Roger Williams University Law Review

Volume 20
Issue 2 *Vol. 20: No. 2 (Spring 2015)*

Article 5

Spring 2015

What If the NCAA Was a State Actor? Here, There, and Beyond

Terri Peretti
Santa Clara University

What If the NCAA Was a State Actor? Here, There, and Beyond

Terri Peretti*

In 1988, in *NCAA v. Tarkanian*, the United States Supreme Court ruled that the National Collegiate Athletic Association ("NCAA") was not a state actor and, thus, did not have to abide by constitutional requirements, such as due process of law.[1] This simple, but controversial, ruling has had enormous consequences. By ignoring the interdependencies of money and power between the Association and public universities, the Court has shielded the NCAA from judicial review and left the liberty and property interests of college athletes and coaches unprotected. Those interests are not insignificant. Because of NCAA actions, college athletes may lose their eligibility to compete, scholarships, and access to an exclusive path to a professional sports career.[2] Because of NCAA actions, coaches may lose their jobs and salaries, and their future career opportunities may be restricted.[3]

* Professor of Political Science at Santa Clara University. Comments and questions can be sent to the author at tperetti@scu.edu.

1. *See* NCAA v. Tarkanian, 488 U.S. 179, 182 (1988).

2. *See, e.g.*, Dan Kane, *U.S. Senate hearing on college athletics will feature former UNC athlete*, NEWS & OBSERVER (July 8, 2014), http://www.newsobserver.com/2014/07/08/3992293/us-senate-hearing-on-college-athletics.html; Tim Keown, *Jamar Samuels and the NCAA follies*, ESPN (Mar. 21, 2012), http://espn.go.com/espn/commentary/story/_/page/keown-120320/jamar-samuels-suspension-kansas-state-tournament-game-more-ncaa-hypocrisy; Jake Trotter, *Banned OU football player Mike Balogun breaks silence*, NEWSOK (Mar. 10, 2010, 8:35 AM), http://newsok.com/banned-ou-football-player-mike-balogun-breaks-silence/article/3445203.

3. *See, e.g.*, Gary Klein, *Ex-USC assistant Todd McNair seeks vindication from Reggie Bush saga*, L.A. TIMES (June 8, 2014, 5:37 PM), http://www.latimes.com/sports/usc/la-sp-usc-ncaa-mcnair-20140609-story.htm

Because of NCAA actions, athletic programs may lose millions of dollars.[4] The Association's investigatory and enforcement proceedings that generate these results have been likened to "kangaroo courts."[5] As long as *Tarkanian* stands as good law, however, the NCAA is free to offer as much, or as little, substantive and procedural fairness as it chooses, and those subject to its investigations and sanctions will have no judicial recourse under the Constitution.

This Article examines several questions regarding this controversial and highly consequential decision. First, was *Tarkanian* wrongly decided? Second, what would its reversal require—doctrinally, politically, and strategically? Third, what consequences would likely follow?

Before addressing these questions, Parts I and II of this Article describe the state action doctrine and the *Tarkanian* case, respectively. Part III observes several weaknesses in the Court's

l (former running back coach for the University of Southern California, Todd McNair); Joe Nocera, Op-Ed, *Standing Up To the N.C.A.A.*, N.Y. TIMES, March 24, 2012, at A19, *available at* http://www.nytimes.com/2012/03/24/opinion/nocera-standing-up-to-the-ncaa.html (former head basketball coach for the State University of New York, Buffalo, Tim Cohane).

4. *See, e.g.*, Steve Eder & Mac Tracy, *N.C.A.A. Decides to Roll Back Sanctions against Penn State*, N.Y. TIMES, Sept. 9, 2014, at B12. The most notorious example involves Penn State, which was sanctioned in the wake of Jerry Sandusky's child sexual abuse conviction. *Id.* The NCAA fined Penn State $60 million, imposed a four-year ban on post-season play, reduced scholarships, and vacated all of its 1998 to 2011 accolades. *Id.* The NCAA later eased some of these sanctions. *Id.*

5. *See* Kerry Eggers, *On Adelman's wife, NCAA's Kangaroo Court, late Pac-12 Hoop starts and much more*, PORTLAND TRIBUNE (Jan. 24, 2013, 10:00 AM), http://portlandtribune.com/pt/12-sports/127132-on-adelmans-wife-aldridge-ncaas-kangaroo-court-late-pac-12-hoop-starts-and-much-more; Ali Fogarty, *Legislators Introduce NCAA Accountability Act*, ONWARD STATE (Aug. 2, 2013, 6:00 AM), http://onwardstate.com/2013/08/02/legislators-introduce-ncaa-accountability-act/; Barry Petchesky, *A Miami Player Filed a Police Report Over the NCAA's "Intimidation,"* DEADSPIN (June 4, 2013, 10:58 AM), http://deadspin.com/a-miami-player-filed-a-police-report-over-the-ncaas-i-511200084; Carter Williams, *How handling Penn State made the NCAA Look foolish again*, SUU NEWS (July 23, 2012), http://www.suunews.com/weblogs/monday-morning-quarterback/2012/jul/23/how-handling-penn-state-made-the-ncaa-look-foolish/. *New York Times* columnist Joe Nocera has employed the "Star Chamber" label in describing the NCAA's justice system. *See* Joe Nocera, Op-Ed, *N.C.A.A.'s 'Justice' System*, N.Y. TIMES, Jan. 6, 2012, at A21, *available at* http://www.nytimes.com/2012/01/07/opinion/-ncaas-justice-system.html.

analysis and concludes that *Tarkanian* should indeed be reversed. Part IV discusses the doctrinal considerations in *Tarkanian*'s reversal, observing that the distance "from here to there" is small—in part due to the Court's rediscovery of the "entwinement" standard which it used in 2001 to find that a high school athletic association was a state actor.[6] While overturning the 5-4 *Tarkanian* decision would require little doctrinal change and only a single vote, the impetus for reversal must nonetheless be political, as Part V argues. Evidence regarding doctrinal change in the fields of reapportionment, the Second Amendment, and state action itself suggests that social and political movements are critical ingredients for constitutional change. This is a valuable lesson for reformers seeking to subject the NCAA to judicial oversight. Part VI explores several strategic factors in securing *Tarkanian*'s reversal, including emphasizing the disparate racial impact of NCAA policies and sanctions; taking advantage of an increasingly tarnished NCAA image as it faces multiple lawsuits and growing media and congressional criticism; and electing more Democrats, especially to the White House and Senate, to help shift the judiciary in a leftward direction. Part VII concludes by discussing the implications of the Supreme Court overturning *Tarkanian* and finding that the NCAA is a state actor.

I. THE STATE ACTION DOCTRINE

Since 1883 in the *Civil Rights Cases*,[7] the Supreme Court has consistently held that the Fourteenth Amendment only restricts state action, not private action.[8] The apparent simplicity of this

6. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 290–91 (2001).

7. United States v. Stanley (*The Civil Rights Cases*), 109 U.S. 3, 11 (1883).

8. *See, e.g.*, Moose Lodge v. Irvis, 407 U.S. 163, 172 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721–22 (1961). At the simplest level, only statutes enacted by a governmental body or the actions of government officials qualify as state action, while conduct by private citizens or organizations is regarded as private action. The problem is that these are not mutually exclusive categories into which all conduct can be easily placed. Rather, they are endpoints on a continuum. Between purely private and purely governmental action is a range of mixed or hybrid activities. For example, there may be government involvement in or encouragement of private action, which effectively transforms it into state action for purposes of applying constitutional restrictions. Finding a persuasive and coherent

rule is deceiving. The Court has itself acknowledged that the question of whether conduct is public or private "frequently admits of no easy answer,"[9] with "the nonobvious involvement of the State in private conduct" often discernible only by "sifting facts and weighing circumstances" on a case-by-case basis.[10] It has, nonetheless, offered some doctrinal guidance with the nexus and public function approaches, each providing an exception to the general state action rule that private actors are not subject to constitutional limitations.

Under the "nexus" or "entanglement" branch, a private actor will be treated as a state actor if there is "significant state involvement" in the private activity.[11] *Burton v. Wilmington Parking Authority*[12] is emblematic. There, the Court found a symbiotic relationship between Eagle Coffee Shoppe and the Wilmington, Delaware Parking Authority.[13] The restaurant, which refused to serve African-American customers, leased its property from the state, operated out of a public parking garage that was maintained by the state and which flew government flags overhead, and received a steady stream of customers who enjoyed convenient parking.[14] The state, on the other hand, profited from Eagle's discrimination by collecting rent, which enabled the garage to be financially self-sustaining.[15] These interdependencies led the Court to view the state as a "joint participant" in Eagle's race discrimination and, thus, to find that Eagle Coffee Shoppe was a state actor for purposes of the Fourteenth Amendment.[16]

The public function theory identifies another exception to the general principle that private actors need not comply with

method for judging those "gray areas" is the challenge of the state action doctrine.

9. *Moose Lodge*, 407 U.S. at 172.

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

11. *See Moose Lodge*, 407 U.S. at 185–86 (Brennan, J., dissenting) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 190–91 (1970)); *Burton*, 365 U.S. at 725; Shelley v. Kraemer, 334 U.S. 1, 13–14 (1948).

12. *Burton*, 365 U.S. at 723–25.

13. *Id.* at 725.

14. *Id.* at 716.

15. *Id.* at 723–24.

16. *Id.* at 725.

constitutional requirements.[17] Here, a private actor becomes a state actor if it performs a public or governmental function.[18] The underlying rationale is that the state cannot escape the reach of the Constitution by delegating its functions to private actors.[19] For example, the Court ruled in *Smith v. Allwright* that, because the Democratic Party performed important electoral functions delegated to it by the state (in this case, the state of Texas), it was indeed a state actor.[20] Therefore, it could not exclude African Americans from participating in its primary elections.[21]

A notable feature of this doctrinal area is considerable change in the Court's willingness to accept state action claims. In the mid-twentieth century, it used the nexus and public function approaches to expand the notion of state action and permitted the Constitution to reach and restrict more and more private conduct, as exemplified by *Burton* and *Smith*.[22] As Table 1 indicates, the Court found state action in all of the leading cases decided in the 1940s, 1950s, and 1960s.[23] A dramatic change followed in the next two decades, with the Court developing a more restrictive interpretation of the public function and nexus theories and limiting the Constitution's reach into the private sector.[24] By 1982, instead of a private actor needing only to perform a public function, the function now had to be one that was "traditionally

17. *See, e.g.*, Evans v. Newton, 382 U.S. 296, 299 (1966); Terry v. Adams, 345 U.S. 461, 469 (1953); Marsh v. Alabama, 326 U.S. 501, 507 (1946); Smith v. Allwright, 321 U.S. 649, 663 (1944).

18. *See, e.g.*, *Marsh*, 326 U.S. at 502–03, 508–09 (holding that residents did not lose their First and Fourteenth Amendment rights (in this case, the right to distribute religious literature on a town sidewalk) simply because the town was owned by a private entity).

19. *See, e.g.*, *Terry*, 345 U.S. at 469; *Smith*, 321 U.S. at 664.

20. 321 U.S. at 657, 664–65.

21. *Id.* at 664.

22. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961); *Smith*, 321 U.S. at 664.

23. *See infra* Table 1.

