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FROZEN IN TIME: THE STATE ACTION DOCTRINE'S APPLICATION TO AMATEUR SPORTS

DIONNE L. KOLLER†

INTRODUCTION

The Supreme Court has made clear that “[t]he Constitution constrains governmental action ‘by whatever instruments or in whatever modes that action may be taken.’”¹ This sweeping promise, however, rings hollow in the area of amateur athletics, where amateur athletes and others are, in a very real sense, caught in what the Supreme Court calls the “essential dichotomy”² between entities that are public, and therefore subject to the limitations of the Constitution, and those that are private, and consequently are not so limited. For nearly two decades, since the Supreme Court’s decisions in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*³ and *National Collegiate Athletic Ass’n v. Tarkanian*,⁴ both the National Collegiate Athletic Association (“NCAA”) and the United States Olympic Committee (“USOC”) have been considered by courts and commentators to be “private” entities, and not state actors, meaning that constitutional protections do not apply to their actions. These decisions illustrate not only the troubled nature of the so-called “state action doctrine,” but also the extraordinary consequence of the doctrine’s application in the amateur sports context. In short, a static conception of the

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¹ *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (quoting *Ex parte Virginia*, 100 U.S. 339, 346–47 (1880)).

² *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972).

³ 483 U.S. 522 (1987).

⁴ 488 U.S. 179 (1988).

USOC and the NCAA has developed, so that they are considered private *as a matter of law*.

This static notion of the relationship between these entities and the government has created what is essentially a legal twilight zone where the Constitution is not applied to exercises of state power⁵ in amateur sports. This Article explores that twilight zone and argues that it has created significant, unintended consequences. Part II of this Article explains the state action doctrine and its application to amateur sports, detailing the state action requirement generally and explaining the major cases applying the state action doctrine to the NCAA, the USOC, and state high school athletic associations. Part III explains the consequences of these cases. Specifically, this part argues that the Supreme Court's holdings in *San Francisco Arts & Athletics* and *Tarkanian* have had the effect of holding the USOC and NCAA to be private actors as a matter of law. Moreover, this static conception of the USOC and NCAA as private actors has provided a powerful incentive for the government to pursue policy objectives, such as combating performance-enhancing drug use through amateur sports regulation, without its methods being subject to constitutional constraint. Finally, this Article asserts that the application of the state action doctrine to amateur sports organizations in a way that denies amateur athletes constitutional protections does not serve the goals of the state action doctrine, but actually undermines the legitimacy of the entities whose "autonomy" the doctrine purportedly aims to protect.

I. THE STATE ACTION DOCTRINE AND AMATEUR SPORTS

To properly examine the consequences of the state action doctrine's application to amateur sports organizations, the state action requirement itself and the prominent state action-amateur sport cases must be reviewed.

A. *The State Action Requirement*

The Fifth and the Fourteenth Amendments to the United States Constitution prohibit government action that deprives "any person of life, liberty, or property, without due process of

⁵ This Article uses the terms "state" and "state power" to mean exercises of authority by both the federal and state governments.

law.”⁶ The Supreme Court has held that this prohibition applies only to actions taken by the state—so called “state action.”⁷ This requirement dates back to shortly after the ratification of the Fourteenth Amendment. In 1883, in *The Civil Rights Cases*, the Supreme Court invalidated the Civil Rights Act of 1875, a Reconstruction Era statute that sought to prohibit racial discrimination in restaurants and other privately-owned ventures.⁸ Interpreting the Fourteenth Amendment, the Supreme Court held that “[i]t is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”⁹ The Supreme Court has subsequently explained that with respect to constitutional due process protections, “this Court in the Civil Rights Cases . . . affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, ‘however discriminatory or wrongful,’ against which the Fourteenth Amendment offers no shield.”¹⁰

The Supreme Court’s primary justification for the state action doctrine is that it “preserves an area of individual freedom” and limits the reach of government power, specifically the power of the judiciary.¹¹ Thus, the doctrine preserves individual autonomy by ensuring that private individuals can act without being subject to the limits of the Constitution.¹² In addition, the doctrine serves the interests of federalism, by allowing the states to determine to what extent private conduct should be regulated.¹³ Indeed, promoting liberty and limiting

⁶ U.S. CONST. amend. XIV, § 1; *accord* U.S. CONST. amend. V.

⁷ *The Civil Rights Cases*, 109 U.S. 3, 10–11 (1883); *see* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507–08 (1985).

⁸ *See The Civil Rights Cases*, 109 U.S. at 4, 18–19; Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 HARV. C.R.-C.L. L. REV. 481, 481, 496–97 (2006).

⁹ *The Civil Rights Cases*, 109 U.S. at 11 (1883); *see* *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989) (stating that the purpose of the Fourteenth Amendment “was to protect the people from the State, not to ensure that the State protected them from each other.”).

¹⁰ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (quoting *Shelley v. Kramer*, 334 U.S. 1, 13 (1948)).

¹¹ *See* *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936–37 (1982).

¹² *See id.* at 936; *DeShaney*, 489 U.S. at 196 (explaining that the Fourteenth Amendment protects “‘against unwarranted government interference’” (quoting *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982))).

¹³ *See* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine*:

government power are bedrock principles of constitutional law, and the notion that it is important to make a distinction between areas of life that are public and those that are private intuitively makes sense. It is believed that there are certain spheres of life, such as amateur athletics, which are private, so that the state is not, and should not, be involved.¹⁴ Effectuating this distinction, there are two ways in which an entity can be held to be a state actor subject to constitutional standards. Most obviously is the case where the challenged action was taken by the state itself, through a state agency or state official.¹⁵ The second instance involves the more complicated scenario where the challenged action was taken by a private actor, but the state is so closely involved in the conduct of the private actor that it can be said that the challenged action was, in effect, the work of the state.¹⁶ The state action inquiry is also used to determine whether a party acted "under color of state law" for purposes of claims under 42 U.S.C. § 1983.¹⁷

The Supreme Court's willingness to find that a private actor is engaged in state action has changed over time. Starting in the 1950s, the Court took a fairly liberal view of the state action requirement, such that "by 1970 the Court was able and apparently willing to find state action in almost any situation."¹⁸ However, in the 1970s and 1980s the Court significantly shifted its approach and strengthened the requirement so that it was far more difficult to show state action.¹⁹ Specifically, in 1982, the Court decided three cases that narrowed the scope of the state

The Search for Government Responsibility, 34 HOUS. L. REV. 333, 339 (1997); Chemerinsky, *supra* note 7, at 542-43.

¹⁴ See Paul Brest, *State Action and Liberal Theory: A Casenote on* *Flag Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1323 (1982) (discussing "our psychological and ideological need to believe that there are essentially private realms, albeit circumscribed by state and society, in which actions are autonomous").

¹⁵ *Lugar*, 457 U.S. at 937.

¹⁶ *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995); *Rendell-Baker v. Kohn*, 457 U.S. 830, 848 (1982).

¹⁷ *Lugar*, 457 U.S. at 936, 942.

¹⁸ Recent Development, *Constitutional Law—State Action Doctrine Invoked as a Limitation upon the Reach of the Fourteenth Amendment*, 25 VAND. L. REV. 1237, 1237 (1972).

¹⁹ See *id.*; Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1413 (2003) (noting that the Court is "significantly more unwilling to find state action and hold private individuals to constitutional requirements"); Hayward D. Reynolds, *Deconstructing State Action: The Politics of State Action*, 20 OHIO N.U. L. REV. 847, 890 (1994).

action doctrine. In *Blum v. Yaretsky*,²⁰ the Court held that the decision to transfer Medicaid patients residing in private nursing homes was not state action, noting that it was the private nursing home and its private physicians who ultimately made the decision to transfer.²¹ Moreover, the Court held that the mere regulation of the treatment the patients received and the subsidy through the Medicaid program was not enough for state action.²² Similarly, in *Rendell-Baker v. Kohn*,²³ the Court held that a private high school for troubled students was not engaged in state action when it terminated one of its teachers, despite the fact that the school was regulated by the state and the school received nearly all of its funding from the state.²⁴ Finally, in *Lugar v. Edmonson Oil Co.*,²⁵ the Court held that there was state action where a private creditor obtained a pre-judgment writ of attachment of the debtor's property.²⁶ The Court found that the attachment of property was joint action between the private creditor and the state, which issued the writ. In *Lugar*, the Court announced a two-part analysis for determining whether seemingly private conduct could be attributed to the state. First, the challenged action

must be caused by the exercise of [a] right or privilege created by the State or by a rule of conduct imposed by the or by a person for whom the State is responsible . . . [and], second, the party charged with the deprivation of rights must be a person who may fairly be said to be a state actor . . . [either] because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.²⁷

As will be discussed below, these three cases set the stage for the state action decisions involving the USOC and the NCAA.

There are now several theories that the Supreme Court has used to determine when the actions of a private actor will be subject to constitutional scrutiny. The Court has looked at whether "there is a sufficiently close nexus between the State

²⁰ 457 U.S. 991 (1982).

²¹ *Id.* at 1006–07.

²² *Id.* at 1004–05.

²³ 457 U.S. 830 (1982).

²⁴ *Id.* at 840.

²⁵ 457 U.S. 922 (1982).

²⁶ *Id.* at 922, 942.

²⁷ *Id.* at 937.

and the challenged action.”²⁸ The Court has also explained that private action can become the action of the state where the state “has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State,”²⁹ or where the private entity acts as a “willful participant in joint activity with the State or its agents.”³⁰ The Court also has found state action where a private actor is “controlled by an ‘agency of the state’” or when the private actor has been delegated a function that has been “‘traditionally the *exclusive* prerogative of the state.’”³¹ More recently, the Court stated that the “pervasive entwinement” of state officials in the structure of an ostensibly private entity would be enough to support a finding of state action.³²

In short, the Court has made clear that constitutional standards apply only when the alleged infringement of “federal right[s] be fairly attributable to the State”³³ or “when it can be said that the State is *responsible* for the specific conduct” at issue.³⁴ However, as the Court explained in *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n* (“*Brentwood I*”), the analysis of what conduct the state is “responsible for” is not one that is undertaken with reference to bright-line rules or specific criteria.³⁵ Instead, the Court stated that “no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.”³⁶ Thus, the Court stated that “examples may be the best teachers.”³⁷

²⁸ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974); *see also* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 725 (1961).

²⁹ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

³⁰ *Lugar*, 457 U.S. at 941; *see also* *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).

³¹ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n* (*Brentwood I*), 531 U.S. 288, 296 (2001) (quoting *Pennsylvania v. Bd. of Dir. of City Trusts of Phila.*, 353 U.S. 230, 231 (1957)); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (quoting *Jackson*, 419 U.S. at 353); *see also* *Evans v. Newton*, 382 U.S. 296, 299 (1966); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946). *See generally* *Terry v. Adams*, 345 U.S. 461 (1953) (discussing that prevention of discrimination against voters because of their race is a national policy and therefore the concern of the government).

³² *Brentwood I*, 531 U.S. at 291.

³³ *Lugar*, 457 U.S. at 937.

³⁴ *Blum*, 457 U.S. at 1004.

³⁵ *Brentwood I*, 531 U.S. at 295.

³⁶ *Id.* at 295–96.

³⁷ *Id.* at 296.

Because of the varying formulations of the state action doctrine, it has been a target of scholarly criticism for decades.³⁸ Some commentators have suggested that the Court's state action jurisprudence lacks coherence.³⁹ Others have advocated eliminating the requirement altogether.⁴⁰ Still others have stated that the state action doctrine is "both grounded in racism and an obstacle to the full effectuation of the Fourteenth Amendment."⁴¹ Some have even argued that the doctrine was so flawed that it would cease to exist.⁴² A central feature of the commentary over the state action doctrine is the desirability and feasibility of distinguishing public from private acts.⁴³ Scholars have argued that it is impossible to distinguish the two, because of legal positivist notions that all conduct can be traced to some decision of the state to either affirmatively permit the conduct, or a decision not to prohibit it.⁴⁴ Regardless of whether such lines between public and private conduct can be drawn, the Supreme Court continues to draw it by relying on the state action doctrine.

Yet wherever and however that "state action" line is drawn, one thing is constant. The doctrine captures the particular circumstances of a relationship between a private entity and the government, and, based on those circumstances, categorizes the private entity as either "private" or "public." Recognizing that relationships are dynamic in nature and change over time and

³⁸ E.g., Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 91 (1967) ("On the cases and on the opinions, 'state action' is a doctrine in trouble."); Chemerinsky, *supra* note 7, at 503; Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1053-54 (1990); Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).

³⁹ Alan R. Madry, *Private Accountability and the Fourteenth Amendment; State Action, Federalism and Congress*, 59 MO. L. REV. 499, 509-11 (1994); Snyder, *supra* note 38, at 1054-55.

⁴⁰ Chemerinsky, *supra* note 7, at 506-07, 550.

⁴¹ Ugarte, *supra* note 8, at 482.

⁴² John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 872 (1966); Williams, *supra* note 38, at 382, 389.

⁴³ See Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT 329, 334 (1993) ("The overwhelming weight of published academic opinion has rejected the premise that legal doctrine can rest on a supposed distinction between public and private actions.").

⁴⁴ *Id.*; Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351 (1982).

through circumstance, the state action doctrine does not have one formulation—and as the Court indicates—is found through a case-by-case inquiry. As explained below, it is in this way that the state action doctrine as applied to amateur sports is problematic. By adopting a static notion of how amateur sports organizations relate to the government, and how the government relates to them, courts and commentators have invited the government to exercise far greater power through and over amateur athletics.

