketball fans, has led to some prominent coaches becoming national celebrities, as evidenced by the proliferation of “inspirational” books published by big-name coaches over the past few years. Examples include Duke Coach Mike Krzyzewski (*LEADING WITH THE HEART: COACH K’S SUCCESSFUL STRATEGIES FOR BASKETBALL, BUSINESS, AND LIFE* (2001)); onetime Kentucky and current Louisville coach Rick Pitino’s *SUCCESS IS A CHOICE: TEN STEPS TO OVERACHIEVING IN BUSINESS AND LIFE* (1998); and Tarkanian’s own memoir, *supra* note 1. The visibility of these and other top coaches has created a situation in which the leader of a university’s basketball program is often the most visible public figure representing that school, further amplifying the financial relevance of ensuring fairness in NCAA enforcement proceedings, which can potentially cripple an athletic program. The National Association of Basketball Coaches (NABC) exists to promote the college game and the role of the coach within it. For information regarding the NABC and its view of coaches as “Guardians of the Game,” see *What Is the NABC and What Does it Do*, <http://nabc.cstv.com/about/about-basicinfo.html> (last visited Mar. 23, 2007).

Although he is now retired from coaching, Jerry Tarkanian (a.k.a. “Tark the Shark”) was for many years one of the most recognizable figures in college sports. After a successful career on the high school and junior college levels, his teams won 778 Division I college games (509 of them during his nineteen-year tenure at the University of Nevada-Las Vegas), reached four Final Fours, and won the 1990 NCAA national championship.⁵⁹ Many of his players went on to great acclaim as professionals,⁶⁰ and he was always well respected by his fellow coaches,⁶¹ but throughout his career, Tarkanian’s unconventional appearance, idiosyncratic courtside behavior, and off-court issues did even more to make him famous than did his coaching success.

By far the most prominent of these controversies was his lengthy battle with the NCAA.⁶² It began in 1972, when Tarkanian was the coach at Long Beach State University. Protesting what he considered to be unfair selective prosecution of recruiting violations by the NCAA enforcement group, Tarkanian wrote two newspaper columns in the *Long Beach Independent Press-Telegram* accusing the NCAA of picking on smaller schools while turning a blind eye to violations at prominent programs, most notably the University of Kentucky.⁶³

⁵⁹ See TARKANIAN WITH WETZEL, *supra* note 1, at xv, 221-22.

⁶⁰ Players like Larry Johnson, Stacey Augmon, Greg Anthony, Sidney Green, Armon Gilliam, and Reggie Theus each played ten or more seasons in the NBA after playing for Tarkanian at UNLV. For a list of players who attended UNLV before playing professionally in the United States, see NBA/ABA Players who Attended University of Nevada-Las Vegas, <http://www.databasebasketball.com/players/bycollege.htm?sch=University+of+Nevada+%2D+Las+Vegas> (last visited Mar. 23, 2007).

⁶¹ See, e.g., Bob Knight, *Foreword* to TARKANIAN WITH WETZEL, *supra* note 1, at ix (“There is no one I have observed in my 40 years of coaching who has been able to do a better job of [getting his players to play hard on the court] consistently than Jerry Tarkanian.”).

⁶² See generally PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: TEXT, CASES, PROBLEMS* 742-43 (3d ed. 2004) (detailing Tarkanian’s conflicts with the NCAA); YAEGER, *supra* note 2, at 195-248 (same).

⁶³ See YAEGER, *supra* note 2, at 200 (quoting one of Tarkanian’s columns: “The University of Kentucky basketball program breaks more rules in a day than Western Kentucky does in a year. . . . The NCAA just doesn’t want to take on the big boys”). The Kentucky program, long reputed to be among the “dirtiest” in the sport, was eventually placed on probation in the late 1980s following an episode in which an overnight envelope, sent by an assistant coach and addressed to prospective recruit Chris Mills, inadvertently came open and revealed \$1500 in cash, in clear violation of the NCAA’s amateur guidelines. Tarkanian, who attempted to recruit Mills to play for him at UNLV, contends that schools like Kentucky (the program that has won the most games in college basketball history) and UCLA (which has won the most national championships) got away with many such recruiting violations over several decades, while less-prominent colleges—including those at which he coached—were targeted by NCAA enforcement. TARKANIAN WITH WETZEL, *supra* note 1, at 147-49; see also John P.

When Tarkanian left Long Beach to become the head coach at the University of Nevada–Las Vegas in 1973, the NCAA was already investigating the UNLV program.⁶⁴ This investigation, which culminated three years later, eventually led to charges that the school had committed thirty-eight different rules violations, ten of which named Tarkanian.⁶⁵ When, in 1977, the University and Tarkanian appealed, the NCAA Council upheld the Infractions Committee's findings.⁶⁶ The NCAA placed UNLV on probation for two years and also made an unprecedented move, ordering the University to suspend its coach for two years or face additional penalties.⁶⁷ Nevada law required UNLV—a state institution—to hold a hearing prior to suspending the coach, but “[a]lthough the hearing officer did not believe that any violations had occurred, he concluded that UNLV *had no choice* but to suspend Tarkanian if the school wanted to remain part of the NCAA.”⁶⁸

Before he could be suspended, Tarkanian sued the university in Nevada state court, alleging that he had been deprived of property and liberty without due process of law, in violation of the Fourteenth

Sahl, *College Athletes and Due Process Protection: What's Left After National Collegiate Athletic Association v. Tarkanian*, ___ U.S. ___, 109 S. Ct. 454 (1988)?, 21 ARIZ. ST. L.J. 621, 621 n.1 (providing details on the Kentucky case).

⁶⁴ WEILER & ROBERTS, *supra* note 62, at 742. The investigation, which had been inactive before Tarkanian took the UNLV job, was reopened within a week of his arrival on the UNLV campus. The first entry into the investigatory file was a newspaper clip reporting Tarkanian's new job. YAEGER, *supra* note 2, at 201.

⁶⁵ See YAEGER, *supra* note 2, at 201 (providing details regarding the NCAA's Official Letter of Inquiry and hearings conducted by its Committee on Infractions). Yae-ger's book goes into exhaustive detail about the NCAA's investigatory policies, which he continually characterizes as being unfair and vindictive. Looking closely at the specifics of the NCAA procedures, however, is beyond the scope of this Comment. For present purposes, it is enough to stipulate that the NCAA's procedures fall well short of constitutional standards of due process, a claim that no one would be likely to deny. See *infra* notes 67 & 89 (discussing the inadequacies of the NCAA's procedures).

⁶⁶ YAEGER, *supra* note 2, at 202.

