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Articles

IS IT TIME TO REVISIT THE DOCTRINE OF "STATE ACTION" IN THE CONTEXT OF INTERCOLLEGIATE AND INTERSCHOLASTIC SPORTS?

RICHARD J. HUNTER, JR.* & PAULA ALEXANDER BECKER**

Consider the following hypothetical. Coach Mysliwy, the soccer coach at St. Swithen’s High School, a private Catholic High School in Belmar, New Jersey, decided to start his team’s preseason practices in mid-July. One day, while practicing at the nearby Sea Girt Army Camp, Coach Mysliwy noticed that the team from the neighboring town of Poseidon, a public high school, was also conducting a preseason practice session. Coach Mysliwy approached the rival coach and suggested a “controlled scrimmage.” All went well until a parent from a different local high school reported the “match” to the New Jersey State Interscholastic Athletic Association (NJSIAA), the governing body for high school (interscholastic) athletics in the state of New Jersey. The NJSIAA investigated the incident and unilaterally decided to suspend both coaches for ten games for conducting an “improper and unscheduled preseason scrimmage” in violation of NJSIAA rules. These actions are reported to St. Swithen’s, and Coach Mysliwy is summarily fired from his position after twenty-five years at the school. Incensed, Coach Mysliwy contacted a local sports-law firm to determine if his “constitutional rights” were violated by either St. Swithen’s or the NJSIAA. The coach at Poseidon High School was also fired for violating the NJSIAA Rules.

The question presented by this article is whether either of the high school coaches have an action for violation of their due pro-

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2. See id. (conducting unscheduled preseason scrimmage is violation of one of NJSIAA’s rules).

(191)
cess rights. This article also explores the implications had this incident occurred between two four-year colleges who were members of the National Collegiate Athletic Association (NCAA).

I. BACKGROUND OF THE CONSTITUTIONAL PROTECTION OF DUE PROCESS RIGHTS

The Fifth and Fourteenth Amendments to the United States Constitution protect against the deprivation of "life, liberty, or property, without due process of law." The Due Process Clause of the Fifth Amendment provides basic procedural safeguards to a person accused of a crime before being deprived of "life, liberty, or property." As originally enacted, the first eight amendments to the Constitution, included in the Bill of Rights, were designed solely to protect citizens against the actions of the federal government, but the amendments did not apply to the states until the adoption of the Fourteenth Amendment in 1868. The Fourteenth Amendment provides that a state should not create any law denying a

3. This article mainly concerns "state action" and whether constitutional protections apply under the circumstances described above. Another aspect of due process rights is the concept of "fundamental fairness." See Henry Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1279-93 (1975) (pointing out fundamental fairness aspect of due process rights). This includes an individual's right to be adequately notified of charges or proceedings involving him/her or his/her interests, and it includes the opportunity to be heard in front of a neutral decision maker. See id. (explaining fundamental fairness includes right to be notified of charges and opportunity to be heard in front of neutral decision maker). This minimum protection extends to all proceedings, civil or criminal, by the government or by other parties that may result in an individual's deprivation of life, liberty, or property. See id. (extending minimum protection to all proceedings, civil or criminal, by government). The late Judge Henry Friendly denotes these procedural safeguards in both content and relative priority: "[a]n unbiased tribunal;" "[n]otice of the proposed action and the grounds asserted for it;" "[a]n opportunity to present reasons why the proposed action should not be taken;" the right to present evidence, "including the right to call witnesses;" the right to know opposing evidence; the right to "cross-examine adverse witnesses;" a decision based exclusively on the evidence presented; an opportunity to be represented by counsel; the requirement that the tribunal prepares a record of the evidence presented; and the requirement that the tribunal prepares written findings of fact and reasons (conclusions of law) for its decision. Id.


5. U.S. Const. amend. V.

6. See Barron v. Baltimore, 32 U.S. 243, 250-51 (1833) (holding that Bill of Rights only applies to Federal Government). The Bill of Rights comprises the first ten amendments to the United States Constitution of 1789. See id. (explaining amendments comprising Bill of Rights). The Ninth and Tenth Amendments, however, affect the people's relationship with both the federal and state governments. See id. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the
United States citizen of rights without due process of law or deny a
citizen equal protection under the law.\footnote{See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law
which shall abridge the privileges or immunities of citizens of the United States;
nor shall any State deprive any person of life, liberty, or property, without due
process of law; nor deny to any person within its jurisdiction the equal protection
of the laws.”). The Fourteenth Amendment is one of three reconstruction amend-
ments, concerned with the abolition of the institution of slavery, which had been
originally recognized and protected in the 1789 constitution. See The Slaughter-
house Cases, 85 U.S. 36, 78 (1873) (describing creation and purpose of Fourteenth
Amendment).}

In 1873, the United States Supreme Court decided a series of
cases holding that the fundamental rights protected by the Bill of
Rights were enacted against federal action and were not privileges
and immunities of national citizenship.\footnote{See id. (leaving privilege and immunity rights to state jurisdiction).}
Therefore, under the
Fourteenth Amendment’s Privileges or Immunities Clause, state ac-
tion was not protected by the Bill of Rights.\footnote{See Michael Anthony Lawrence, Reviving a Natural Right: The Freedom
effect on the privileges or immunities clause is the classic case in point, where an
erroneous interpretation of a constitutional provision by the Court effectively put
the provision out of play for (at least) the following 130-plus years.”).} The decision in the
Slaughterhouse Cases eviscerated the Fourteenth Amendment Privi-
leges or Immunities Clause as a possible source of protecting indi-
vidual rights against state abridgment.\footnote{For a further discussion on state action, see infra notes 41-51 and accom-
panying text.}

Subsequently, the Court has relied on the Fourteenth Amendment’s Due Process and Equal
Protection Clauses to protect an individual’s rights against state
action.\footnote{See Adamson v. California, 332 U.S. 46, 54 (1947) (rejecting incorporation
of Bill of Rights in Fourteenth Amendment), overruled in part by Malloy v. Hogan,
378 U.S. 1 (1964). Interestingly, the Fourteenth Amendment guarantee of “equal
protection of the laws,” by its own terms, limits only actions of the states. See U.S.
CONST. amend. XIV, § 1. There is no similar provision of the Constitution that is

Over time, the Supreme Court altered its jurisprudence and
held that certain provisions of the Bill of Rights may be sufficiently
“fundamental” and, therefore, worthy of protection against state
abridgment through the Fourteenth Amendment Due Process
Clause. The Court accepted that the Fourteenth Amendment’s
Due Process Clause protected some rights provided by the Bill of
Rights yet rejected the view that the Clause incorporated the Bill of
Rights.\footnote{See The Slaughterhouse Cases, 85 U.S. at 78 (noting boundaries of Fourteenth
Amendment as enacted by Congress).} The Court created the concept of selective incorporation

states, are reserved to the states respectively, or to the people.” U.S. CONST.

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by doing a case-by-case analysis of whether each amendment in the Bill of Rights should be made applicable against the states. The Court thus created various tests or criteria to determine which provisions of the Bill of Rights are protected against both federal and state action. In *Palko v. Connecticut*, the Supreme Court noted that the Fourteenth Amendment incorporated principles which are inherent to ordered liberty. The Supreme Court later held in

applicable to actions of the federal government. The United States Supreme Court, however, has ruled that most actions by the federal government that would deny "equal protection" constitute a "deprivation of liberty" within the Fifth Amendment's Due Process Clause. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding racial segregation practiced in public schools in Washington, D.C. deprived African-American pupils of their "liberty" in violation of Fifth Amendment's Due Process Clause).


The "total incorporation" position was strongly supported in the dissenting opinions in *Adamson*. See *Adamson*, 332 U.S. at 68-93 (Black, J., dissenting) (supporting total incorporation in dissenting opinion). In the principal dissent by Justice Black, joined by Justice Douglas, Justice Black commented:

If the choice must be between the selective process of the *Palko* decision applying some of the provisions of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—
to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, protections of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

Id. at 89 (Black, J., dissenting). Conversely, Justice Harlan strenuously and regularly objected to this point of view. In *Malloy*, he wrote:

The consequence is . . . inevitably disregard of all relevant differences which may exist between state and federal criminal law and its enforcement. The ultimate result is compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved either by encroachment on the States' sovereign powers or by dilution in federal law enforcement of the specific protections in the Bill of Rights.

*Malloy*, 378 U.S. at 16-17 (Harlan, J., dissenting).


15. See *Palko*, 302 U.S. at 325 (noting that Fourteenth Amendment incorporates principle of ordered liberty). Interestingly and perhaps surprisingly, the
Duncan v. Louisiana\textsuperscript{16} that the rights required to achieve justice are included in the Fourteenth Amendment, namely those rights that are "fundamental to the American scheme of justice."\textsuperscript{17}

Court had ruled earlier that states are not required to provide jury trials under the principle of ordered liberty. See id. (describing Court's interpretation of what constitutes ordered liberty).


17. Duncan, 391 U.S. at 149. Although the Supreme Court continued to employ the "Palko selective incorporation process" when it decided Duncan in 1968, it no longer employed the Cardozo-Frankfurter terminology, which inquired into whether a particular guarantee of the Bill of Rights was "implicit in the concept of ordered liberty" or required by the "immutable principles of justice" as conceived by a civilized society. Id. at 149 n.14.

There is a separate debate concerning whether all aspects and elements of an incorporated right must be deemed incorporated by the Fourteenth Amendment. A majority of the Court has held that if the Fourteenth Amendment incorporates a right, then all aspects or issues of the right will receive the same protection against state action through the Fourteenth Amendment that it receives against federal action through the Bill of Rights. Opposing this view, Chief Justice Burger, Justice Powell, and Justice Rehnquist would have ruled that some aspects of the Bill of Rights are not so fundamental that they must be held binding against the states as a matter of due process. See Crist v. Bretz, 437 U.S. 28, 39-53 (1978) (Burger, C.J., dissenting); id. (Powell, J., dissenting). Accordingly, a right incorporated by the Fourteenth Amendment is not automatically afforded the same amount of protection against state action as it is against federal action. See Crist, 437 U.S. at 39-53 (Powell, J., dissenting) (expanding view that some rights are not as fundamental as others and, therefore, should not receive same amount of protection from state action as they do from federal action). Additionally, in Apodaca v. Oregon, the Court held that although the Fourteenth Amendment's Due Process Clause incorporates the right to a jury trial, the requirement of a unanimous jury verdict required in a federal case is not afforded the same level of fundamental value and, therefore, is not required by due process. 406 U.S. 404, 412-13 (1972) (holding that unanimity is not required for juries in state trials because it is not as fundamental of right as right to jury trial).

Consequently, while states must afford criminal defendants charged with a serious offense a jury trial, the states do not have to require a unanimous verdict by the jury. See id. at 413 (describing situation where Court considers one right "more fundamental" than another and, therefore, applies it differently). The result of the Court's decision is that the Sixth Amendment right to a jury trial is entitled to lesser protection in state than in federal courts — at least as to the requirement of a unanimous jury verdict. See id.