24. *See, e.g.*, DeShaney v. Winnegabo Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989); NCAA v. Tarkanian, 488 U.S. 179, 194–96 (1988); S.F. Arts & Athletics v. U.S. Olympic Comm., 483 U.S. 522, 546–47 (1987); Rendell-Baker v. Kohn, 457 U.S. 830, 840–43 (1982); Blum v. Yaretsky, 457 U.S. 991, 1003 (1982); Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978); Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976); Jackson v. Metro. Edison, 419 U.S. 345, 350–51 (1974); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 119 (1973); Moose Lodge v. Irvis, 407 U.S. 163, 175 (1972); Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 569 (1972).

the exclusive prerogative of the State."[25] The bar for finding state action was similarly raised with respect to the nexus approach. Mere entanglements between the state and the private entity, including significant financial support, would no longer suffice.[26] Instead, the state was required to compel or coerce the private action.[27]

25. *Blum*, 457 U.S. at 1005 (citing *Jackson*, 419 U.S. at 353).

26. *See, e.g.*, *Jackson*, 419 U.S. at 351.

27. *See, e.g.*, *Blum*, 457 U.S. at 1004–05. An explanation of both the Court's liberal expansion of state action rules and its subsequent conservative contraction of those rules is described briefly below on page 297-307 of this Article and more fully in Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 LAW & SOC. INQUIRY 273, 298–303 (2010).

Table 1: Leading State Action Cases, 1940–1989[28]

1940s		
US v. Classic (1941)	State Action	
Smith v. Allwright (1944)	State Action	
Marsh v. Alabama (1946)	State Action	
Shelley v. Kraemer (1948)	State Action	
1950s		
PUC v. Pollak (1952)	State Action	
Barrows v. Jackson (1953)	State Action	
Terry v. Adams (1953)	State Action	
Pennsylvania v. Bd. of Dir. of Trusts (1957)	State Action	
1960s		
Burton v. WPA (1961)	State Action	
Peterson v. Greenville (1963)	State Action	
Lombard v. Louisiana (1963)	State Action	
Evans v. Newton (1966)	State Action	
Reitman v. Mulkey (1967)	State Action	
Amalgamated v. Logan Valley (1968)	State Action	
1970s		
Evans v. Abney (1970)	State Action	
Moose Lodge v. Irvis (1972)		No State Action
Lloyd Corp. v. Tanner (1972)		No State Action
Norwood v. Harrison (1973)	State Action	
CBS v. DNC (1973)		No State Action
Gilmore v. Montgomery (1974)	State Action	
Jackson v. Metro Edison (1974)		No State Action
Hudgens v. NLRB (1976)		No State Action
Flagg Bros. v. Brooks (1978)		No State Action
1980s		
Lugar v. Edmonson Oil (1982)	State Action	
Blum v. Yaretsky (1982)		No State Action
Rendell-Baker v. Kohn (1982)		No State Action
S.F. Arts & Athletics v. USOC (1987)		No State Action
NCAA v. Tarkanian (1988)		No State Action
DeShaney v. Winnebago Cty DSS (1989)		No State Action

28. Peretti, *supra* note 27, at 282 (Wiley) ("This Web site and any Wiley publications and material which may be accessed from it are protected by copyright. Nothing on this Web site or in the Wiley publications and material may be downloaded, reproduced, stored in a retrieval system, modified, made available on a network, used to create derivative works, or transmitted in any

Blum v. Yaretsky[29] effectively illustrates these changes. The decision of a private nursing home to discharge or transfer patients without notice or the opportunity for a hearing was challenged as state action that violated constitutional requirements of due process.[30] The Court rejected the argument that the government was a "joint participant" due to its extensive regulation and substantial financial support of the nursing home, including its reimbursement of over ninety percent of patients' medical expenses.[31] Furthermore, the Court observed that the state neither dictated nor coerced the challenged action and that

29. 457 U.S. at 1003.
30. *Id.* at 995–96.
31. *Id.* at 1010–11.

nursing home care was not "traditionally the exclusive prerogative of the state."[32]

Other state action cases that were decided around this time period, including *Jackson v. Metropolitan Edison Co.*,[33] *Lugar v. Edmondson Oil Co.*,[34] and *Rendell-Baker v. Kohn*,[35] illustrate the Court's newly restrictive application of the public function and nexus approaches. As will next be discussed, these decisions and the higher hurdle they established for a finding of state action proved to be quite advantageous to the NCAA, aiding its legal victory in the 1988 *Tarkanian* case. The NCAA was, to put it simply, very lucky in its timing.

II. NCAA V. TARKANIAN

The NCAA is a private, non-profit association founded in 1906 to establish uniform rules for intercollegiate sports.[36] Its creation was in response to growing concerns—including those voiced by President Theodore Roosevelt—over violence and player injuries in college football.[37] Today, the NCAA consists of almost 1,300 members, including nearly every four-year public and private American university and college with a major athletic program.[38] In 2013, it earned revenues of over $900 million with net assets of

32. *Id.* at 1011–12 (quoting Jackson v. Metro. Edison, 419 U.S. 345, 353 (1974)).

33. 419 U.S. 345 (1974) (holding that there was not a sufficient nexus between the state and a privately owned and operated utility company that had been issued a public certificate of convenience, giving it a partial monopoly to render its actions as state actions).

34. 457 U.S. 922 (1982) (holding that a statutory system that allowed state officials to attach privately owned property based on one party's ex parte application displayed a sufficient nexus to render the attachment as a state action).

35. 457 U.S. 830 (1982) (holding that a private school performing a traditionally public function was not a state actor solely based on the receipt of public funds since the school was not compelled by state regulations).

36. *See* JOSEPH N. CROWLEY, IN THE ARENA: NCAA'S FIRST CENTURY iii (2006); Rodney K. Smith, *A Brief History of the National Collegiate Athletic Assocation's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

37. *See* Smith, *supra* note 36, at 11–12.

38. *See, e.g.*, *Turner introduce new NCAA.com*, NCAA (Oct. 31, 2013, 12:37 PM), http://www.ncaa.com/news/ncaa/article/2013-10-31/ncaaturner-introduce-new-ncaacom. In 1988, when the Supreme Court decided *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988), the Association only consisted of 960 member universities and colleges.

over $625 million, and its workforce currently consists of 500 employees.[39] As the primary governing body for college sports, the NCAA has developed a complex set of rules that regulate recruiting and financial aid relating to college athletes.[40] Most of these rules are designed to enforce "the amateur code" and preserve the "student-athlete" concept, which has protected the NCAA against workmen's compensation claims by college athletes and which most experts regard as an antitrust violation.[41] The NCAA's rules gained authority as the Association's economic power grew, primarily due to its role in securing lucrative television contracts which has transformed it into "the gatekeeper

39. *See* Mark Alesia, *NCAA approaching $1 billion per year amid challenges by players*, INDY STAR (Mar. 27, 2014, 11:06 PM), http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-amid-challenges-players/6973767/.

40. *See* NCAA, 2014–15 NCAA DIVISION I MANUAL arts. 13, 15, at 87–145, 187–209 (2014), *available at* http://www.ncaapublications.com/productdownloads/D115.pdf [hereinafter D-1 MANUAL].

41. *See* Jason Belzer, Op-Ed., *Leveling The Playing Field: Student Athletes Or Employee Athletes?*, FORBES (Sept. 9, 2013, 2:00 P.M.), http://www.forbes.com/sites/jasonbelzer/2013/09/09/leveling-the-playing-field-student-athletes-or-employee-athletes/; *see also* D-1 MANUAL, *supra* note 40, art. 12, at 57–86. The NCAA asserts that its "membership has adopted amateurism rules to ensure the students' priority remains on obtaining a quality educational experience and that all of student-athletes are competing equitably." *Amateurism*, NCAA, http://www.ncaa.org/amateurism (last visited Jan. 21, 2015); *see also* D-1 MANUAL, *supra* note 40, art. 2.9, at 4. It is well known, however, that the "student-athlete" term was adopted to protect the NCAA and universities from workmen's compensation claims for injured football players. *See, e.g.*, Taylor Branch, *The Shame of College Sports*, ATLANTIC (Sept. 7, 2011, 11:28 A.M.), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true. A variety of antitrust experts and sports economists believe that this agreement among member institutions to limit compensation for college athletes violates antitrust laws, thereby transforming the NCAA into a cartel. *See generally* ARTHUR A. FLEISCHER ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR (1992); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS (1999); *see also* Richard J. Hunter, Jr. & Ann M. Mayo, *Issues in Antitrust, the NCAA, and Sports Management*, 10 MARQ. SPORTS L. J. 69, 77–78 (1999); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2643 (1996); Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213, 226 (2004); Roger G. Noll, The Antitrust Economics of NCAA Restrictions on Athletic Scholarships 4, 7 (Aug. 31, 2012) (unpublished manuscript), *available at* http://winthropntelligence.com/wp-content/uploads/2013/02/Noll-Report-NCAA-The-Antitrust-Economics-of-NCAA-Restrictions-on-Athletic-Scholarships.pdf.

of . . . the 'entertainment Goliath.'"[42] The process by which the NCAA asserts its authority is indirect, however. Member institutions do not grant the NCAA authority over their athletic programs, but they do agree to follow and enforce NCAA rules.[43] Thus, it is the school rather than the NCAA that takes disciplinary action against athletes and the athletic program staff. As previously mentioned, those sanctions can have devastating consequences: a coach may be denied his or her position and livelihood, and a college athlete may lose his or her eligibility, a subsidized college education, and the opportunity for a lucrative career in professional sports. Fighting those sanctions can also be an exhausting and costly endeavor.[44]

The dominant view in the lower federal courts in the 1970s was that the NCAA[45] and high school athletic associations[46] were state actors. Judges typically observed that public institutions comprised a large portion of the association's membership, the association's regulatory control was extensive, and school compliance with association recommendations was more coercive than voluntary.[47] As a result of these decisions, the NCAA and equivalent associations at the high school level would need to observe constitutional requirements like due process when

42. Kadence A. Otto & Kristal S. Stippich, *Revisiting* Tarkanian*: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS SPORT 243, 288 (2008) (quoting JOHN R. GERDY, THE SUCCESSFUL COLLEGE ATHLETIC PROGRAM 31, 55 (1997)).

43. *See* NCAA v. Tarkanian, 488 U.S. 179, 183 (1988).

44. *See, e.g.*, Phil Fairbanks, *Judge rejects suit by former UB coach,* BUFFALO NEWS (Mar. 22, 2013, 7:46 P.M), http://www.buffalonews.com/20130322/judge_rejects_suit_by_former_ub_coach.html (describing SUNY Buffalo basketball coach Tim Cohane's ten year legal fight with the NCAA); Rachel George, *Many taking the fight to the NCAA these days*, USA TODAY SPORTS (Apr. 25, 2013, 11:58 P.M.), http://www.usatoday.com/story/sports/ncaaf/2013/04/25/ncaa-lawsuits-jerry-tarkanian-todd-mcnair/2114469/ (detailing that Jerry Tarkanian's twenty year battle with the NCAA cost millions, although he was eventually awarded $2.5 million in legal fees).

45. *See, e.g.*, Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Parish v. NCAA , 506 F.2d 1028 (5th Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974).

46. *See, e.g.*, Wright v. Ark. Activities Ass'n, 501 F.2d 25 (8th Cir. 1974); La. High Sch. Athletic Ass'n v. St. Augustine High Sch., 396 F.2d 224 (5th Cir. 1968).