B. The State Action-Amateur Sport Cases

Several notable state action cases involve amateur sports. This likely reflects sports programs' integration with public educational institutions and the federal government's growing interest in amateur sports as part of larger policy agendas, such as fighting drug use. To be sure, there is state action to support a constitutional challenge against an entity such as a public high school or university that takes action against a student-athlete, or another individual.⁴⁵ However, the area that has produced noteworthy state action litigation, and on which this article is focused, concerns organizations such as the NCAA and the USOC that are without a doubt shaped and influenced by state power, but structurally maintain a "private," non-governmental status. The result is that these entities operate in a legal twilight zone, caught between the state's undeniable interest in and temptation to regulate amateur sports, and the common wisdom that sport is "private."

1. The National Collegiate Athletic Association—*National Collegiate Athletic Association v. Tarkanian*

The NCAA is a tax-exempt, non-profit, voluntary⁴⁶ member-

⁴⁵ See *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

⁴⁶ Critics have noted that the NCAA is not a voluntary organization from the perspective of the student-athletes who are regulated by its actions:

I have heard the Chairman and others talk about a voluntary organization. I think that anybody that has studied the NCAA readily realizes that the athletes are not members nor are they invited to be members . . . and they have no input, but they are controlled . . . And who has been victimized by this? It is the student-athlete.

Due Process and the NCAA: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 108th Cong. 3–4 (2004) [hereinafter *Hearing*] (statement of Rep. Spencer Bachus, Member, House Subcomm. on the Constitution).

ship association dedicated to the promotion of inter-collegiate athletics.⁴⁷ Confirming that athletics are a “vital part” of education, the basic purpose of the NCAA, as stated in its constitution, is “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”⁴⁸ The NCAA’s rules apply to issues including recruitment of student-athletes, academic eligibility, and financial aid.⁴⁹ The NCAA also has a program for drug testing athletes. Despite its regulation of virtually every aspect of a student’s athletic experience, critics have stated that student-athlete welfare is not one of the NCAA’s central concerns.⁵⁰ Instead, the NCAA’s focus is on its member institutions, as the NCAA has been characterized as the “organization through which many of the nation’s colleges and universities act and speak on national athletic matters.”⁵¹

The NCAA consists of over 1,200 public and private institutions and athletic conferences.⁵² Nearly all public and private colleges and universities with major athletic programs are members of the NCAA and therefore have agreed to conduct their programs in accordance with the NCAA’s rules and regulations.⁵³ It is public universities, however, that make up the majority of the NCAA’s membership. Currently, there are over 300,000 student-athletes competing for NCAA-member schools.⁵⁴ The student-athletes who compete for NCAA-member schools are not NCAA members themselves, but they are

⁴⁷ See NCAA Website: The Online Resource for the National Collegiate Athletic Association, <http://www.ncaa.org> (follow “About the NCAA” hyperlink) (last visited Oct. 15, 2007).

⁴⁸ John Kitchin, *The NCAA and Due Process*, 5 KAN J.L. & PUB. POL’Y 71, 72 (1996).

⁴⁹ James Arslanian, *The NCAA and State Action: Does the Creature Control Its Master?*, 16 J. CONTEMP. L. 333, 333 (1990).

⁵⁰ See W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 4–5 (2000).

⁵¹ Kitchin, *supra* note 48, at 71.

⁵² Matthew M. Keegan, Comment, *Due Process and the NCAA: Are Innocent Student-Athletes Afforded Adequate Protection from Improper Sanctions? A Call for Change in the NCAA Enforcement Procedures*, 25 N. ILL. U. L. REV. 297, 299 (2005); see also NCAA Website: The Online Resource for the National Collegiate Athletic Association, <http://www.ncaa.org> (follow “Composition & Sport Sponsorship of the Membership” hyperlink under the “Our Members” hyperlink) (last visited Oct. 15, 2007).

⁵³ Carter, *supra* note 50, at 6.

⁵⁴ Keegan, *supra* note 52, at 299.

required to follow NCAA rules. Because member schools obligate themselves to enforce the NCAA's rules, the NCAA does not take any direct action against student-athletes, coaches, or others who run afoul of its regulations. If the school does not take action in accordance with NCAA policy, the NCAA will sanction the member school.⁵⁵

The NCAA's member-institutions are assigned to particular divisions—I, II, or III—depending upon the institution's athletic program's size and success. Schools that are considered to have the largest and most successful athletic programs, usually from their football and men's basketball teams, are in Division I.⁵⁶ The NCAA currently functions through divisional management structures with each division promulgating its own rules for governance.⁵⁷ For instance, since 1997, Division I has been governed by a Board of Directors and Management Council, which adopts rules that apply to all Division I institutions. This structure differs markedly from the "one institution, one vote" system that had been in place, and that was important to the analysis of the state action issue in *Tarkanian*.⁵⁸ The national body of the NCAA no longer has broad rule-making authority. Instead, NCAA "action" now results from the divisional level, with much narrower participation from member schools.⁵⁹

Until 1982, the overwhelming majority of federal courts held that the NCAA was a state actor.⁶⁰ These holdings were primarily based on the theory that the NCAA performed a government function and that there was a close nexus between the NCAA and the state.⁶¹ Courts focused on the fact that coordinating college athletics was an important part of education, and therefore a traditional government function, and that at least half of the members of the NCAA were public institutions.⁶² Courts also focused on the "mutually beneficial relationship" between the public and private entities that formed the NCAA

⁵⁵ Kitchin, *supra* note 48, at 72.

⁵⁶ Carter, *supra* note 50, at 6–7.

⁵⁷ *Id.* at 28.

⁵⁸ *Id.*

⁵⁹ *Id.* at 38.

⁶⁰ Keegan, *supra* note 52, at 303.

⁶¹ *Id.* at 303–04; see also John Sahl, *College Athletes and Due Process Protection: What's Left After National Collegiate Athletic Association v. Tarkanian*, 21 ARIZ. ST. L.J. 621, 642, 644 (1989).

⁶² See Parish v. NCAA, 506 F.2d 1028, 1032–33 (5th Cir. 1975).

and the fact that state institutions wielded the majority of the power in the organization.⁶³ Courts noted that state institutions, in addition to being a substantial portion of the NCAA's membership, were a major force in setting NCAA policy, and that the NCAA's actions had a governmental quality.⁶⁴

Lower courts backed away from holding the NCAA to be a state actor in the 1980s after the Supreme Court decided *Blum*, *Rendell-Baker*, and *Lugar*, all of which limited the application of the state action doctrine.⁶⁵ Finally, in 1988, the Supreme Court decided *Tarkanian*⁶⁶ and held by a margin of 5-4 that the NCAA was not engaged in state action when it required the University of Nevada Las Vegas ("UNLV"), a public institution, to fire its men's basketball coach, Jerry Tarkanian. Tarkanian brought suit under 42 U.S.C. § 1983 alleging that he had been deprived of his Fourteenth Amendment Due Process rights when the NCAA required UNLV to fire him based on the NCAA's findings of wrongdoing, or risk sanctions. The Court noted that UNLV, as an NCAA member, agreed to abide by NCAA bylaws and enforcement proceedings conducted pursuant to those bylaws. Accordingly, the NCAA conducted the investigation of Tarkanian and the administration of UNLV's men's basketball program. UNLV apparently resisted the NCAA inquiry and completed its own investigation. It was based on the NCAA's findings, however, that the NCAA required UNLV to sever all ties between Tarkanian and UNLV's athletic programs or risk additional sanctions. UNLV complied.⁶⁷

Tarkanian argued that, by essentially forcing UNLV to suspend him, the NCAA and UNLV were engaged in joint action sufficient to make the NCAA a state actor.⁶⁸ Tarkanian argued that UNLV had basically delegated its authority to the NCAA to govern its athletic program and that it clothed the NCAA in

⁶³ See *Howard Univ. v. NCAA*, 510 F.2d 213, 219-20 (D.C. Cir. 1975).

⁶⁴ *Id.*

⁶⁵ See *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021 (4th Cir. 1984); see also *Karmanos v. Baker*, 816 F.2d 258, 260 (6th Cir. 1987); *Graham v. NCAA*, 804 F.2d 953, 958 (6th Cir. 1986); *Hawkins v. NCAA*, 652 F. Supp. 602, 606-07 (C.D. Ill. 1987); *Kneeland v. NCAA*, 650 F. Supp. 1047, 1055 (W.D. Tex. 1986), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988); *McHale v. Cornell Univ.*, 620 F. Supp. 67, 69-70 (N.D.N.Y. 1985).

⁶⁶ 488 U.S. 179 (1988).

⁶⁷ See *id.* at 180-87.

⁶⁸ See *id.* at 195, 196 n.16.

UNLV's state status. The Supreme Court disagreed, stating in a now famous phrase that the case required the court to "step through an analytical looking glass to resolve" it because of the "unique" situation it presented since the challenged action was not taken by a private actor, as in the usual state action case, but by UNLV, unquestionably an agent of the state.⁶⁹ The Court then said that the inquiry came down to "whether UNLV's actions in compliance with the NCAA's rules and recommendations turned the NCAA's conduct into state action."⁷⁰

For several reasons, the Court found that it did not. Taking a formalistic approach, the Court noted that UNLV's influence on the NCAA rule-making process was too minor to clothe the NCAA in Nevada's state status because the NCAA was a huge organization with numerous members.⁷¹ Second, the Court found that the NCAA had no governmental power to undertake its investigation of UNLV.⁷² The Court also stressed that there could not be "joint action" sufficient to find state action since UNLV resisted the NCAA's investigation of Tarkanian and the basketball program and also had options other than compliance. Thus, the Court reasoned that UNLV did not have to follow the NCAA's mandate to sever ties with Tarkanian because it could have retained him and risked more severe sanctions or simply withdrawn from the NCAA.⁷³

The dissent argued that the state action situation presented by *Tarkanian* was not unique, but was in fact similar to prior cases where the Court found that private actors could be engaged in state action if they acted jointly with state officials in undertaking the challenged action.⁷⁴ The dissent explained that there was ample evidence of such joint action in *Tarkanian* because UNLV suspended Tarkanian based on violations of NCAA rules that UNLV agreed to follow. As a result, it was the

⁶⁹ See *id.* at 191-93.

⁷⁰ *Id.* at 193.

⁷¹ See *id.* at 193, 195.

⁷² *Id.* at 197. The Court cited its ruling in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), and reaffirmed that the regulation of amateur athletics is not a traditional public function. The Court stated that while it had previously found the administration of inter-collegiate athletics to be a "critical" function, it was not a "traditional, let alone an exclusive, state function." *Tarkanian*, 488 U.S. at 198 n.18.

⁷³ See *Tarkanian*, 488 U.S. at 196 & n.16, 198.

⁷⁴ *Id.* at 200 (White, J., dissenting).

NCAA that conducted the investigation and hearings that formed the basis for Tarkanian's suspension, and the findings that came out of the investigation and subsequent hearings were binding on UNLV.⁷⁵ The dissent stated that it was irrelevant that UNLV had the option to withdraw from the NCAA or that UNLV and the NCAA were adversaries throughout the investigation. What was important, the dissent stated, was that ultimately UNLV agreed with the NCAA to take action against Tarkanian.⁷⁶

Several states responded to the *Tarkanian* decision by introducing or adopting legislation that would provide individuals affected by NCAA investigations and sanctions with due process protections.⁷⁷ For instance, Nevada, Nebraska, Illinois, and Florida—all home to major NCAA Division I athletic programs—passed legislation that required the NCAA to provide those accused of rules violations with due process as specified in the statutes.⁷⁸ These statutes are now either no longer in effect or their effect is in serious doubt because courts have held that they violate the Commerce Clause.⁷⁹ The Supreme Court reaffirmed *Tarkanian* in 2001 in *Brentwood I*.⁸⁰

The change from holding the NCAA to be a state actor, as the lower courts did, to finding it was not engaged in state action in *Tarkanian*, can be at least somewhat attributed to what commentators have called the “tremendous judicial deference and goodwill”⁸¹ that the NCAA has enjoyed in the regulation of intercollegiate athletics. The combination of the *Tarkanian* holding and lower court rulings that state statutes conferring due process protections on athletes and others caught in NCAA investigations violate the Commerce Clause means that the NCAA is not subject to constitutional limitations or state

⁷⁵ *Id.* at 200–02.

⁷⁶ *See id.* at 202–03.

⁷⁷ Keegan, *supra* note 52, at 319.

⁷⁸ *Hearing*, *supra* note 46, at 11–12 (statement of Gary R. Roberts, Deputy Dean and Director of the Sports Law Program, Tulane Law School).

⁷⁹ *See* Kitchin, *supra* note 48, at 77–78; *see also* NCAA v. Miller, 10 F.3d 633, 637–38 (9th Cir. 1993) (invalidating a Nevada statute that sought to impose due process limitations on the actions of the NCAA because the NCAA was engaged in interstate commerce and the Nevada statute therefore would have directly regulated interstate commerce in violation of the Commerce Clause). The Ninth Circuit also held that the statute must be struck down because its “extraterritorial effect” would subject the NCAA to “inconsistent obligations.” *Id.* at 640.

⁸⁰ 531 U.S. 288, 297–98 (2001).

⁸¹ Carter, *supra* note 50, at 69.

statutes that attempt to establish due process protections for those involved in NCAA action.⁸² In a 2004 congressional hearing on the subject, Professor Gary Roberts explained that "it seems reasonably clear that . . . the NCAA's enforcement process and procedures are unconstrained by either federal constitutional or state law. Thus, the question for Congress to consider is whether it would be appropriate for new federal legislation to impose any procedural requirements on the NCAA"⁸³ Thus far, Congress has not adopted such legislation.