Further, the Supreme Court has also refused to set aside those convictions solely because the verdict was obtained by a "substantial majority" of the jurors rather than a unanimous verdict. See Johnson v. Louisiana, 406 U.S. 356, 360 (1972) (rejecting argument that allowing less than unanimous verdict undermines "reasonable doubt" standard generally required by due process); see also In re Winship, 397 U.S. 358, 361 (1970) (noting that reasonable doubt standard frequently satisfies due process requirement). While the general rule is that state courts only require a majority vote for a guilty verdict, the Court has held that the verdict must be unanimous when the jury is composed of only six persons. See Burch v. Louisiana, 441 U.S. 130, 134 (1979) ("[W]e believe that conviction by a non-unanimous six-member jury in a state criminal trial for a non-petty offense deprives an accused of his constitutional right to trial by jury."). Statutorily, the number of jurors for federal criminal trials is twelve. See Ballew v. Georgia, 435 U.S. 223, 239 (1978) (holding that jury composed of five people was insufficient to meet constitutional requirements); Williams v. Florida, 399 U.S. 78, 86 (1970) ("We hold that the 12-
In his concurring opinion in *Griswold v. Connecticut*, Justice Goldberg offered a differing opinion on incorporation. Justice Goldberg believed that judges should not determine what are the fundamental rights based on their personal beliefs but rather based on the traditions and beliefs of United States citizens. Over the years, the Court has used the *Palko* and *Duncan* tests to determine that the majority of the Bill of Rights provisions are so fundamental that they apply to the states in addition to the federal government. These fundamental rights include: the First Amendment's protections of religion, speech, assembly, and the right of individuals to petition their government for grievances. Additional exam-

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18. 381 U.S. 479 (1975).

19. See *Griswold*, 381 U.S. at 493 (explaining how justices should determine which rights are fundamental). "In determining which rights are fundamental, judges are not left to decide cases in light of their personal or private notions." *Id.* at 493 (Goldberg, J., concurring) (citing *Snyder* v. Massachusetts, 291 U.S. 97, 105 (1934)). "[T]he Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 487 (quoting *Snyder*). The argument concerning an interpretation of the Fourteenth Amendment being simply a digression into a judge's personal opinion was addressed by Justice Frankfurter in *Adamson*:

Judicial review of the [the Due Process Clause] of the Fourteenth Amendment inescapably imposes on this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.


20. See generally *Palko v. Connecticut*, 302 U.S. 319 (1937) (describing test used to determine if right was so fundamental as to apply to states). It is interesting to note that as a matter of jurisprudence, *Palko* was later overruled in *Benton v. Maryland*. See 395 U.S. 784, 794 (1969). Justice Marshall wrote for the Court in *Benton*:

Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States so long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice," the same constitutional standards apply against both the State and Federal governments.

*Id.* at 795.

ples include the Fourth Amendment’s search and seizure provision; the Fifth Amendment’s protection against double jeopardy, the privilege against self incrimination, and the bar against taking property without just compensation; the Sixth Amendment’s right to counsel in criminal proceedings, confrontation and cross-examination of witnesses, speedy trial, public trial, jury trial, and compulsory process for obtaining witnesses; and the Eighth Amendment’s prohibition against cruel and unusual punishment. Conversely, there are certain provisions in the Bill the Fourteenth amendment); see also Edward Dumbaule, The Bill Of Rights And What It Means Today 133-34 (1957) (explaining which provisions of Bill of Rights are fundamental). In Winsby v. John Oster Manufacturing Company, the Western District Court of Pennsylvania noted:

Indeed, as late as 1922, the Supreme Court took the view that the Fourteenth Amendment did not make even the First Amendment binding on the States. In 1925, however, it ventured the tentative assumption that the 'freedom' of speech protected by the First Amendment was included in the 'liberty' which the Fourteenth Amendment required the States to respect. Thus began what Charles Warren called 'the new liberty.'


22. See Kerr v. California, 374 U.S. 23, 30 (1963) (noting Fourth Amendment is enforceable against states through Fourteenth Amendment).

23. See Benton, 395 U.S. at 794 (finding that Fifth Amendment is applicable against states and overruling Palko).

24. See Malloy v. Hogan, 378 U.S. 1, 6 (1964) ("We hold today that the Fifth Amendment’s exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States.").


26. See Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that when provision of Bill of Rights is essential to fair trial, it is obligated on states by Fourteenth Amendment).

27. See Pointer v. Texas, 380 U.S. 400, 403 (1965) (holding right to confront witness against defendant is fundamental right).


29. See In re Oliver, 333 U.S. 257, 278 (1948) (holding public trial is part of due process).

30. See Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding jury trials are fundamental to "the American scheme of justice").

31. See Washington v. Texas, 388 U.S. 14, 18 (1967) ("The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.").

32. See Robinson v. California, 370 U.S. 660, 675 (1962) ("The command of the Eighth Amendment, banning 'cruel and unusual punishments,' stems from the Bill of Rights of 1888. . . . And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." (citing Francis v. Resweber, 329 U.S. 459, 463 (1947))).
of Rights that the Court has held are not so fundamental as to be applicable to the states. These include the grand jury indictment guarantee of the Fifth Amendment\(^3\) and the civil jury trial guarantee of the Seventh Amendment for all suits at common law involving more than twenty dollars.\(^3\) Also, the Court has yet to rule on whether the Eighth Amendment’s bar against “excessive bail” applies to the states.\(^3\)

Supreme Court decisions from the 1970’s indicate that the Fourteenth Amendment’s due process guarantees may extend past mere incorporation of various rights enumerated in the first eight amendments; the due process guarantees may reach rights not expressly found in the Bill of Rights or anywhere else in the Constitution. For example, while the right to privacy is not expressly mentioned in the Constitution, the Supreme Court has recognized such a right or at least “a guarantee of certain areas or zones of privacy.”\(^3\) In *Griswold v. Connecticut*,\(^3\) Justice Douglas opined that a right of privacy was within the “penumbras” or “emanations” of various provisions of the Bill of Rights.\(^3\) In 1973, the Supreme Court strengthened its *Griswold* decision by holding that the right of per-

The historic punishments that were cruel and unusual when the Eighth Amendment was adopted included “burning at the stake, crucifixion, breaking on the wheel,” the rack and thumbscrew, and in some circumstances, even solitary confinement. *In re Kemmler, 136 U.S. 436, 446 (1890)*; *see also* *Chambers v. Florida, 309 U.S. 227, 237 (1940)* (rack and thumbscrew); *In re Medley, 134 U.S. 160, 167-68 (1890)* (solitary confinement).

33. *See Hurtado v. California, 110 U.S. 516, 538 (1884)* (holding that “the substitution for a presentment or indictment by a grand jury of the proceeding by information” is due process of law). Thus, states may experiment with what has been termed the “information system” and charge crimes in a manner that does not utilize a Grand Jury. *See id.* (explaining states’ use of “information system” which does not require use of Grand Jury).

34. *See Walker v. Sauvinet, 92 U.S. 90, 92 (1876)* (noting that civil jury trial guarantee has been held to apply only to trials in federal courts).

35. *See Preliminary Proceedings, 35 Geo. L.J. Ann. Rev. Crim. Proc. 203, 305 n.986 (2006)* (“It is unclear whether the excessive bail prohibition applies to the states through the Due Process Clause of the Fourteenth Amendment. The Supreme Court has indicated that the Excessive Bail Clause ‘has been assumed’ to apply to the states.”); *see also* *Schilb v. Kuebel, 404 U.S. 357, 365 (1971)* (applying Eighth Amendment to states through Fourteenth Amendment). Bail becomes excessive when a court sets it higher than is reasonably necessary either to ensure a defendant’s appearance at trial or to promote other compelling governmental interests.


37. 381 U.S. 479 (1965).

38. *See id.* at 484 (noting various Bill of Rights guarantees creating zones of privacy).
sonal privacy is implicit in the concept of liberty protected by the Due Process Clause.39

II. THE ATHLETIC CONTEXT

While a number of provisions of the United States Constitution prohibit the government from infringing on individual constitutional rights, only the Thirteenth Amendment, prohibiting the institution of slavery whether imposed by the government or by a private party, extends to both private and governmental action.40 If an action does not involve slavery, or what is sometimes referred to as a "badge of slavery," it is necessary to attribute the action to the government or its agencies and officials, acting under color of law,

39. See Roe, 410 U.S. at 158 (holding that right of personal privacy is basic human right of fundamental importance in society); see also Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (striking down criminal prohibition of homosexual sodomy in Texas and overruling Bowers v. Hardwick).

In Lawrence, the Houston police arrested two adult men, John Geddes Lawrence and Tyrone Garner, when the police entered Lawrence’s home and found the two men having consensual sex. 539 U.S. at 563. The two men were charged and convicted under a Texas state statute making it a crime to engage in "deviate sexual intercourse." Id. The statute defined deviate sexual intercourse as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." Id. (quoting TEX. PENAL CODE ANN § 21.06(a) (2003)).

Delivering the majority opinion, Justice Kennedy stated that there were three issues in dispute: (1) whether the statute violated the plaintiffs’ rights under the Fourteenth Amendment’s guarantees of equal protection; (2) whether the statute violated the plaintiffs’ rights under the Fourteenth Amendment’s guarantees of due process; and (3) whether Bowers v. Hardwick, the 1986 Supreme Court case upholding Georgia’s anti-sodomy law, should be overturned. See id. at 564. In Bowers, the Court refused to invalidate a Georgia statute that made it a crime for both heterosexuals and gay people to engage in sodomy. See Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Kennedy’s opinion. The Court ruled that the plaintiffs’ Fourteenth Amendment due process rights were infringed when they were arrested. See Lawrence, 539 U.S. at 578. Justice Kennedy stated:

[Adults] may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the [Due Process Clause of the] Constitution allows homosexual persons the right to make this choice.

Id. at 567. Justice O’Connor joined the majority in the judgment and wrote a concurring opinion in Lawrence. See id. at 579-85 (O’Connor, J., concurring). Justice O’Connor based her concurrence on an equal protection analysis rather than a due process analysis. See id. at 579 (O’Connor J., concurring).

to find the action unconstitutional.\textsuperscript{41} It is well settled, however, that the act complained of does not necessarily have to be performed directly by a government actor. State action has included actions by private individuals or organizations that function in a capacity traditionally reserved as the exclusive prerogative of the state.\textsuperscript{42} Another type of state action occurs when the government requires, sanctions, or significantly encourages private acts of discrimination.\textsuperscript{43}

Two cases involving state action in the area of sports law merit special consideration: \textit{NCAA v. Tarkanian}\textsuperscript{44} and \textit{Brentwood Academy v. Tennessee Secondary School Athletic Association}.\textsuperscript{45} In \textit{Tarkanian}, the United States Supreme Court dealt with a well-known figure embroiled in a bitter and protracted controversy with the NCAA.\textsuperscript{46} The status of the NCAA was at the heart of the controversy.\textsuperscript{47} The Court determined that the NCAA was a voluntary association of public and private universities that established rules ("legislation") for its members regarding intercollegiate sports.\textsuperscript{48} Pursuant to finding that several of these rules had been violated, the NCAA urged the University of Nevada at Las Vegas (UNLV), where Tarkanian served as a highly successful and ubiquitous men's collegiate basketball coach, to suspend Tarkanian for various recruiting violations.\textsuperscript{49} The United States Supreme Court reversed the Nevada Supreme Court's decision and found that the NCAA was neither a state actor nor operating under color of state law.\textsuperscript{50} As a result, the Court held that Coach Tarkanian could not sue the


\textsuperscript{42} For a further discussion of state action through private activity, see infra notes 53-63 and accompanying text.

\textsuperscript{43} For a further discussion of state action through government supported action, see infra notes 64-114 and accompanying text.