⁶⁷ WEILER & ROBERTS, *supra* note 62, at 743. The main charges against Tarkanian were that he paid for a player's flight home, that he arranged for a player's grade to be changed to maintain his on-court eligibility, and that he had pressured witnesses to give false statements to investigators. *Id.* at 742-43. The evidence presented against Tarkanian consisted entirely of hearsay testimony by NCAA investigators. *Id.* at 743. No oral examination or cross-examination of witnesses was allowed, and the NCAA enforcement staff was granted a private consultation with the Council in between the presentation of evidence and the rendering of the verdict. *Id.*; see also *Tarkanian v. NCAA*, 741 P.2d 1345, 1347 (Nev. 1987) (discussing the inadequacy of the NCAA's adjudicatory practices, including its reliance on investigators' mere oral recollections of source interviews and the interviewees' inability to check the accuracy of the evidentiary memoranda).

⁶⁸ WEILER & ROBERTS, *supra* note 62, at 743 (emphasis added).

Amendment.⁶⁹ After the trial court enjoined the suspension, UNLV appealed; the NCAA was subsequently joined as a party, at its own request.⁷⁰ Tarkanian then filed an amended complaint, adding the NCAA as a defendant. After four years of delays, during which Tarkanian remained the active head coach at UNLV, he won a bench trial. The court found that the NCAA's conduct qualified as state action and that its decision had been arbitrary and capricious.⁷¹ After Tarkanian filed a petition to recover attorney's fees and the NCAA was ordered to pay ninety percent of the \$196,000 due him, the NCAA appealed to the Nevada Supreme Court; UNLV did not join in that appeal.⁷²

The Nevada Supreme Court also found that the NCAA qualified as a state actor, at least insofar as the suspension of Tarkanian was concerned.⁷³ In doing so, it relied in large part on the fact that "many NCAA member institutions were either public or government supported,"⁷⁴ and that, because the right to discipline a public employee "is traditionally the exclusive prerogative of the state," UNLV could not delegate that duty to a private entity.⁷⁵ Upon the NCAA's appeal, the case finally reached the U.S. Supreme Court in 1988, some fifteen years after the initial NCAA investigation of UNLV had commenced.

2. The Coach at the Highest Court

Justice Stevens authored the Court's 5-4 majority opinion, which reversed the Nevada Supreme Court and held that the NCAA did not function as a state actor for Fourteenth Amendment purposes.⁷⁶ The majority's analysis declined to follow the liberal precedents established most broadly in *Shelley* and *Burton*, and instead continued along the much more restrictive lines of *Moose Lodge*, *Jackson*, and their more recent progeny. In doing so, the Court rejected Tarkanian's claims one by one, unwilling to consolidate the various elements of his case against the NCAA into a single, cumulatively powerful argument.

⁶⁹ *Tarkanian*, 741 P.2d at 1346.

⁷⁰ NCAA v. Tarkanian, 488 U.S. 179, 188 (1988).

⁷¹ *Id.*

⁷² *Id.* at 189.

⁷³ *Tarkanian*, 741 P.2d at 1349.

⁷⁴ *Id.* at 1347.

⁷⁵ *Id.* at 1348.

⁷⁶ NCAA v. Tarkanian, 488 U.S. 179, 199 (1988).

Tarkanian claimed that UNLV, clearly a state actor, created a cooperative arrangement with the NCAA by delegating to the Association exclusive authority to discipline UNLV's coach. Since the NCAA was now a joint actor with the state university, on this theory, the NCAA enforcement proceedings became state action. This seemed to be a strong argument; in fact, even *Jackson's* restrictive test⁷⁷ could arguably be met on the facts presented. But, far from finding a "close nexus" between the NCAA and UNLV, the Court held that Tarkanian's joint action claim "fundamentally misconstrue[d] the facts of this case."⁷⁸ The Court was convinced that UNLV had acted under color of state law. But while the NCAA's behavior was clearly influential in determining how the university would act, it was the school itself, not the national association, that suspended Tarkanian. Therefore, the majority argued, "the question is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."⁷⁹ By focusing on the technical fact that the NCAA had no direct power to discipline Tarkanian, the Court effectively minimized the obvious truth that UNLV was largely bound by economic necessity to follow the NCAA's "recommendations" of punishment.⁸⁰

The Court also relied upon the fact that the NCAA, as a national association, was composed of institutions from many different states. For the majority, the fact that almost all of those schools were located outside Nevada, and that NCAA rules, propagated by its collective membership, were therefore independent of any one state, made Tarkanian's claim that the NCAA was acting under color of Nevada law a nonstarter.⁸¹

⁷⁷ "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

⁷⁸ *Tarkanian*, 488 U.S. at 192.

⁷⁹ *Id.* at 193.

⁸⁰ Because the NCAA is composed of member institutions, not individuals, its authority does not explicitly extend to "ordering" suspensions of coaches. As the *Tarkanian* fact pattern shows, however, the NCAA does wield a great deal of coercive power over its member schools. For a discussion of the financial stakes involved, see *THE BUSINESS OF SPORTS*, *supra* note 7; Rovell, *supra* note 7. Of course, further motivation to keep Tarkanian on the sidelines came from the kinds of visibility issues addressed in note 58, *supra*.

⁸¹ See *Tarkanian*, 488 U.S. at 194 ("Whatever *de facto* authority the [private standard-setting] Association enjoys, no official authority has been conferred on it by any

Refusing to recognize the substantive reasons that led the university to discipline its coach, despite his success and an investigation by the school that revealed no wrongdoing, the Court made this argument regarding the dilemma UNLV faced:

UNLV retained the authority to withdraw from the NCAA and establish its own standards. The university alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair, or unwieldy. Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance.⁸²

This analysis bespeaks the Court's adherence to rigid tests for determining whether a private party may be held to be a state actor. "By strictly concentrating on determining if UNLV's suspension of Tarkanian was under color of Nevada law or under NCAA rules for purposes of state action, the Court necessarily trivialized the substantial claims advanced by Tarkanian that he was unfairly deprived of fundamental interests."⁸³ Most importantly, by abandoning consideration of the human interests at stake in favor of a strict analysis of the degree to which the Nevada government was involved, the Court violated the spirit of Fourteenth Amendment jurisprudence, which has generally provided guarantees of due process and equal protection rights for U.S. citizens.⁸⁴

The Court insisted that UNLV had a real choice in whether to follow the NCAA's punishment recommendations, and it held that the school never delegated to the NCAA any power to discipline its coach.⁸⁵ Both of these points may be factually correct, but neither reflects the substantive context within which the school found itself. NCAA investigations and enforcement proceedings were the only reasons why Tarkanian was in any trouble at all with UNLV, and the university's financial health depended on maintaining NCAA membership. When push came to shove, the NCAA had all of the power. The

government . . . [.]'" (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (alterations in original)).

⁸² *Tarkanian*, 488 U.S. at 194-4-95 (footnote omitted).

⁸³ Sahl, *supra* note 63, at 654.

⁸⁴ *See id.* (arguing that, had the Court paid more attention to "the alleged interest[s] at stake," it could have lowered the risk that "basic values of human dignity, such as notice and a fair hearing, [would be] abused").