47. *See supra* notes 45–46.

imposing sanctions against athletes, coaches, or schools.

This consensus was upended by 1982's so-called "*Blum* trilogy," a set of three decisions decided on the same day that established more restrictive state action rules.[48] Following these new rules, for example, the U.S. Court of Appeals for the Fourth Circuit rejected the claim of a Duke University tennis player that the NCAA's decision ruling him ineligible was state action and held that the NCAA's action was not reviewable in federal court.[49] Following the Supreme Court's doctrinal lead, the court ruled that there is no state action when "the state in its regulatory or subsidizing function does not order or cause the action complained of" and noted that the public function of regulating collegiate athletics "is not one traditionally reserved to the state."[50] Other federal courts in the 1980s, with rare exceptions,[51] similarly ruled that the NCAA was not a state actor.[52] Surprisingly, however, courts continued to rule that high school athletic associations were state actors.[53]

This divergence in judicial treatment of the NCAA and high school athletic associations currently exists at the Supreme Court level as well. In 1988, the Court found that the NCAA was not a state actor, but in 2001 the Court ruled that the Tennessee Secondary School Athletic Association was a state actor.[54] As will be discussed shortly, the Court's reasoning in the latter case provides an opening for reformers seeking to subject the NCAA's policies and activities to judicial review. The primary obstacle standing in the way of this goal is *NCAA v. Tarkanian*, to which this Article now turns.

48. *See* Otto & Stippich, *supra* note 42, at 247. The 1982 "*Blum* trilogy" consists of *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

49. Arlosoroff v. NCAA, 746 F.2d 1019, 1021–22 (4th Cir. 1984).

50. *Id.* at 1022.

51. *See, e.g.*, McDonald v. NCAA, 370 F. Supp. 625 (C.D. Cal. 1974).

52. *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986); Spath v. NCAA, 728 F.2d 25 (1st Cir. 1984); Hawkins v. NCAA, 652 F. Supp. 602 (C.D. Ill. 1987).

53. *See e.g.*, Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982); Griffin High Sch. v. Ill. High Sch. Ass'n, 822 F.2d 671 (7th Cir. 1987).

54. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 290–91 (2001); NCAA v. Tarkanian, 488 U.S. 179, 182 (1988).

The NCAA began investigating Jerry Tarkanian while he was a basketball coach at California State University, Long Beach, nearly two decades before the Supreme Court's 1988 ruling.[55] It continued to scrutinize Tarkanian after his arrival at the University of Nevada-Las Vegas ("UNLV") in 1973, which was already the subject of an NCAA investigation.[56] Many commentators agree that "the NCAA's dogged pursuit of Jerry Tarkanian appears to have been driven at least as much by personal animus as by evidence against him or his players."[57] The NCAA ultimately charged UNLV with thirty-eight rule violations involving recruiting and providing aid and benefits to players; ten of those violations implicated Coach Tarkanian.[58] The NCAA placed UNLV on probation for two years and, in an unusual move, also asked UNLV to show cause as to why it should not face additional penalties if it failed to suspend Tarkanian from its program.[59] UNLV President Donald Baepler ordered an internal investigation which concluded that the NCAA's charges lacked merit. He nonetheless concluded that his institution could neither withdraw from the NCAA nor risk additional sanctions, and he reluctantly ordered the coach's two-year suspension.[60]

Jerry Tarkanian sued the University, with the complaint later being amended to include the NCAA.[61] A Nevada trial court and the Nevada Supreme Court both ruled in Tarkanian's favor, finding that the NCAA's conduct was state action and that due process guarantees had not been observed.[62] The Nevada Supreme Court reasoned that disciplining government employees

55. *See* BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA 111 (2012).

56. *See id.*

57. *Id.* at 114; *accord* JERRY TARKANIAN & DAN WETZEL, RUNNIN' REBEL (2005); DON YEAGER, SHARK ATTACK: JERRY TARKANIAN AND HIS BATTLE WITH THE NCAA AND UNLV (1992). Tarkanian's harsh criticism of the NCAA, mostly for the selective enforcement of its recruiting rules, likely triggered the organization's lengthy battle with the coach. *See* James Potter, Comment, *The NCAA as State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA. L. REV. 1269, 1282 (2007).

58. *See* Tarkanian v. NCAA, 741 P.2d 1345, 1347 (Nev. 1987), *overruled by Tarkanian*, 488 U.S. 179.

59. *See id*; *see also* PORTO, *supra* note 55, at 115.

60. *See Tarkanian*, 741 P.2d at 1347; *see also* Univ. of Nev. v. Tarkanian, 594 P.2d 1159, 1162 (Nev. 1979).

61. *Tarkanian*, 741 P.2d at 1347.

62. *Id.* at 1349–51.

was traditionally an exclusive prerogative of the state and that the University's delegation of such authority to the NCAA and the University's implementation of the NCAA's recommended sanctions rendered the two institutions joint participants in the suspension.[63] The procedures employed by the NCAA were furthermore found to be deficient in several respects when it came to due process, including the failure of enforcement staff to provide written affidavits from interviewees.[64]

The NCAA appealed to the U.S. Supreme Court, which granted certiorari—though just barely.[65] The preliminary pool memorandum did not in fact regard the case as "worthy of cert"[66] and found the state action issue to be "troubling in several respects."[67] First, the memorandum observed that there was no split in the lower courts, with recent circuit court decisions in agreement that the NCAA was not a state actor.[68] The law clerk authoring the pool memorandum additionally argued that the Nevada Supreme Court decision seemed to contradict, and in fact failed to acknowledge, the U.S. Supreme Court's 1987 decision in *San Francisco Arts & Athletics v. U.S. Olympic Committee* that the U.S. Olympic Committee was not a state actor since "the coordination of amateur sports has [not] been a traditional governmental function."[69] Finally, the memorandum observed that the state action issue presented oddly in the case.[70] Instead of the typical inquiry as to whether the state compelled the private action, the question in *Tarkanian* was whether the private actor (the NCAA) compelled the state (UNLV) to act against its employee (Tarkanian)—thereby assuming the state-actor mantle. The pool memorandum thus recommended denial of the certiorari petition and offered several alternatives, including remand for

63. *Id.* at 1348–49.
64. *Id.* at 1350.
65. NCAA v. Tarkanian, 484 U.S. 1058 (1988).
66. Preliminary Pool Memorandum, U.S. Supreme Court on Univ. of Nevada v. Tarkanian, 741 P.2d 1345 (1987) (No. 87-1061) 8 (Feb. 19, 1988), *available at* http://epstein.wustl.edu/research/blackmunMemos/1988/GM-1988-pdf/87-1061.pdf [hereinafter *Tarkanian* Pool Memo].
67. *Id.* at 7.
68. *Id.* at 6.
69. 483 U.S. 522, 545 (1987); *Tarkanian* Pool Memo, *supra* note 66, at 6.
70. *Tarkanian* Pool Memo, *supra* note 66, at 8.

reconsideration in light of *San Francisco Arts*.[71] The Court nonetheless chose to accept the case for review, with only four Justices voting to grant certiorari.[72] Those votes, however, provided no hint of the likely outcome on the merits. Two of the four Justices choosing to grant review—Rehnquist and Stevens—would later vote to reverse the Nevada Supreme Court's ruling, while the other two Justices—White and O'Connor—would vote to affirm.

In 1988, in a close 5-4 decision, the U.S. Supreme Court ruled that the NCAA was not a state actor.[73] The majority opinion by Justice Stevens emphasized that the NCAA was a private organization whose national membership was independent of any particular state and, thus, whose policies could not be characterized as a product of Nevada law.[74] The Court additionally ruled that promoting and administering college athletics was not a "traditional" or "exclusive" state function and that, while the NCAA could sanction UNLV, the NCAA could not and did not perform the state's function of disciplining public employees.[75] The majority opinion also disputed the claim that UNLV had no choice but to comply with the NCAA's recommendations.[76] It asserted that UNLV could have refused to suspend Tarkanian, withdrawn from the NCAA, or fought as an NCAA member to improve the Association's rules and processes.[77] Finally, the majority thought it critically important that, unlike the relationship between Eagle Coffee Shoppe and Wilmington Parking Authority, the NCAA and UNLV were "antagonists, not joint participants" throughout the proceedings.[78]

In his dissent, Justice White came to a starkly different conclusion, finding that the NCAA "acted jointly" with UNLV in

71. *Id*. at 8, 9. Ultimately, the pool memorandum advised against both summary reversal or remand, despite concerns regarding the Nevada Supreme Court's treatment of the state action issue. *Id*. The law clerk authoring the memorandum instead regarded "the best course" as waiting for other courts to decide the issue to see if a split between the circuits developed. *Id*. at 9.

72. NCAA v. Tarkanian, 484 U.S. 1058 (1988) (mem.).

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

74. *Id.* at 193.

75. *Id.* at 197 n.18.

76. *Id.* at 198–99.

77. *Id.* at 198.

78. *Id.* at 196 n.16.

suspending Tarkanian.[79] This followed obviously and logically, he argued, from the fact that "it was the NCAA's findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Tarkanian's suspension by UNLV."[80] In response to the majority's claim that UNLV retained other choices, including withdrawing from the NCAA, White responded that the most important fact was that the University did not choose those options, but instead suspended Tarkanian.[81] White also observed that, while UNLV and the NCAA may have acted as adversaries throughout the proceedings, the bottom line, "as with any conspiracy, is that ultimately the parties agreed to take the action."[82]

One very interesting feature of the *Tarkanian* decision was the unusual composition of the majority and minority coalitions. The narrow five-member majority in *Tarkanian* consisted of Justices Stevens, Blackmun, Scalia, Kennedy, and Chief Justice Rehnquist, while the dissenters included Justices White, Brennan, Marshall, and O'Connor.[83] As University of California, Davis Law Professor Vikram Amar observes, this particular 5-4 line-up was unique, *never* appearing in any of the other 350 cases in which these nine Justices participated together.[84] Table 2 offers additional support, using Martin-Quinn measures of Supreme Court ideology to demonstrate that the Justices' votes were not ideologically ordered;[85] the majority consisted of Justices ranked first (i.e., most conservative), second, fourth, sixth, and seventh, while the dissenters were ranked third, fifth, eighth and ninth. Had the votes been ideologically-ordered, a 5-4 ruling would have

79. *Id.* at 200 (White, J., dissenting).
80. *Id.* at 203.
81. *Id.* at 202, 203.
82. *Id.* at 203.
83. *Id.* at 180 (majority opinion).
84. Vikram David Amar, *The NCAA as Regulator, Litigant, and State Actor*, 52 B.C. L. REV. 415, 431 (2011).
85. Andrew D. Martin & Kevin M. Quinn, *Measures*, MARTIN-QUINN SCORES, http://mqscores.berkeley.edu/measures.php (last visited Jan. 21, 2015). Martin and Quinn employ a Bayesian model to generate ideal point estimates for each Justice that are dynamic, i.e., varying for each term, and which are derived from the Justices' actual votes and inferred from the patterns of voting coalitions.

seen Justices O'Connor and White voting with the majority and Justices Stevens and Blackmun with the dissent. Justice White's deviation from ideological expectations is often explained by the fact that he was "Whizzer White," a former college athlete who understood the real power of the NCAA.[86]

Table 2: Ideological Disorder in *NCAA v. Tarkanian* (1988)[87]

Most to Least Conservative	**Majority**	**Minority**
1	Rehnquist	
2	Scalia	
3		O'Connor
4	Kennedy	
5		White
6	Stevens	
7	Blackmun	
8		Brennan
9		Marshall

III. WHY *TARKANIAN* SHOULD BE REVERSED

Scholarly reaction to the Supreme Court's *Tarkanian* decision has been overwhelmingly and properly negative.[88] The Court's

86. *See* PORTO, *supra* note 55, at 134–35; *see also* DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 43–45 (1998).