\textsuperscript{44} 488 U.S. 179 (1988) (discussing case in which Coach Tarkanian sued NCAA for allegedly violating his constitutional rights by suspending him without conducting hearing that would generally be required to satisfy due process requirements).

\textsuperscript{45} 531 U.S. 288 (2001) (holding association was so entwined with state that its actions could fairly be considered state action).

\textsuperscript{46} See generally \textit{Tarkanian}, 488 U.S. 179 (1988) (holding that NCAA was not state actor and was not operating under color of state law).

\textsuperscript{47} See id. at 181-82 (requiring NCAA's actions to be state action and to be under color of state law to be held liable).

\textsuperscript{48} See id. at 183 (describing structure of NCAA).

\textsuperscript{49} See id. at 185-87 (discussing NCAA's investigation of UNLV and its ultimate findings).

\textsuperscript{50} See id. at 199; see also Alain Lapeter, \textit{Bloom v. NCAA: A Procedural Due Process Analysis and the Need for Reform}, 12 \textit{Sports Law. J.} 255, 276-78 (2005) (discussing issue of "Who is a State Actor?").
NCAA for allegedly violating his constitutional rights by suspending him without conducting the type of hearing required to satisfy due process requirements.\textsuperscript{51}

In contrast, the Supreme Court in \textit{Brentwood Academy} departed from its decision in \textit{Tarkanian} and held that an association that regulates high school sports within a single state and to which most public schools belong was so \textit{entwined} with the state that its actions can fairly be considered state action because: (1) its governing body is made up mostly of public school officials; (2) its meetings are held during regular school hours; (3) its employees are eligible to join the state retirement system, which is funded by gate receipts from sports contests; and (4) the participation by student athletes was held to satisfy the state board’s physical education requirement.\textsuperscript{52} A detailed discussion of why these cases produced differing results will follow a preliminary analysis and review of the “state action” requirement.

\section{The Import of the Fourteenth and Fifteenth Amendments to State Action}

A reading of the Fourteenth and Fifteenth Amendments, including those provisions of the Bill of Rights that have been made applicable to the states, denotes that the language restricts only governmental action or the actions of parties acting “under color of law.” The acts of purely private individuals do not fall within the prohibitions of either amendment.\textsuperscript{53} In \textit{Lugar v. Edmondson},\textsuperscript{54} the Court commented that the “state action” requirement protects individual rights by limiting federal law while avoiding the imposition of responsibility on a State for conduct it cannot control.\textsuperscript{55}

When Congress enacted Title 42, Section 1983 of the United States Code as the statutory remedy for violations of the Constitu-

\textsuperscript{51} See \textit{Tarkanian}, 488 U.S. at 199 (reversing Nevada Supreme Court decision).


\textsuperscript{53} See \textit{The Civil Rights Cases}, 109 U.S. 3, 24-25 (1883) (discussing constitutionality of Civil Rights Act).

\textsuperscript{54} 457 U.S. 922 (1982).

\textsuperscript{55} See \textit{id.} at 936 (reasoning that “[c]areful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law”).
tion, it specified that the conduct at issue must have occurred "under color of law."56 This attaches liability only to those wrongdoers that act with the apparent authority of a State, even if they act outside of or abuse their given authority.57 In United States v. Classic,58 the Court explained that the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."59

As a result, the concept of "state action" emerged as a basis for proceeding and as the source of many important pronouncements by the United States Supreme Court. State action includes actions taken by legislative, executive, judicial, and administrative branches or agencies of both the federal and state governments and their political subdivisions, including counties, cities, and districts.60 State action also includes conduct or actions performed by government officials in their official capacities "under color of law,"61 even

56. See 42 U.S.C. § 1983 (2007) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia . . .").

57. See Monroe v. Pape, 365 U.S. 167, 172 (1961) (focusing on those "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it").

58. 313 U.S. 299 (1941).

59. Id. at 326.

60. See Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400 (1995) (holding that Amtrak, with President of United States having authority to appoint majority of its directors, is "part of the Government for purposes of the First Amendment" notwithstanding authorizing statute's statement to contrary). A government agency may include a corporation created by a federal statute "for the furtherance of governmental objectives." Id.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id. Section 1983 was originally enacted on April 20, 1871, as part of the Ku Klux Klan Act. See Tenn. v. Lane, 541 U.S. 509, 559 (2004). It was known as the Ku Klux Klan Act because one of its main purposes was to provide a civil remedy against the abuses and intimidations that were being committed by the Klan in many Southern states. See Christopher Long, Ku Klux Klan, HANDBOOK OF TEXAS ONLINE, Jun. 6, 2001, http://www.tsha.utexas.edu/handbook/online/articles/KK/vek2.html.
though their actions may be specifically forbidden by law. 62 Since its decision in Brentwood Academy, the Supreme Court has held that state action includes actions taken by ostensibly private parties, entities, or organizations but only under well-established and widely recognized criteria. 63

A. Public and Governmental Functions

In several important cases, the Court has established that certain actions or activities undertaken by private individuals or organizations that are "traditionally the exclusive prerogative of the State" may be characterized as "public" or "government" functions, and such actions may be treated as "state action," subject to the due process provisions of the Fourteenth and Fifteenth Amendments. 64 A number of these cases have evolved in the area of conducting elections, a function that is traditionally and normally an exclusive state function - courts have invalidated racial discrimination by a group or by individuals who exercise control over the selection of candidates. In 1944, the Court held that the Texas Democratic Party constitutionally could not exclude African-Americans from voting in a primary election where the party's nominee for the general election was to be chosen. 65 Likewise, in 1953, the Court ruled

62. See, e.g., Ex parte Virginia, 100 U.S. 339, 340 (1879) (holding that actions of jury commissioner who discriminated against African-Americans selecting jury panels were acts done "under color of law" and thus were state action); Screws v. United States, 325 U.S. 91, 134 (1945) (finding that actions of police officer who beats prisoner to death in effort to obtain confession, or stands by while third party beats prisoner to death, constitutes state action because officer, while acting in his official capacity, deprived prisoner of life without due process of law).
63. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 551 U.S. 288, 295-97 (2001) (holding that association under certain circumstances is so entwined with state that its actions can fairly be considered state action).
65. See Smith v. Allwright, 321 U.S. 649, 664-65 (1944) (holding that exclusion of African-Americans from voting in Texas Democratic Party primary by adopting resolution restricting party membership to white citizens was state action in violation of the Fifteenth Amendment). It is interesting to note that Thurgood Marshall was recorded as counsel for the African-American petitioners. See id. at 650. The Court's statement may be relevant to a possible appraisal of Tarkanian and Brentwood Academy.

[W]e are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. ... [T]his Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. ... This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.

Id. at 665-66 (citations omitted).
that a Texan county political group could not exclude African-Americans from a pre-primary election when the winner of that election nearly always ran unopposed in the later party primary and general election.66

A second application of the state action through private activity rule involves so-called “company towns.”67 In Marsh v. Alabama,68 a private corporation, the Gulf Shipbuilding Corporation, owned a town (Chickasaw, Alabama) that possessed “all the characteristics of any other American town.”69 The corporation pursued a trespass conviction of a distributor of religious literature, a member of the Jehovah’s Witnesses, who refused to leave the town’s business district.70 The Supreme Court held the corporation’s action to be “state action” which violated the First and Fourteenth Amendments because the town’s streets, although privately owned, were the functional equivalent of city streets, and the residents of this company town had as great an interest in receiving information as did those of an ordinary town.71


69. Id. at 502.

70. See id. at 503-04 (describing case history).

71. See id. at 507-09 (“[People living in company-owned towns], just as residents of municipalities, are free citizens of their State and country. . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.”). In other similar cases, however, the Court has not found that privately conducted activity amounted to a public or government function. But see Blum v. Yaretsky, 457 U.S. 991, 1012 (1982) (holding conduct of nursing home in deciding to discharge or transfer Medicaid patients to lower levels of care, although wholly funded and extensively regulated by state, was not state action because such function was not exclusive province of state); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (holding specialized private school, whose income was derived primarily from public sources and which was regulated by public authorities, was not acting under color of law for purposes of Section 1983 when school discharged certain employees); Hudgens v. NLRB, 424 U.S. 507, 518 (1976) (holding that large, self-contained shopping center, similar to business district or ordinary town, was “functional equivalent” of municipality because it possessed all civil attributes of town), overruling Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974) (holding regulated electric company, which was granted monopoly by state, was not engaged in state action when it terminated user’s service without notice or hearing because “the supplying of utility service is not traditionally the exclusive prerogative of the State”). In both Blum and Rendell-Baker, the Court based its decision on the following major points: (1) the decisions were not compelled or influenced by any state regulation; and (2) the relationship of the organi-
B. Significant State Involvement

In terms of analyzing both *Tarkanian* and *Brentwood Academy*, a significantly greater number of cases have involved a determination of the question of state action where the government has either required or significantly encouraged the specific acts complained of — especially in the area of racial discrimination in violation of the Equal Protection Clause.\(^{72}\) At the outset, it should be stated that the Constitution does not require the government to outlaw acts of private discrimination, and the government’s mere allowance of such conduct would not be enough to find “state action.” The Supreme Court concluded in *Burton v. Wilmington Parking Authority*\(^{73}\) that the Fourteenth Amendment “‘erects no shield against merely private conduct, however discriminatory or wrongful’ . . . unless to some significant extent the State in any of its manifestations has been found to have become involved in it.”\(^{74}\)

To bring a constitutional claim, the state must either “compel” or “significantly participate” in the private conduct. As might be expected, whether state action may be found requires a case-by-case determination, which will often turn on the particular facts brought before a court.\(^{75}\) As the test applied in *Burton* indicates, “the act-


\(^{74}\) *Id.* at 721 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

\(^{75}\) *See id.* at 722 (discussing attention to facts needed to determine existence of state action). In *Burton* the Court noted:

"Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."
tion inhibited by the first section (Equal Protection Clause) of the Fourteenth Amendment is only such action as may fairly be said to be that of the States'" and includes "'state participation through any arrangement, management, funds or property.'" 

Several practical examples illustrate the requirement of "significant state involvement." In *Peterson v. City of Greenville*, a city ordinance required the racial segregation of public restaurants. Ten African-Americans remained seated at the lunch counter of a store after "the manager announced that the 'lunch counter was being closed and would everyone leave' the area." The petitioners were arrested and subsequently convicted in the Recorder's Court of the City of Greenville, South Carolina for violating the state trespass statute. The Court concluded that "[w]hen a state agency passes a law compelling persons to discriminate against other persons because of race," and then when a state's criminal processes are used to enforce the mandated discrimination, a violation of the Fourteenth Amendment occurs. This violation arises even though private conduct abridging individual rights "does no violence to the equal protection clause unless to some significant extent the state . . . has been found to have become involved in it." 

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Id. (quoting Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

In *Reitman v. Mulkey*, the Court noted that its task would not be an easy one. See 387 U.S. 369, 378 (1967). "This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations." Id. at 378 (quoting *Burton*, 365 U.S. at 722). The Court gave great deference to the rationale put forth by the California Supreme Court and concluded:

Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26 [of the California State Constitution], and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court.

Id. at 378-79. For a further discussion of *Reitman*, see infra notes 102-06 and accompanying text.