⁸⁵ *Tarkanian*, 488 U.S. at 195-96 ("UNLV delegated no power to the NCAA to take specific action against any university employee.").

Court's reluctance to deal with these realities makes its opinion entirely dependent upon formalistic criteria.

"[M]ost experts [agree] that there is no viable alternative to the NCAA for successfully marketing athletic programs."⁸⁶ That was true in 1977, when UNLV faced the prospect of increased sanctions if it failed to show cause why Tarkanian should not be suspended; it was true in 1988, when the Court ruled in favor of the NCAA in this case; and it is even more clearly true in 2007, given the financial explosion in college basketball during the last two decades.⁸⁷

The only real awareness of this substantive context was visible between the lines of the majority opinion. Justice Stevens's opinion argues that not only were UNLV and the NCAA not joint actors in the suspension, but they "acted much more like adversaries than like partners engaged in a dispassionate search for the truth."⁸⁸ That opinion assumes, of course, that the NCAA proceeding was in fact a legitimate attempt to uncover "the truth" in the first place. Given that UNLV did conduct its own internal investigation into the charges leveled against the basketball program, and especially given the degree to which NCAA procedures fail to meet the kinds of due process standards that Fourteenth Amendment protections would have required,⁸⁹ the Court seems to have placed the university in an untenable position: If UNLV cooperates with the NCAA and suspends its coach, the school is implicitly consenting to the Association's practices, many of which UNLV might otherwise find lacking. If, on the other hand, the school challenges the validity of the NCAA's findings, then UNLV in effect places itself on probation, having already ceded its disciplinary authority to the NCAA. In a sense, the real loser in this case is the university. At least Tarkanian himself had his day in court—indeed,

⁸⁶ Sahl, *supra* note 63, at 623.

⁸⁷ For a discussion of the NCAA's financial growth in recent years, see *supra* note 7.

⁸⁸ *Tarkanian*, 488 U.S. at 196.

⁸⁹ Tarkanian alleged, *inter alia*, the following due process infirmities: the Committee on Infractions failing to "inform Tarkanian of its practices and procedures and misleading Tarkanian about an adversarial hearing so that he was unrepresented at the hearing" and "rel[ying] on the unsworn recollections of an NCAA investigator as truthful and consider[ing] all evidence to the contrary as untruthful without standards or guidelines regarding the burden of proof"; an NCAA Committee member "decid[ing] that Tarkanian was wrong before the actual hearing"; and "the NCAA secretly tap[ing] their conversations with Tarkanian or UNLV representatives in violation of state laws." Sahl, *supra* note 63, at 654 n.205 (citing 2 ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES: COMMON ISSUES IN AMATEUR AND PROFESSIONAL SPORTS 80-81 (1986)).

he had several. While it is certainly true that a school may have a conflict of interest in finding its own coach or program innocent of rules infractions, one would think that fact should lead the Court *toward* requiring constitutional standards of due process, not away from it.

The dissent in *Tarkanian*, written by Justice White and joined by Justices Brennan, Marshall, and O'Connor, simply found the NCAA to be a state actor because it acted jointly with UNLV in the suspension.⁹⁰ Justice White's dissent offers three main reasons why this "joint action" should be sufficient to bring the NCAA under constitutional due process guidelines. "First, Tarkanian was suspended for violations of NCAA rules, which UNLV embraced in its agreement with the NCAA."⁹¹ In other words, the NCAA set up the rules, and the alleged breaking of those rules was the sole reason for the coach's suspension. "Second, the NCAA and UNLV also agreed that the NCAA would conduct the hearings concerning violations of its rules."⁹² The dissenters clearly recognized that UNLV had, in fact, delegated some degree of authority to the NCAA enforcement proceedings. "Third, the NCAA and UNLV agreed that the findings of fact made by the NCAA at the hearings it conducted would be binding on UNLV."⁹³ Not only did the Association dictate the procedures to be employed, but the school agreed to be bound by them, with no right of appeal; that is, UNLV agreed "to accept the NCAA's findings of fact as in some way superior to [the school's] own."⁹⁴ These three elements, added together, convinced the four dissenters that Tarkanian deserved the Fourteenth Amendment's due process protections.

From the *Tarkanian* dissent, one can see how, if a Court were inclined to favor precedent like *Burton*, UNLV could have been deemed a state actor under state nexus analysis.⁹⁵ In the alternative, an application of public function analysis, grounded in an understanding of how completely UNLV, a state actor, delegated its authority to the "private" NCAA, could have also yielded a victory for Tarkanian.⁹⁶

⁹⁰ *Tarkanian*, 488 U.S. at 203 (White, J., dissenting). Both the majority and dissent agreed that UNLV was itself a state actor. "A state university without question is a state actor." *Id.* at 192.

⁹¹ *Id.* at 200 (White, J., dissenting).

⁹² *Id.* at 201.

⁹³ *Id.*

⁹⁴ *Id.* (internal quotation marks omitted).

⁹⁵ See *supra* notes 30-40 and accompanying text (discussing state nexus analysis).

⁹⁶ For a discussion of public function analysis and delegation of authority, see *supra* notes 24-29 and accompanying text.

However, because of the “meandering precedent of inconsistent verdicts”⁹⁷ that has plagued state action doctrine, the Court was free to choose its own precedential authority from among various strains, some of which are seemingly incompatible with one another.

B. *Post-Tarkanian Developments*

1. *State Inaction*

In the immediate aftermath of the *Tarkanian* decision, the U.S. Supreme Court further refined its position regarding state action in one especially poignant case. In *DeShaney v. Winnebago County Department of Social Services*, the Court declined to find state action in the case of a boy who was severely beaten by his custodial father.⁹⁸ Although county social workers were aware of persistent child abuse, they took no action to secure the boy’s safety; eventually he suffered permanent brain injuries.⁹⁹ The boy, along with his mother (who had not been living with her son during the abuse), sued the county and its Department of Social Services for depriving him of his liberty without due process.¹⁰⁰ Writing for the majority, Chief Justice Rehnquist found that, despite the tragedy of the case, the Due Process Clause of the Fourteenth Amendment was designed “to protect the people from the State, not to ensure that the State protected them from each other.”¹⁰¹

Rejecting the majority’s approach, Justice Brennan in dissent asserted that the state’s affirmative intervention into the boy’s life through a child-protection program created a duty to protect him, and that *Shelley* and *Burton* “suggest[ed] that a State may be found complicit in an injury even if it did not create the situation that caused the harm.”¹⁰² More pointedly, Justice Blackmun’s separate dissent rebuked the Court for its “sterile formalism”¹⁰³ and compared its approach—claiming that its hands were tied by settled law—to that of

⁹⁷ Culpepper, *supra* note 57, at 1164.

⁹⁸ 489 U.S. 189, 193-94 (1989).

⁹⁹ *Id.* at 193.