2. The United States Olympic Committee—*DeFrantz v. United States Olympic Committee* and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*

Similar to the "deference" and "goodwill" shown to the NCAA, courts have shown great deference to the USOC in the application of the state action doctrine. The USOC enjoys this deference despite the fact that it is plainly not the usual "private" actor.

Unlike many other countries, the United States does not have an official government agency or ministry for sports. This is because sports regulation has not traditionally been viewed as a government matter. Although sports regulation is not a formal part of our government structure, amateur sports issues increasingly have become important to the United States Government.⁸⁴ The USOC, as it exists today, was first developed as a result of a Presidential Commission created in 1975 to study ways in which the United States could be more competitive in Olympic competition.⁸⁵ The work of the Commission led to the Amateur Sports Act of 1978,⁸⁶ which made the USOC a federally-chartered corporation. The Act gave the USOC the exclusive

⁸² See *Hearing*, *supra* note 46, at 11 (statement of Gary R. Roberts, Deputy Dean and Director of the Sports Law Program, Tulane Law School); see also Sahl, *supra* note 61, at 660–61.

⁸³ *Hearing*, *supra* note 46, at 12 (statement of Gary R. Roberts, Deputy Dean and Director of the Sports Law Program, Tulane Law School).

⁸⁴ Dionne L. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, 50 ST. LOUIS U. L.J. 91, 94 (2005).

⁸⁵ Exec. Order No. 11,868, 40 Fed. Reg. 26,255 (June 23, 1975).

⁸⁶ Jimmy Carter, Amateur Sports Act of 1978: President's Statement on Signing S. 2727 into Law, 2 PUB. PAPERS 1976 (Nov. 8, 1978), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=30133>; see also 36 U.S.C. §§ 220501–12, 220521–29 (2000) (encompassing the codification of the Amateur Sports Act of 1978).

power to coordinate and govern Olympic Movement athletics in the United States.⁸⁷

The federal government exercises significant influence over the USOC. For instance, after the Soviet invasion of Afghanistan prior to the 1980 Olympic Games in Moscow, President Carter and Congress called on the USOC to boycott the Games.⁸⁸ The President, however, made clear that he would take all steps necessary to enforce his decision not to send a team to Moscow.⁸⁹ Not surprisingly, the USOC voted not to send a team to the Games.⁹⁰ These circumstances spawned the *DeFrantz* litigation, explained below. More recently, Congress has taken an interest in reforming the USOC in response to allegations of mismanagement and ethical violations,⁹¹ and Congress made specific recommendations to the USOC to guide its reorganization. Thus, although the USOC operates in many ways as a private corporation, it is nevertheless subject to considerable government influence.⁹² As will be explained below, the federal government's influence over the USOC allowed Congress and the Office of National Drug Control Policy ("ONDCP") to take the lead role in establishing the United States Anti-Doping Agency ("USADA").

Despite the strong government presence in the operation of the USOC generally and in specific circumstances, courts have ruled that the USOC is not a state actor. The first such case to

⁸⁷ See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 554 (1987).

⁸⁸ Jeffrey M. Marks, Comment, *Political Abuse of Olympic Sport—DeFrantz v. United States Olympic Committee*, 14 N.Y.U. J. INT'L L. & POL. 155, 156 n.7 (1981–82).

⁸⁹ *Id.*

⁹⁰ See *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1182–83 (D.D.C. 1980) (declining to enjoin the USOC from carrying out its resolution of April 12, 1980, not to send a team to Moscow).

⁹¹ See *Does the U.S. Olympic Committee's Organizational Structure Impede Its Mission?: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (Mar. 19, 2003) (statement of William C. Martin, Acting President, U.S. Olympic Comm.).

⁹² The federal government's influence over and interest in the USOC can also be seen in the actions of individual members of Congress who appear to have a personal interest in matters involving the Olympics. For instance, in litigation surrounding the selection of the 2000 Olympic Greco-Roman wrestling team, Senator Ted Stevens wrote a letter to the United States District Court for the Northern District of Illinois weighing in on his interpretation of the Amateur Sports Act and which competitor should be sent to the Games to represent the United States. See *Lindland v. U.S.A. Wrestling Ass'n*, 227 F.3d 1000, 1008 (7th Cir. 2000).

do so, *DeFrantz v. United States Olympic Committee*, involved the United States' boycott of the 1980 Moscow Olympic Games.⁹³ The claim in *DeFrantz* was brought by a group of Olympic athletes who were selected to participate in the 1980 Moscow summer Olympic Games. After President Carter determined that the United States should not, and would not, send a team to Moscow, and the USOC voted not to do so, the athletes brought suit alleging that the USOC's action violated their rights under the Amateur Sports Act and the Constitution.

The evidence indicated that President Carter and the "Administration strenuously urged a boycott of the Moscow games" as a sanction against the Soviet Union for its invasion of Afghanistan.⁹⁴ As part of this effort, the President urged the International Olympic Committee to remove the Games from Moscow. He also announced in his State of the Union address that he would not support sending a United States team to compete in the Olympic Games as long as the Soviet military forces remained in Afghanistan. Moreover, the House of Representatives and Senate passed a resolution opposing participation in the Olympic Games by United States athletes. White House counsel met with the USOC Executive Board and other USOC officers and urged them to vote against sending a team to Moscow. President Carter also met with the Athlete's Advisory Council of the USOC and told them that the United States would not send a team to the Moscow Olympics. Finally, President Carter sent a message to the USOC and stated that he would take all legal action necessary to enforce his decision not to send a team to Moscow.⁹⁵

Although there was considerable evidence that the federal government—and specifically President Carter—made the decision not to send a team to the 1980 Olympic Games, the court held that the President and federal government only held persuasive power over the USOC, but did not have sufficient "control" over the entity to justify a finding of state action. The court's analysis, however, focused relatively little on whether there was "a sufficiently close nexus between the state and the challenged *action*" as required by prior state action precedent, but instead looked at whether *in general* the federal government

⁹³ *DeFrantz*, 492 F. Supp. at 1193.

⁹⁴ *Id.* at 1183–84.

⁹⁵ *Id.*

had to approve the USOC's actions before they could be enforced.⁹⁶ The court also noted that there was no "symbiotic relationship" between the federal government and the USOC because the USOC did not receive government funding. Significantly, the court explained that finding that the President and the government's efforts to influence the USOC to boycott the Games was sufficient for a finding of state action would

open the door and usher the courts into what we believe is a largely nonjusticiable realm, where they would find themselves in the untenable position of determining whether a certain level, intensity, or type of "Presidential" or "Administration" or "political" pressure amounts to sufficient control over a private entity so as to invoke federal jurisdiction.⁹⁷

Given these concerns, the court clearly was not interested in performing a searching state action inquiry. Not surprisingly, the *DeFrantz* decision was criticized.⁹⁸

After *DeFrantz*, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*—a case that did not involve the Olympic Games or an Olympic Movement athlete—the Supreme Court ruled by a 5-4 margin that the USOC was not a state actor.⁹⁹ In *San Francisco Arts & Athletics*, the USOC brought suit against San Francisco Arts & Athletics, Inc. ("SFAA"), an organization that was attempting to organize and promote the "Gay Olympic Games," to prohibit SFAA from using the word "Olympic" in its materials.¹⁰⁰ SFAA defended by arguing that its use of the Olympic mark was permissible under the Lanham Act, and that the USOC's enforcement of its exclusive right to the marks in this case violated the Fifth Amendment Equal Protection Clause.¹⁰¹

The Court rejected this challenge, holding that SFAA could not show state action.¹⁰² The Court explained that extensive regulation of a private entity "does not transform the actions of the regulated entity into those of the government."¹⁰³ Second, the Court stated that the USOC's receipt of government funding did

⁹⁶ *Id.* at 1193–94 (emphasis added).

⁹⁷ *Id.* at 1194.

⁹⁸ Marks, *supra* note 88, at 157.

⁹⁹ 483 U.S. 522, 547–48 (1987).

¹⁰⁰ *Id.* at 525, 527.

¹⁰¹ *Id.* at 530, 542.

¹⁰² *Id.* at 544–45.

¹⁰³ *Id.* at 544.

not alter the analysis.¹⁰⁴ The Court stated that "[t]he Government may subsidize private entities without assuming constitutional responsibility for their actions."¹⁰⁵ Finally, the Court rejected the "public function" analysis, stating that while the USOC's activities served "a national interest," this fact was not enough to make the USOC's actions governmental action.¹⁰⁶ The Court stated that "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function."¹⁰⁷ Moreover, the Court explained that the facts did not show that the government "coerced or encouraged the USOC" in its decision to deny SFAA the use of the Olympic mark.¹⁰⁸

Justice Brennan's dissent argued that the USOC was a government actor under both the traditional government function analysis and the "close nexus" analysis.¹⁰⁹ The dissent noted that the USOC performs a "distinctive, traditional governmental function" by representing the United States to the world and explained that this function has become increasingly important as the Olympic Games have grown in importance.¹¹⁰ The dissent used the example of the 1980 Olympic boycott to argue that the Olympics had an important place in American foreign policy, and that the 1980 experience "laid bare the impact and interrelationship of USOC decisions on the definition and pursuit of the national interest."¹¹¹ The dissent explained, however, that the function of the USOC was more than just representing the United States and its interests, but was also to perform a function that the private sector had never performed, which is to coordinate Olympic Movement sports. In doing this, the dissent noted, the USOC was endowed by Congress with unique authority to serve an important government interest, and in this way the federal government and the USOC exist in a "symbiotic relationship."¹¹² Accordingly, the dissent noted that

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 545.

¹⁰⁸ *Id.* at 547.

¹⁰⁹ *Id.* at 548-49 (Brennan, J., dissenting).

¹¹⁰ *Id.* at 550.

¹¹¹ *Id.* at 551-53.

¹¹² *Id.* at 556-57 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)).

Congress put the "power and prestige of the United States Government" behind the USOC.¹¹³

Like *DeFrantz*, *San Francisco Arts & Athletics* was criticized. As one commentator noted: "[I]n *San Francisco Arts and Athletics*, almost all types of Government involvement were existent and nevertheless, according to the majority stopped short of finding state action."¹¹⁴ The Court's unwillingness, in both *Tarkanian* and *San Francisco Arts & Athletics*, to find state action, even in the face of considerable evidence of state involvement in the challenged entities, solidified the notion that courts will not intrude in the affairs of amateur sports organizations by allowing constitutional challenges to their actions. This stance, as explained below, has opened the door to ever-increasing involvement by the state in amateur athletics.

3. State High School Athletic Associations—*Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n*

A notable exception to the general rule that the Constitution does not apply to entities involved with amateur athletics is the case of state high school athletic associations. A majority of cases hold that such associations are state actors, because in most cases they actually function as state agencies.¹¹⁵ *Brentwood I* involves a classic example of such an entity.¹¹⁶ In that case, the Supreme Court found that the Tennessee Secondary School Athletic Association ("TSSAA") was engaged in state action in enforcing a recruiting rule against a private school member of the association. The TSSAA had been held to be a state actor in the past, when it was statutorily recognized as an instrumentality of the state. In response to that previous litigation, the statutory designation was changed, but little else about the workings of the

¹¹³ *Id.* at 559.

¹¹⁴ Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1182 (1995); see also Buchanan, *supra* note 13, at 407 (explaining that "[t]he opinion reveals little, if any, effort to consider the combined force of all relevant factors in relation to the state action issue"); Mitchell L. Beckloff, Comment, *State Action in San Francisco Arts and Athletics, Inc. v. United States Olympic Committee: Let the Games Begin*, 22 LOY. L.A. L. REV. 635, 654 (1989).

¹¹⁵ Thomas A. Mayes, Comment, *Tonya Harding's Case: Contractual Due Process, the Amateur Athlete, and the American Ideal of Fair Play*, 3 UCLA ENT. L. REV. 109, 133 (1995).

¹¹⁶ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n (Brentwood I)*, 531 U.S. 288, 290–92 (2001).

TSSAA did. The Supreme Court therefore held, by a margin of 5-4, that the state ultimately was responsible for the decisions of the TSSAA because public officials were "pervasively entwined" in the management and control of the association.¹¹⁷

The Court found that the state was entwined with the TSSAA from the "top down" in that employees of the State Board of Education sat on many of the athletic association's committees, and employees of the athletic association were part of the state retirement system.¹¹⁸ The state was also entwined from the "bottom up" in that an overwhelming majority of the members of the association were public high schools represented by school principals and others acting in their official capacities.¹¹⁹ The Court noted that "[t]here would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions"¹²⁰ The TSSAA argued that a finding of state action would have dire consequences for the association, as it would trigger an avalanche of litigation against the association that would impair significantly its ability to regulate athletics. The Court dismissed this argument, noting that "pleas for special treatment are hard to sell."¹²¹

The dissent in *Brentwood I* was interesting not simply because it rejected the notion that "mere entwinement" could support a finding of state action;¹²² the dissent also took an analytical approach that differed from the approach taken by the majority in *Tarkanian*, where the Court rejected the state action argument. In *Tarkanian*, the Court focused heavily on the formal relationship between UNLV and the NCAA and gave little weight to the particulars of the *action* taken by the NCAA and UNLV against *Tarkanian*. Had the majority done so, the dissent in *Tarkanian* argued, a finding of state action under the "joint action" theory would necessarily have followed. In *Brentwood I*, the dissent advocated a different approach, looking less at the

¹¹⁷ *Id.* at 298 ("The nominally private character of the [Athletic] Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings").