87. Martin & Quinn, *supra* note 85.

88. *See, e.g.*, W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS L. 1 (2000); Betty Chang, *Coercion Theory and the State Action Doctrine as Applied in* NCAA v. Tarkanian *and* NCAA v. Miller*,* 22 J.C. & U.L. 133 (1995); Kevin M. McKenna, *The* Tarkanian *Decision: The State of College Athletics is Everything But State Action*, 40 DEPAUL L. REV. 459 (1990); Otto & Stippich, *supra* note 42; John P. 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 (1989); Robin J. Green, Note, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99 (1992); Bill McManus, Note, NCAA v. Tarkanian*: May a Student-Athlete Receive Constitutional Protection from the NCAA's Actions or*

adoption in the 1970s and 1980s of an increasingly formalistic and crabbed approach to state action questions led it in *Tarkanian* to ignore functional considerations in its state action analysis and downplay compelling evidence of interdependence between the NCAA and the state. Both factors should have led to a finding that the NCAA's action with respect to Coach Tarkanian was indeed state action.

As previously noted, the Court significantly eroded its state action rules during the mid-twentieth century, enabling the Constitution to reach and restrict more and more private activities, mostly in the area of race discrimination. Its primary tool for doing so was the flexible, "totality-of-the-circumstances" approach established in *Burton v. Wilmington Parking Authority*.[89] The Court explicitly rejected the idea that a simple formula could be constructed in order to find state action.[90] Instead, it claimed that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[91] This case-by-case and fact-based approach might be seen as a failure by the Court to develop clear and precise doctrinal rules; to some, however, it was an appropriate response to "the increasingly malleable nature of public and private."[92] In the 1970s and 1980s, the Rehnquist Court turned away from this totality-of-the-circumstances approach and returned to a "'rule-oriented' approach to state action analysis."[93] It "restored the doctrine's

has the Final Door Been Closed?, 57 UMKC L. REV. 949 (1989); Potter, *supra* note 57; Jose R. Riguera, Case Note, NCAA v. Tarkanian*: The State Action Doctrine Faces a Half-Court Press*, 44 U. MIAMI L. REV. 197 (1989); Branden Tedesco, Comment, National Collegiate Athletic Association v. Tarkanian*: A Death Knell for the Symbiotic Relationship Test?*, 18 HASTINGS CONST. L.Q. 237 (1990); Stephen R. Van Camp, Note, National Collegiate Athletic Ass'n v. Tarkanian: *Viewing State Action Through the Analytical Looking Glass*, 92 W. VA. L. REV. 761 (1989); Susan Westover, Note, National Collegiate Athletic Association v. Takanian*: If NCAA Action is Not State Action, Can its Members Meaningfully Air Their Dissatisfaction?*, 26 SAN DIEGO L. REV. 953 (1989).

89. 365 U.S. 715, 725–26 (1961).

90. *Id.*

91. *Id.* at 722.

92. *State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1254 (2010) [hereinafter *Harvard State Action*].

93. Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1391 (2005).

formalist underpinnings," which were firmly embraced in 1982 by the *Blum* trilogy of cases.[94] The modern Court's strict, rule-bound approach to state action, however, inhibits its ability to recognize and appreciate the potentially varied, unusual, and cumulative impacts of state and private entanglements. As evidence, remember that the Court almost did not accept the *Tarkanian* case for review because of the unusual framing of the state action question. The coach's suspension was actually ordered by the University, itself a state actor.[95] The question in the case, thus, became "whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."[96] The Court's opinion in *Tarkanian* took explicit notice that the case "uniquely mirror[ed] the traditional state-action case" and required the Court "to step through an analytical looking glass to resolve the case."[97] Clearly, the Court's formalism challenged its ability to adapt to an unusual set of facts, a blind spot that would not have emerged under *Burton*'s totality-of-the-circumstances approach.[98]

Professor Amar has similarly criticized the Court for its rigid and misguided search for the abstract quality of "stateness."[99] His improved "function over form" approach invites the Court to explore potential functional reasons for either extending or restricting the Constitution's reach. For example, a state action claim might be denied for reasons relating to privacy, separation of powers, or federalism.[100] However, as Amar points out, these functional justifications are not compelling when it comes to the NCAA.[101] A privacy rationale for rejecting state-action status, for instance, fails because the NCAA is not an intimate or expressive association that deserves autonomy from constitutional or governmental regulations.[102] Nor does ruling that the NCAA is a

94. *Harvard State Action*, *supra* note 92, at 1251.
95. NCAA v. Tarkanian, 488 U.S. 179, 192 (1988).
96. *Id.* at 193.
97. *Id.* at 192, 193.
98. *See* Riguera, *supra* note 88, at 225, 226 n.193; *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725–26 (1961) (describing the totality-of-the-circumstances approach).
99. Amar, *supra* note 84, at 416, 417–18.
100. *Id.* at 425.
101. *Id.* at 433–37.
102. *Id.* at 437.

private actor appropriately leave Congress, rather than courts, in charge of crafting fair procedures for resolving disputes; thus, a separation-of-powers rationale also fails.[103] Finally, Amar argues, there is no compelling federalism-based reason to reject the argument that the NCAA is a state actor.[104] It makes little sense to preserve the option of diverse state and local regulation for a national association that designs and enforces uniform rules for college athletics.[105] The Supreme Court has, in any case, precluded that option. Several states, including Florida, Illinois, Nebraska, and Nevada, responded to *Tarkanian* by enacting laws that imposed procedural requirements on NCAA investigations and enforcement proceedings.[106] The Court, however, refused to review and left intact a Ninth Circuit decision holding that these regulatory efforts ran afoul of the Constitution by unduly burdening interstate commerce.[107]

Professor Amar is correct that the Court's rigid approach to state action deterred it in *Tarkanian* from exploring functional reasons for accepting or rejecting the state action claim. Even more significantly, in my view, the Court's formalism blinded it to the considerable evidence of interdependence between the NCAA and the state.[108] There is a broad array of entanglements and mutually shared benefits between the two parties, which had led the Court to find state action in previous cases like *Burton*.[109] First, through its coordination and regulatory role, the NCAA enables intercollegiate athletic competition which "generates revenue, visibility and prestige" for its member institutions.[110] The NCAA, which is based in Indianapolis, furthermore enjoys tax-exempt status and a significant taxpayer subsidy in the form of $1.00 annual rent in its long-term lease agreement with the

103. *Id.* at 434–37.
104. *Id.* at 433.
105. *Id.*
106. *See* FLA. STAT. ANN. §§ 240.5339 – .5349 (West 1992); 105 ILL. COMP. STAT. ANN. §§ 25/1–13 (LexisNexis 1993); NEB. REV. STAT. § 85-1202(7) (1992); NEV. REV. STAT. §§ 398.155 – .255 (1991).
107. *See* NCAA v. Miller, 10 F.3d 633, 640 (9th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994).
108. *See* Potter, *supra* note 57, at 1286; *see also* Tedesco, *supra* note 88, at 237–38, 252, 255–56.
109. *See* Otto & Stippich, *supra* note 42, at 247–48.
110. *Id.* at 277.

Indiana White River State Park Development Commission.[111] Additionally, state and local funding supported the construction of its new facility in Indianapolis in the 1990s.[112] While there are numerically more private than public school members in the NCAA, public schools "dominate the funding, management and control of the NCAA," mostly because of their powerful presence in Division I.[113] NCAA regulations, in addition, cover a broad range of activities at public universities and colleges, including "recruit[ment of athletes], post-season and regular-season [athletic] competition, academic credentials, eligibility for financial aid . . . and promotion[]" of athletic events.[114] For their part, state schools devote considerable resources to recruit athletes; fund, train, and promote athletic teams; pay coaches who are often the most highly paid public employees in the state; and construct and maintain stadiums and other athletic facilities.[115] Another sizable state expense comes in the form of legal fees spent by public institutions to defend themselves against alleged NCAA infractions, with major violations far more likely to be imposed against public compared to private institutions.[116] This sizable investment is necessitated by the enormous costs of NCAA sanctions, particularly bans on post-season play.[117] It is these huge financial stakes that "make it exceedingly difficult for a public school to honor [its] constitutional obligations when they conflict with the NCAA's sanctions."[118] Finally, the NCAA is exerting more and more influence on high school athletics and youth sports.[119] This extensive and varied evidence creates a powerful case that the NCAA and the state enjoy a symbiotic relationship which, under a flexible, totality-of-the-circumstances approach like that employed in *Burton*, renders the NCAA a state

111. *See id.* at 276–77.
112. *See id.* at 277.
113. *Id.* at 279–82.
114. *Id.* at 282.
115. *See id.* at 286–88.
116. *See id.* at 285, 286; *see also id.* at 285 ("An analysis of the NCAA institutions (entire membership [Divisions I, II and III]) with the most major infractions (1953-present) [total of 269 infractions] revealed that 180(67%) are public and 89(33%) are private." (first alteration in original)).
117. *See id.* at 288–89.
118. *Id.* at 289.
119. *Id.* at 283–85.

actor. In any case, since 1988 there has been considerable change in the NCAA's structure and financial status, suggesting that courts need to provide an updated, fact-based assessment of whether the NCAA is a state actor, instead of their private status being "frozen in time" by *Tarkanian*.[120]

The *Tarkanian* Court's formalistic blinders are also responsible for its failure to acknowledge UNLV's subservience to NCAA power. The majority opinion emphasized that UNLV retained alternatives to following the NCAA's recommended sanctions, such as continuing to employ Tarkanian as coach or withdrawing from the NCAA entirely.[121] The Court, furthermore, placed great weight on the fact that UNLV and the NCAA were antagonists throughout the lengthy investigatory and enforcement process, claiming that this proved that they could not be considered joint participants in Tarkanian's suspension.[122] However, the critical fact is that UNLV did choose to suspend the coach and did so in spite of being convinced that the charges were false.[123] The fact that the University fired its coach, despite its considerable opposition, constitutes powerful evidence that UNLV had indeed delegated its authority to the NCAA and that the NCAA was the master, not the servant.[124] UNLV was not able, as a practical matter, to defy or leave the NCAA because, "in the world of intercollegiate athletics, there is but one well-kept playing field open to colleges and universities, private or public, and the NCAA is the groundskeeper."[125] "[T]he NCAA is, in effect, a 'private monopolist' in the realm of intercollegiate athletics."[126]

To summarize, there are no compelling functional reasons to

120. *See generally* Dionne L. Koller, *Frozen in Time: The State Action Doctrine's Application to Amateur Sports*, 82 ST. JOHN'S L. REV. 183 (2008).

121. NCAA v. Tarkanian, 488 U.S. 179, 198 (1988).

122. *Id.* at 196 n.16.