¹⁰⁰ *Id.* at 191, 193.

¹⁰¹ *Id.* at 196.

¹⁰² *Id.* at 207 (Brennan, J., dissenting).

¹⁰³ *Id.* at 212 (Blackmun, J., dissenting).

“the antebellum judges who denied relief to fugitive slaves.”¹⁰⁴ Justice Blackmun’s chief complaint was the Court’s attempt

to draw a sharp and rigid line between action and inaction. But such formalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment. . . . On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them.¹⁰⁵

Implicitly acknowledging that the decision to follow precedent is rarely value neutral, Justice Blackmun’s dissent in *DeShaney* contrasts sharply with the formalistic approach to state action that the Court favored throughout the Rehnquist era. Justice Blackmun’s approach is unusual for its frank admission that, at least in the state action realm, stare decisis does not always dictate a result. To acknowledge that members of the Court may, in fact, *choose* to interpret a doctrine broadly or narrowly runs counter to the ideal of a limited judiciary, and exposes Justice Blackmun to charges of “judicial activism.” But no matter how one feels about such ideological critiques, Justice Blackmun’s *DeShaney* dissent is refreshing for its candor, and it should be applauded by any who favor flexibility over formalism on the Court.

However, Justice Blackmun would soon leave the Court, as would the pair of stalwart progressive Justices, Brennan and Marshall. By the middle of the 1990s, nearly half of the *Tarkanian* Court had retired, and while the newer Justices did not always cater to progressive ideals, the Court’s turnover in personnel did leave state action doctrine somewhat open for reevaluation.

2. “Entwinement”: An Expansionist Return?

In *Brentwood Academy v. Tennessee Secondary School Ass’n*, the Court moved away from the restrictive analysis that had been so dominant for three decades when it held that the Tennessee Secondary School Athletic Association (TSSAA), an organization of member schools that regulates high school sports within that state, was indeed a “state actor.”¹⁰⁶ Justice Souter’s majority opinion took the “close nexus” test

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 212-13.

¹⁰⁶ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 305 (2001). The Supreme Court recently granted certiorari again in *Brentwood*, but not on the state action issue; this time the Court will address the merits of the constitutional claims. *Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad.*, 127 S. Ct. 852 (2007).

used in *Jackson*¹⁰⁷ as an invitation to make a “normative judgment” where “the criteria lack rigid simplicity.”¹⁰⁸ Adding to the multitude of tests it has employed in state action cases, the Court in *Brentwood* held “that the association’s regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association,” in part because there was “no offsetting reason to see the association’s acts in any other way.”¹⁰⁹

The standard employed in *Brentwood*, then, clearly marks two changes from the Court’s previous state action decisions. First, it recognizes, as did Justice Blackmun’s *DeShaney* dissent, that the act of judging is sometimes more art than science. That the regulatory activity “*may and should* be treated as state action” sounds much different from the blindly formalistic pronouncements of the more restrictive cases, wherein questions were generally answered “yes” or “no,” with little gray area left open for discussion. Second, by explicitly balancing different sides of an issue, the *Brentwood* standard allows substantive concerns to play a role in the adjudication of state action questions. To speak of “no offsetting reason” to see things another way strongly implies that some other fact pattern may present such a reason. This flexibility alone distinguishes *Brentwood* from most of its contemporary state action predecessors. The key point, and the reason why *Brentwood* may signal a reevaluation of state action as it applies to the NCAA, is that “Justice Souter took the conception and test of the state action doctrine decidedly back in the direction of the intuitive, ad hoc doctrine of the pre-Rehnquist Vinson and Warren Courts.”¹¹⁰

As with *Tarkanian*, the dispute in *Brentwood* began with allegations of illegal recruiting of athletes. The football coach at Brentwood Academy, a private Christian high school in a Nashville suburb, was accused of violating TSSAA rules by, among other things, inviting promising eighth graders to visit a practice and giving some students free tickets to Brentwood games.¹¹¹ After finding that the school’s actions violated recruiting rules, the TSSAA placed Brentwood on four years’ athletic probation, banned its football and basketball teams

¹⁰⁷ See *supra* note 77 (explaining the nexus test).

¹⁰⁸ *Brentwood*, 531 U.S. at 295.

¹⁰⁹ *Id.* at 291.

¹¹⁰ Alan R. Madry, *Statewide School Athletic Associations and Constitutional Liability*; *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 12 MARQ. SPORTS L. REV. 365, 391 (2001).

¹¹¹ WEILER & ROBERTS, *supra* note 62, at 753-54.

from the playoffs for two years, and fined the school \$3,000.¹¹² Brentwood then sued the TSSAA in federal court, alleging that enforcement of the recruiting rules was state action and in violation of the First and Fourteenth Amendments.¹¹³ Brentwood prevailed on a motion for summary judgment, with the district court ironically relying on a footnote from *Tarkanian* suggesting that statewide interscholastic athletic associations actually *were* state actors.¹¹⁴ On appeal, the TSSAA won a reversal, with the Sixth Circuit holding that the district court had erred in finding a symbiotic relationship between the State and the Association.¹¹⁵

Justice Souter's majority opinion surveyed the various factors that the Court had at times found dispositive in assessing the existence of state action, noting that previous cases had

identified a host of facts that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful participant in joint activity with the State or its agents." We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," when it has been delegated a public function by the State, when it is "entwined with governmental policies," or when government is "entwined in [its] management or control."¹¹⁶

Having summarized the history of state action doctrine, the *Brentwood* majority then declined to force the facts of the case into a pre-fabricated portal. Instead, Justice Souter's opinion bespeaks a commitment to substantive evaluation on a case-by-case basis, a method far removed from the judicial formalism to which the Court had rather faithfully adhered up through *Tarkanian* and *DeShaney*. In fact, in

¹¹² *Brentwood*, 531 U.S. at 293.

¹¹³ *Id.*

¹¹⁴ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 682 (M.D. Tenn. 1998). The *Tarkanian* footnote reads, in pertinent part: "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." *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988). This formal difference seems to have provided Justice Stevens with a reason sufficient to find state action in *Brentwood*, in which he joined the majority opinion, as distinct from *Tarkanian*. Because both cases found the Court mired in 5-4 splits, in a limited sense the *Brentwood* decision actually *does* rest on formalist grounds.

¹¹⁵ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 180 F.3d 758, 766 (6th Cir. 1999), *rev'd*, 531 U.S. 288 (2001).

¹¹⁶ *Brentwood*, 531 U.S. at 296 (citations omitted).

Brentwood the Court seems to weigh factors and decide that the TSSAA should be treated as a state actor, for the most part, simply because there's no reason *not* to do so: "The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and *there is no substantial reason to claim unfairness in applying constitutional standards to it.*"¹¹⁷

Rather than err on the side of the private actor via some formalistic approach based on precise definitions, Justice Souter applies due process safeguards almost as a default, since there seems to be no reason why doing so would be unfair, given the entwinement of public and private in the case. In place of the predictable but inflexible doctrine advanced by Justice Rehnquist from *Moose Lodge* through *De-Shaney*, the *Brentwood* Court endorses a method of analysis in which the facts of the case itself play a larger role in its outcome. From the perspective advanced herein, this is obviously a welcome change.