¹¹⁸ *Id.* at 300.

¹¹⁹ *Id.* at 299-300.

¹²⁰ *Id.* at 300.

¹²¹ *Id.* at 305.

¹²² *Id.* at 305 (Thomas, J., dissenting).

entity's relationship with the state, which the majority found inescapably evidenced state action, and instead analyzed the facts by explaining that the state had no involvement, under any theory, in the particular challenged *action*—the enforcement of the recruiting rule against Brentwood Academy.

As a matter of state action jurisprudence, *Brentwood I* has been criticized as adding to the general incoherence of the doctrine by articulating yet another test for determining when the actions of a private entity have a sufficient nexus with the state to amount to state action.¹²³ Yet whatever it means for the state action doctrine generally, *Brentwood I* already has had an important impact in terms of the application of the state action doctrine to amateur sports.¹²⁴ First, the Court in *Brentwood I* clearly signaled that it would not turn a blind eye to the clear presence of the state in a purportedly private organization.¹²⁵ It would not, the majority stated, be swayed by formal declarations of an entity's "private" status where it operates, through "winks and nods," in concert with the state.¹²⁶ This is significant because, in the amateur sports context, there are many such "winks and nods." Yet, while the Court signaled it may be more willing to look behind amateur sports regulators' assertion of "private" status, it also contributed to the static conception of the NCAA as a private actor by reaffirming *Tarkanian*. As will be discussed below, "freezing" the status of the NCAA and the USOC has had important consequences.

¹²³ *Id.* at 303.

¹²⁴ The state action holding was not examined by the Supreme Court in the recently-announced decision in *Brentwood II*, which considered the merits of the First Amendment challenge to one of the TSSAA's recruiting rules, although Justice Thomas stated in his concurring opinion that he would have overruled *Brentwood I* because it "departed so dramatically from our earlier state action cases." *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (Brentwood II)*, 127 S. Ct. 2489, 2499 (2007) (Thomas, J., concurring).

¹²⁵ The *Brentwood I* majority noted that the state "once freely acknowledged the Association's official character but now does it by winks and nods." *Brentwood I*, 531 U.S. at 301. It went on to add that the "significance of winks and nods in state action doctrine" was one of the areas where the dissent disagreed with the majority, explaining that the dissent preferred a more formalistic approach to the analysis, rather than one based on "practical certainty." *Id.* at 301 n.4. The majority stated that "if formalism were the sine qua non of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling." *Id.*

¹²⁶ *Id.* at 301.

II. THE CONSEQUENCES OF THE STATE ACTION-AMATEUR SPORT CASES

It might be assumed that the obvious consequence of the state action-amateur sport cases is that, consistent with the goals of the state action doctrine, the liberty of sports regulators such as the USOC and the NCAA is enhanced because courts are not imposing constitutional requirements on their actions. That is, the government, in the form of the judicial branch, is not intruding on the "private" realm of amateur sports regulation. To some extent, the state action-amateur sport cases achieve these goals. Amateur sports organizations, like the USOC and the NCAA, are free to manage the athletes and athletic competitions within their respective jurisdictions without fear of constitutional litigation. They can give athletes and others the due process of their own design without considering whether such procedures would pass constitutional muster. Giving sports organizations "room" in this regard can be important, so that the rules of the game, so to speak, prevail. This beneficial consequence is underscored by amateur sports regulators, who commonly assert that there would be dire consequences if the state action doctrine were applied to allow constitutional litigation to go forward against them.¹²⁷ Such consequences, amateur sports organizations assert, would include a wave of litigation that would destroy the entities' budgets and render them incapable of effectively regulating athletics.¹²⁸ These predictions of disaster, while found to be unconvincing by the Court in *Brentwood I*, may contribute significantly to courts' unwillingness to hold that amateur sports organizations are engaged in state action.

Yet while doomsday consequences of a state action finding are frequently predicted by amateur sports organizations, what is not examined are the *actual* consequences of holding that entities such as the NCAA and the USOC are private actors. As explained below, a closer look at the consequences of *San Francisco Arts & Athletics* and *Tarkanian* reveals not that the "private realm" of amateur athletics has been protected and

¹²⁷ See *id.* at 304 (citing Brief for Respondents at 35, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 532 U.S. 288 (2001) (No. 99-901)).

¹²⁸ Such an argument is frequently made in the anti-doping context, where it is commonly believed that constitutional litigation would significantly weaken an entity like the USADA because of the costs involved.

enhanced, but that there has been a quite different and paradoxical result.

A. *The Constitutional Status of Amateur Sports Organizations Has Been "Frozen"*

Commentators have noted that "[n]ew forms of governmental activities . . . change the reality of state actions."¹²⁹ This has certainly been the case with amateur sports, where the increasing role of the government has changed the reality of state involvement. Yet, the law has not, and under current formulations will not, keep up with this changed reality. Instead, what has happened is precisely what Justice Brennan foreshadowed in his dissent in *San Francisco Arts & Athletics*. Justice Brennan warned that a narrow interpretation of the state action doctrine would, in essence, "freeze into law a static conception of government," so that "our judicial theory of government action would cease to resemble contemporary experience."¹³⁰ Indeed, this "freezing," to a large extent, has occurred in the area of amateur sports, where a powerful ripple effect was created by the decisions in *Tarkanian*, *DeFrantz*, and *San Francisco Arts & Athletics*.¹³¹ Lower courts and legal scholars have assumed that the USOC and the NCAA are not state actors *as a matter of law*.¹³² Thus, common wisdom that the

¹²⁹ Barak-Erez, *supra* note 114, at 1191.

¹³⁰ *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 549 n.1 (1987) (Brennan, J., dissenting).

¹³¹ Interestingly, this "freezing" seems only to operate one way. There does not seem to be any notion that *Brentwood I*, which held a high school athletic association to be a state actor, has frozen a conception of all high school athletic associations as public actors as a matter of law. Indeed, the TSSAA is still litigating the state action issue, asking the Supreme Court to overrule its previous finding that it was a state actor when it sanctioned member-school Brentwood Academy.

¹³² See, e.g., *Harding v. U.S. Figure Skating Ass'n*, 851 F. Supp. 1476, 1479 (D. Or. 1994), *vacated*, 879 F. Supp. 1053 (D. Or. 1995); Beckloff, *supra* note 114, at 644-45; Douglas Bryant, Comment, *A Level Playing Field? The NCAA's Freshman Eligibility Standards Violate Title VI, but the Problems Can Be Solved*, 32 TEX. TECH. L. REV. 305, 325 (2001); Carter, *supra* note 50, at 80; Michael G. Dawson, Note, *National Collegiate Athletic Association v. Tarkanian: Supreme Court Upholds NCAA's Private Status Under Fourteenth Amendment, Repelling Shark's Attack on NCAA's Disciplinary Powers*, 17 PEPP. L. REV. 217, 235-36 (1989); Amanda N. Luftman, Comment, *Does the NCAA's Football Rule 9-2 Impede the Free Exercise of Religion on the Playing Field?*, 16 LOY. L.A. ENT. L. REV. 445, 448 (1995); Mayes, *supra* note 115, at 130-31; Paul C. McCaffrey, Note, *Playing Fair: Why the United States Anti-Doping Agency's Performance-Enhanced Adjudications Should Be Treated as State Action*, 22 WASH. U. J.L. & POL'Y 645, 667 (2006).

USOC and the NCAA are "private" has evolved to be a static, settled principle of law. This static view of the state action doctrine prevents the law from accounting for an increased government presence in amateur athletic regulation. This view also has acted as a virtual invitation to the government to exercise increasing levels of involvement in amateur sports without corresponding constitutional restraints, as a means of promoting government policies. Therefore, the current application of the state action doctrine to amateur sports organizations undermines their legitimacy more than it enhances their liberty.

The Supreme Court's formulation of the state action doctrine seems to negate the possibility of "freezing" a conception of an entity and its relationship with the government, such that the entity can be held as a matter of law to be, or not be, a state actor. The Court has stated that the state action inquiry is "necessarily fact-bound,"¹³³ and that the state action determination can only be conducted by "sifting facts and weighing circumstances."¹³⁴ The Court has also stressed that no one set of facts or circumstances is sufficient to find state action.¹³⁵ Finally, there are several different theories upon which state action can be found and the Supreme Court has emphasized that it is not relevant whether state action might be lacking under certain theories if there is at least one that is sufficient.¹³⁶ Despite these admonitions, however, the state-action amateur sport cases are generally interpreted as establishing the NCAA and USOC's constitutional status as a matter of law.

1. The Static Conception of the NCAA

It has been "universally accepted" that *Tarkanian* established that the NCAA is not a state actor subject to constitutional limitations.¹³⁷ *Tarkanian* was decided in 1988,

¹³³ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n (Brentwood I)*, 531 U.S. 288, 298 (2001) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982)).

¹³⁴ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

¹³⁵ *Brentwood I*, 531 U.S. at 295-96; see also *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1994) ("The Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.'" (quoting *Ex parte Virginia*, 100 U.S. 339, 346-47 (1880))).

¹³⁶ *Brentwood I*, 531 U.S. at 295-96.

¹³⁷ *Hearing, supra* note 46, at 11 (statement of Prof. Gary Roberts); see also *Matthews v. NCAA*, 79 F. Supp. 2d 1199, 1207 (E.D. Wash. 1999); *Bloom v. NCAA*,

and, since that time, several facts have changed that make a static conception of the NCAA's constitutional status particularly troubling. First, as explained in great detail by Burlette Carter, the NCAA has undergone significant restructuring in that time, so that the association's governance structure, which was in place and significant to the Supreme Court's ruling in *Tarkanian*, is now gone.¹³⁸ Professor Carter makes a compelling case for re-examining the NCAA's constitutional status based on this dramatic restructuring, stating that "there now seems a very good argument that state power has been delegated by public institutions to the NCAA, at least in the case of Division I."¹³⁹ Professor Carter also convincingly argues that state action could be found on a theory of joint action.¹⁴⁰

Also changed is our understanding of the student-athlete experience and the interests that are at stake for those who participate in NCAA-regulated sports.¹⁴¹ Numerous commentators have asserted that the due process protections offered to student-athletes are terribly inadequate given the interests that are at stake.¹⁴² Yet, the universal acceptance of the NCAA as a private actor means that student-athletes have very little meaningful legal recourse. This is because, since *Tarkanian*, the constitutional status of the NCAA and the facts underlying its operations have been taken by courts "as law

93 P.3d 621, 624 (Colo. Ct. App. 2004).

¹³⁸ Carter, *supra* note 50, at 27, 39. In the petitioner's brief in *Tarkanian*, it was explained that "the general policies and all rules of the Association are voted on by the member institutions at annual conventions. Each member is entitled to one vote in matters voted on at Association meetings" to show that the influence of state institutions is diminished because every institution, public or private, is entitled to the same amount of authority over the rule-making process. Brief for the Petitioner at 4, *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (No. 87-1061). Burlette Carter explains, however, that this is no longer the case.

¹³⁹ Carter, *supra* note 50, at 85. Professor Carter argues that NCAA restructuring will have its "most wide-ranging effect" on the state action issue, because in *Tarkanian*, the Court relied on the fact that NCAA policies were established by a one-member, one-vote system, so that for any given policy, "several hundred" other institutions in addition to UNLV established it. Now, however, with restructuring, the authority to set NCAA policy is controlled at the Divisional level, so that, for instance, Division I members delegate authority to the Division I Board of Directors and Management Council to set policy. *Id.* at 81-82.

¹⁴⁰ *Id.* at 86.

¹⁴¹ See generally Timothy Davis, *Student-Athlete Economic Interests: Contractual Dimensions*, 19 T. MARSHALL L. REV. 585 (1994); Sahl, *supra* note 61.

¹⁴² See, e.g., *Hearing*, *supra* note 46, at 4-5 (statement of Rep. Spencer Bachus, Member, House Subcomm. on the Constitution).

itself.”¹⁴³ Accordingly, there have been no successful state action challenges to the NCAA since *Tarkanian* was decided.

2. The Static Conception of the USOC

Similar to freezing the constitutional status of the NCAA, the status of the USOC is widely assumed to be that of a private actor, not subject to constitutional restraint due to the decisions in *San Francisco Arts & Athletics* and *DeFrantz*. Aside from the fact that such “freezing” is inappropriate according to the terms of the state action doctrine itself, it is particularly problematic in the case of the USOC because its “private” status was determined in cases where the state action issue was litigated in a limited way.

In *DeFrantz*, as discussed above, the case was litigated in the sensitive aftermath of the former Soviet Union’s invasion of Afghanistan. The call to boycott the Olympic Games upon which the claim in *DeFrantz* was made was a significant feature of the Carter Administration’s foreign policy response to the invasion. The court’s scrutiny of the involvement of the federal government in the USOC’s decision to boycott reveals that the court engaged in a limited analysis of the issue. Noting that there was no symbiotic relationship or close nexus between the federal government and the USOC, the court concluded that the plaintiffs, in essence, had to satisfy a higher burden to prove state action because the case did not involve discrimination on the basis of race.¹⁴⁴ The Supreme Court, however, has never imposed such a heightened requirement. Failing this version of the state action inquiry, the district court in *DeFrantz* ruled against the athletes, concluding that there was no state action. The court tellingly noted that a finding of state action would necessarily involve the court in a “non-justiciable” area.

¹⁴³ Carter, *supra* note 50, at 80.

¹⁴⁴ *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1194 (D.D.C. 1980).