77. Id. at 722 (quoting *Cooper v. Aaron*, 358 U.S. 1, 4 (1958)).
78. 373 U.S. 244 (1963).
79. See id. at 246-47 (concerning Greenville segregation statute).
80. Id. at 246.
81. See id. 245-46.
82. Id. at 248.
83. Id. at 247 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)). The same result was obtained in *Lombard v. Louisiana*, where the enforcement of segregation at refreshment counters in New Orleans was accomplished on the basis of an official policy announced by public officials and not on the basis of any state or local ordinance. See 373 U.S. 267, 268-69 (1963). The petitioners had been charged and convicted of criminal mischief in a Louisiana state court. See id. at 269.
A second example of "significant state involvement" occurs where the government administers a trust document that, by its terms, requires discrimination based on race.\textsuperscript{84} The Court concluded that where a will named a city as trustee of a school (Girard College), the board operating the school was established by an act of the state legislature.\textsuperscript{85} As an agent of the state, the Board transformed its actions into state action, notwithstanding the fact that the underlying documents were a will and a private trust document.\textsuperscript{86}

A third application of "significant state involvement" involves joint action between government officials and private persons.\textsuperscript{87} The context of the dispute was a garnishment and prejudgment attachment procedure.\textsuperscript{88} Justice White's opinion went beyond the particular facts of the dispute and rejected the notion that a constitutional deprivation of due process could only apply where "there is a usurpation or corruption of official power by the private litigant or a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree."\textsuperscript{89} Instead, the Court ruled that constitutional requirements of due process under the Fourteenth Amendment apply whenever state officers act jointly with a private creditor to secure property where the state statute authorizing such an action is "procedurally defective."\textsuperscript{90} Thus, the action of the private party is conduct that is also an action "under color of law" and would support a suit under Section 1983.\textsuperscript{91}

A fourth application of the "state involvement principle" involves the potential judicial enforcement of a private racially restrictive covenant. In \textit{Shelley v. Kraemer},\textsuperscript{92} the Court considered the implications of a court being called upon to enforce a racially restrictive covenant found in the deeds of certain homeowners.\textsuperscript{93}

85. See \textit{id}. (noting Girard College's Board of Trustees was state agency because it was run by Philadelphia).
86. See \textit{id}. (explaining how Board's actions violated Equal Protection).
88. See \textit{id}. (stating issue of case).
89. \textit{Lugar}, 457 U.S. at 926.
90. \textit{Id}. at 941.
91. \textit{Id}. (concerning joint action between private litigant and government).
92. 334 U.S. 1 (1948).
93. See \textit{id}. at 4-5 (discussing issue of case). The covenant provided: [T]he said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all}
The plaintiff sought to enjoin an African-American, who had purchased a piece of property from a white owner, from taking possession and sought damages against the white seller through merit of the restrictive covenants.\footnote{94} The Court conceded that the Fourteenth Amendment is directed against state action only and does not reach private conduct — no matter how discriminatory.\footnote{95} The Court, however, concluded that "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property."\footnote{96} Next, the Court concluded that "discriminations imposed by the state courts" that "den[y] equal [protection] of property rights to a designated class of citizens of specified race and ancestry" cannot "be justified as proper exertions of state police power."\footnote{97} Thus, the Court held that judicial action, even for the enforcement of a private restrictive covenant against certain races, is state action and falls within the scope of the Amendment's "field of operation."\footnote{98}

The Court reaches a similar result where the government \textit{approves of private conduct}. In \textit{Public Utilities Commission v. Pollak},\footnote{99} the Supreme Court held that when a state regulatory agency approves a practice of a regulated business, the practice may be considered as state action.\footnote{100} The Court noted with approval, "[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself."\footnote{101}

\footnote{94} See \textit{id.} at 6 (summarizing events leading to litigation).
\footnote{95} See \textit{id.} at 13 (defining Fourteenth Amendment as applying to state action only).
\footnote{96} \textit{Id.} at 10.
\footnote{97} \textit{Shelley v. Kraemer}, 334 U.S. 1, 21 (1948).
\footnote{98} See \textit{id.} at 22-23 (defining judicial action as state action for purpose of Fourteenth Amendment).
\footnote{99} 343 U.S. 451 (1952).
\footnote{100} See \textit{id.} at 462-63 (determining that there was sufficiently close relation between radio service and government to consider restrictions placed on government).
The Supreme Court reached a similar conclusion in *Reitman v. Mulkey*, where a state constitutional amendment both repealed existing anti-discrimination in housing statutes and further prohibited the legislature from regulating the sale or rental of residential property in the future. As a result, a private apartment owner refused to rent to a potential African-American tenant. The majority of the Supreme Court struck down the constitutional amendment on the basis of the Fourteenth Amendment because the state constitutional amendment did more than just repeal anti-discrimination laws — its purpose was seen as encouraging racial discrimination. The Court noted, "Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations."

Not all members of the Supreme Court agreed with the decision in *Reitman*. In fact, Justice Harlan penned a vigorous dissent
that frames the debate on the question of government/state approval of private conduct quite well. The words of Justice Harlan are prophetic and may portend our analysis of both Tarkanian and Brentwood Academy. Justice Harlan wrote, "A moment of thought will reveal the far-reaching possibilities of the Court's new doctrine, which I am sure the Court does not intend."108 Justice Harlan notes that "[e]very act of private discrimination is either forbidden by state law or permitted by it" in some way.109 He adds:

There can be little doubt that such permissiveness—whether by express constitutional or statutory provision, or implicit in the common law—to some extent 'encourages' those who wish to discriminate to do so. Under this theory 'state action' in the form of laws that do nothing more than passively permit private discrimination could be said to tinge all private discrimination with the taint of unconstitutional state encouragement.110

Justice Harlan argued that this type of alleged state involvement, "simply evincing a refusal to involve itself at all," is very different from cases where the Supreme Court "found active involvement of state agencies and officials in specific acts of discrimination."111 Justice Harlan also noted that people acting to approve a constitutional amendment through an electoral process is "also quite different from cases in which a state enactment could be said to have the obvious purpose of fostering discrimination."112 Justice Harlan spoke forcefully for the view that "the state action required to bring the Fourteenth Amendment into operation must be affirmative and purposeful, actively fostering discrimination."113 He concluded, "Only in such a case is ostensibly 'private' action more properly labeled 'official.' I do not believe that the mere enactment of § 26, on the showing made here, falls within this class of cases," and Justice Harlan warns future jurists, "I think the Court has taken to it-

108. Id. at 394 (Harlan, J., dissenting).
109. Id. (emphasis added).
110. Id. at 394-95 (Harlan, J., dissenting) (emphasis added).
111. Id. at 395 (Harlan, J., dissenting) (articulating difference between encouraging action and not preventing it).
113. Id.
self powers and responsibilities left elsewhere by the Constitution."114

IV. TARKANIAN and BRENWOOD ACADEMY REVISITED:
A Detailed Look

A. Tarkanian — No State Action, No Remedy Under the Fourteenth Amendment

UNLV, a state university, belonged to an unincorporated national association of public and private universities and colleges (the NCAA), which regulated its members’ student-athletics activities.115 “One of the NCAA’s fundamental policies ‘is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between college athletics and professional sports.’"116

A standing committee of the NCAA (The Committee on Infractions) investigated a series of widely reported allegations of improper athletic recruiting practices by UNLV. Subsequently, the NCAA issued a report that concluded that there had been numerous violations of the association’s rules, including several violations by the university’s successful head basketball coach, Jerry Tarkanian.117 A NCAA report detailed thirty-eight NCAA rule violations by UNLV personnel, with ten violations personally involving Coach Tarkanian.118 The NCAA proposed a series of sanctions against the university, including a two-year probation period.119 The NCAA also requested the university to “show cause” as to why

114. Id. at 395-96 (Harlan, J., dissenting).
115. See generally W. Burlette Carter, The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931, 8 VAND. J. ENT. & TECH. L. 211 (2006) (providing NCAA’s historical background). There is no question that a state university like UNLV is a state actor. When UNLV decided to impose a serious disciplinary sanction upon one of its tenured employees, it was required to comply with the terms of the Fourteenth Amendment’s Due Process Clause. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). Thus, when UNLV notified Tarkanian that it would separate him from all relations with the university’s basketball program, UNLV clearly acted under color of state law within the meaning of Section 1983.
117. See id. at 185 (setting out facts which led to litigation).
118. See id. at 181 (motivating UNLV to take action against Tarkanian).
119. See id. (describing actions taken by NGCA). Among the sanctions that the Committee may impose “against an institution” are:
(1) Reprimand and censure;
(2) Probation for one year;
(3) Probation for more than one year;
additional penalties should not to be imposed if the university failed to remove the coach completely from the university’s intercollegiate athletic program during the probation period. The council of the association reviewed and approved the committee’s investigation and hearing process and adopted the committee’s recommendations; the president of the university then ordered the coach to be suspended for the probation period. Afterwards, during a university administrative hearing, the hearing officer doubted the sufficiency of the evidence and the credibility of various witnesses who had testified against Coach Tarkanian. The hearing officer, however, concluded that, “given the terms of the university’s relationship with the NCAA,” the university could not substitute its own judgment as to the credibility of the witnesses. The coach, facing demotion and a drastic cut in pay, brought suit in a Nevada state court against the university and a number of its officers and alleged that, in violation of Section 1983, he had been deprived of various rights, including the right to due process under the Fourteenth Amendment. Eventually, the NCAA was joined

(4) Ineligibility for one or more National Collegiate Championship events;
(5) Ineligibility for invitational and postseason meets and tournaments;
(6) Ineligibility for any television programs subject to the Association’s control or administration;
(7) Ineligibility of the member to vote or its personnel to serve on committees of the Association, or both;
(8) Prohibition against an intercollegiate sports team or teams participating against outside competition for a specified period;
(9) Prohibition against the recruitment of prospective student-athletes for a sport or sports for a specified period . . . .

Id. at 185 n.6.

120. See Tarkanian, 488 U.S. at 181 (detailing NCAA request to UNLV).
121. See id. at 187 (detailing final events leading to Tarkanian’s suspension).
122. See id. at 186-87 (mentioning doubts about witness’s testimony).
123. Id. Actually, the hearing office noted that UNLV had three options:
   • Reject the sanction requiring us to disassociate Coach Tarkanian from the athletic program and take the risk of still heavier sanctions, e.g., possible extra years of probation.
   • Recognize the University’s delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position—though tenured and without adequate notice—even while believing that the NCAA was wrong.
   • Pull out of the NCAA completely on the grounds that you will not execute what you hold to be their unjust judgments.

Id. at 187.

124. See id. at 181 n.1 (detailing Tarkanian’s salary contract). The trial court found that Tarkanian, as head basketball coach:

is annually paid (in lieu of his salary as a professor) $125,000, plus 10% of the net proceeds received by UNLV for participation in NCAA-authorized championship games, plus fees from basketball camps and clinics, product endorsements, and income realized from writing a newspaper col-
as a defendant, and the Nevada trial court ruled against both UNLV and the NCAA. On appeal, the Supreme Court of Nevada generally affirmed the trial court's grant of injunctive relief against the NCAA but narrowed the scope of the relief sought. The Nevada State Supreme Court expressed the view that the NCAA's regulatory activity constituted state action under the due process clause of the Fourteenth Amendment, and further, as a state actor, the NCAA acts under color of state law as required in Section 1983. The Nevada court also determined that the fact-finding procedures used by the association violated the due process rights of Coach Tarkanian under the Fourteenth Amendment.