Justice Thomas wrote the dissent in *Brentwood*, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined.¹¹⁸ Unsurprisingly, given the history of the debate on the state action issue, the dissent focused on the need for less flexible criteria. Justice Thomas opined in the first paragraph that the Court had "never found state action based upon mere 'entwinement,'"¹¹⁹ and in the last paragraph complained that "the scope of [the] holding is unclear."¹²⁰ In a direct response to Justice Thomas's complaints, Justice Souter articulated the perspective shared by those past jurists who had favored a more flexible approach to state action by arguing that "if formalism were the *sine qua non* of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling."¹²¹

The most interesting aspect of the Thomas dissent is buried in a footnote. However, like the footnote in *Tarkanian*'s majority opinion that was later used by the district court in *Brentwood*, Thomas's footnote could also point to future developments in state action doctrine, though probably not in a direction of his choosing. Justice Thomas found Justice Souter's state action criteria to be so broad that it actu-

¹¹⁷ *Id.* at 298 (emphasis added).

¹¹⁸ *Id.* at 305-15 (Thomas, J., dissenting).

¹¹⁹ *Id.* at 305.

¹²⁰ *Id.* at 314.

¹²¹ *Id.* at 301 n.4 (Souter, J.).

ally called the viability of *Tarkanian* into question: “[I]t is not difficult to imagine that application of the majority’s entwinement test could change the result reached in [*Tarkanian*], so that the National Collegiate Athletic Association’s actions could be found to be state action given its large number of public institution members that virtually control the organization.”¹²² That prospect, unwarranted as it may be from Justice Thomas’s perspective, will be addressed, and indeed advocated, in the next Section of this Comment.

III. WHERE SHOULD THE COURT GO FROM HERE?

A. *An Adaptive Analytical Model*

The most basic conflict between the conservative, formalistic approach and the more progressive, fact-based approach to state action revolves around how much one values legal predictability as compared with flexibility. A bright-line doctrinal approach will always lead to more certainty in the law, but, like the powerful but plodding seven-foot center who appears lost when drawn out away from the basket by a quicker opponent, the formalist cannot easily adjust to “game” circumstances. By contrast, the *Brentwood* approach promises to be more adaptable, albeit at the cost of some doctrinal certainty.

College athletics has now become so financially relevant, and important in so many ways to the lives of students, coaches, administrators, alumni booster organizations, and legions of fans that a more adaptive doctrine is required. Therefore, the Supreme Court should look afresh at the NCAA, and do so in light of the *Brentwood* approach. It should be remembered that this approach is not “new;”¹²³ it is just from a different precedential line than the one followed by most recent Court decisions. Overly formalistic conceptions of state action have essentially given the NCAA a free pass to operate in a self-regulated environment when it comes to its enforcement proceedings, and the Association’s track record reveals an inability to function fairly in such a context. Granted, the prospects for the progressive move advocated here may be dim in the short term, particularly if Chief Justice John Roberts and Justice Samuel Alito maintain their generally

¹²² *Id.* at 314 n.7 (Thomas, J., dissenting).

¹²³ “[I]n accepting background involvement to be sufficient for finding state action, *Brentwood Academy* seems more of a piece with [*Burton*] . . . than recent state action decisions.” Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1415 n.166 (2003).

conservative judicial philosophies during their tenures on the Supreme Court. However, there is much at stake in the state action question that should be conceptualized in politically neutral ways. One should also remember that, once confirmed, Supreme Court Justices do not inevitably follow the anticipated ideological lines for which they were presumably appointed.¹²⁴

Even if conservative ideology does dominate the Court in the coming years, leading to a more restrictive state action doctrine, there is no logical reason why the NCAA deserves a “bye” when it comes to due process and equal protection. Indeed, recent events have demonstrated more than ever that a hard-line “law and order” approach to enforcing rules on the collegiate level should point first toward reform of the NCAA.

For examples one need look no further than two recent, well-publicized cases. One involved the former head basketball coach at Baylor University who, in an effort to deflect attention away from his own misdeeds, attempted to cover up one of his players’ criminal responsibility for the murder of a former teammate by fabricating a story that painted the deceased student-athlete as a drug dealer.¹²⁵ The other is a longtime controversy regarding the former head women’s basketball coach at Penn State University, who is alleged to have imposed a de facto ban on lesbian players on her team.¹²⁶ Obvi-

¹²⁴ The most recent example of this phenomenon would be Justice Souter, whose decisions on the Court have disappointed most conservatives. Other examples include Justice Stevens (generally among the more liberal voices on the current Court), Justice Blackmun (author of many conservatives’ least favorite opinion, *Roe v. Wade*, 410 U.S. 113 (1973)), and, paradigmatically, Chief Justice Warren (under whose leadership the Court extended civil rights legislation to unprecedented levels between 1953 and 1969). Each of these four men joined the Court as Republicans, having been appointed by Republican Presidents.

¹²⁵ Barry Horn, *How a Career Unraveled: NCAA Report Reveals Depth of Bliss’ Efforts to Cover Up Violations*, DALLAS MORNING NEWS, June 24, 2005, at 1C. Coach Dave Bliss resigned in disgrace. The NCAA responded by punishing the Baylor players who remained, canceling the team’s nonconference schedule and placing the program on five years’ probation. See also Matt Fulks, *Beyond the Stats: A Long Way from Baylor to Bismarck*, KCMETROSPORTS.COM, <http://kcmetrosports.com/articles/article.asp?aid=2702&full=1> (last visited Mar. 23, 2007) (criticizing the NCAA for its response to the problems at Baylor). Following his ignominious exit from Baylor, Bliss briefly coached professionally in the minor league Continental Basketball Association, resigning after one losing season as the head coach of the Dakota Wizards. W.H. Stickney, Jr. & Brian McTaggart, *Around Sports*, HOUS. CHRON., Mar. 23, 2006, at 2.

¹²⁶ Coach Rene Portland was recently sued in federal court for alleged discrimination against a former player based on that player’s sexual orientation. Press Release, Nat’l Ctr. for Lesbian Rights, National Center for Lesbian Rights Files Federal Discrimination Lawsuit on Behalf of Former Penn State Basketball Star Jennifer Harris:

ously, most cases of misconduct in and around college sports do not reach this level of seriousness, but when even a single player endures a lengthy procedure in which he is ruled ineligible,¹²⁷ or when a coach is dismissed for allegedly making improper payments to a recruit,¹²⁸ the consequences are serious enough to insist on a fair and open forum for adjudication.