Like *DeFrantz*,¹⁴⁵ *San Francisco Arts & Athletics* seems to be a weak case from which to draw the conclusion that the USOC is not a state actor as a matter of law. First, the state action issue was not central to the parties' arguments. The case focused primarily on statutory claims related to the use of the Olympic trademark. Additionally, the case did not involve a dispute related to Olympic Movement sports or an Olympic Movement athlete. Moreover, the state action holding in *San Francisco Arts & Athletics* is simply not broad enough to support the conclusion that the USOC is not a state actor as a matter of law. The Court held that the USOC is not a state actor under the "traditional public function" theory because the USOC does not perform functions that were traditionally the "exclusive prerogative" of the government. This theory was SFAA's primary argument for state action, as it was unable to show that the challenged action, the denial of the use of the Olympic mark, was the product of joint action, coercion, or significant encouragement by the United States Government.¹⁴⁶ Indeed, SFAA could not show that the action of denying the use of the mark had any nexus at all to the federal government. Yet, despite the seemingly narrow ruling in *San Francisco Arts & Athletics*, it is generally taken as fact that the USOC is not a state actor. As with the NCAA, there appears to have been few if any constitutional challenges to the USOC since the decisions in *DeFrantz* and *San Francisco Arts & Athletics*.

¹⁴⁵ Given the highly unique circumstances of *DeFrantz*, and the limited state action analysis that resulted, *DeFrantz* would seem like a poor case upon which to build a conclusion that the USOC is not a state actor as a matter of law. However, this is just the effect that it had in *San Francisco Arts & Athletics*. An analysis of the parties' briefs and the opinion in *San Francisco Arts & Athletics* shows the power of the state action bootstrapping that has taken place. An important part of the argument and holding that the USOC was not a state actor in *San Francisco Arts & Athletics* was that it had been held not to be a state actor in *DeFrantz*. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 545 n.27 (1987) (noting that "even the unique sequence of events in 1980 confirms that the USOC cannot properly be considered a governmental agency" was quoted extensively from the opinion in *DeFrantz* and explained that the District Court in that case found there was no state action); see also Brief for Respondents at 45, *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987) (No. 86-270) (citing *DeFrantz* for the proposition that the USOC is not subject to constitutional restrictions).

¹⁴⁶ See Koller, *supra* note 84, at 118-19.

B. The State Action-Amateur Sport Cases Invite Increased State Involvement in Amateur Athletics: The Case of the United States Anti-Doping Agency

The "freezing" of the law's conception of the NCAA and the USOC as private actors has had important consequences beyond the fact that it has chilled constitutional litigation against the NCAA and the USOC. The effect goes even further, by not only deterring potential litigation, but also inviting increased state involvement in amateur athletics without constitutional constraints.¹⁴⁷ This effect can clearly be seen in the formation and operation of the United States Anti-Doping Agency ("USADA").

Scholars have criticized the Supreme Court's narrow interpretation of the state action doctrine by noting that it comes at a time of increased "privatization" of traditional government programs.¹⁴⁸ Of particular concern is the government enlisting private entities to implement government programs or provide services on the government's behalf.¹⁴⁹ Changes to Medicare and Medicaid, welfare, and public education programs, among others, are examples of increased "privatization."¹⁵⁰ Privatization can therefore take the form of contracting out traditionally-provided government services, as was the case in *Blum* and *Rendell-Baker*, or privatizing traditional public services such as utilities or transportation.¹⁵¹ The resulting exercises of government power through ostensibly private hands are not subject to constitutional scrutiny because of the current formulation of the state action doctrine.¹⁵² Thus, it has been argued that the "old tests" for state

¹⁴⁷ This Article does not argue that increased state involvement in amateur athletics is by itself improper or unwarranted. Instead, this Article makes the point that it is state involvement without corresponding constitutional limitations that is problematic.

¹⁴⁸ Barak-Erez, *supra* note 114, at 1183; Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 587-89 (2001); Metzger, *supra* note 19, at 1457-60; Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 987 (2005).

¹⁴⁹ William Brooks, *The Privatization of the Civil Commitment Process and the State Action Doctrine: Have the Mentally Ill Been Systematically Stripped of Their Fourteenth Amendment Rights?*, 40 DUQ. L. REV. 1, 6 (2001); Metzger, *supra* note 19, at 1370.

¹⁵⁰ Metzger, *supra* note 19, at 1369, 1382.

¹⁵¹ Barak-Erez, *supra* note 114, at 1183.

¹⁵² Metzger, *supra* note 19, at 1373.

action are not keeping up with new governmental realities.¹⁵³ These new governmental realities go beyond the trend towards "privatization." In the amateur sports context, the new governmental reality is *increasing* state power in a traditionally *private* area. This clearly can be seen in the formation of the USADA, whose creation was through the efforts of the federal government for the purpose of promoting federal anti-drug policy goals.

In the past, prohibiting performance-enhancing drug use in sports was not a government concern. Barrie Houlihan has examined the "transition" of anti-doping efforts "from a private matter to a public policy issue."¹⁵⁴ While describing the United States Government as traditionally "apathetic" on the issue of doping, Houlihan states that the "United States Government, which had for many years studiously avoided acknowledging the issue of doping in sport," emerged in the late 1990's as a "leading supporter . . . of a more rigorous anti-doping regime."¹⁵⁵ This interest in anti-doping was a result of many factors, including persistent reports of performance-enhancing drug use by elite athletes and the fact that the government believed such use was leading to an increase in performance-enhancing drug use, including steroids, by young people.¹⁵⁶ It was not just steroid use by Olympic Movement athletes that concerned the government, but use of such drugs by professional athletes as well.¹⁵⁷ Many within the United States Government believed that the government had a responsibility to undertake domestic and international efforts to "strengthen anti-doping regimes."¹⁵⁸ Building a domestic anti-doping "regime," however, required

¹⁵³ Barak-Erez, *supra* note 114, at 1186.

¹⁵⁴ Barrie Houlihan, *Building an International Regime to Combat Doping in Sport*, in *SPORT AND INTERNATIONAL RELATIONS: AN EMERGING RELATIONSHIP* 62, 62 (Roger Levermore & Adrian Budd eds., 2004).

¹⁵⁵ *Id.* at 64, 72.

¹⁵⁶ *Effects of Performance Enhancing Drugs on the Health of Athletes and Athletic Competition: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 106th Cong. 95 (1999) [hereinafter *Hearing on the Effects of Performance Enhancing Drugs*] (statement of Sen. John McCain, Member, S. Comm. on Commerce, Science, and Transportation).

¹⁵⁷ See generally *Steroids in Amateur and Professional Sports—The Medical and Social Costs of Steroid Abuse: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. (1989).

¹⁵⁸ *Hearing on the Effects of Performance Enhancing Drugs*, *supra* note 156, at 20 (statement of Gen. Barry R. McCaffrey).

uniquely "state" resources.¹⁵⁹ Accordingly, many members of Congress and the Executive Branch made it a policy objective to fight doping in sports, resulting in the creation of the USADA.¹⁶⁰

The USADA became functional on October 1, 2000,¹⁶¹ designated by Congress as the United States' "official" anti-doping agency. The USADA was created as a private, not-for-profit corporation, which undertakes its duties pursuant to a contract with the USOC to administer the United States' drug testing programs.¹⁶² The USADA receives the vast majority of its funding from the United States Government through the Office of National Drug Control Policy ("ONDCP").¹⁶³ The USADA's mission is to preserve "the well-being of Olympic sport, the integrity of competition, and ensur[e] the health of athletes."¹⁶⁴ In addition to its Olympic Movement duties, there have been a variety of proposals in Congress that would involve the USADA in drug testing programs for professional sports leagues and the NCAA.¹⁶⁵

The need for state resources and the authority to combat doping, coupled with the constitutional limits that state power entails, provided a challenging situation for the government officials who hoped to combat doping through the power of the state. On the one hand, to be effective, officials believed an anti-doping entity had to have United States Government status. Initially, it was contemplated by the government officials involved in forming the USADA that it would need to be an actual government agency to be effective.¹⁶⁶ Officials envisioned a "U.S. agency" with "certain governmental or quasi-

¹⁵⁹ Houlihan, *supra* note 154, at 68.

¹⁶⁰ Koller, *supra* note 84, at 103, 105.

¹⁶¹ U.S. Anti-Doping Agency History, <http://www.usantidoping.org/who/history.html> (last visited Oct. 15, 2007).

¹⁶² Travis T. Tygart, *Winners Never Dope and Finally, Dopers Never Win: USADA Takes Over Drug Testing of United States Olympic Athletes*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 124, 127-28 (2003).

¹⁶³ Koller, *supra* note 84, at 129.

¹⁶⁴ U.S. ANTI-DOPING AGENCY, 2004 ANNUAL REPORT 3 (2005), http://www.usantidoping.org/files/active/who/annual_report_2004.pdf.

¹⁶⁵ S. 1114, *The Clean Sports Act of 2005*, and S. 1334, *The Professional Sports Integrity and Accountability Act: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 39 (2005) (statement of Gary Bettman, Commissioner, National Hockey League); *see also id.* at 65 (statement of Frank D. Uryasz, President, The National Center for Drug Free Sport, Inc.).

¹⁶⁶ *See* Koller, *supra* note 84, at 114-16.

governmental powers,”¹⁶⁷ or at least “some instrumentality of the United States’ status.”¹⁶⁸ It was asserted that governmental status would improve the accountability of anti-doping efforts and significantly enhance the credibility of the United States.¹⁶⁹

On the other hand, however, there were concerns that the United States would not be able to establish an effective anti-doping agency because of constitutional rights of privacy and due process.¹⁷⁰ Indeed, at least some government officials hoped to limit due process protections for accused athletes so that the athlete could be removed from competition before having a chance to defend him or herself.¹⁷¹ Some even questioned whether there was a place for “fundamental notions of due process” in the fight against doping.¹⁷² This is the prevailing view among anti-doping advocates—that, to be effective, authorities must stay one step ahead of the cheaters.¹⁷³ One of the ways doping authorities stay “one step ahead” is through the administration of an anti-doping regime, the World Anti-Doping Code, which was developed through the World Anti-Doping Agency with significant input and influence from the United States.¹⁷⁴ Under these regulations, doping is a strict liability offense, and authorities need only prove their claim based on the “comfortable satisfaction” of regulators, not “beyond a reasonable doubt.”¹⁷⁵ Using this standard, the USADA announced that it had eliminated the requirement that an athlete actually fail a

¹⁶⁷ *Hearing on the Effects of Performance Enhancing Drugs*, *supra* note 156, at 20 (statement of Gen. Barry R. McCaffrey).

¹⁶⁸ WHITE HOUSE TASK FORCE ON DRUG USE IN SPORTS, PROCEEDINGS: FIRST MEETING OF THE WHITE HOUSE TASK FORCE ON DRUG USE IN SPORTS 83 (2000) [hereinafter WHITE HOUSE TASK FORCE ON DRUG USE IN SPORTS].

¹⁶⁹ *Hearing on the Effects of Performance Enhancing Drugs*, *supra* note 156, at 20 (statement of Gen. Barry R. McCaffrey).

¹⁷⁰ *See* WHITE HOUSE TASK FORCE ON DRUG USE IN SPORTS, *supra* note 168, at 7 (statement of Barry R. McCaffrey).

¹⁷¹ *See id.* at 35 (open discussion response of Mickey Ibarra).

¹⁷² *Id.* at 56 (remarks of Scott Blackmun).

¹⁷³ *See* Laura S. Stewart, Comment, *Has the United States Anti-Doping Agency Gone Too Far? Analyzing the Shift from ‘Beyond a Reasonable Doubt’ to Comfortable Satisfaction*, 13 VILL. SPORTS & ENT. L.J. 207, 227 (2006); *see also* Amy Shipley, *A Wider Front in Doping Battle: Law Enforcement Takes the Lead in Sports Probes*, WASH. POST, Mar. 2, 2007, at A01 (“In an environment in which the athletes who use illegal performance-enhancing substances seem routinely to be at least one step ahead of drug testers, efforts are underway to strengthen the relationship between sports bodies and law enforcement officials.”).

¹⁷⁴ Koller, *supra* note 84, at 100, 103–04.

¹⁷⁵ Stewart, *supra* note 173, at 225.

drug test before being sanctioned. Instead, the USADA asserted that it can sanction an athlete based on a "non-analytical positive," which is circumstantial evidence of doping "to the comfortable satisfaction" of regulators.¹⁷⁶ Critics have argued that this level of proof for a doping violation has the possibility of being "unreliable and unfair,"¹⁷⁷ especially coupled with the stiff penalties and difficult procedural hurdles for accused athletes. Athletes have few legal options, outside of arbitration, if they believe the process was unfair.¹⁷⁸ Such a system, if administered by the state, could trigger constitutional privacy and due process protections.

This fact is not lost on those both within and outside of the government who wish to fight doping in sports. Therefore, instead of simply creating a government agency to fight doping, members of Congress and the ONDCP worked to establish an entity that would not be subject to constitutional limitations. Congress and the ONDCP did this by using their influence over the USOC, which had been declared by the Supreme Court in *San Francisco Arts & Athletics* to be a private entity, to direct it to establish the USADA.¹⁷⁹ Thus, officially, the USADA states it was created by the USOC.¹⁸⁰ However, the impetus for and effort to create the USADA was from the ONDCP and Congress, both of which provided the blueprint and funding for what the USADA became.¹⁸¹

Since its formation, members of Congress and the Executive Branch have been significantly involved in key areas of the USADA's operation. For instance, in the months leading up to the 2004 Athens Olympic Games, the government used its subpoena power to aid a USADA investigation and prevent certain athletes from competing in the Games.¹⁸² Specifically,

¹⁷⁶ Koller, *supra* note 174, at 93, 111. The USADA has in fact sanctioned several athletes using the "non-analytical positive" standard. *Id.* at 93.