The holding of the Nevada Supreme Court that the NCAA is a state actor was based on several factors. First, the court assumed that it was reviewing “UNLV’s and the NCAA’s imposition of penalties against Tarkanian,” rather than the NCAA’s proposed sanctions against UNLV if it failed to discipline Tarkanian. Second, the court stated that it regarded the NCAA’s regulatory activities as state action because “many NCAA member institutions were either public or government supported.” Third, the court stated that the right to discipline a public employee was “traditionally the exclusive prerogative of the state” and that UNLV could not escape its responsibility for disciplinary action by delegating its duty to a private entity. The court also cited Lugar, where the Court held that the deprivation of a federal right may be attributed to the State if it

unn, speaking on a radio program entitled ‘THE JERRY TARKANIAN SHOW,’ and appearing on a television program bearing the same name.

That compensation was ‘entirely contingent on [Tarkanian’s] continued status as the Head Basketball Coach at UNLV.’ As a tenured professor alone, he would have earned about $53,000 a year, the court found.

Id.

125. See Tarkanian, 488 U.S. at 187-89 (discussing decisions by Nevada trial court).

126. See id. at 189 (narrowing scope of trial court’s ruling to prohibit enforcement of penalties imposed on Tarkanian).

127. See id. at 190 (reasoning that government supposedly justified seeing parties as state actors). The Court continues by explaining that state action must fall under the purview of Section 1983. See id. at 191.

128. See Tarkanian v. NCAA, 741 P.2d 1345, 1350 (Nev. 1987) (disagreeing with NCAA claim that process used did not violate due process).

129. Id. at 1347 (addressing imposition of penalties).

130. Id. (citing Rivas Tenorio v. Liga Athletica Interuniversitaria, 554 F.2d 492, 495 (1st Cir. 1977)) (appealing to previous decisions).

131. Id. at 1348 (articulating court’s argument that UNLV could not avoid responsibility).
resulted from a *state-created rule* and the party charged with the deprivation can fairly be considered a state actor.\footnote{132}{See Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (establishing steps to determine when deprivation of federal rights is state action).}

Applying *Lugar*, the Nevada Supreme Court held that the NCAA’s activities constituted state action.\footnote{133}{See Tarkanian, 741 P.2d at 1349 (concluding there was state action).} In reviewing the holding of the Nevada Supreme Court, the Supreme Court focused on “whether UNLV’s actions in compliance with the NCAA rules and recommendations turned the NCAA’s conduct into state action.”\footnote{134}{The Supreme Court noted that the NCAA would be liable if the NCAA’s involvement in Coach Tarkanian’s suspension (1) constituted state action prohibited by the Fourteenth Amendment’s Due Process Clause and (2) was performed under color of state law within the meaning of Section 1983.} The Supreme Court reversed the holding that the NCAA’s conduct did not constitute a state action.\footnote{135}{The key points of the Supreme Court’s decision are summarized as follows:

- UNLV was a member of the NCAA and enforced the Association’s rules.\footnote{136}{NCAA v. Tarkanian, 488 U.S. 179, 193 (1988) (reexamining issue and analysis necessary to determine state action).} As a member of the Association, UNLV impacted the formulation of various NCAA policies — especially relating to aspects of its premier bas-


133. See Tarkanian, 741 P.2d at 1349 (concluding there was state action). The court states:

The first prong [of Lugar] is met because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.

Id.


135. See id. at 181-82 (explaining criteria necessary for NCAA to be found liable).

136. See id. at 182 (reversing decision of Nevada Supreme Court).

137. See id. at 192-93 (evaluating relationship between UNLV and NCAA); see also NCAA, http://www.ncaa.org (last visited Feb. 25, 2007) (describing membership of NCAA).

The more than 1,250 members of the NCAA are divided into five categories: active colleges and universities, provisional colleges and universities, conferences, affiliated organizations, and corresponding members. The 1,024 active member schools self-determine which of three divisions they will be classified in and must annually meet membership criteria for that division. The active member institutions and voting conferences are the ultimate voice in all Association decisions.

NCAA, http://www.ncaa.org.}
basketball program. Similarly, other NCAA members influenced those policies, but they did not act under the color of Nevada law because the vast majority of NCAA members are located in States other than Nevada. The Court determined that the collective membership characteristic created an association that is independent of any particular State.

- Through implementation of the NCAA’s rules, UNLV may have converted the NCAA rules into state rules and the NCAA into a state actor. As a publicly funded state-sponsored university, UNLV engaged in state action when it embraced the NCAA’s rules to govern its own behavior regardless of whether or not UNLV participated in the creation of those rules. UNLV had the right to remove itself from the NCAA at any time and institute its own standards, or it could remain in the NCAA and try to make changes to rules it considered “harsh, unfair, or unwieldy.”

- Coach Tarkanian argued that the NCAA’s actions, including the “investigation, enforcement proceedings, and consequent recommendations,” represented state action because it was a delegation of power by UNLV. A state may assign authority to a private party to create a

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138. See Tarkanian, 488 U.S. at 193 (explaining member’s influence on NCAA policies).

139. See id. (distinguishing UNLV from other private and public member institutions).

140. See id. (reasoning that NCAA policy is not Nevada law); see also Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988) (“Whatever de facto authority the [private standard-setting] Association enjoys, no official authority has been conferred on it by any government . . . .”).


142. See id. (holding there would be state action regardless of its participation in creating rules).

143. Id. at 194-95. The Court determines:

Neither UNLV’s decision to adopt the NCAA’s standards established through its legislation nor its role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance for its athletic department or for its student athletes.

Id. at 195.

144. Id. at 195. “UNLV, as an NCAA member, subscribed to the statement in the Association’s bylaws that NCAA ‘enforcement procedures are an essential part of the intercollegiate athletic program of each member institution.’” Id.
state actor.145 UNLV did not give authority to the NCAA to take specific action against any university employee, and the NCAA could only enforce procedures through sanctions on UNLV.146 Any action taken against Coach Tarkanian was that of UNLV — not the NCAA.

- Coach Tarkanian contended that UNLV and the NCAA were "joint participants" in state action.147 Yet the interests of UNLV and the NCAA were not similar; therefore, they were not joint participants.148 Rather, they disagreed throughout the investigation and disciplinary process, meaning the NCAA may not be deemed a state actor on the grounds of joint participation.149

- The NCAA did not possess any governmental powers to conduct its investigation.150 The NCAA's authority was limited to imposing sanctions against UNLV, including expelling the university from membership in the NCAA.151 The NCAA did not have the ability to directly discipline Tarkanian or any other state university employee.152 The NCAA did not order Tarkanian's suspension but merely requested it.153

- Coach Tarkanian asserted that the NCAA had "usurped a traditional, essential state function" through the implemen-

145. See id. (noting State can delegate authority to establish state actor); see also West v. Atkins, 487 U.S. 42, 108 (1988) (holding that private physician who had contracted with state prison to attend to inmates' medical needs was state actor).

146. See Tarkanian, 488 U.S. at 195-96 (asserting no state action because no delegation of power).

147. See id. at 196 (relying on idea that state and private parties' interests intersect); see also Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding lease between private restaurant and publicly owned parking structure constituted joint participants in state action).

148. See Tarkanian, 488 U.S. at 196 (disputing joint participant argument).

149. See id. (noting disagreement in process negated joint participant argument).

150. See id. at 197 (explaining NCAA's limited governmental powers). The NCAA did not have the authority "to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual." Id.

151. See id. (describing NCAA's power to sanction members).

152. See id. (noting limits on NCAA's power to discipline member's employees).

153. See Tarkanian, 488 U.S. at 197 (explaining NCAA did not directly punish university employee). The NCAA requested UNLV "to show cause why the NCAA should not impose additional penalties if UNLV declines to suspend Tarkanian." Id. at 198. UNLV officials confirmed that the university was given the option to continue to employ Tarkanian and risk additional sanctions or expulsion or voluntarily withdrawal from the NCAA. See id.
tation of its rules.\textsuperscript{154} The Supreme Court reasoned that the function may be considered "critical" but not an exclusive, state function.\textsuperscript{155} Tarkanian's argument was erroneous because it ignored the fact that the NCAA, through its own rules, was prohibited from directly disciplining Tarkanian or any other coach.\textsuperscript{156} Moreover, Tarkanian's suspension was only one of many recommendations made by the NCAA for the UNLV basketball program to comply with.\textsuperscript{157}

- Coach Tarkanian insisted that UNLV had no choice but to submit to the NCAA's demands since the NCAA was so powerful.\textsuperscript{158} The Court was not swayed by this argument.\textsuperscript{159} The Court concluded that UNLV was acting under NCAA policies, not under color of Nevada law.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{154} Id. (announcing reason behind Tarkanian's belief that NCAA was state actor).
\item \textsuperscript{155} See id. (holding not exclusive state function). Coach Tarkanian supported his argument with the contention that the NCAA became a state actor when it took control of the State's exclusive power to discipline its employees. See id. Tarkanian contends:
\begin{quote}
[A]s state employees connected with collegiate athletics, the NCAA requires that its standards, procedures and determinations become the State's standards, procedures and determinations for disciplining state employees. . . . The State is obligated to impose NCAA standards, procedures and determinations making the NCAA a joint participant in the State's suspension of Tarkanian.
\end{quote}
Id. (quoting Brief for Respondent at 34-35); see also San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 545 (1987) ("Neither the conduct nor the coordination of amateur sports has been a traditional government function.").
\item \textsuperscript{156} See Tarkanian, 488 U.S. at 198 (repudiating Tarkanian's usurpation argument).
\item \textsuperscript{157} See id. (noting more than one NCAA compliance request).
\item \textsuperscript{158} See id. (arguing UNLV was forced to comply).
\item \textsuperscript{159} See id. (disagreeing with Tarkanian's argument). The Court stated:
We are not at all sure this is true, but even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law.
\item \textsuperscript{159} Id. at 199. It was evident that UNLV wanted to remain a powerhouse among the nation's college basketball teams, which would not be possible without membership in the NCAA and eligibility for the NCAA basketball tournament. See id. "But that UNLV's options were unpalatable does not mean that they were nonexistent." Id.; see also Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-52 (1974) (noting state's assignment of monopoly status does not create state action).
\item \textsuperscript{160} See Tarkanian, 488 U.S. at 199 (holding not state action). The Court focused on whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State." Id. (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)). The Court concluded:
It would be ironic indeed to conclude that the NCAA's imposition of sanctions against UNLV—sanctions that UNLV and its counsel, including
As a footnote to the determination of the United States Supreme Court, in April of 1998, rather than defend itself against charges of trying to force Coach Tarkanian out of college basketball, the NCAA settled with the veteran coach for $2.5 million.¹⁶¹ In response, the NCAA said the settlement was not an admission that it had made mistakes in sanctioning Tarkanian.¹⁶² Tarkanian returned to coaching in the NCAA in 1996.¹⁶³

Before taking a detailed look at the views of the four dissenting justices who would have found state action on the part of the NCAA, and whose views seemingly prevailed in Brentwood Academy, let's shift to the discussion of Brentwood Academy.

B. Brentwood Academy — State Action, Constitutional Remedy

1. Facts and Procedure

The Tennessee Secondary School Athletic Association (TSSAA) was created to regulate public and private high school in-

the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings—is fairly attributable to the State of Nevada. It would have been more appropriate to conclude that UNLV conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law.

Id.