123. *See* James L. Arslanian, Comment, *The NCAA and State Action: Does the Creature Control Its Master?*, 16 J. CONTEMP. L. 333, 342–43 (1990); Tedesco, *supra* note 88, at 246.

124. *See* Arslanian, *supra* note 123, at 347–48, 351.

125. Linda S. Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U. L.J. 101, 127 (1984).

126. Ronald J. Thompson, Comment, *Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?*, 41 UCLA L. REV. 1651, 1664 (1994) (quoting *Tarkanian*, 488 U.S. at 198); *accord* Greene, *supra* note 125, at 135–36.

protect the NCAA from being considered a state actor; there are numerous interdependencies between the state and the NCAA; and UNLV appears to have delegated its authority to the NCAA. The Court was, thus, incorrect in its 1988 *Tarkanian* ruling that the NCAA is not a state actor.

IV. FROM "HERE TO THERE:" DOCTRINAL CONSIDERATIONS

These weaknesses in the Court's reasoning have been amplified by the "unsustainable dichotomy"[127] between the Court's *Tarkanian* ruling that the NCAA is not a state actor and the *Brentwood Academy v. Tennessee Secondary School Athletic Association*[128] decision that a Tennessee high school athletic association is a state actor. Not only was the outcome different in *Brentwood Academy*, the Court there employed a much more flexible and fact-based approach.[129] This actually offers a path and a rather short doctrinal step for the reversal of *NCAA v. Tarkanian*.

The *Brentwood Academy* case began when the Tennessee Secondary School Athletic Association ("TSSAA") charged the Brentwood Academy (the "Academy"), a private Christian high school, with violating recruiting rules and placed it on athletic probation for four years, banned its football and basketball teams from the playoffs for two years, and imposed a fine of $3,000.[130] In 2001, the Supreme Court held that these were state actions requiring the observance of due process safeguards because of "the pervasive entwinement of public institutions and public officials in [the Association's] composition and workings."[131] In support, the majority noted that eighty-four percent of the Association members were public high schools; public school officials dominated the governing council and control board; members of the State Board of Education sat ex officio on the Association's governing bodies; and Association employees were permitted to

127. *See* Otto & Stippich, *supra* note 42, at 245.
128. 531 U.S. 288 (2001).
129. *Compare Tarkanian*, 488 U.S. 179 (holding that the NCAA is not a state actor when enforcing its recruiting rules and causing the UNLV men's basketball coach to be fired), *with Brentwood Acad.*, 531 U.S. 288 (holding that the Tennessee Secondary School Athletic Association was a state actor when attempting to enforce a rule against a member school).
130. *Brentwood Acad.*, 531 U.S. at 293.
131. *Id*. at 291.

join the state retirement system.[132] Furthermore, every voting member of the governing board that imposed penalties against Brentwood Academy was a public school administrator.[133] Interestingly, the Court claimed that the result in *Brentwood* was "foreshadow[ed]" by *Tarkanian*,[134] which had held that the NCAA's actions could not be fairly attributed to the state of Nevada given the NCAA's multi-state membership, but that it might be different if its members, many of them public institutions, were located within a single state.[135] Perhaps it was this distinction that prompted Justice Stevens to switch his vote from *Tarkanian* and find state action in the *Brentwood* case.

Justice Thomas's dissent criticized the majority for introducing a new and uncertain state action standard, relying on "mere 'entwinement'" without requiring additional evidence of the state's joint participation, encouragement, or coercion.[136] In a particularly astute footnote, he further criticized the Court's reference to *Tarkanian* as

> ironic because it is not difficult to imagine that application of the majority's entwinement test could change the result reached in that case, so that the National Collegiate Athletic Association's actions could be found to be state action given its large number of public institution members that virtually control the organization.[137]

Many commentators find the *Brentwood Academy* case notable, first, for the majority's use of the "entwinement" language and, second, for its surprisingly flexible approach to the state action issue.[138] As the dissenters correctly point out, the majority seemed to have backed away from the Court's requirement of

132. *Id*. at 291–92, 300.
133. *Id*. at 293.
134. *Id.* at 297.
135. NCAA v. Tarkanian, 488 U.S. 179, 193 n.13 (1988).
136. *Brentwood Acad.*, 531 U.S. at 305 (Thomas, J., dissenting).
137. *Id*. at 314 n.7.
138. *See, e.g.*, Otto & Stippich *supra* note 42, at 270–72. This Article views the Court's approach in *Brentwood* as a move toward a more flexible fact-based approach. *See also* Potter, *supra* note 57, at 1290–94 (focusing on the "entwinement" analysis embraced over previously established criteria for determining what constitutes state action in *Brentwood*).

encouragement or coercion, which emerged from restrictive state action rulings like *Jackson*, *Blum*, and *Rendell-Baker*.[139] The entwinement language in *Brentwood*, which had not been employed since the 1966 *Evans v. Newton* case,[140] has sparked considerable speculation about whether it "marked a return to an old theory of state action or the adoption of a new one."[141] Uncertainty regarding its significance in the state action field remains.

A second noteworthy development in *Brentwood* is the reemergence of a more practical and flexible approach to the state action issue, compared to the rigid formalism the Court has demonstrated over the last few decades. In *Brentwood*, Justice Souter's majority opinion explicitly noted that "[w]hat is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity."[142] State action is, thus, a "necessarily fact-bound inquiry."[143] Furthermore, with regard to Brentwood Academy, there is "no offsetting reason to see the association's acts in any other way" (i.e., other than as state action) and "no substantial reason to claim unfairness in applying constitutional standards to it."[144] Another indicator of flexibility is the Court's treatment of the Tennessee Board of Education's decision to drop its 1972 rule expressly designating the Association as "the organization to supervise and regulate the athletic activities in which the public junior and senior high

139. *See Brentwood Acad.*, 531 U.S. at 309–11 (Thomas, J., dissenting) (citing Blum v. Yaretsky, 457 U.S. 991 (1982)); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974)). These cases all strengthened the requirements for finding state action, requiring for example that the action was traditionally an exclusive state function or was coerced by the state. *Id.*

140. 382 U.S. 296, 299, 301 (1966) (holding that a private park was municipal in character and, thus, could not discriminate based on race under the Fourteenth Amendment, particularly where the city had previously been significantly entwined in its management).

141. Porto, *supra* note 55, at 160 (discussing the uncertainty generated by the *Brentwood* entwinement concept as it relates to earlier nexus and joint participant theories of state action and its failure to make headway in overturning *Tarkanian*); *see also Brentwood*, 531 U.S. at 291, 297, 300, 302; *Evans*, 382 U.S. at 299, 301.

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

143. *Id.* at 298 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982)).

144. *Id.* at 291, 298.

schools in Tennessee participate on an interscholastic basis."[145] The Court chose to look "not to form but to an underlying reality," sensing that "the Association's official character" continued to exist, even though "by winks and nods."[146]

A final observation regarding the *Brentwood* decision is that, unlike in *Tarkanian*, the Justices' votes were perfectly ordered ideologically. As seen in Table 3, the majority consisted of the five least conservative Justices—Stevens, Ginsburg, Breyer, Souter, and O'Connor. The four dissenters were the most conservative Justices—Kennedy, Rehnquist, Scalia, and Thomas. This information suggests an ideology-based strategy for reformers seeking to reverse *Tarkanian*: target the Court's ideologically-median Justice and pay close attention to the ideological location of new appointees.

Table 3: Ideological Disorder in Brentwood Academy v. Tennessee Secondary School Athletic Association (2001)[147]

Most to Least Conservative	**Majority**	**Minority**
1		Thomas
2		Scalia
3		Rehnquist
4		Kennedy
5	O'Connor	
6	Souter	
7	Breyer	
8	Ginsburg	
9	Stevens	

Brentwood Academy and its corresponding scholarly commentary make clear that reversing *Tarkanian* would not require the Court to invent a new doctrine or discard an entire line of precedents and doctrinal rules. Instead, it would only need

145. *Id*. at 292–93, 300–01.
146. *Id*. at 301 & n.4.
147. Martin & Quinn, *supra* note 85.

to "look afresh at the NCAA, and do so in light of the *Brentwood* approach,"[148] seeing behind the "winks and nods" which are so abundant "in the amateur sports context."[149] To clarify:

> Given that the purpose, structure, and operations of the NCAA and high school athletic associations are similar, and public school members are critically involved in both associations, there is no convincing basis to distinguish between high school athletic associations and the NCAA for state actor purposes. If anything, by highlighting the nature of the relationship between the public high schools and the TSSAA, emphasizing the money that schools spend on competition, their need for the association, how the association's functions are so dependent upon public education and the interdependence on each other, *Brentwood* leads the way for a finding that the NCAA, too, should be a state actor.[150]

Although reversing *Tarkanian* may require only a small doctrinal step, the nudge for the Court to take that step must be political. That is the argument that Part V seeks to develop.

V. FROM "HERE TO THERE:" POLITICAL CONSIDERATIONS

Effective critiques and a new doctrinal path laid out in scholarly articles may be necessary conditions for constitutional change, but they are certainly not sufficient conditions. Constitutional change requires a political impetus and, typically, a strong commitment by the dominant partisan regime. As discussed below, this has been demonstrated in a variety of areas of the law, including reapportionment, the Second Amendment, and state action itself. To be successful, any reform movement to subject the NCAA to judicial oversight must understand and observe this lesson.

148. Potter, *supra* note 57, at 1294 (arguing that, in order to rein in the NCAA, a more flexible approach, already adopted by the Court, must be applied).

149. Koller, *supra* note 120, at 203 (noting that the Court's refusal in *Brentwood* to ignore the state's action through the TSSAA, even though not as overt as it was in the past, could hold serious implications in the world of amateur sports where the same pattern is so common).

150. Otto & Stippich, *supra* note 42, at 274.

A. *Reapportionment.*

In 1962, the Supreme Court entered what Justice Frankfurter called "the political thicket" of reapportionment.[151] It ruled in *Baker v. Carr* that the severe malapportionment existing in the House of Representatives and virtually every state legislature—typically overrepresentation of rural residents and underrepresentation of urban residents—was a justiciable issue that could be addressed by federal courts.[152] With this green light, federal court judges began entertaining and deciding constitutional challenges to malapportioned legislative bodies. Within two years, the Court imposed a strict one person-one vote equality standard on the U.S. House of Representatives and every state legislative chamber.[153] Remarkably, by 1970 all states had complied with the Court's new equal population standard in its congressional districts and in both state houses, and representational equality dramatically improved.[154]

151. *See* Baker v. Carr, 369 U.S. 186, 269 (1962) (Frankfurter, J., dissenting) ("In effect, today's decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty states."); *see also* Colegrove v. Green, 328 U.S. 549, 556 (1946) (dismissing a suit by Illinois voters seeking a declaration that an Illinois statute apportioning congressional districts resulted in unequal representation of their districts and was, therefore, unconstitutional, Justice Frankfurter advised that "Courts ought not enter this political thicket").

152. *Baker*, 369 U.S. at 209–10; *see also* STEPHEN ANSOLABEHERE & JAMES M. SNYDER, JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS 31 (2008) (recognizing that in 1960, the most overrepresented county in a typical state enjoyed thirty-five times as much representation as the underrepresented county); *see also* Mathew D. McCubbins & Thomas Schwartz, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 AM. J. POL. SCI. 388, 390–91 (1988) ("In the 88th Congress (1962) only nine districts were within 1 percent of the average size in their states.").