¹⁷⁷ James A.R. Nafziger, *Circumstantial Evidence of Doping: BALCO and Beyond*, 16 MARQ. SPORTS L. REV. 45, 47 (2005).

¹⁷⁸ See Stewart, *supra* note 173, at 242.

¹⁷⁹ See *Hearing on the Effects of Performance Enhancing Drugs*, *supra* note 156, at 20 (statement of Gen. Barry R. McCaffrey); see also WHITE HOUSE TASK FORCE ON DRUG USE IN SPORTS, *supra* note 168, at 15 (remarks of Frank Shorter).

¹⁸⁰ U.S. ANTI-DOPING AGENCY, 2001 ANNUAL REPORT 2 (2002), http://www.usantidoping.org/files/active/who/annual_report_2001.pdf.

¹⁸¹ See *Hearing on the Effects of Performance Enhancing Drugs*, *supra* note 156, at 20 (statement of Gen. Barry R. McCaffrey).

¹⁸² See Owen Slot, *United States Risks Losing Race Against Time to Keep Athens*

government officials were concerned that track and field athletes implicated in the Bay Area Laboratory Cooperative ("BALCO") scandal might compete in Athens. Yet without the information from the BALCO grand jury investigation, USADA was unable to bring doping cases against those who may have used previously-undetectable performance-enhancing drugs. Accordingly, to prevent any BALCO-tainted athletes from going to Athens, a Senate Committee subpoenaed documents from the Department of Justice that were part of the ongoing BALCO investigation.¹⁸³ The Senate, in what was termed an "unprecedented action"¹⁸⁴ subsequently turned the material over to USADA.¹⁸⁵

The BALCO scandal was not an isolated incident. In fact, the USADA regularly works with the government to develop evidence and pursue sanctions against athletes. For instance, the USADA recently has worked with federal agents as part of a multi-state investigation and bust of an operation that sold steroids and other performance-enhancing drugs through the internet, and they apparently are working with the government on several other investigations.¹⁸⁶ It is contemplated that, just as it did with the BALCO scandal, the government will provide any evidence of purchases by Olympic Movement athletes so that the USADA can take action to sanction them.¹⁸⁷ This collaboration has yielded results that the USADA simply could not achieve on its own.¹⁸⁸ In addition, in 2004, the United States Attorney involved in the BALCO case gave permission to one of the investigators in the case to testify at hearings in which USADA was seeking to ban from competition athletes who had never failed a drug test. The United States Attorney allowed the

Clean, U.K. TIMES, Apr. 29, 2004, at 46.

¹⁸³ Press Release, Sen. John McCain, Chairman, Senate Comm. on Commerce, Science, and Transp., Committee to Subpoena DOJ Documents Relating to Banned Substance Use in Olympics (Apr. 8, 2004).

¹⁸⁴ S. 529: *To Authorize Appropriations for the U.S. Anti-Doping Agency: Hearing Before the S. Comm. on Commerce, Science & Transportation*, 109th Cong. (2005) (opening statement of Ted Stevens, Chairman, U.S. Anti-Doping Agency).

¹⁸⁵ S. Res. 355, 108th Cong. (2004) (enacted).

¹⁸⁶ See Shipley, *supra* note 173, at A01.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.* (explaining that doping authorities do not have reliable tests for agents such as human growth hormone and other performance-enhancing agents so that they must rely on evidence developed from government investigations). "If you look at the really big busts, the really big advances, the majority have been with the assistance of other government agencies" *Id.* (quoting WADA Director, Gen. David Howman).

investigator to use at the hearings original documents from the investigation so that their authenticity could not be challenged, and so that the USADA could win its case. The United States Attorney acknowledged that such a move was "unique" because the criminal investigation was still ongoing, but that partnering with the USADA was part of an effort to "help them in their mission."¹⁸⁹ Moreover, the blurred line between the government and the USADA is illustrated by the fact that when athletes who test positive for use of a banned substance agree to assist *the government* in steroid-related investigations, *the USADA* offers them a lesser penalty.¹⁹⁰ As one anti-doping official stated, the government's assistance in USADA's operations has caused a "revolution" in the anti-doping movement, as "sports authorities have no power to do anything and government has the power to do all. That's what it takes."¹⁹¹

It is this "difference" that is made by the government using its tools against individuals that is supposed to trigger constitutional protections. Yet, while nothing should preclude a finding of state action against the USADA, such a finding, under current state action-amateur sports jurisprudence, is not likely.¹⁹² The USADA's position is that, like the USOC, it is a "private" actor. Given the static conception of both the USOC and the NCAA as "private" actors, the state action precedent is particularly powerful. It not only arguably protects USADA's "private" status, it protects the government's ability to fight doping in the manner it deems most effective: using the power and status of the state to combat doping, while avoiding the unpleasant side-effects of constitutional litigation. Thus, while the state action-sport cases do limit the reach of "federal judicial power," according to one of the asserted goals of the state action doctrine, it certainly does not limit the reach of government

¹⁸⁹ *Id.* (quoting Matt Parrella, an assistant U.S. attorney assigned to the BALCO case).

¹⁹⁰ *Cf.* Amy Shipley, *Gatlin Will Claim Sabotage in Defense of Doping Charges*, WASH. POST, July 30, 2007, at E01.

¹⁹¹ Shipley, *supra* note 173, at A01 (noting that government "tools" make the difference in the anti-doping effort). "When I look at the 23 years of work before Balco and what we were able to do—yeah, we would grind out positives and occasionally have a big hit—but when the government . . . decides to go after it and comes in with their tools . . . [t]hey (wiretap), they pull out e-mails; I was amazed." *Id.* (quoting Don Catlin, Director of UCLA's Olympic Analytical Laboratory).

¹⁹² See Koller, *supra* note 84, at 116.

power exercised through the executive and legislative branches. This fact has a cost, as explained below, in that it undermines the legitimacy of our most important amateur sports organizations.

C. The "Frozen" Status of the NCAA and USOC Undermines Their Legitimacy

The conclusion that the NCAA and the USOC were private actors in *San Francisco Arts & Athletics* and *Tarkanian*, and the static conception of these entities that has followed, directly collides with the perception that the USOC and NCAA regulate athletes through and with the power of the state. This perception undermines the legitimacy of these organizations in a way that allowing constitutional litigation against them to go forward would not.

1. Amateur Athletic Regulation Is Perceived to Be Unfair

Amateur sport is a tempting target for government influence, because of its high profile nature, appeals to nationalism, and commercial importance. As a result, the NCAA, USOC, and now the USADA are far from being simply "private," but instead operate with significant government presence and influence. This dissonance between the notion that the USOC and the NCAA are private as a matter of law and the perceived reality of the state's presence in their activities undermines the legitimacy of their regulation¹⁹³ because the USOC and the NCAA, and now the USADA, are perceived to have an unfair advantage over the athletes and others they regulate—the backing of the government.

To some extent, the legitimacy problems brought on by the state action-amateur sports cases begin with the reasoning of the decisions themselves, which emphasize a formalistic analysis of the structure of the NCAA and the USOC, and not the practical

¹⁹³ It could be argued that *Brentwood I* went a long way to curing some of the legitimacy problems created by the state action-amateur sport cases, by holding the obviously state-influenced TSSAA to constitutional standards. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n (Brentwood I)*, 531 U.S. 288, 291 (2001). However, in that case, the Court also reaffirmed the conclusion in *Tarkanian*. See *id.* at 297–98. Moreover, in *Brentwood II*, one Justice said the state action ruling was wrong and should be over-turned. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n (Brentwood II)*, 127 S. Ct. 2489, 2499 (2007) (Thomas, J., concurring in the judgment).

realities of how these entities operate.¹⁹⁴ For instance, of significance to the Court in *Tarkanian* was the fact that UNLV could simply have refused to sanction Tarkanian according to the NCAA's demands and withdrawn from the NCAA. Although the dissent pointed out that such a reason was not *legally* sufficient to defeat a finding of state action,¹⁹⁵ the reasoning itself was not *factually* sound in terms of the NCAA's virtual monopoly over inter-collegiate athletic competition. Pulling out of the NCAA would essentially have cost the university its athletic programs and millions of dollars of lost television and marketing revenue, something no university would risk.

Moreover, the Court's emphasis on the formal structure of UNLV's relationship with the NCAA ignored the practical realities of the challenged action. The facts in *Tarkanian* indicated that public universities had a great deal to do with the actions taken against Coach Tarkanian. The Committee on Infractions and the NCAA Council were responsible for the sanctions. Four out of five members of the Committee on Infractions were representatives of public universities,¹⁹⁶ and eleven out of sixteen members of the NCAA Council were representatives from public universities. By turning a blind eye to these facts, the Supreme Court contributed to what one commentator has explained is "a long-held perception of those involved in intercollegiate athletics . . . that the NCAA has exercised unfettered discretion in regulating college sports."¹⁹⁷ Moreover, as stated during a 2004 hearing on Due Process and the NCAA, "Merited or not, the NCAA has at least the perception of a fairness problem."¹⁹⁸

Likewise, the Court's steadfast refusal, in *San Francisco Arts & Athletics*, to acknowledge the unique importance of the USOC to the federal government, and its unique status within the governmental orbit was, again, a refusal to acknowledge

¹⁹⁴ Such a "disconnect" between the state action doctrine and political and social realities is, as some critics have argued, a problem with the doctrine itself. As Charles Black asserted, the doctrine fails to account for "the wonderfully variegated ways in which the Briarean state can put its hundred hands on life." Black, *supra* note 38, at 89.

¹⁹⁵ *NCAA v. Tarkanian*, 488 U.S. 179, 202-03 (1988) (White, J., dissenting).

¹⁹⁶ *Id.* at 185 (majority opinion).

¹⁹⁷ Arslanian, *supra* note 49, at 355.

¹⁹⁸ *Hearing*, *supra* note 46, at 2 (statement of Rep. Steve Chabot, Chairman, House Subcomm. on the Constitution).

commonly accepted facts and perceptions. The effect of this, as discussed above, is that the USADA is likely to enjoy the same deference as the USOC and escape constitutional scrutiny. This is particularly troubling, as the USADA, perhaps even more than the USOC, is clearly perceived to be an instrument of the United States Government. In addition to its designation as the United States' "official" anti-doping agency, the USADA, in many cases, carries the endorsement of the United States Government.¹⁹⁹ Moreover, the "imprimatur" of the federal government on USADA's actions is apparent to the athletes who are tested and sanctioned by USADA. For instance, when the BALCO scandal was unfolding, many athletes were acutely aware of Congress's indispensable assistance with USADA's investigation of athletes for doping violations.²⁰⁰

Finally, the perception of unfairness is enhanced because the state action doctrine as applied to amateur sports has not "preserve[d] state sovereignty"²⁰¹ to regulate private behavior by limiting the reach of federal power. In the case of the NCAA, as explained above, numerous states reacted to the *Tarkanian* decision by attempting to provide enhanced due process protections for institutions and individuals, including student-athletes, who are targeted by NCAA proceedings.²⁰² The NCAA responded to these initiatives by suing for declaratory and injunctive relief on the grounds that the state statutes violated the Commerce Clause.²⁰³ This effort was successful, and state statutes attempting to require the NCAA to provide targeted

¹⁹⁹ Indeed, this endorsement is clear to the media, which frequently reports on the USADA as if it were an instrumentality of the United States Government. See Sally Jenkins, *Due Process? Not for Track Stars*, WASH. POST, June 26, 2004, at D01 ("You get an uneasy feeling from watching USADA's bumbling zealots. You get the feeling they'd waive the U.S. Constitution if they could—which is a pretty unsettling thing to feel about an organization that is funded by U.S. taxpayer dollars and a grant from the White House."); see also Luis Fernando Llosa & L. Jon Wertheim, *Inside the Steroid Sting*, SI.COM, Mar. 6, 2007, <http://sportsillustrated.cnn.com/2007/more/03/06/rx.trouble0312/index.html> (listing the USADA among the "law enforcement and prosecutorial agencies" involved in a recent bust of individuals involved in distributing performance-enhancing substances).

²⁰⁰ See Koller, *supra* note 84, at 132 (observing that track and field athletes Marion Jones and Kelli White had noted Congress's intense interest in the USADA's anti-doping efforts, and even expressed their belief that Congress appeared to be singling out track and field and ignoring doping in other sports).

²⁰¹ Chemerinsky, *supra* note 7, at 536.

²⁰² See Kitchin, *supra* note 51, at 76.

²⁰³ See *id.* at 76–77.

individuals with certain due process protections were either struck down or rendered meaningless, leaving states with no options for regulating such conduct.²⁰⁴ For instance, in *NCAA v. Miller*, the court held that the NCAA's need for uniformity in its enforcement procedures overrode states' interests in ensuring due process for its citizens.²⁰⁵ Similarly, state law that might apply to actions taken against Olympic Movement athletes is pre-empted by the Amateur Sports Act.²⁰⁶

2. Amateur Athletic Regulation Is Perceived to Be Racist

Critics of the state action doctrine have pointed out that applying the state action requirement to protect individual autonomy and freedom is "to look at only one side of the equation."²⁰⁷ This equation is a complex one in the area of amateur sports, because sports are entwined with and reflective of power relationships in society.²⁰⁸ The law applied to sports is necessarily so entwined as well, especially with respect to race and sports. In this way, what may be most troubling about the application of the state action doctrine to amateur sports is that the deference shown to organizations such as the NCAA and the USOC is necessarily married with a doctrine that originated in racism.²⁰⁹

The *Civil Rights Cases* and the resulting state action requirement, which limited the Fourteenth Amendment to cases of active discrimination by the state, were the product of the 1877 Compromise, which ended Reconstruction²¹⁰ and reflected the entrenched racism that has troubled this country since its

²⁰⁴ See *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993); *NCAA v. Roberts*, No. TCA 94-40413-WS, 1994 WL 750585, at *1 (N.D. Fla. Nov. 8, 1994).