If these and countless other recent examples mean anything at all, they point to the need for a stronger governing body. But, for the NCAA to function effectively, it must be fair. In order to increase the public perception of fairness—thereby legitimizing the Association's role in these matters—and to engender confidence in the thousands of athletes and coaches who fill stadiums and generate millions of dol-

Complaint Names Coach Rene Portland, Athletic Director Tim Curley, and Penn State as Defendants (Dec. 21, 2005), *available at* <http://www.clubs.psu.edu/up/psupride/articles/Federal%20Lawsuit%20Press%20Release%2012212005.pdf>. In the wake of a university investigation conducted after the suit was filed, Portland was fined \$10,000, threatened with dismissal should further violations occur, and instructed to undergo "diversity and inclusiveness" training. The lawsuit was settled in early 2007, and Portland resigned her position soon thereafter. *Penn State's Portland Makes "Difficult" Decision to Quit*, ESPN.COM, Mar. 22, 2007, <http://sports.espn.go.com/ncw/news/story?id=2808075>. Although Portland's animosity toward lesbian players has been public knowledge at least since 1986, *id.*, and despite Penn State's eventual reprimand, the NCAA never disciplined her or her school's program in any way.

¹²⁷ For example, Kentucky freshman center Randolph Morris accepted expense money from NBA teams when it appeared he would be leaving college basketball, but then he went undrafted in the 2005 NBA player draft. When Morris applied to re-enter school, initially he was ruled permanently ineligible to play basketball. Then he was ushered through a number of appeals processes, and again ruled ineligible. Finally, he was allowed to play after missing the first fourteen games of the 2005-2006 season. *NCAA Reduces Morris' Suspension to 14 Games*, ESPN.COM, Dec. 15, 2005, <http://sports.espn.go.com/espn/print?id=2260113&type=story>. In contrast, the NCAA acted very quickly—in a matter of days—when a violation occurred involving USC's Heisman Trophy-winning quarterback Matt Leinart and an unauthorized ESPN promotional advertisement. *NCAA Reinstates Leinart After 'Inadvertent' Violation*, ESPN.COM, Dec. 21, 2005, <http://sports.espn.go.com/espn/print?id=2267624&type=story>. Such discrepancies raise questions about why some NCAA investigations drag on for years while other disputes are resolved so quickly. Of course the stigma of being publicly "under investigation" is punishment in itself.

¹²⁸ For example, Ohio State University fired head basketball coach Jim O'Brien in 2004 when school officials discovered that he had lent \$6,000 to a potential recruit. Although O'Brien had a clause in his contract ensuring that he could not be fired for rules infractions absent an NCAA ruling, Ohio State dismissed the coach without any findings from the NCAA. *O'Brien Denies He Gave Ohio State Grounds for Firing*, ESPN.COM, Dec. 14, 2005, <http://sports.espn.go.com/espn/print?id=2259096&type=story>. Still awaiting an NCAA ruling, O'Brien sued Ohio State and was awarded \$2.4 million in damages. *Ohio State Appeals \$2.4 Million Award to O'Brien*, ESPN.COM, Sept. 16, 2006, <http://sports.espn.go.com/espn/print?id=2590492&type=story>.

lars in revenue for its member schools and conferences, the NCAA should be held to due process and equal protection standards.

B. Balancing Uniformity with Diversity

The NCAA is a peculiar blend of diverse institutions, and in many ways this diversity is responsible for the strength and popularity of intercollegiate sports. However, if fair competition is to remain a possibility, at some level the member schools must abide by a uniform set of guidelines. How should the desire for fair competition be balanced against both the rights of each institution to police itself and the benefits and protections provided to the student-athletes and coaches? This is a major dilemma facing intercollegiate sports; how one feels about *Tarkanian* and similar cases depends in part on where one thinks that line between collectivity and autonomy ought to be drawn.

NCAA bylaws mandate minimum academic standards for students to maintain athletic eligibility, and all member schools must comply.¹²⁹ But many schools and conferences go well beyond the minimum standards, meaning, in effect, that schools content with meeting only the minimum requirements may have a significant competitive advantage when it comes to some academically weak prospects. Conversely, certain schools that have higher academic reputations (Duke and Stanford being preeminent among them in the basketball world) probably win some recruiting battles because of the perception that such schools will better prepare those players who do *not* make the NBA for alternative careers in their adult lives. These kinds of differences among institutions seem unobjectionable. Unless we want to foster a system that drastically circumscribes the boundaries within which academic institutions are allowed to prioritize athletics, it seems that the current system is sufficient as to academic standards.

But what of the ways in which schools police their own athletes and coaches? A wide variation in approaches to dealing with internal disciplinary matters may be found at the highest levels of intercollegiate sports. For example, the men's basketball programs at the University of North Carolina and the University of Connecticut have a great deal in common. They are both led by iconic coaches, they each draw upon a tradition of excellence on the court, and they have each

¹²⁹ NCAA, Eligibility, <http://www.ncaa.org> (follow "Academics & Athletes" hyperlink; then follow "Student-Athlete Eligibility" hyperlink) (last visited Mar. 23, 2007).

recently won multiple NCAA basketball championships.¹³⁰ The schools part ways, however, when it comes to their responses to recent legal troubles surrounding their programs.

In the spring of 2004, high school senior and prospective North Carolina recruit James On Curry—who had, more than a year earlier, accepted a scholarship to play for his home-state Tar Heels—became the leading high school scorer in the rich basketball history of that state. However, when he was later arrested as part of a local sting operation and charged with selling a small amount of marijuana (a charge that Curry later admitted was true), North Carolina head coach Roy Williams revoked Curry's scholarship offer.¹³¹ Curry's legal troubles meant that he would never be allowed to enroll at the school of his choice, even though he had been promised a full scholarship to attend.

Curry later matriculated at Oklahoma State University, a school that had never recruited him before his legal troubles began, but where he excelled as a freshman on a prominent, nationally ranked team.¹³² Owing to the presence of four other stars who would each soon leave college early to become wealthy professional players, North Carolina was able to win the national championship in 2005 even without Curry.¹³³ So, perhaps it was not a great sacrifice for the talent-rich Tar Heels to take a hard line in Curry's case. However, if he had been a member of their team in the following season, he would have been one of the best players on an inexperienced roster. The decision to revoke his scholarship thus does have a lasting impact for the North Carolina program, to say nothing of the program at Oklahoma State. More importantly, one wonders whether the same decision to revoke the scholarship would have been made by a different coach, at a different school, in a different context. If not, should the NCAA strive to mandate a uniform policy in such cases, or is this scenario better handled within the confines of each member school?

¹³⁰ Connecticut won championships in 1999 and 2004; North Carolina won titles in 1993 and 2005. NCAA Sports.com, *History—Past Champions*, <http://ncaasports.com/basketball/mens/history/divi> (last visited Mar. 23, 2007).