153. *See* Reynolds v. Sims, 377 U.S. 533, 568, 577 (1964) ("By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."); Wesberry v. Sanders, 376 U.S. 1, 7–9, 18 (1964) ("While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal of the House of Representatives.").

154. *See* James B. Cottrill & Terri J. Peretti, *Gerrymandering from the Bench? The Electoral Consequences of Judicial Redistricting,* 12 ELECTION L.

While the Court is typically and understandably praised for advancing democratic values with these extraordinary decisions, the motivation behind them was largely partisan.[155] As I have argued elsewhere, it was not the Court's desire to promote equal representation that explains why the *Baker* ruling materialized in 1962 instead of 1952, 1942, or 1932, when severe malapportionment also existed.[156] The timing of the Court's intervention in the redistricting field and the strictly egalitarian nature of that intervention make sense, however, when a regime-politics lens is employed.

A regime-politics perspective places constitutional change in a larger political context, recognizing that it is often the result of a coordinated, inter-branch partisan campaign.[157] The Court's reapportionment revolution, according to this view, resulted generally from the electoral success of the Democratic Party and more specifically from the efforts of the Kennedy Administration.[158] Democrats dominated presidential and congressional elections from 1932 through 1966 and, over those three-and-a half decades, controlled the White House nearly

J. 261, 261–76 (2013); *see also* ANSOLABEHERE & SNYDER, *supra* note 152, at 95.

155. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77–88, 116–25 (1980). In the former section, Ely discusses the democratic principles embodied in the Constitution and the importance of representation in the functioning of those principles. In the latter section, he addresses the importance of the Court's role in the reapportionment cases in advancing the democratic principles previously discussed. *See also* JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH 126 (2006).

156. Terri Peretti, *Democracy-Assisting Judicial Review and the Challenge of Partisan Polarization*, 2014 UTAH L. REV. 843, 854–55 (2014) (adapting Cass Sunstein's question regarding why the Supreme Court recognized an individual right to gun ownership under the Second Amendment "in 2008, rather than 1958, 1968, 1978 or 1998," in order to discuss the reapportionment cases from a regime politics perspective); *see also* Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 247 (2008)); *see also* ANSOLABEHERE & SNYDER, *supra* note 152, at 25–34.

157. *See generally* Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUDIES IN AM. POL. DEV. 35 (1993); *see also* Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 585–96 (2005).

158. *See* Peretti, *supra* note 156, at 855–56.

eighty percent of the time[159] and Congress ninety percent of the time.[160] This translated directly into Democratic control of federal judicial appointments. Especially significant in terms of its ideological impact on the Supreme Court, in 1962 President Kennedy replaced Justice Whittaker with Justice White and Justice Frankfurter with Justice Goldberg, which shifted the Court dramatically to the left.[161] Also relevant was John Kennedy's campaign theme, both as a senator and a presidential candidate, regarding "the crisis of the cities," which resulted, he said, from "political discrimination" against the urban majority. This campaign continued after Kennedy arrived in the White House, including Solicitor General Archibald Cox and Deputy Attorney General Byron White choosing to meet with the *Baker* attorneys and deciding to file an amicus brief in the case.[162] The Administration continued to file briefs in the redistricting cases that followed and praised the Court for the favorable (i.e., liberal) decisions that resulted.[163] Additionally, the Court's intervention, combined with the largely Democratic composition of the federal bench in the 1960s, had a strong partisan impact, eliminating a longstanding Republican representational bias outside of the South.[164] As explained by Cox and Katz, the Supreme Court

159. *See The Presidents*, THE WHITE HOUSE, http://www.whitehouse.gov/1600/presidents (last visited Jan. 21, 2015).

160. *See Party Divisions of the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last visited Jan. 21, 2014); *Party Division in the Senate, 1789-Present*, U.S. SENATE, https://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Jan. 21, 2015).

161. The percentage of conservative Court decisions fell from 42 percent in the 1960 term to 22 percent in the 1962 term, according to data from *The Supreme Court Database*. *See Analysis Specifications*, SUPREME COURT DATABASE, http://www.scdb.wustl.edu/analysis.php (last visited Jan. 21, 2015). Using Martin-Quinn ideology scores—in which positive numbers indicate a conservative orientation and negative numbers indicate a liberal orientation—the median Justice on the Court changed from Justice Stewart in the 1960 term (with an ideology score of 0.533), to Justice White in the 1961 term (-0.046), to Justice Goldberg in the 1962 term (-0.808), to Justice Brennan in the 1963 term (-0.874). *See* Martin & Quinn, *supra* note 85.

162. *See* ANSOLABEHERE & SNYDER, *supra* note 152, at 1, 4.

163. *See, e.g.*, Brief for the United States as Amicus at 15–16, Davis v. Mann, 377 U.S. 678 (1964) (No. 69), 1963 WL 106063.

164. *See generally* GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION (2002).

altered the redistricting game, with rural state legislators no longer able to refuse to redistrict or to favor their own interests when doing so because there was a federal judge—in all likelihood, a Democratic federal judge—who could and did impose his or her own plan.[165]

The key point is that the Supreme Court did not just neutrally advance democratic values with its reapportionment decisions. The impetus for this doctrinal revolution was partisan. The Court in the 1960s was part of the Kennedy-Johnson Democratic regime, and it predictably advanced egalitarian values in a variety of doctrinal areas, including reapportionment. The Court's *Baker v. Carr*, *Wesberry v. Sanders*, and *Reynolds v. Sims*[166] decisions unsurprisingly helped the Democratic Party's urban, minority constituency, as well as Democratic politicians who had long suffered under rural, conservative domination in the legislatures. The Court, in other words, advanced not just democratic values, but a Democratic agenda. It was a partisan campaign, rather than a commitment to constitutional principles or democratic values, that transformed this field of constitutional law.

B. *The Second Amendment.*

This lesson of the preeminent role of partisan politics in constitutional development is also evident in the Second Amendment doctrinal area. The Supreme Court barely acknowledged the Second Amendment throughout the nineteenth and most of the twentieth century, and constitutional law casebooks rarely discussed it. Yet the Court declared a robust individual right to gun ownership in the 2008 *District of Columbia v. Heller* case.[167] This profound constitutional change, like that in the reapportionment field, was politically-driven. Playing a key role in this particular constitutional revolution was a "powerful and aggressive social movement promoting public and judicial recognition of an individual right to have guns for nonmilitary purposes."[168] Its remarkable success is seen in the existence

165. *Id.*
166. Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).
167. 554 U.S. 570, 622 (2008).
168. Sunstein, *supra* note 156, at 252.

today of sizable majorities supporting gun rights[169] and the commitments expressed in both the Democratic and Republican national platforms to a Second Amendment right to keep and bear arms.[170]

When it comes to the Court adopting a new position on the Second Amendment, two developments are especially noteworthy. First is the National Rifle Association's ("NRA") organized "campaign" in the last few decades of the twentieth century "to develop a large body of literature supporting the individual right position and to create a perception that this view constitutes a standard model of scholarship."[171] The NRA's efforts included distributing money to "friendly scholars," launching an annual "Stand Up for the Second Amendment" essay contest (with a $25,000 prize), and funding a new organization called Academics for the Second Amendment that filed amicus briefs advancing the so-called standard model.[172] These efforts paid off, with the number of law review articles advocating the individual right position growing from three in the 1960s to twenty-seven in the

169. In a February 2008 USA Today/Gallup poll, seventy-three percent of Americans expressed the belief that the Second Amendment guarantees the rights of individuals, rather than members of state militias, to own guns, and nearly seventy percent of Americans opposed handgun bans. Jeffrey M. Jones, *Americans in Agreement With Supreme Court on Gun Rights*, GALLUP (Jun. 26, 2008), http://www.gallup.com/poll/108394/americans-agreement-supreme-court-gun-rights.aspx. In a 2013 Rasmussen poll, nearly two-thirds of Americans believed that "the purpose of the Second Amendment is to make sure that people are able to protect themselves from tyranny." *65% See Gun Rights As Protection Against Tyranny*, RASMUSSEN REP. (Jan. 18, 2013), http://www.rasmussenreports.com/public_content/politics/current_events/gun_control/65_see_gun_rights_as_protection_against_tyranny.

170. The 2012 Republican National Platform states, "[w]e uphold the right of individuals to keep and bear arms, a right which antedated the Constitution and was solemnly confirmed by the Second Amendment." GOV. BOB MCDONNELL ET AL., REPUBLICAN PLATFORM 20 (2012), *available at* https://cdn.gop.com/docs/2012GOPPlatform.pdf. The 2012 Democratic National Platform states, "[w]e recognize that the individual right to bear arms is an important part of the American tradition, and we will preserve Americans' Second Amendment right to own and use firearms." DEMOCRATIC PLATFORM 18 (2012), *available at* http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf.

171. Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 24 (2000).

172. *See id.* at 14.

1970s and 1980s to fifty-eight in the 1990s.[173] Although both Scalia's majority opinion and Stevens's dissenting opinion in *Heller* examined the history of the Second Amendment, Scalia's opinion asserting the individual right view relied more heavily on law review articles written by law professors, rather than those authored by trained historians.[174]

Providing a significant boost to the NRA's efforts was the electoral success of the Republican Party, which won five of the seven presidential elections from 1980 to 2004. Executive branch support for gun rights followed, as "[p]rominent Justice Department officials in the Reagan, first Bush, and second Bush administrations publicly supported the individual rights interpretation of the Second Amendment and aggressively took steps to make their position the constitutional law of the land."[175] This included vigorous support for an originalist interpretive approach that the *Heller* Court thoroughly embraced, Attorney General John Ashcroft committing George W. Bush's administration to the individual right of gun ownership in a public letter to the NRA in 2001,[176] and an amicus brief in *Heller* advancing the individual right view of the Second Amendment.[177] Republican appointments to the Supreme Court helped ensure that those arguments would be given a receptive hearing. It is no surprise that each member of the *Heller* majority—Scalia, Kennedy, Thomas, Roberts, and Alito—was a Republican appointed by a Republican president.[178] Like *Baker*, *Heller*

173. *See id.* at 14–15. In contrast, the number of law review articles supporting the collective right model remained relatively static at eleven in the 1960s, twenty-two in the 1970s and 1980s, and twenty-nine in the 1990s. *See id.*

174. *Compare* District of Columbia v. Heller, 554 U.S. 570, 581–86 (2008), *with id.* at 640–51 (Stevens, J., dissenting).

175. HOWARD GILLMAN ET AL., 2 AMERICAN CONSTITUTIONALISM 924–25 (2013).

176. Letter from John Ashcroft, Attorney General, U.S., to James J. Baker, Executive Director, National Rifle Ass'n (May 17, 2001), *available at* http://www.nraila.org/images/Ashcroft.pdf.

177. Brief for Amici Curiae Former Senior Officials of the Department of Justice in Support of Respondent, *Heller*, 554 U.S. 570 (No. 07-290), 2008 WL 405551.

178. In all fairness, two of the dissenting Justices—Stevens and Souter—were also Republicans appointed by Republican presidents. Of course, they are also seen by the Republican Party faithful as "presidential mistakes" when it comes to Supreme Court appointments. *See Presidents sometimes*

represents the "triumph of politics"[179] and another example of the partisan orchestration of doctrinal change.