¹⁶¹ See Richard Sandomir, Maverick Coach Wins Battle and Collects from N.C.A.A., N.Y. TIMES, Apr. 3, 1998, at A1 (detailing settlement agreement between Tarkanian and NCAA). The dispute between Tarkanian and the NCAA had lasted twenty-six years before it was settled the month before the lawsuit was set to go to trial in Las Vegas, where he coached for nineteen seasons. See id. Reacting to the settlement, Tarkanian said, "Nothing can make up for what they have done, but it helps to clear the air. . . . But they couldn't pay me enough to make up for the agony they caused me and my family." Id.

¹⁶² See id. (refuting admission of improper sanctions). The NCAA was unsuccessful in getting a change of venue from Las Vegas, where Tarkanian was still well-known for having coached nineteen seasons. See id. The denial of request for change of venue influenced the decision to settle with Tarkanian. See id.

¹⁶³ See Dick Weiss, Fresno State Swims with the Shark Tarkanian Regains Old Fire, but Still Sour Over UNLV Years, N.Y. DAILY NEWS, Feb. 25, 2001, at 62 (reporting Tarkanian's career developments post-litigation with NCAA). Tarkanian returned to college coaching at Fresno State in 1996. See id.; see also Tarkanian Retires from Coaching, HOUS. CHRON., Mar. 16, 2002, at 11 (reporting end to Tarkanian's long coaching career). Tarkanian, with a 778-202 record, ended his NCAA coaching career as the coach with the fourth most wins in college basketball history. Id.; see also John Branch, Ultimately, Tark's Era Leaves Only Emptiness, FRESNO BEE, May 29, 2003, at D1 (reporting Fresno State basketball scandal). The NCAA investigated fraudulent academic activity on the part of three basketball players on Tarkanian's team. See id. Thirty-four Fresno State victories will be discounted because the players were ineligible to play due to the academic fraud. See id.
interscholastic athletics in Tennessee. Membership to the TSSAA was not mandatory, but the majority of the state's public and private high schools were members. The TSSAA is comprised of two bodies: the legislative council and the board of control. Tennesse's State Board of Education has recognized TSSAA as regulator of interscholastic athletics in the state's public schools. The State Board deleted the rule which specifically authorized the TSSAA to regulate, yet it created a statement reaffirming the Association's role as regulator.

In 1997, the TSSAA's board of control determined that Brentwood Academy, a private parochial high school belonging to the TSSAA, violated a recruiting rule. In response to the violation,

165. See id. (noting 290 public high schools and 55 private schools were members). Public high schools located in Tennessee constituted 84% of the TSSAA's members. See id.
166. See id. (outlining structure of Association). The legislative council is responsible for rulemaking while the board of control handles all administrative matters. See id. Each committee consists of nine elected members, ranging from high school principals, assistant principals, and superintendents of member schools. See id. The majority of meetings occur during regular school hours. See id. Members do not receive salary from the State but are compensated with the opportunity to participate in the State's public retirement system for its employees. See id. The Association is only partially funded by members' dues, with the majority of revenue coming from ticket sales at member teams' football and basketball tournaments. See id.
167. See id. at 292 (acknowledging TSSAA's role in regulating). The State Board of Education recognized TSSAA's role "in providing standards, rules and regulations for interscholastic competition in public schools of Tennessee." Id. A new amendment was adopted in 1995 which stated:


168. See Brentwood Acad., 531 U.S. at 292-93 (revising rule which named TSSAA as regulator). The State Board revised the rule to acknowledge "the value of participation in interscholastic athletics and the role of [the Association] in coordinating interscholastic athletic competition, while authoriz[ing] the public schools of the state to voluntarily maintain membership in [the Association]." Id.
169. See id. at 293 (noting facts of regulatory proceeding). The Association concluded that Brentwood engaged in "undue influence in recruiting student athletes, when it wrote to incoming students and their parents about spring football practice." Id.; see also Brentwood Acad., 13 F. Supp. 2d at 673-74 (detailing TSSAA's Recruiting Rule).

The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person con-
the TSSAA (1) placed the school's athletic program on probation for four years, (2) prohibited the school's football and boys' basketball teams from competing in state playoffs for two years, and (3) sanctioned the school with a $3,000 fine. The school argued that enforcing the rule and penalties constituted "state action" and violated the Fourteenth Amendment. The District Court ruled that the TSSAA was a "state actor" under Section 1983 and the Fourteenth Amendment. The United States Court of Appeals for the Sixth Circuit reversed the District Court's judgment and held that the TSSAA was not a state actor because the TSSAA (1) had no symbiotic relationship with the state, (2) was not engaging in a traditional and exclusive public function, and (3) was not responding to state compulsion.

2. The Supreme Court's Rationale – Distinguishing its Tarkanian Decision

On certiorari, the United States Supreme Court held that the TSSAA had engaged in state action for purposes of the Fourteenth Amendment when it enforced the "no recruiting" rule against the member school. The Supreme Court based its decision on two

Q. How is undue influence interpreted in the recruiting rule?
A. A person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record.

Q. What is the penalty for violation of the recruiting rule?
A. Violation of the recruiting rule shall cause the student to be ineligible at the school in violation, and a penalty shall be placed against the school.

Brentwood Acad., 13 F. Supp. 2d at 673-74.

170. See Brentwood Acad., 531 U.S. at 293 (outlining punishment infliction on Brentwood Academy for recruiting violations). The penalties were affirmed by the voting members of the board of control and legislative council, which were both comprised of public school administrators. See id.

171. See id. (claiming state action). Brentwood Academy sued the TSSAA for a violation of § 1983. See id.

172. See id. (explaining procedural history of case). The District Court entered summary judgment for the school and prohibited the TSSAA from enforcing the rule. See id. The District Court concluded that the TSSAA was a state actor because the "State had delegated authority over high school athletics to the Association, characterized the relationship between the Association and its public school members as symbiotic, and emphasized the predominantly public character of the Association's membership and leadership." Id.

173. See Brentwood Acad., 531 U.S. at 294 (noting reasons Court did not find state action). Because there was no strict test for the Court to apply in determining whether it was a state action, the court applied criteria stemming from precedent. See id.

174. See id. at 291 (holding TSSAA's actions constituted state action).
major factors: (1) the “pervasive entwinement” of state school officials in the TSSAA’s structure and (2) the fact that it was reasonable to apply constitutional standards to the TSSAA.\footnote{175 See id. at 298 (stating basis for state action). The Court applied the “necessarily fact-bound” inquiry to conclude it was a state action. Id. (quoting Lugar, 457 U.S. at 939). The private nature of the TSSAA was overshadowed by the involvement of public institutions and public officials. See id.}

The question becomes what was the major difference or distinction between Tarkanian and Brentwood Academy. Can any distinction be attributed to a unique interpretation of facts, a change in the composition of the Court, or even a shift in the viewpoint of one of the senior justices, Justice Stevens?\footnote{176 See id. at 290 (framing issue for analysis). The Court acknowledged that a number of other courts have recognized statewide athletic associations as state actors. Id. at 295; see also, e.g., Griffin High Sch. v. Ill. High Sch. Ass’n., 822 F.2d 671, 674 (7th Cir. 1987) (holding “overwhelmingly public character of the IHSA membership is sufficient to confer state action for the purposes of § 1983”); Clark v. Ariz. Interscholastic Ass’n., 695 F.2d 1126, 1128 (9th Cir. 1982) (1983) (holding athletic association’s regulations met state action requirements); In re United States ex rel. Miss. State High Sch. Activities Ass’n., 682 F.2d 147, 151 (8th Cir. 1982) (holding rules governed state action because association consisted mainly of public schools); Moreland v. Western Pa. Interscholastic Athletic League, 572 F.2d 121, 125 (3d Cir. 1978) (conceding state action); La. High Sch. Athletic Ass’n. v. St. Augustine High Sch., 396 F.2d 224, 227-28 (5th Cir. 1968) (holding private high school was state actor); Okla. High Sch. Athletic Ass’n. v. Bray, 321 F.2d 269, 272-73 (10th Cir. 1963) (holding association comprised of public schools was state actor); Ind. High Sch. Athletic Ass’n. v. Carberg, 694 N.E.2d 222, 229 (Ind. 1997) (holding state action for decision regarding student-athletes); Miss. High Sch. Activities Ass’n v. Coleman, 631 So. 2d 768, 774-75 (Miss. 1994) (holding rule requiring students to reside in district in order to participate in interscholastic athletics was form of state action); Kleez v. R.I. Interscholastic League, Inc., 612 A.2d 734, 736 (R.I. 1992) (finding interscholastic league’s rules are form of state action).}

The Court analyzed whether the TSSAA, as regulator of public and private school interscholastic athletics, was a state actor when it enforced a recruiting violation against a member school.\footnote{177 See Brentwood Acad., 531 U.S. at 295 (examining line between state action and Fourteenth Amendment). The Court reasons: If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed. Id.}

The Court recognized the essential dilemma found in many Fourteenth Amendment cases.\footnote{178 Id. (explaining attempts to “plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct”). The Court continues: The judicial obligation is not only to ‘preserve an area of individual freedom by limiting the reach of federal law’ and avoid the imposition of responsibility on a State for conduct it could not control, but also to as-}
focused on the "close nexus between the State and challenged action [to determine if the private action] may be fairly treated as that of the State itself."\textsuperscript{179}

Justice Souter concentrated on what he believed was the most important consideration in imposing the due process obligations of the Fourteenth Amendment. "Thus, we say that state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"\textsuperscript{180}

The Court identified reasons to fairly attribute activity to the government.\textsuperscript{181} Previously, the Court found the activity of a private actor to be a state action in many circumstances.\textsuperscript{182} The Court has treated a nominally private entity as a state actor.\textsuperscript{183} Thus, the application of the "entwinement doctrine" becomes not only the answer to the State Athletic Association's arguments offered to persuade the Court that the facts would not support a finding of state action under various criteria applied in other cases; the application of the "entwinement doctrine" is also a discrete insight into the possible further jurisprudence of the United States Supreme Court — whether or not this expansion of due process rights continues to be supported in the future.

To distinguish Brentwood Academy from Tarkanian, Justice Souter reflected on the Tarkanian decision and noted that the NCAA's policies "were shaped not by the University of Nevada alone, but by

\begin{itemize}
\item sure that constitutional standards are invoked 'when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.'
\item Id. (quoting Tarkanian, 488 U.S. at 191 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982))).
\item 180. Id. ("If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes."
\item 181. See id. at 295-96 (setting forth comprehensive factors for state action).
\item 182. See id. at 296 (detailing previous state action holdings); see also Blum, 457 U.S. at 1004 (1982) (finding state action resulting from State's exercise of "coercive power" or significant encouragement); Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982) (finding state action when private actor acts as "willful participant in joint activity with the State or its agents").
\item 183. See Brentwood Acad., 531 U.S. at 296 (characterizing private entities as state actors); see also West v. Atkins, 487 U.S. 42, 56 (1988) (finding state action when it has been "delegated a function of the state"); Evans v. Newton, 382 U.S. 296, 299 (1966) (holding state action when "entwined with governmental policies"); Pa. v. Bd. of Dirs. of City Trusts of Phila., 353 U.S. 290, 231 (1957) (holding state actor when "controlled by an agency of the State").
\end{itemize}
several hundred member institutions, most of them having no connection with Nevada, and exhibiting no color of Nevada law." Justice Souter conceded that because it would be difficult to see the NCAA, "not as a collective membership, but as surrogate for the one State, we held the organization's connection with Nevada too insubstantial to ground a state action claim." The situation, however, was quite different in Brentwood Academy. Justice Souter wrote:

To complement the entwinement of public school officials with the Association from the bottom up, the State of Tennessee has provided for entwinement from top down. State Board members are assigned ex officio to serve as members of the board of control and legislative council, and the Association's ministerial employees are treated as state employees to the extent of being eligible for membership in the state retirement system. . . .