¹³¹ See Thayer Evans, *Cowboys' Curry Makes Most of Second Chance*, WASH. POST, Mar. 15, 2005, at D7 (quoting Curry on North Carolina: "Carolina is a great university. . . . They did what they had to do. I respect them for that. It's a decision they had to make.").

¹³² *Id.*

¹³³ Keith Parsons, *Twenty-nine Years Later, May Matches his Father's Title*, http://www.ncaasports.com/basketball/mens/gamecenter/recap/NCAAB_20050404_NC@IL (last visited Mar. 23, 2007).

During the summer of 2005, two Connecticut players were arrested for stealing laptop computers from a dormitory on campus. They each admitted to the offense. One of them, junior point guard Marcus Williams, was among the top backcourt players in the nation, with a near-certain future in the NBA. Connecticut coach Jim Calhoun responded to Williams's offense with a half-year suspension, forcing the star player to miss eleven games at the start of the season, a period during which Connecticut went undefeated while playing a relatively weak nonconference schedule. Williams then returned to a starting role for the Huskies,¹³⁴ who later advanced to the "Elite Eight" of the NCAA Tournament.

Calhoun's relatively lenient treatment of Marcus Williams contrasts with his full-year suspension of the other player involved with the theft, freshman A.J. Price. Privacy issues regarding the two players' involvement in the crime make it difficult to assess their relative culpability, but the disparate punishment raises questions regarding the school's treatment of student-athletes. If Price had been a veteran player, would he have received as harsh a punishment? Or, if a less prominent member of the team had been involved, would he, like Williams, have been allowed to keep his scholarship? Again, is this an area where the need to maintain fair standards of competition among member schools warrants NCAA involvement?

These two cases are by no means identical, but both North Carolina and Connecticut are public universities (and therefore state actors), both annually recruit the finest high school prospects in the country, and both produce more than their share of professional stars. Their responses to these legal issues also represent the kind of institutional variance in punishment that makes for the appearance of competitive imbalance. Is this an area in which institutional diversity should be allowed to govern, or does the NCAA need to enforce some kind of uniformity when it comes to disciplining athletes with criminal backgrounds? To what degree is it fair to insist on a level playing field among competitors?

¹³⁴ See Gregg Doyel, *Huskies Take Risk, Williams Brings Results*, CBS SPORTSLINE.COM, Jan. 22, 2006, <http://www.cbs.sportsline.com/collegebasketball/story/9180364> (calling Coach Calhoun "the most powerful man in Connecticut" and saying that Williams's renewed eligibility "was worth every bit of political capital Calhoun could muster"). Williams has since entered the NBA, having been drafted in the first round by the New Jersey Nets. NBA.com, *Nets Sign First-Round Picks Williams and Boone*, http://www.nba.com/nets/news/netswilliamsboone_060712.html (last visited Mar. 23, 2007).

These questions have no easy answers. On the one hand, conflict-of-interest concerns are obviously present whenever a school is allowed the final word on its own athletes' punishments. On the other, many schools would likely withdraw from a national association before allowing it to interfere too much in admissions and other eligibility determinations. Even if such issues fall outside the appropriate realm for national uniformity, and even if broad policies regarding membership in the NCAA may not have direct constitutional implications, the complexity of these and other questions points toward the need for more procedural safeguards to protect the rights of all concerned. However one feels about these issues, there are surely limits to the value of this type of diversity among schools. There must be some point at which we need to compare apples with apples, instead of trying to impose the same guidelines on institutions or sports that do not actually have that much in common.

These issues have drawn the attention of Jay Bilas, a national commentator on college basketball who is also an attorney. Bilas argues that "[t]he NCAA needs to have 'sport-specific' rules that make practical sense for each specific sport."¹³⁵ He argues, for example, that it is "patently absurd to have the same rules apply to a field hockey player that apply to a basketball player."¹³⁶ He advocates drawing the line between sports based on purely economic differences in revenue generation, a change that would further isolate football and men's basketball from other intercollegiate sports.¹³⁷ How much do football and men's basketball dominate in terms of revenue generation at the major college level? The University of Michigan's athletic program generated \$44.2 million during the 1997-1998 academic year;¹³⁸ among Big Ten universities, ninety-five percent of the total athletic department revenue came from those two sports alone.¹³⁹

¹³⁵ Jay Bilas, *Good Guards, Bad Shooting and Worse Rules*, ESPN.COM, Dec. 17, 2005 (on file with author). Bilas graduated from Duke University School of Law after playing collegiate basketball as an undergraduate there; he now balances a law practice with a seasonal job analyzing college basketball for ESPN. See Moore & Van Allen, Attorney Profile of Jay S. Bilas, <http://www.mvalaw.com/AttDetails.php?id=19> (last visited Mar. 23, 2007). Bilas's article offers a number of other useful perspectives regarding NCAA enforcement proceedings, the use of scholarship reductions as punishment for rules violations, and the accountability of coaches.

¹³⁶ Bilas, *supra* note 135.

¹³⁷ *Id.* Regarding the revenue generation of college basketball, see the discussion *supra* note 7.

¹³⁸ DUDERSTADT, *supra* note 4, at 136 tbl.1.

¹³⁹ *Id.* at 138. The NCAA is not directly involved in the bowl system governing big-time college football; consequently, the great majority of its operating budget depends

This Comment has dealt with only a select few of the issues facing intercollegiate athletics, but there is no shortage of instances in which the NCAA becomes involved in legal battles. For example, a recent class action lawsuit filed on behalf of some 20,000 former student-athletes has challenged the NCAA's scholarship standards, seeking "to prohibit the NCAA from telling member colleges they cannot offer athletic scholarships up to the full cost of attendance."¹⁴⁰ The suit accuses the NCAA of collusion amounting to \$117 million in damages, an amount that could be trebled under antitrust law to \$351 million should the NCAA lose the case.¹⁴¹ While this suit may not turn on the state action question directly, it, like *Tarkanian*, obviously does raise issues regarding the NCAA's ability to dictate policy to its member institutions. If this or a similar lawsuit challenging the NCAA's authority were to reach high enough, the Supreme Court may well seize another opportunity to define the NCAA in relation to basic constitutional standards. If and when that happens, it will be interesting to see whether *Tarkanian* is treated as controlling precedent, or if *Brentwood* signaled a sea change in the Court's state action doctrine.

C. Back to the Future?

Clearly, the NCAA has plenty of work to do, and as intercollegiate athletics continues to grow in popularity and profitability, the Association will undoubtedly face new challenges. However, none of its initiatives, no matter how necessary and well meaning, will garner significant public support unless the Association itself is perceived to be fair. Ultimately, nothing could do more to help the NCAA, and intercollegiate sports in general, than to require the Association to meet Fourteenth Amendment procedural guidelines. Despite the doctrinal confusion in the area, the NCAA should be considered a state actor.

on men's basketball. For example, of the \$422 million NCAA budget for 2002-2003, nearly eighty-eight percent (\$370 million) came from the Association's new 11-year, \$6.2 billion deal with CBS for rights to televise the men's basketball tournament. *THE BUSINESS OF SPORTS*, *supra* note 7, at 459.