C. *State Action.*

Doctrinal developments in the state action field during the twentieth century provide a final lesson of how partisan regimes construct constitutional law. The liberalization of state action rules in the 1940s, 1950s, and 1960s was engineered by leaders in the Democratic Party,[180] while its retrenchment in the several decades that followed can be credited to Republican Party elites.[181]

Democratic leaders in the executive branch in the mid-twentieth century encouraged the Supreme Court to adopt an expansive interpretation of state action rules in order to ban private race discrimination that a Southern-dominated Congress would not address.[182] They did so through Supreme Court appointments and Justice Department litigation strategies that sought to broaden state action in areas perceived to be most important such as voting, housing, and public accommodations.[183] Court victories like *Smith v. Allwright*, *Shelley v. Kraemer*, and *Burton v. Wilmington Parking Authority* then followed, along with enhanced judicial support for congressional efforts to battle private race discrimination.[184] Because the 1964 Civil Rights Act prohibited a variety of forms of private race discrimination,[185] state action cases involving race largely disappeared from the federal court docket—along with pressure on the Court to stretch state action rules. Unsurprisingly, the Court returned to a more modest view of state action.

Reinforcing that trend was the ascendance of "the new right Republican regime."[186] Republican victories in five of six

regret justices they appoint, USA TODAY (July 4, 2005), http://usatoday30.usatoday.com/news/washington/2005-07-04-defiant-justices_x.htm.

179. Sunstein, *supra* note 156, at 273.

180. *See* Peretti, *supra* note 27, at 277–78.

181. *See id.* at 288–89.

182. *See id.* at 290–98.

183. *See id.*

184. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Heart of Atl. Motel v. United States, 379 U.S. 241, 270 (1964).

185. Pub. L. No. 88-352, 78 Stat. 241.

186. Cornell W. Clayton & J. Mitchell Pickerill, *The Political*

presidential elections from 1968 to 1988 produced eleven consecutive Supreme Court appointment opportunities. Remarkably, nearly three-quarters of those GOP-controlled vacancies were "distal" in which the departing Justice resides at or on the opposite side of the Court median from the president;[187] it is precisely (and only) these types of vacancies that allow the president to "move the Court median" and alter Supreme Court ideology.[188] In addition to their transformative Supreme Court appointments, Presidents Richard Nixon and Ronald Reagan both campaigned against liberal judicial activism, arguing that unelected judges had seized power from elected officials—with Nixon pointing to Court decisions regarding school desegregation and law and order[189] and Reagan emphasizing abortion and school prayer.[190] Justice Department officials additionally gave speeches and published position papers advancing those conservative constitutional commitments.[191] The Reagan Justice Department's *Guidelines on Constitutional Litigation*, for example, advised government litigators on the use of originalism to reverse precedents involving, not only school prayer, the exclusionary rule, and abortion, but also the incorporation doctrine, a broad interpretation of congressional enforcement powers under the Fourteenth and Fifteenth Amendments, and an

Determinants of the Supreme Court's Criminal Justice Jurisprudence: How the New Right Regime Has Shaped the Rehnquist Court, 94 GEO. L.J. 1385, 1394 (2006).

187. According to my analysis, eight of the eleven vacancies occurring from 1969 to 1992 were "distal" (Warren, Fortas, Black, Harlan, Douglas, Powell, Brennan, and Marshall), while three were "proximal" (Stewart, Burger, Rehnquist). *See* Terri Peretti, Distal Vacancies, Partisan Regimes, and Supreme Court Ideology (Apr. 21–23, 2011) (prepared for Annual Meeting of the Western Political Science Association, San Antonio, TX) (on file with author).

188. Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AM. J. POL. SCI. 231 (2007).

189. *See generally* KEVIN MCMAHON, NIXON'S COURT (2011).

190. *See* GILLMAN ET AL., *supra* note 175, at 737–43.

191. *See* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES (2015); MCMAHON, *supra* note 189; STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2010); OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, GUIDELINES FOR CONSTITUTIONAL LITIGATION (1988); OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 7 (1988).

expansive state action doctrine.[192] Although this campaign was not always successful, the Republican regime made significant headway in altering constitutional law in a variety of doctrinal areas, including state action.

Both the rise and the fall of the state action doctrine were engineered by partisan elites. The lesson once again is that constitutional change requires more than the presence of effective scholarly critiques and a credible doctrinal alternative; it requires the support of an electorally-successful partisan movement. Those seeking to reverse *Tarkanian* must learn this lesson and gain partisan support for their reform agenda.

VI. FROM "HERE TO THERE:" STRATEGIC CONSIDERATIONS

Creating a new constitutional rule or reversing a longstanding precedent sometimes requires an enormous step, a challenge given that the Court is more inclined to move incrementally than in large leaps and bounds. When it comes to reversing *Tarkanian*, however, the doctrinal step is quite small and potential paths for that step have already been laid out by legal scholars and by the Court itself in *Brentwood Academy*. The entwinement standard and the willingness to look beyond formalities and "winks and nods" could enable the Court to see the numerous financial linkages and dependencies between the NCAA and the state and recognize the truly monopolistic and coercive nature of NCAA power. Like in *Brentwood*, the Court can also ask whether, on balance, it is unreasonable or unfair to ask that the NCAA observe constitutional standards.

Reversal appears to be a small step, not only doctrinally, but also in terms of votes. The Court has been closely divided on the question of whether amateur athletic associations are state actors, with both *Tarkanian* and *Brentwood Academy* being decided by a single vote and votes in the latter case also being ideologically-ordered. In counting potential votes for reversal, it should be noted that Scalia and Kennedy, the only two remaining *Tarkanian* Justices, voted against the state action claims in both *Tarkanian* and *Brentwood Academy* and are unlikely sources.[193] Justice

192. *See* GILLMAN ET AL., *supra* note 175, at 748–52.

193. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 305 (2001) (Thomas, J., dissenting, joined by Rehnquist, C.J., Scalia, J.,

Thomas dissented in *Brentwood Academy*, preferring to rule that the TSSAA was not a state actor and further expressing in a footnote his disagreement with the implications of the entwinement standard: a reversal of *Tarkanian* and a new finding that the NCAA is a state actor.[194] A reasonable expectation is that the other two conservative Justices currently on the Court and to the right of Kennedy—Roberts and Alito—would also reject state actor status for the NCAA. It is probable, though not certain, that all four Democratic Justices would disagree and vote to reverse *Tarkanian*; after all, Justices Breyer and Ginsburg voted with the *Brentwood* majority and Sotomayor and Kagan lie ideologically between the two.[195] This informal head count and best-case scenario for reformers suggest at least a one-vote deficit.

Securing one additional vote sounds deceptively simple. It would in fact require a vote switch from Scalia, Kennedy, or Thomas; ideologically-unexpected votes from Roberts or Alito; or the replacement of a conservative Justice with a liberal Justice. The latter option, moreover, involves two steps—a conservative Justice departing from the Court while a Democrat occupies the White House. While certainly possible, it is less likely to the degree that modern Justices engage in strategic retirement.[196] Because the Democratic Party has historically been, and will probably continue to be, the most likely supporter of an expansive

& Kennedy, J.); NCAA v. Tarkanian, 488 U.S. 179 (1988).

194. *Brentwood Acad.*, 531 U.S. at 935 (Thomas, J., dissenting).

195. *See Current Beliefs,* SUP CT. IDEOLOGY PROJECT, http://sct.tahk.us/current.html (last visited Jan. 21, 2015).

196. Although anecdotal evidence supports the claim that Supreme Court Justices time their retirements strategically—for example when a co-partisan president is in office—systematic empirical evidence is mixed. *Compare* Timothy M. Hagle, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 15 POL. BEHAV. 25 (1993) (confirming strategic retirement); Kjersten R. Nelson & Eve M. Ringsmuth, *Departures from the Court: The Political Landscape and Institutional Constraints*, 37 AM. POL. RES. 486 (2009) (same); Ross M. Stolzenberg & James Lindgren, *Retirement and Death in Office of U.S. Supreme Court Justices*, 47 DEMOGRAPHY 269 (2010) (same), *with* Terri Peretti & Alan Rozzi, *Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power?* 30 QUINNIPIAC L. REV. 131 (2011) (rejecting strategic retirement); Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869-2002*, 8 AM. L. & ECON. REV. 143 (2006) (same); Christopher J. W. Zorn & Steven R. Van Winkle, *A Competing Risks Model of Supreme Court Vacancies, 1789-1992*, 22 POL. BEHAV. 145 (2000) (same).

state action doctrine under which *Tarkanian* would be reversed, the wisest strategy for reversal, to put it simply and bluntly, is to elect more Democrats. When the White House and Senate are controlled by the Democratic Party, courts move in a liberal direction, and conservative precedents like *Tarkanian* are more likely to fall.[197]

In terms of a more specific litigation strategy, the history of state action rulings is instructive. The Court has been much more likely in the past to accept state action claims that involve race,[198] suggesting that litigators would be wise to emphasize the racial angle where possible. In fact, it is not difficult to demonstrate that NCAA policies and enforcement actions often have a disparate racial impact. Eligibility rules based on grades and entrance examinations disproportionately exclude African American athletes from participation and have been labeled as "patently racist."[199] Its rules enforcing amateurism also are more likely to harm economically disadvantaged athletes who are disproportionately African American.[200] A recent example is the case of basketball player Ben McLemore, whose partial academic disqualification by the NCAA in his first year at the University of Kansas delayed his entry into the NBA and ensured that his family would have to suffer another year of devastating poverty.[201] Selective and uneven enforcement of NCAA rules is

197. This scenario could also be aided by the appointment to the Supreme Court of Sri Srinivasan, placed on the D.C. Circuit Court of Appeals by President Obama. He is the first federal appellate judge of South Asian descent and is often touted as a likely Supreme Court nominee. *See* Richard Wolf, *Sri Srinivansan: Supreme Court Justice in the Making?*, USA TODAY (May 23, 2013, 6:53pm), http://www.usatoday.com/story/news/2013/05/23/sri-srinivasan-judge-supreme-court-circuit-dc-obama-bush/2351543/. Judge Srinivasan could be another vote for *Tarkanian*'s reversal, given his fanatical support for the University of Kansas men's basketball team.

198. *See* Peretti, *supra* note 27.

199. Greene, *supra* note 125, at 104; DelGreco K. Wilson, *Black Athletes, Race and the Rise of NCAA Eligibility Requirements*, THE BLACK CAGER (Sept. 18, 2014), http://delgrecowilson.com/2014/09/18/black-athletes-race-and-the-rise-of-ncaa-eligibility-requirements/.

200. *See* Joe Nocera, Op-Ed, *Race And the N.C.A.A.*, N.Y. TIMES, Sept. 20, 2012, at A27, *available at* http://www.nytimes.com/2012/11/20/opinion/nocera-race-and-the-ncaa.html?_r=0.