For the same reason, it avails the Association nothing to stress that the State neither coerced nor encouraged the actions complained of. "Coercion" and "encouragement" are like "entwinement" in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead. Facts that address any of these criteria are significant, but no one criterion must necessarily be applied. When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.

The Court rejected the other arguments made by the TSSAA as being "beside the point, simply because the facts justify a conclusion of state action under the criterion of entwinement, a conclusion in no sense unsettled merely because other criteria of state action may not be satisfied by the same facts."

185. Id. (citing Tarkanian, 488 U.S. at 193, 196).
186. Id. at 300-03 (citations omitted).
187. Id. at 302. The TSSAA placed great stress on the "public function test," as found in Rendell-Baker v. Kohn. See generally Rendell-Baker, 457 U.S. 830 (1982). The Court explained: There, an apparently private school provided education for students whose special needs made it difficult for them to finish high school. The record, however, failed to show any tradition of providing public special
V. THE DISSENTING JUSTICES IN BOTH TARKANIAN AND BRENTWOOD ACADEMY: AN INSIGHT INTO THE FUTURE?

The dissenting opinions in both Tarkanian and Brentwood Academy may provide insight into what a future United States Supreme Court might do if the core issue presented in both cases comes again before the Court. Justice White, himself an accomplished collegiate athlete, wrote the dissenting opinion in Tarkanian. Justices Brennan, Marshall, and O'Connor joined him. Recall, however, that Justice Stevens was in the majority in both cases — Justices White, Brennan, and Marshall are long gone from the Court and Justice O'Connor and the late Chief Justice, William Rehnquist, have been replaced by Chief Justice John Roberts and Associate Justice Samuel Alito. Justice Stevens, who may have cast the decisive fifth-vote in both cases, remains.

A. The Tarkanian Dissent

Both the majority and the dissent agreed that UNLV was a state actor and that Tarkanian's suspension was state action. The dissent, however, framed the issues as "whether the NCAA acted jointly with UNLV in suspending Tarkanian and thereby also be-

education to students unable to cope with a regular school, who had historically been cared for (or ignored) according to private choice. It was true that various public school districts had adopted the practice of referring students to the school and paying their tuition, and no one disputed that providing the instruction aimed at a proper public objective and conferred a public benefit. But we held that the performance of such a public function did not permit a finding of state action on the part of the school unless the function performed was exclusively and traditionally public, as it was not in that case. The Association argues that application of the public function criterion would produce the same result here, and we will assume, arguendo, that it would. But this case does not turn on a public function test, any more than Rendell-Baker had anything to do with entwinement of public officials in the special school.

Brentwood Acad., 531 U.S. at 302-03.


190. Id.


came a state actor." Justice White stated that he would have held that the NCAA acted jointly with UNLV in suspending Tarkanian.

The dissent based its conclusion on the fact that UNLV, adhering to NCAA’s rules, suspended Coach Tarkanian for the violation of those rules. Referring to the Nevada Supreme Court opinion in *University of Nevada v. Tarkanian*, Justice White noted that NCAA rules provide that NCAA “enforcement procedures are an essential part of the intercollegiate athletic program of each member institution.” Under an agreement between the NCAA and UNLV, the NCAA was to conduct hearings regarding violations of its rules. According to NCAA’s procedures, and subject to appeal to the NCAA Council, the NCAA Committee on Infractions ultimately determines facts related to alleged violations. Despite UNLV’s own investigation into the alleged recruiting violations by Coach Tarkanian, “the NCAA conducted the very hearings the Nevada Supreme Court held to have violated Tarkanian’s right to procedural due process.” Although, in fact, the only issue before the Supreme Court was the threshold question of whether the NCAA had acted jointly with UNLV.

In addition, UNLV contracted to be bound by NCAA’s findings of fact under the agreement. UNLV’s appointed hearing officer ruling on Tarkanian’s suspension “expressly agreed to accept the NCAA’s findings of fact as in some way superior to [its] own.” Thus, “it was the NCAA’s express findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which

193. *Id.* at 200.
194. *See id.*
195. *See id.* at 201.
196. 594 P. 2d 1159, 1160 (Nev. 1979) (“[A]s a member of the NCAA, UNLV contractually agrees to administer its athletic program in accordance with NCAA legislation.”).
198. *See id.* (discussing details of agreement between UNLV and NCAA).
199. *See id.* (discussing procedure for determining whether violation has occurred).
200. *Id.*
201. *See id.* at 201 n.1 (noting grant of petition was limited to state action question).
203. *Id.* at 201 (internal quotations omitted). “[A]ccording to] the terms of UNLV’s membership in the NCAA, the NCAA’s findings were final and not subject to further review by any other body, and it was for that reason that UNLV suspended Tarkanian, despite concluding that many of those findings were wrong.” *Id.*
UNLV agreed to in its membership agreement with the NCAA, that resulted in Tarkanian’s suspension by UNLV.” 204

Commenting on the majority’s statement that UNLV was free to withdraw from the NCAA at any time, Justice White conceded that one of UNLV’s options was to withdraw from the NCAA entirely. 205 Seemingly dismissing this argument, and analogizing Dennis v. Sparks, Justice White concluded that “[w]hat mattered was not that he [(Dennis)] could have withdrawn, but rather that he did not do so.” 206

Moreover, even if the NCAA and UNLV were adversaries throughout the proceedings before the NCAA, a fact heavily relied on by the majority, their agreement was not undercut. 207 Citing the majority, “[i]t would be ironic indeed to conclude that the NCAA’s imposition of sanctions against UNLV — sanctions that UNLV and its counsel, including the Attorney General of Nevada, steadfastly opposed during protracted adversary proceedings — is fairly attributable to the State of Nevada.” 208 While agreeing, Justice White found it not to be applicable because UNLV did not refuse to suspend Tarkanian, an action that would have led to sanctions by the NCAA. 209 Rather, UNLV did suspend Tarkanian because it had adopted the NCAA rules and the results of the hearing conducted by the NCAA. 210 Based on those facts, the dissent concluded that “the NCAA acted jointly with UNLV and therefore is a state actor.” 211

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204. Id. at 202.

205. See id. (noting UNLV is not required to be member of NCAA). It is the author’s opinion, however, that the ability of UNLV to withdraw from the NCAA is more theoretical than practical, because inter-collegiate contests are held within NCAA leagues.

206. Id. at 203 (citing Dennis v. Sparks, 449 U.S. 24 (1980)).

207. See Tarkanian, 488 U.S. at 203 (White, J., dissenting) (citing majority opinion, 488 U.S. at 196).

208. Id. (citing majority opinion, 488 U.S. at 199).

209. See id. (noting that “it would be hard indeed to find any state action that harmed Tarkanian” if UNLV had not suspended Tarkanian).

210. See id. (“Here, UNLV did suspend Tarkanian, and it did so because it embraced the NCAA rules governing conduct of its athletic program and adopted the results of the hearings conducted by the NCAA concerning Tarkanian, as it had agreed that it would.”).

211. Id. at 203.
B. The *Brentwood Academy* Dissent

Chief Justice Rehnquist and Justices Scalia and Kennedy joined Justice Thomas's dissenting opinion in *Brentwood Academy*.[212] At the outset, Justice Thomas addressed the "entwinement doctrine" by stating, "[w]e have never found state action based upon mere 'entwinement.'"[213] Moreover, Justice Thomas noted that the Court has "found a private organization's acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government."[214] Next, Justice Thomas stated, "[t]he majority's holding — that the . . . [TSSAA's] enforcement of its recruiting rule is state action — not only extend[ed] the state-action doctrine beyond its permissible limits but also encroach[ed] upon the realm of individual freedom that the doctrine was meant to protect."[215]

Justice Thomas emphatically explained the basis for his dissenting opinion. Quoting *Lugar*, Justice Thomas reiterated, "[c]areful adherence to the state action requirement . . . preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."[216] Further, adherence to the traditional formulation of the state-action doctrine also promotes important values of federalism by "avoid[ing] the imposition of responsibility on a State for conduct it could not control"[217] to determine whether an individual action performed by a private party "can fairly be attributed to the State."[218]

Examining the case at hand, Justice Thomas stated that common sense alone, without use of the state-action tests, points to the conclusion that the action could not be attributed to Tennessee because the State of Tennessee did not create the TSSAA, does not fund the TSSAA, and neither directly nor indirectly compensates TSSAA's employees.[219] Furthering his position, Justice Thomas

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213. Id.
214. Id.
215. Id.
216. Id. at 306 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)).
218. Id. (citing *Blum*, 457 U.S. at 1004).
219. See id. at 306-08 (explaining why TSSAA's actions cannot be attributed to Tennessee). While the TSSAA's employees are statutorily permitted to participate in the state retirement system, Tennessee does not contribute to their compensa-
pointed out that member school dues only make up four percent of the TSSAA's income while the majority comes from the state tournaments that it sponsors and organizes. In addition to the TSSAA not being allowed to use state-owned facilities for a discounted or reduced fee and not being exempt from state taxation, Tennessee does not permit the State, or a group on behalf of the state, to organize interscholastic athletics. Justice Thomas spotlights the fact that Tennessee's sole acknowledgment of the TSSAA is a rule stating that the State Board of Education permits public schools to choose if they want to be members of the TSSAA.

Tennessee did not participate in the TSSAA's action against Brentwood Academy. In fact, enforcement of the TSSAA's recruiting rule, prohibiting members from using "undue influence" on students or their parents or guardians "to secure or to retain a student for athletic purposes," was designed by member schools themselves in order to preserve athletic balance among member schools. Justice Thomas noted that there was no indication that the State was involved with the enforcement of the recruitment regulations. The TSSAA's authority to enforce its recruiting rules comes solely from the membership contracts that each school signs when they join the TSSAA. The contract states that the school agrees to conduct its athletic program in accordance with the rules, policies, and decisions of the TSSAA.

Traditionally, the organization of interscholastic sports has not been a state function in Tennessee, demonstrated by the fact that


See Brentwood Acad., 531 U.S. at 307 (Thomas, J., dissenting) (explaining TSSAA not financially state entity).

See id. (providing additional examples demonstrating that Tennessee does not treat TSSAA as state entity).

See id. at 308 (Thomas, J., dissenting) (pointing out sole instance Tennessee addresses TSSAA). The rule provides:


Brentwood Acad., 531 U.S. at 306 (Thomas, J., dissenting) (noting TSSAA regulations are enforced by own board, not by state agency).

See id. at 308 (emphasizing State had no control over enforcement of recruitment regulations).

See id. (explaining where TSSAA's authority comes from).