²⁰⁵ *Miller*, 10 F.3d at 639-40.

²⁰⁶ See *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 596 (7th Cir. 2001).

²⁰⁷ Chemerinsky, *supra* note 7, at 537. "[U]nder the state action doctrine, the rights of the private violator always are favored over the rights of the victims. Therefore, state action enhances freedom only if it is believed that the liberty to violate the Constitution always is more important than the individual rights that are infringed." *Id.* "[The state action] doctrine has seldom been used to shelter citizens from coercive federal or judicial power. More often, it has been employed to protect the autonomy of business enterprises against the claims of consumers, minorities, and other relatively powerless citizens." Brest, *supra* note 14, at 1330.

²⁰⁸ See JAY COAKLEY, *SPORT IN SOCIETY: ISSUES AND CONTROVERSIES* 87-93 (8th ed. 2004).

²⁰⁹ See Black, *supra* note 38, at 70; Silard, *supra* note 42, at 855; Ugarte, *supra* note 8, at 482.

²¹⁰ Silard, *supra* note 42, at 855.

founding.²¹¹ Since that time, with some exceptions,²¹² the doctrine has been invoked with the result being that "private" forms of racism were permitted to stand.²¹³ As Charles Black noted in the late 1960s: "[T]he 'state action' concept . . . has just one practical function; if and where it works, it immunizes racist practices from constitutional control."²¹⁴ This fact cannot be ignored in the discussion of the state action doctrine as applied to amateur sports, because a significant number of athletes affected by NCAA, USOC and now USADA actions are African-American.

Critics of amateur sports regulation have made a compelling case that racism in amateur sports persists, despite the "illusion of equality."²¹⁵ For instance, Professor Timothy Davis and others explain that one of the symptoms of racism in college sports is that while a substantial number of African-American student-athletes participate in college revenue-producing sports, there are a limited number of African-Americans holding decision-making positions within the NCAA and at the university level.²¹⁶ Additionally, many argue that "another consequence of unconscious racism [in college sports] is the disparate impact of NCAA rules and regulations on African-American student athletes."²¹⁷ The NCAA's initial eligibility standards, which set the benchmarks of academic achievement that must be met for a prospective student-athlete to be eligible for a college athletic scholarship, is one example that has received a great deal of scholarly attention.²¹⁸ Critics have pointed to other rules as well, such as those limiting a coach's contact with current student-athletes and regulations limiting the amount of money student-

²¹¹ Ugarte, *supra* note 8, at 507.

²¹² See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 717 (1961) (holding that a restaurant owner's exclusion of customers based on race could, in certain circumstances, violate the Equal Protection Clause of the Constitution); *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948) (holding that the enforcement of a restrictive covenant that would limit occupancy of real property based upon race is violative of the Equal Protection Clause of the Constitution).

²¹³ See Silard, *supra* note 42, at 855; Ugarte, *supra* note 8, at 481. See generally Black, *supra* note 38 (discussing the "private" forms of racism permitted under the state action doctrine).

²¹⁴ Black, *supra* note 38, at 90.

²¹⁵ Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 640-41 (1995).

²¹⁶ *Id.* at 657.

²¹⁷ *Id.* at 660; see also KENNETH L. SHROPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA 110 (1996).

²¹⁸ See, e.g., SHROPSHIRE, *supra* note 217, at 103-27.

athletes can earn.²¹⁹ On that issue, one member of Congress pointed out that "most of these students are very poor and it is very hard for them to even pay for their cost of living. Yet the NCAA has really led the fight against a lot of things for athletes, including compensating them at least for their living expenses."²²⁰ Indeed, some commentators have suggested that addressing issues of exploitation in amateur sports is a "new frontier" for the civil rights movement.²²¹ Because of the current application of the state action doctrine to amateur sports, however, constitutional Equal Protection and Due Process challenges to the NCAA are considered impossible.²²²

Similarly, actions taken by the USADA—and recognized by the USOC—arguably have a disproportionate impact on African-American athletes, and yet are likely not subject to constitutional challenge. For instance, track and field, a sport that is traditionally represented by a significant number of African-American athletes, especially sprinters, is by far the most tested sport by the USADA.²²³ Indeed, all of the athletes sanctioned by the USADA as a result of the Senate providing secret grand jury documents to the USADA were African-American. This emphasis on track and field, with the resulting USADA sanctions, has created a perception that African-American athletes are cheaters.²²⁴ This is particularly troubling because

²¹⁹ Davis, *supra* note 215, at 660–61 ("Many believe that these rules as a whole operate to produce disproportionate injury to African-American student-athletes and their communities."); see also Timothy Davis, *African-American Student Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199, 199–200 (1995) (arguing that the "dissonance" between the economic and social realities that many African-American student-athletes face and the NCAA rules undermines the legitimacy of the NCAA's regulatory scheme).

²²⁰ *Hearing*, *supra* note 46, at 14 (statement of Rep. Spencer Bachus, Member, House Subcomm. on the Constitution).

²²¹ Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L.J. 259, 267 (1993).

²²² *Id.* at 281 (noting that the NCAA is "probably immune to attack" because of *Tarkanian*).

²²³ U.S. ANTI-DOPING AGENCY, 2006 ANNUAL REPORT 14 (2007), http://www.usantidoping.org/files/active/who/annual_report_2006.pdf (stating that the USADA performed 1,755 drug tests on track and field athletes, by far the largest number for any sport).

²²⁴ Gregory Moore, *Cheaters Like Gatlin, Others Make Track a Modern Day Sodom*, BLACK ATHLETE, Aug. 27, 2006, http://www.blackathlete.net/artman2/publish/Track_amp_Field_36/Cheaters_Like_Gatlin_Others_Make_Track_A_Modern_Da_2267.shtml.

such actions have the weight of the state behind them due to the USADA's unique relationship with Congress and the ONDCP.

The significant consequences outlined above should not be ignored. Accordingly, as explained below, the most effective solution might not be preventing constitutional litigation based on the state action doctrine, but rather acknowledging the state power at work in amateur athletics, permitting the complete litigation of the interests of the athletes and the process given. In this way, the law could be "settled" more convincingly for both athletes and the organizations that regulate them, so that the concerns discussed above can fully be heard.

III. A BETTER APPROACH—ALLOW CONSTITUTIONAL CLAIMS TO PROCEED ON THE MERITS

The argument made by this Article, that the static conception of the state action doctrine as applied to amateur sports has important consequences, begs the question of whether such consequences are necessary or can be avoided through a different, better approach. I argue that they can, by simply allowing constitutional litigation against the NCAA, USOC, and now the USADA, to go forward. Doing so is not unfair,²²⁵ and it will allow important questions of what interests an amateur athlete possesses, and to what process an individual affected by NCAA, USOC, or USADA action is entitled, to be heard. Moreover, the government will have less of an incentive to exercise its unchecked authority and influence through amateur athletic institutions. Allowing constitutional litigation to go forward will also go a long way toward eliminating the perception, if not the reality, that protecting organizations such as the NCAA, the USOC, and the USADA from constitutional litigation is facilitating the exploitation of athletes.

A. *Applying the State Action Doctrine to Amateur Sports Organizations Is Not Unfair*

The Supreme Court consistently has explained that the central consideration in determining whether the Constitution should be applied to ostensibly private entities is whether it is "fair" to do so.²²⁶ In the case of the amateur sports organizations

²²⁵ See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

²²⁶ *Id.* at 923 (stating that the challenged action must be "fairly attributable to

discussed here, the NCAA, the USOC, and now the USADA, can be fairly held to constitutional standards because they are not simply a typical private individual or entity that conducts its affairs in the absence of direct influence from the state. In addition, it is fair to hold these entities to constitutional standards because there are no compelling "countervailing reasons" not to.

Applying the Constitution to the NCAA, the USOC, or the USADA, and breaking the static conception of these entities as private as a matter of law, would not be akin to applying constitutional restrictions to the "homeowner's choice of his guests."²²⁷ All three were created and are sustained by the direct involvement and influence of the state. In the case of the NCAA, the entity is substantially controlled and funded by public universities. The USOC, while not predominantly funded by the federal government,²²⁸ was created by and takes substantial direction from it. The USADA is substantially funded and influenced by the federal government, enforcing policies that the United States Government had a hand in creating. Moreover, to better achieve the federal government's goals, the USADA was established in such a way to avoid constitutional protections for the athletes that it sanctions. Accordingly, the argument that these entities have a significant public character does not simply derive from positivist notions that all power and authority can be traced to the state,²²⁹ or that the state has an affirmative obligation to act to protect athletes and others from the actions of "private" sports regulators.²³⁰ The state *is* intervening in amateur sports regulation through its control of the NCAA, the USOC, and the USADA. This is, then, a matter of the exercise of affirmative state power, in the "full and complete sense of the phrase"²³¹ and not a matter of state abstention.²³² Additionally,

the State").

²²⁷ Silard, *supra* note 42, at 870-71.

²²⁸ Although it is not directly funded by the federal government, as is USADA, the USOC derives the majority of its revenue from the exclusive right to license the Olympic trademark granted by Congress in the Amateur Sports Act.

²²⁹ Chemerinsky, *supra* note 7, at 520-21.

²³⁰ See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 193 (1989) (rejecting the petitioner's argument that the state violated his Due Process rights by failing to intervene to protect him).

²³¹ *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948).

²³² *Id.* "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by

it is also not unfair to hold these entities to constitutional limitations because there is no important, "countervailing reason"²³³ against finding state action. The Supreme Court has explained that such a countervailing reason can support the conclusion of no state action if there are important policy reasons for the entity or individual at issue to remain "private."²³⁴ Such a reason has never been articulated in the state action-amateur sport cases.²³⁵

In the absence of a clear countervailing reason to reject a finding of state action, the decisions are left to rest simply on the outdated, static notion that amateur sports are a purely private endeavor. This reflects what has been called "Lochner-like thinking,"²³⁶ where the state had little involvement in areas such as health, education, and general welfare, and of course, sports. Yet because of the increased presence of the state in amateur athletics, the state action-amateur sport cases have the effect of granting significant deference to the *state*, because the courts are allowing the government, in effect, to operate unfettered in the regulation of amateur athletics. This deference amounts to leaving issues regarding the state's involvement in amateur sports to what is essentially a non-justiciable gray area, and it

private actors. The Clause is phrased as a limitation on the State's power to act...it forbids the State itself to deprive individuals of life, liberty or property..." *DeShaney*, 489 U.S. at 195.

²³³ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n (Brentwood I)*, 531 U.S. 288, 295-96 (2001).

From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

Id.

²³⁴ The Supreme Court found that there was a countervailing reason against finding state action in a case involving a challenge to the actions of a public defender. *See Polk County v. Dodson*, 454 U.S. 312 (1981). The Supreme Court held that the public defender was not an agent of the state, despite being an employee of the state, because the attorney's function in that role is to be an adversary of the state, not working in concert with it. *Id.* at 320.

²³⁵ It is hard to imagine that a strong case could be made that there are important countervailing reasons to reject a finding of state action in the amateur sports context. Unlike the preservation of the attorney-client relationship and maintenance of the adversarial system, there is not a valid, independent reason why the state could not be responsible for amateur athletics regulation.

²³⁶ Barak-Erez, *supra* note 114, at 1186.

invites increasing involvement in areas that implicate significant constitutional concerns.

Finally, continuing to hold on to static, outdated notions that amateur sports organizations such as the USOC and the NCAA are private unfairly grants these organizations special treatment. Indeed, the common theme in the arguments against applying constitutional due process standards to amateur sports organizations is that doing so would jeopardize the ability of the NCAA and USOC—and now the USADA—to regulate sports effectively. This argument consists of part threat and part plea for special treatment, and courts and Congress by and large give it great weight. The first component of the argument is that constitutional protections for athletes would be expensive and that constitutional lawsuits and the cost of litigation would make it impossible for the entities that regulate athletics to do their jobs.²³⁷ Because athletics at all levels is such a vital part of American society, and the “amateur ideal” so revered, courts and Congress are urged to give amateur sports organizations room to regulate without these enormous costs.

The second component of the deference argument is that amateur sports organizations are in a unique position, fighting an uphill battle to regulate and preserve the amateur ideal against extraordinary incentives to cheat.²³⁸ Indeed, both the NCAA and the USADA make such arguments and thereby justify giving less due process protection because of the unique needs of regulating in such a difficult environment. Giving the NCAA, USOC, and potentially the USADA deference in this regard really then gives deference to the state to protect the “amateur ideal” and fight cheating in amateur athletics without constitutional restriction.

²³⁷ See *Hearing*, *supra* note 46, at 17 (statement of Gary R. Roberts, Deputy Dean and Director of the Sports Law Program, Tulane Law School); Brief for Colorado High School Activities Ass'n et al. as Amici Curiae Supporting Petitioner at 3–5, *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.* (*Brentwood II*), 127 S. Ct. 2489 (2007) (No. 06-427), 2006 WL 3495621, at *3–4; Brief for National Federation of State High School Ass'ns as Amicus Curiae Supporting Petition for a Writ of Certiorari at 6–7, *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.* (*Brentwood II*), 127 S. Ct. 2489 (2007) (No. 06-427), 2006 WL 3495622, at *6–7.