201. *See* Eric Prisbell, *Kansas' Ben McLemore Fights Through Poverty to NCAA's Center Stage*, USA TODAY (June 21, 2013, 3:39am), http://www.usatoday.com/story/sports/ncaab/big12/2013/02/27/big-12-mens-college-basket

another potential source of race discrimination claims.[202]

A final factor that could aid *Tarkanian*'s reversal is the increasingly hostile environment in which the NCAA finds itself.[203] In the past, the NCAA enjoyed a glow of deference and good will, which has helped it in its dealings with Congress and the courts, and both have been quite kind to the NCAA. The courts have shielded the NCAA from both constitutional constraints and state regulation, and its *Tarkanian* ruling seems "frozen in time."[204] The NCAA has been the subject of numerous congressional hearings, including a dozen formal hearings over the last decade, but none thus far have produced any formal legislative action.[205] Recent years have seen an increase, however, in both the negative tone of those hearings and the presence of opposition from both sides of the aisle. Examples abounded at the Senate Commerce Committee hearing held on July 9, 2014.[206] Especially striking were statements by Senators Claire McCaskill (D-MO) and Dean Heller (R-NV), challenging the very existence of the NCAA and questioning why it should not be disbanded.[207] Furthermore, a number of bipartisan bills have been introduced, such as the NCAA Accountability Act that would guarantee four-year athletic scholarships, require annual baseline concussion tests, permit universities to pay stipends to their

ball-kansas-jayhawks-ben-mclemore/1947401/.

202. *See* Nocera, *supra* note 200.

203. *See* Branch, *supra* note 41; Joe Nocera, Op-Ed, *The College Sports Cartel*, N.Y. TIMES, Dec. 31, 2011, at A23, *available at* http://www.nytimes.com/2011/12/31/opinion/nocera-the-college-sports-cartel.html; Joe Nocera, Op-Ed, *The N.C.A.A.'s Ethics Problem*, N.Y. TIMES, Jan. 26, 2013, at A19, *available at* http://www.nytimes.com/2013/01/26/opinion/nocera-the-ncaas-ethics-problem.html; Nocera, *supra* note 5; Nocera, *supra* note 5; Norman Ornstein, *Why Hasn't Congress Investigated Corruption in the NCAA?*, ATLANTIC (Apr. 9, 2014, 12:05pm), http://www.theatlantic.com/entertainment/archive/2014/04/why-hasn't-congress-investigated-corruption-in-the-ncaa/360391/.

204. Koller, *supra* note 120, at 183.

205. *See, e.g.*, *Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes: Hearing Before the H. Educ. & the Workforce Comm.*, 113th Cong. (2014); *Promoting the Well-Being and Academic Success of College Athletes: Hearing Before U.S. S. Comm. on Commerce, Sci., & Transp.*, 113th Cong. (2014) [hereinafter *Well-Being Hearing*].

206. *Well-Being Hearing*, *supra* note 205.

207. *Id.* (statements of Sen. Claire McCaskill (D-MO) & Sen. Dean Heller (R-NV)).

athletes, and mandate due process protections prior to the imposition of NCAA sanctions.[208] While there is currently little optimism regarding the passage of such bills, the threat of legislation on this and a range of other important NCAA matters, including anti-trust and tax exemptions, may prompt the Association to act in order to avoid congressional intervention, as it did after a 1978 Senate report that recommended federal regulation of the NCAA's enforcement procedures.[209]

Greater media scrutiny and harsh press reports in recent years are also contributing to the NCAA's increasingly tarnished image.[210] This loss of credibility is important as it enhances the possibility of unfriendly government action. Much of the recent negative press has focused on multiple lawsuits that have been filed against the NCAA,[211] including a class action suit by Jeff Kessler on behalf of college athletes alleging that the NCAA and

208. H.R.J. Res. 2903, 113th Cong. (2013).

209. The NCAA amended its enforcement processes after the Senate held hearings and published its report, S. REP. 95-69 (1978), suggesting future federal regulation. *See* NATHAN BROOKS, THE NCAA AND DUE PROCESS: LEGAL ISSUES, CRS REPORT FOR CONGRESS (2004), *available at* http://congressionalresearch.com/RL32529/document.php?study=The+NCAA+and+Due+Process+Legal+Issues.

210. *See, e.g.*, Branch, *supra* note 41; *see also supra* note 203.

211. *See, e.g.*, Dennis Dodd, *Potential landmark cases make these perilous times for the NCAA*, CBS SPORTS (Jan. 16, 2013, 10:44am), http://www.cbssports.com/collegefootball/story/21563406/potential-landmark-casesmake-theseperiloustimes-for-the-ncaa; Nathan Fenno, *New lawsuit targets NCAA, 11 conferences over scholarships*, L.A. TIMES (Apr. 25, 2014, 4:23 PM), http://www.latimes.com/sports/sportsnow/la-sp-sn-lawsuit-targets-ncaa-scholarships-20140425-story.html; Sara Ganim, *'Amateurism is a myth': Athletes file class-action against NCAA*," CNN (Apr. 5, 2014, 2:35 AM), http://www.cnn.com/2014/03/17/justice/ncaa-student-athletes-payment-lawsuit/; George, *supra* note 44; Peter Hall, *Judge: Paterno suit targeting Penn State sanctions can move toward trial*, MORNING CALL (Sept. 11, 2014, 8:14 PM), http://www.mcall.com/news/breaking/mc-penn-state-paterno-ncaa-lawsuit-advances-20140911-story.html; Jerry Hinnen, *Labor attorney Jeffrey Kessler files antitrust lawsuit vs. NCAA*, CBS SPORTS (Mar. 17, 2014, 11:42 AM), http://www.cbssports.com/collegefootball/eye-on-college-football/24488838/labor-attorney-jeffrey-kessler-files-antitrust-lawsuit-vs-ncaa; John Keilman*, NCAA reaches $75 million settlement in concussion lawsuit*, CHI. TRIBUNE (July 29, 2014, 7:33 PM), http://www.chicagotribune.com/news/local/breaking/chi-ncaa-reaches_75-million-settlement-in-concussion-lawsuit-20140729-story.html; Joe Nocera, *The Lawsuit and the N.C.A.A.*, N.Y. TIMES, June 22, 2013, at A19, *available at* http://www.nytimes.com/2013/06/22/opinion/nocera-the-lawsuit-and-the-ncaa.html; Nocera, *supra* note 3.

the five major athletic conferences constitute a cartel.[212] Each lawsuit inspires another, which inspires another, which increases the appearance of NCAA vulnerability. Especially significant, the lawsuits provide courts with more opportunities to evaluate NCAA policies and practices. One or more of these cases could make their way to the U.S. Supreme Court.

All of these factors—a more Democratic federal bench, the strategic selection of cases raising race-related claims, growing congressional hostility, multiple lawsuits against the NCAA, mounting media criticism, and an increasingly negative public image for the NCAA—all lend themselves to *Tarkanian*'s reversal. It is not unreasonable to believe that NCAA enforcement actions could be subjected to judicial review in the not so distant future.

VII. "AND BEYOND:" THE CONSEQUENCES OF REVERSING *TARKANIAN*

Reversing *Tarkanian* opens the door to judicial oversight of the NCAA. State actor status for the NCAA brings judges into its investigatory and enforcement processes and alters the power relationships among the key players. This is precisely what happened in the reapportionment field once judicial intervention was permitted. After 1962, state legislators were no longer free to do whatever they wanted when it came to redistricting. Federal judges were guaranteed a seat at the redistricting table and were empowered to assert constitutional interests, particularly those of underrepresented urban minorities.[213] With *Tarkanian*'s reversal, federal judges would similarly be empowered. They could assess the substantive and procedural fairness of NCAA policies and practices and protect the liberty and property interests of college athletes, coaches, and member institutions. The NCAA would be forced to become more attentive to those interests and would need to reform "the arbitrary and opaque enforcement process [it] currently utilize[s]."[214]

It is well-known that government agencies are most effective and responsive when their clients are well-organized and

212. *See* Jon Solomon, *Meet Jeffrey Kessler, lawyer whose suit strikes fear in NCAA's heart*, CBS Sports (Nov. 4, 2014, 1:26 PM), http://www.cbssports.com/collegefootball/writer/jon-solomon/24783680/meet-jeffrey-kessler-lawyer-whose-suit-strikes-fear-in-ncaas-heart.

213. *See generally* COX & KATZ, *supra* note 164.

214. Fogarty, *supra* note 5.

powerful. A classic example is the Social Security Administration, whose effectiveness is in large part a product of the political power of its clientele. The elderly vote at very high rates, their interests are well-represented by the American Association of Retired Persons, and members of Congress ensure that Social Security benefits are both generous and effectively administered.[215] The Federal Aviation Administration and the Securities and Exchange Commission are also regarded as effective government agencies, which is similarly a result of their well-organized and influential clientele—the airline industry and the securities industry, respectively.[216] The inverse relationship holds as well: organizations serving a weak clientele are more prone to corruption, incompetence, and abuse of power. Such imbalances of power are readily apparent, for example, with welfare agencies in relation to welfare recipients, prison officials in relation to prisoners, and law enforcement agencies in relation to criminal suspects. It is no surprise that the clients of these agencies have had to turn to the courts for the protection of their rights.[217]

When it comes to college athletes, they too have been poorly-organized and weak in relation to the NCAA. They have had to accept scholarships that were not guaranteed beyond a single year, a persistent gap between the scholarship amount and the true cost of their college education, and few procedural protections when the NCAA investigates potential rule violations and imposes sanctions. The University, in theory, could act as an effective counter-weight to NCAA power, but its tremendous financial

215. *See* Naureen Khan, *Is the AARP the '900-pound invisible gorilla' in the room*, ALJAZEERA AM. (Mar. 22, 2014, 7:00 AM), http://america.aljazeera.com/articles/2014/3/22/is-the-aarp-the-900poundinvisiblegorillaintheroom.html.

216. *See* Steven M. Davidoff, *The Government's Elite and Regulatory Capture*, N.Y. TIMES, (Jun. 11, 2010, 2:00 PM), http://dealbook.nytimes.com/2010/06/11/the-governments-elite-and-regulatory-capture/?_r=0. Of course, responsiveness sometimes goes too far in the form of "agency capture" in which the agency is captured by the interests it is supposed to regulate instead of advancing broader public interests. *See generally* HUGH HECLO, A GOVERNMENT OF STRANGERS (1977); George Stigler, *The theory of economic regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

217. The Supreme Court has acted to protect the due process rights of welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254 (1970), prisoners in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and probationers and parolees in *Morrissey v. Brewer*, 408 U.S. 471 (1972).

interests do not always coincide with the needs of athletes and coaches. A declaration by the Supreme Court that the NCAA is a state actor will give legal standing to athletes and coaches to assert constitutional claims against the Association. Judges can explore what due process requires when the liberty and property interests of athletes and coaches are harmed by NCAA enforcement actions. Judges might decide that the NCAA must provide parties with the right to confront and cross-examine witnesses. Judges might decide that the NCAA cannot serve simultaneously as an investigator, prosecutor, and judge and that athletes and coaches accused of wrong-dong must be provided with a neutral, third-party decision maker. These are desirable changes from the longstanding practice in which "only the NCAA's own version of due process . . . constrain[s] it."[218]

By reversing *NCAA v. Tarkanian* and treating the NCAA as a state actor, the Association would be held to constitutional requirements, such as due process of law. Judicial oversight of NCAA enforcement proceedings would promote basic fairness to those individuals and institutions whose interests can be so greatly harmed. As the Supreme Court said in *Brentwood Academy*, that is not unreasonable.

218. PORTO, *supra* note 55, at 161.