See id. (describing contents of membership contracts).
the TSSAA had been in existence for forty-seven years before the Tennessee government showed any interest in regulation of interscholastic sports.\textsuperscript{227} When the state did begin to take interest, the State Board of Education only went along with what the TSSAA had already established.\textsuperscript{228} Justice Thomas continued his dissent by expanding on the TSSAA’s objectives. In 1925, the TSSAA was privately incorporated with the main purpose of organizing interscholastic athletic tournaments.\textsuperscript{229} There has never been any indication that the Tennessee state government helped create the TSSAA or control its management.\textsuperscript{230} Although the current TSSAA board is made up of all public school officials and the majority of its members are public schools, there is no requirement in the TSSAA Constitution that requires the public school system to be served by the TSSAA.\textsuperscript{231}

There is no record that the State has pressured the TSSAA or dictated how the TSSAA must regulate their interscholastic activities.\textsuperscript{232} Specifically, there is no indication that the enforcement of the recruiting rule came from the state – the rule came from the TSSAA’s board, which is granted that authority in the membership schools’ contracts specifically.\textsuperscript{233} Justice Thomas contended there is not a symbiotic relationship between the TSSAA and the Tennessee state government as the TSSAA is treated the same as many companies who contract their services to the government.\textsuperscript{234} Here,

\textsuperscript{227} See id. at 309 (describing tradition of interscholastic sports regulated by TSSAA, not Tennessee). Up until the twentieth century, the students themselves organized most interscholastic sports. See id. (explaining non-existent role of state government in organizing interscholastic sports). The first known incident of school-regulated athletics in the country was in 1896, when a group of teachers in Wisconsin created a committee to organize and regulate sports contests. See id. (indicating first known incident of school-run athletics).

\textsuperscript{228} See Brentwood Acad., 531 U.S. at 309 (suggesting Tennessee’s interest was not to regulate but merely to approve TSSAA’s actions). The Court in Flagg Brothers, Inc. \textit{v. Brooks} determined that a state’s approval of a private party’s actions is not enough to hold that state accountable for those actions. See 436 U.S. 149, 164-65 (1978); cf. Blum \textit{v. Yaretsky}, 457 U.S. 991, 1004-05 (1982) (“Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the Fourteenth Amendment.”).

\textsuperscript{229} See Brentwood Acad., 531 U.S. at 310 (Thomas, J., dissenting) (indicating founding objectives of TSSAA).

\textsuperscript{230} See id. (describing lack of state involvement in TSSAA’s formation and management).

\textsuperscript{231} See id. (discussing TSSAA board composition).

\textsuperscript{232} See id. at 311 (Thomas, J., dissenting) (noting no record that Tennessee interfered with TSSAA’s regulation of scholastic activities).

\textsuperscript{233} See id. (describing where TSSAA’s board received their authority).

\textsuperscript{234} See Brentwood Acad., 531 U.S. at 311 (Thomas, J., dissenting) (contending there was no symbiotic relationship between State and TSSAA but instead TSSAA acted like any other contractor for services).
the TSSAA’s contracted service is organizing athletic tournaments. Thomas further comments on what he believes to be a novel approach to the issue of “state action.” Because none of the existing state-action theories or common sense could establish TSSAA’s enforcement theories as a state action, the majority created a new theory which identified factors that show “entwinement” between the state and the TSSAA. Justice Thomas seemingly complains that the majority did not define “entwinement” and that there is no support in the Court’s state-action jurisprudence. Thomas challenged the majority’s examples of entwinement analysis by pointing out state action was never previously established solely by entwinement.

VI. THE LESSONS OF TARKANIAN AND BRENTWOOD ACADEMY

The majority in Brentwood Academy applied but never fully defined “entwinement.” Therefore, the scope of its holding remains unclear. Justice Thomas’s criticism, however, is both stinging and direct. Justice Thomas remarked, “[i]f we are fortunate, the majority’s fact-specific analysis will have little bearing beyond this case.” He warned that should the majority’s new entwinement test develop in future years and become an accepted basis for finding “state action,” it could affect many activities in high schools, not

235. See id. (describing service provided by TSSAA).
236. See id. at 312 (Thomas, J., dissenting) (explaining Justice Thomas’ opinion of majority’s approach).
237. See id. (describing entwinement approach used by majority).
238. See id. (noting majority never defined entwinement in opinion). Justice Thomas wryly notes that two of the cases that the majority cited did not even use the word “entwinement.” See id. (suggesting majority did not properly explain new approach). One of the cases was Evans v. Newton, which provided no more support to an “entwinement” theory than did Lebron v. National Railroad Passenger Corp. and Pennsylvania v. Board of Directors of City Trusts of Philadelphia. See id. at 313 (citing Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995); Evans v. Newton, 382 U.S. 296 (1966); Pennsylvania v. Bd. ofDirs. of City Trusts of Phila., 353 U.S. 230 (1957) (using Evans as example of Court’s use of entwinement approach). Although Evans at least used the word “entwined,” the Court did not discuss entwinement as a distinct concept, let alone one that would be sufficient to transform a private entity into a state actor when traditional theories of state action do not. See id. (citing Evans, 382 U.S. at 299, 302) (furthering point by showing Court used undefined entwinement approach when other theories did not work).
239. See Brentwood Acad., 531 U.S. at 314 (Thomas, J., dissenting) (challenging majority’s position that entwinement theory alone is sufficient to show state action).
240. Id.
merely athletics.\textsuperscript{241} Moreover, the impact of the Court's holding in \textit{Brentwood Academy} could be staggering if extended to other state controlled organizations.\textsuperscript{242}

Nonetheless, Justice Thomas might have misplaced his concern. Currently, three of the dissenters in \textit{Brentwood Academy}, Justices Thomas, Scalia, and Kennedy, remain on the Supreme Court. Chief Justice John Roberts replaced Chief Justice Rehnquist and Justice Samuel Alito replaced Justice Sandra Day O'Connor, who was in the majority in \textit{Brentwood Academy}.\textsuperscript{243} Whether Justice Alito and Chief Justice Roberts desert their more conservative "brethren" will determine if the reaches of the Fourteenth Amendment will extend to this type of private conduct.\textsuperscript{244} Justice Stevens, who seemingly "changed sides" from \textit{Tarkanian} to \textit{Brentwood Academy}, is now

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241. See id. (explaining various school-sponsored activities which state-action analysis could extend to including high school agriculture, mathematics, music, marching band, and cheerleading).

242. See id. (listing examples of publicly funded activities that could potentially be affected, including firefighters, policemen, and teachers).

243. See id. at 290 (listing Justice O'Connor with majority).

244. See generally Toni Lester, \textit{Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?} 14 AM. U. J. GENDER SOC. POL'y & L. 253 (2006) (questioning how far entwinement approach can reach under Fourteenth Amendment). By looking at Chief Justice Roberts' legal history, one might attempt to decipher how he will vote. Although Chief Justice Roberts served as a law clerk for the late Chief Justice William Rehnquist, "it is not so easy to determine whether Roberts is cut from the same anti-gay cloth as his former mentor." \textit{Id.} at 305. When Roberts was deputy solicitor general, he wrote briefs opposing abortion and advocating for the reversal of \textit{Roe v. Wade}, and it could be argued that overruling \textit{Roe} would threaten the fundamental rights of privacy and liberty which include freedom of gay, lesbian, bisexual, and transgender Americans. However, when the law firm he once worked for agreed to represent a gay rights group in \textit{Romer v. Evans}, Roberts helped prepare their arguments. See generally 517 U.S. 620 (1996) (pointing out significance of Chief Justice Robert's participation in gay rights case).

Proponents of expanding the Fourteenth Amendment to encompass a right of gay marriage are also concerned about the views of Justice Samuel Alito. Similar to Chief Justice Roberts, Justice Alito has an extensive record of attacking the constitutionality of \textit{Roe v. Wade}. Fairly or unfairly, Justice Alito was widely criticized for comments he made on a 1985 application for a political appointment within the Reagan administration when he said that he was "particularly proud" of his work on cases in which he argued that the Constitution does not protect a right to abortion. See Sheryl Gay Stolberg & David D. Kirkpatrick, \textit{Nominee Plays Down Remarks on Quotas and Abortion}, N.Y. TIMES, Nov. 16, 2005, at A16 (discussing Justice Alito's comments concerning his personal conservative view on constitutional right to abortion). More alarmingly to some, as a judge on the Third Circuit Court of Appeals, Alito authored a dissenting opinion in \textit{Planned Parenthood v. Casey}, in which he wrote, "Pennsylvania has a legitimate interest in furthering the husband's interest in the fate of the fetus." 947 F.2d 682, 726 (3d Cir. 1991). The Supreme Court rejected this view, which would have required a woman seeking an abortion to first notify her husband before taking any action. See Stolberg and Kirkpatrick, \textit{ supra} (stating Supreme Court's holding). Professor Lester opines, "Alito's record on gay rights issues during his time serving on the U.S. Court of Appeals for the
the senior justice on the Court and is joined in his view by Justices Breyer and Ginsburg, both standing firm in their expansive view of the reaches of the Fourteenth Amendment’s Due Process Clause.\textsuperscript{245} Barring some unpredictable event, it appears that the notion generated from the ruling in \textit{Brentwood Academy} that state action could be predicated upon the notion of “entwinement” may no longer command a majority on the Court.

Justice Thomas’s dissent in \textit{Brentwood Academy} may prove to be most prophetic. Now may be the appropriate time for the Court to revisit its decision in \textit{Brentwood Academy} so that it falls more in line with the more traditional state-action analysis used in \textit{Tarkanian}, or at least so that it asserts in more formal terms that the “entwinement doctrine” is not a departure from the Court’s prior understanding of the Fourteenth Amendment. Regardless of the outcome, the issue deserves the clarity that the Court’s further review will provide.

Third Circuit during the past fifteen years is a bit more mixed.” Lester, \textit{supra} at 305.

In a case closely related to the issue of gay marriage, Justice Alito offered a very traditional reading of the meaning of marriage. \textit{See} Adam Liptak, \textit{In Abortion Rulings, Idea of Marriage is Pivotal}, \textit{N.Y. Times}, Nov. 2, 2005, at A1 (pointing out another case in which Justice Alito took conservative stance). In a case concerning a university anti-harassment policy that prohibited the harassment of gays and other minorities, Alito sided with the majority that ruled the policy was an infringement of first amendment rights and therefore unconstitutional. \textit{See} Kathi Wolfe, \textit{Alito’s Record on Gay Rights a Mixed Bag}, Jan. 9, 2006, http://www.progressive.org (describing Alito’s position on anti-harassment of gays and minorities policy); Lou Chibbaro, Jr., \textit{Gay Groups Oppose Alito Nomination}, Dec. 12, 2005, http://www.washingtonblade.com/thelatest/thelatest.cfm?blog_id=4008 (discussing Alito’s view on freedom of speech and anti-harassment speech codes). In a later case, Justice Alito ruled that a New Jersey school district was obligated to fund a male student’s transfer to a new school because the student was being called “faggot,” “homo,” and “gay” and harassed because he was perceived to be effeminate by his classmates. \textit{See} Wolfe, \textit{supra} (describing Alito’s position in another case concerning gay rights). Finally in a case that addressed the right of a municipality to block HIV-positive adults from becoming foster parents to non-HIV-positive foster children, Justice Alito wrote that the municipality’s policy discriminates against the son’s HIV-positive status even though there is almost no possibility of HIV transmission. \textit{See id.} (citing Doe v. County of Centre, 242 F.3d 437, 451 (3d Cir. 2001)) (pointing out another case where Alito took conservative role).

245. For further discussion of state-action analysis in \textit{Tarkanian} and \textit{Brentwood Academy}, see \textit{supra} notes 42-121 and 134-67 and accompanying text.