¹⁴⁰ Tom Farrey, *NCAA Might Face Damages in Hundreds of Millions*, ESPN.COM, Feb. 21, 2006, <http://sports.espn.go.com/espn/print?id=2337810&type=story>. Unlike other students who receive scholarships, student-athletes are not permitted to receive any funds for "incidentals such as phone bills and travel expenses," due to NCAA regulations. *Id.* The lawsuit, *White v. NCAA*, was filed on February 17, 2006, in federal court in Los Angeles. *Id.*

¹⁴¹ *Id.* The complaint filed in *White v. NCAA* in the United States District Court for the Central District of California is available at http://www.voluntarytrade.org/downloads/6P09_Complaint.pdf (last visited Mar. 23, 2007).

Thankfully, a legal paradigm for this doctrine already exists. It comes from a different era, before college sports became quite such big business. In the mid-1970s, before the Supreme Court first considered the issue in *Tarkanian*, federal circuit courts twice ruled that the NCAA *was* a state actor. In 1975, the Fifth Circuit held in *Parish v. NCAA* that “by taking upon itself the role of coordinator and overseer of college athletics—in the interest both of the individual student and of the institution he attends—[the NCAA] is performing a traditional governmental function.”¹⁴² The court went even further, arguing that the Association was so public that “were the NCAA to disappear tomorrow, government would soon step in to fill the void.”¹⁴³ If the public function prong of state action doctrine is to have any teeth at all, it is hard to see how any private organization could be required to meet a higher standard than that one. Moreover, if the NCAA’s public relevance was anywhere near that level in 1975, it is surely much more so today.

Later that same year, in *Howard University v. NCAA*, the D.C. Circuit cited both the expansive *Burton* and the restrictive *Jackson* rulings as controlling precedent.¹⁴⁴ The court ruled that the NCAA and its member schools “are joined in a mutually beneficial relationship, and in fact may be fairly said to form the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny.”¹⁴⁵

Interestingly, the circuit courts in both *Parish* and *Howard* foresaw the kind of circumstance that would come before the Supreme Court in *Tarkanian*. Speaking to the delegation issue, the courts argued that “it would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form . . . a ‘private’ organization to which they have relinquished some portion of their governmental power.”¹⁴⁶

The perspectives advanced in these pre-*Tarkanian* opinions should be resuscitated by the Supreme Court today. It is time for college athletes and their coaches to be protected from overzealous enforcement

¹⁴² 506 F.2d 1028, 1032-33 (5th Cir. 1975).

¹⁴³ *Id.* at 1033.

¹⁴⁴ 510 F.2d 213 (D.C. Cir. 1975).

¹⁴⁵ *Id.* at 220. The court also characterized the NCAA as being “impregnated with a governmental character.” *Id.*

¹⁴⁶ *Id.* (quoting *Parish*, 506 F.2d at 1033). For further discussion of *Howard*, *Parish*, and other issues related to the NCAA and state action in the 1970s, see Sahl, *supra* note 63, at 640-45.

procedures that, while they may be well intentioned, too often run afoul of basic fairness. It is also time for the NCAA to renew itself in the public eye. A demonstrably above-board enforcement process would go a long way toward rehabilitating the Association's poor public image, and would in turn bolster confidence in the legitimacy of intercollegiate sports in general.¹⁴⁷

CONCLUSION

Whether the Court's analysis is to be based on public function, state nexus, pervasive entwinement, or any combination of tests, the NCAA operates in such a way that warrants it being treated as a state actor for Fourteenth Amendment purposes. As this Comment has argued, the NCAA functions as a quasi-governmental body. The member institutions—many of them public and therefore unquestionably state actors themselves—delegate a large degree of authority to the private NCAA. Its member schools are virtually forced to comply with NCAA rulings, as the option of leaving the Association is practically out of the question. The potential for abuse is clear, and the mechanistic reasoning of *Tarkanian*, which is unduly permissive toward NCAA procedures, should not be followed.

Brentwood's emphasis on fact-specific determinations instead of rigid, formalistic rules provides a template for how the Court could define the status of the NCAA. Though it concerns an association of a different kind, *Brentwood*-style jurisprudence could easily be applied to a *Tarkanian*-type case. To do so would benefit all concerned, by protecting coaches and athletes from discriminatory or otherwise unfair enforcement proceedings and by restoring credibility to the NCAA itself. Too many important issues exist within the NCAA's purview, and too much is riding on their fair disposition, for anything less than constitutional protections to apply.

Justice delayed is better than nothing, and in 1998 Jerry Tarkanian finally settled his claims against the NCAA for \$2.5 million.¹⁴⁸ By then, he had outlasted most of the investigators who had worked so hard to

¹⁴⁷ In any event, the NCAA's "enthusiasm for fighting corruption in college sports is partly driven by the fear of federal intervention." *College Sports Get a Warning*, *supra* note 8, at A20. Were such federal intervention (and its consequent "entanglement") to occur, the NCAA would probably be much more likely to be considered a state actor.

¹⁴⁸ TARKANIAN WITH WETZEL, *supra* note 1, at 204.

end his career. Bringing an end to the long conflict, NCAA President Cedric Dempsey issued a statement reading, in part:

The NCAA regrets the 26-year ongoing dispute with Jerry Tarkanian and looks forward to putting this matter to rest. Obviously, Jerry Tarkanian has proven himself to be an excellent college basketball coach, and we wish him and his family continued success for the remainder of his career. We know that this dispute has caused distress for all concerned. We sincerely hope that by resolving this conflict, wounds can begin to heal.¹⁴⁹

The agreement left Tarkanian feeling like a winner, but also disappointed that the settlement received little media coverage.¹⁵⁰ He eventually retired in 2002.

In November 2005, the coach returned to Las Vegas to be honored by UNLV at a special dedication ceremony. The Rebels' home floor at the Thomas & Mack Center will henceforth be known as "Jerry Tarkanian Court."¹⁵¹ Given the percentage of his career that was spent tied up in litigation, one wonders how many of those present to honor the retired coach on that night truly grasped the doubly appropriate nature of that phrase.

¹⁴⁹ *Id.*

¹⁵⁰ Tarkanian writes in his memoir:

To me this was total vindication. It couldn't have gone better. . . . The NCAA investigated us for seven years, and they didn't come up with one single major violation. Not one. After all that time. They had to pay me \$2.5 million. They had to admit they were wrong. The president of the NCAA had to issue that statement. And it barely got any attention at all.

Id.

¹⁵¹ *UNLV Dedicates Jerry Tarkanian Court*, ESPN.COM, Nov. 26, 2005, <http://sports.espn.go.com/espn/print?id=2237913&type=story>.