²³⁸ See *Hearing*, *supra* note 46, at 12 (statement of Gary R. Roberts, Deputy Dean and Director of the Sports Law Program, Tulane Law School); Richard W. Pound, *Performance-Enhancing Drugs in Sport: Response by the International Sports Community*, 55 CANADIAN INST. OF INT'L AFFAIRS: INT'L J. 485, 488 (2000).

This alone, however, fails to provide a compelling reason to ignore the state power present in amateur athletics and the unfairness to athletes and others that results by effectively cutting off any meaningful legal recourse against the entities that regulate amateur sports. Additionally, it also fails to explain how protecting the “amateur ideal” and preventing cheating cannot be done by respecting fundamental notions of privacy and due process. For these reasons, it can be argued that the application of the state action doctrine to the NCAA, the USOC, or the USADA would not unduly extend the reach of the state action doctrine, but would instead serve to limit judicial deference to amateur sports organizations. Limiting this deference is hardly unfair, because deference, by its very nature, is not something that an entity is entitled to.

B. Applying the State Action Doctrine to Amateur Sports Organizations Will Not Impede Their Ability to Regulate Athletics

A second reason to allow constitutional litigation to go forward against the NCAA, the USOC, and the USADA is that it will not, contrary to what these organizations suggest, impede their ability to effectively regulate amateur athletics. Indeed, it might even enhance it, by acknowledging the state power that is present in the regulation of amateur athletics, thereby shifting the debate to whether the amateur athlete or other aggrieved individual has a sufficient interest at stake and whether this interest was adequately protected. It will also minimize the perception that in trying to uphold the “amateur ideal” and prevent cheating in amateur athletics, the NCAA, the USOC, and the USADA, with a mantle of state authority, cheat themselves.

As an initial matter, the NCAA and the USOC are no strangers to government influence in their operations. The NCAA was subject to constitutional standards for years before the *Tarkanian* ruling, seemingly without disastrous consequences. In addition, Congress historically has taken a special interest in their activities. For instance, Congress has held numerous hearings on the conduct of the USOC.²³⁹ Most

²³⁹ See *Olympic Family—Functional or Dysfunctional?: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the*

recently, Congress held hearings and proposed reforms related to the USOC's governance structure after allegations of ethical improprieties.²⁴⁰ During those hearings, the acting president of the USOC demonstrated the USOC's dependence on and responsiveness to Congress, stating that "[a]ll of this comes down to the question of just what Congress, to whom we are ultimately accountable, wants the USOC to do."²⁴¹ Moreover, as described above, it was the pressure of Congress and the President that caused the USOC to boycott the 1980 Olympic Games. It was also the pressure brought by Congress, and specifically individual senators, which ultimately led the USOC to discontinue its anti-doping program and create the USADA.

Similarly, the NCAA has been called before Congress several times to answer for what appears to be unfair enforcement procedures and harsh treatment of student-athletes.²⁴² This

Judiciary, 109th Cong. (2005); *Legislative Efforts to Reform the U.S. Olympic Committee: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2003); *Does the U.S. Olympic Committee's Organizational Structure Impede Its Mission?: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2003); *United States Olympic Committee ("USOC") Reform: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 108th Cong. (2003); *State of the United States Olympic Committee ("USOC"): Hearing Before the S. Comm. on Commerce, Science and Transportation*, 108th Cong. (2003); *Investigation of the Olympic Scandal: Hearing Before the S. Comm. on Commerce, Science and Transportation*, 106th Cong. (1999); *Oversight of Activities of the Olympic Committee: Hearing Before the Subcomm. on Consumer of the S. Comm. on Commerce, Science and Transportation*, 103d Cong. (1994).

²⁴⁰ See *Does the U.S. Olympic Committee's Organizational Structure Impede Its Mission?: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2003).

²⁴¹ *Id.* at 26 (statement of William C. Martin, Acting President, United States Olympic Committee).

²⁴² See *Hearing, supra* note 46; *Supporting Our Intercollegiate Student-Athletes: Proposed NCAA Reforms: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2004); *College Recruiting: Are Student-Athletes Being Protected?: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2004); *Challenges Facing Amateur Athletics: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 107th Cong. (2002); *Amateur Sports Integrity Act: Hearing on S. 718 Before the S. Comm. on Commerce, Science and Transportation*, 107th Cong. (2001); *Student Athlete Protection Act: Hearing on H.R. 3575 Before the H. Comm. on the Judiciary*, 106th Cong. (2000); *Stipends for Student Athletes: Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the H. Comm. on Energy and Commerce*, 103d Cong. (1994); *Intercollegiate Sports: Hearing Before the Subcomm. on Commerce, Consumer*

perception fuels congressional inquiries into whether the process given to student-athletes and others affected by its actions is sufficient. These congressional inquiries indicate that the NCAA is in many ways treated as if it were a state actor. This point was driven home in a 2004 hearing on "Due Process and the NCAA," where one member of the Sub-Committee on the Constitution of the House Judiciary Committee pointed out that it was not at all clear that the procedures of the NCAA fall within the committee's jurisdiction, stating that "due process does fall under the jurisdiction of this Subcommittee, but that is generally due process by the United States Government, not due process by a private organization, such as the NCAA."²⁴³ Because the NCAA still faces pressure to provide better due process protections for student-athletes and others targeted by their enforcement proceedings, some commentators have called *Tarkanian* a "pyrrhic" victory.²⁴⁴ Thus, with respect to the NCAA, the USOC, and now the USADA, it appears that there is not a practice of undiluted liberty or autonomy that the state action-amateur sport cases have enhanced.

In addition, all of these entities give their athletes some measure of due process when they take actions against them. These due process protections might pass constitutional muster, or a court could find, despite the persuasive arguments to the contrary, that an amateur athlete does not have a property interest at stake. Because the state action decision does not settle constitutional litigation, but only gets it to the merits, there is then plenty of room for courts to show deference to amateur sports organizations in a case-by-case analysis of whether athletes have a protected property interest sufficient to trigger due process protections, for instance, or a sufficient expectation of privacy to support a Fourth Amendment claim.

If this were the case, it would not mean that constitutional litigation was inefficient or wasteful. Allowing athletes to have their day in court would have the significant benefit of eliminating the perception that amateur sports organizations

Protection, and Competitiveness of the H. Comm. on Energy and Commerce, 103d Cong. (1993); *Hearings on the Role of Athletics in College Life: Hearing Before the Subcomm. on Postsecondary Education of the H. Comm. on Education and Labor*, 101st Cong. (1989).

²⁴³ *Hearing, supra* note 46, at 3 (statement of Rep. Jerrold Nadler, Member, Comm. on the Judiciary).

²⁴⁴ Verkuil, *supra* note 148, at 973.

such as the NCAA, the USOC, and the USADA have an unfair advantage and that such advantage results in the exploitation of athletes. Moreover, it would develop a body of case law that would credibly settle issues relating to athletes' due process rights, more than could be done by simply "freezing" outdated and inaccurate conceptions of the USOC and the NCAA. Allowing constitutional litigation to go forward against the NCAA, the USOC, and the USADA would also go a long way toward eliminating the damaging disconnect between application of the state action doctrine and the reality of *who* the state action doctrine is disempowering. This would enhance the legitimacy of these organizations more than the litigation itself would hinder their efficiency.

C. Individuals Affected by Amateur Sports Regulation Have Little Legal or Legislative Recourse

A final reason to allow constitutional litigation to go forward is that the only hope for a meaningful legal option is through federal constitutional litigation. As explained above, states have little or no options to protect amateur athletes and others from perceived abuses by the NCAA, the USOC, and the USADA. Moreover, a federal statutory remedy is not likely. First, student-athletes cannot possibly match the resources of the NCAA in terms of lobbying. Burlette Carter notes that one of the NCAA's roles for its members is as "lobbyist and litigation strategist" and one of its projects was to work to defeat the various state initiatives that sprung up after *Tarkanian* to give greater due process in its enforcement proceedings.²⁴⁵ The NCAA also uses litigation to challenge undesirable legislation.²⁴⁶ Accordingly, while it is true that individual Congressmen have taken up issues regarding the NCAA's due process protections in certain cases, a broader interest in protecting athletes' rights has yet to, and likely will not, develop in Congress.²⁴⁷

²⁴⁵ Carter, *supra* note 50, at 24–25.

²⁴⁶ *Id.* at 25.

²⁴⁷ See *Hearing*, *supra* note 46, at 16 (statement of Gary R. Roberts, Deputy Dean and Director of the Sports Law Program, Tulane Law School) (noting that reform of college athletics is "politically unrealistic" because such reform would be counter to the "millions of fans who... 'consume' college athletics as an entertainment product").

Similarly, the access and resources of the USOC and now the USADA are no match for the typical athlete. Because of their close relationship with the federal government through Congress, and, for the USADA, and the ONDCP as well, it is not likely that a movement among athletes for greater due process protections would get very far. Especially on the issue of fighting performance-enhancing drug use, government officials seem not at all concerned about due process protections. In fact, it appears that at least some in Congress and the Executive Branch fear that due process protections would undermine initiatives to achieve the government goal of combating drug use in sports.

In contrast to the extraordinary access and resources the NCAA, USOC, and USADA enjoy, the athletes they regulate are more akin to participants in an entitlement program. As Metzger explains, the “private” entities that administer government programs have a significant amount of control over the participants. She states:

[T]his control is enhanced when private entities have a monopoly or quasi-monopoly over access to government-subsidized services or broad powers over how government institutions operate. Another factor enhancing private power over participants is that privatization frequently occurs in contexts marked by relations of dependence²⁴⁸

Similarly, the ostensibly private entities that regulate amateur athletics have an enormous degree of power over athletes. Athletes cannot compete, whether in collegiate or Olympic Movement sports, without meeting the eligibility criteria of the relevant organization—the NCAA, the USOC, or the USADA. The dependence of the amateur athlete on the entity that regulates his or her sport is not simply because he or she must meet the entity’s criteria in order to compete. Typically, amateur athletes have few resources²⁴⁹ and are dependent on the entity to fund their educations, training, and living expenses. In the case of NCAA student-athletes, it has been said that “most of these students are very poor.”²⁵⁰

²⁴⁸ Metzger, *supra* note 19, at 1396.

²⁴⁹ See Sahl, *supra* note 61, at 641–42 (noting that some authorities consider student-athletes a “vulnerable” class”).

²⁵⁰ *Hearing, supra* note 46, at 5 (statement of Rep. Spencer Bachus, Member, House Subcomm. on the Constitution).

Additionally, political accountability as a check on the abuse of state power through amateur sports organizations is not a viable option. Amateur athletes are a distinct voting minority, assuming they vote at all. From the perspective of the democratic process, then, amateur athletes, because of their limited numbers, would have to rely on non-athlete voters to galvanize support for legislation that would protect their interests. Yet the voting majority, because they are not athletes themselves, very likely is misinformed or poorly informed about the issues surrounding amateur athletes and the organizations that regulate them. For instance, the NCAA provides huge entertainment and in this way generates a large amount of goodwill. Further, there is a belief that student-athletes are lucky, that those who are most vulnerable are being given a chance with their college scholarship. Similarly, in the case of the USOC and the USADA, there appears to be little interest in providing accused athletes with greater due process protections. The voting public seems most concerned with general notions of catching cheaters and preserving the integrity of the Olympic Games and has thus far shown little interest in making sure that those caught really are cheaters and that they are treated fairly. Accordingly, given their circumstances, it is unlikely that the amateur athletes affected by the actions of the NCAA, USOC, and USADA will have the collective power to influence Congress and secure federal legislation that would protect their rights.

CONCLUSION

This Article makes the claim that the law's failure to account for new realities of state power in amateur athletics, through a static conception of the USOC and the NCAA's status for constitutional purposes, has important consequences for both the individuals regulated by the USOC, the NCAA, and now the USADA as well as the entities themselves. Perhaps the most important consequence is that the state action doctrine's failure in the amateur sports context has meant not only that state power exercised in this area remains unconstrained by the Constitution, but it invites further state involvement without corresponding constitutional limitation. Such a result, as evidenced by the formation and operation of the USADA, is particularly troubling in this new anti-doping era, as amateur sports organizations, with the power and prestige of the state,

are taking actions that implicate significant privacy, Equal Protection and Due Process rights. And they are taking actions that are only made possible because the federal government is in a “unique” relationship with the USADA, making government tools available so that the USADA can sanction athletes who could otherwise not be sanctioned.

It is far from clear whether constitutional litigation brought by an amateur athlete or others against the NCAA, the USOC, or the USADA ultimately would be successful. However, this Article argues that merely acknowledging that the Constitution *applies* to these entities is a success. That is, regardless of whether in a given situation, for example, due process would demand more protection than an athlete received, the litigation would be worthwhile because it would have acknowledged the state power and presence in amateur athletic regulation. This Article therefore argues that the time has come to rethink our approach to state action with respect to amateur sports, not only to check the state power that is currently exercised in this context, but to discourage a further expansion of state power without corresponding constitutional protections. Such an approach will enhance the legitimacy of our most prominent amateur sports organizations by remaining true to the Supreme Court’s promise that above all, the state action doctrine is meant to acknowledge state power in all of its various forms.²⁵¹

²⁵¹ *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995).

