Marquette Sports Law Review

Volume 12
Issue 1 *Fall*

Article 12

2001

Statewide School Athletic Associations and Constitutional Liability: *Brentwood Academy v. Tennessee Secondary School Athletic Association*

Alan R. Madry
Marquette University Law School

STATEWIDE SCHOOL ATHLETIC ASSOCIATIONS AND CONSTITUTIONAL LIABILITY; *BRENTWOOD ACADEMY V. TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION*

ALAN R. MADRY*

I. INTRODUCTION

In its recent decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,[1] the Supreme Court for the first time held that the actions of a private, statewide school athletic association could be treated as state action subjecting the association to the requirements of the Fourteenth Amendment.[2] The case arose when Brentwood Academy, a private, parochial high school member of the Tennessee Secondary School Athletic Association (TSSAA), sued to prevent the Association from enforcing penalties that it had imposed on the Academy for violating recruiting rules.[3] The penalties included suspending the Academy's boy's football and basketball teams from tournament play for two years, a fine of $3,000.00 and probation for the Academy's entire athletic program for four years. The Academy alleged that the Association's enforcement of the penalties constituted state action for purposes of the Fourteenth Amendment and as state action violated the Amendment's guarantee of procedural due process as well as the First Amendment. With the narrowest majority, the Court, in an opinion by Justice Souter, agreed with the Academy on the threshold issue that the

* Associate Professor of Law, Marquette University Law School; B.A., J.D., University of Michigan.

1. 121 S. Ct. 924, 927 (2001).

2. Though *Brentwood Academy* is the first opinion in which the Supreme Court has weighed in on the issue, a number of other courts over almost thirty years had already confronted the liability of statewide high school athletic organizations to constitutional standards. *Brentwood Acad.*, 121 S. Ct. at 929 n.1. Contrary to the tide of opinion and the decision of the Supreme Court in *Brentwood Academy*, the Sixth Circuit found no state action in *Brentwood Academy*. Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n., 180 F.3d 758 (6th Cir. 1999).

3. *Brentwood Acad.*, 121 S. Ct. at 929. All facts related in this article, unless otherwise noted, are drawn from the opinions discussed.

Association was subject to constitutional scrutiny, but remanded the case for decision on the substantive issues.

The state action doctrine, under which *Brentwood* was decided, is among the most incoherent of the Court's constitutional doctrines.[4] It purports to be an interpretation of the language "No State shall," which introduces each of the guarantees of the Fourteenth Amendment – the Privileges or Immunities Clause, the Equal Protection Clause, and the Due Process Clause. That phrase appears to limit those guarantees to the actions of the states and to deny any constitutional protection against private defendants for their conduct. In other words, the duty bearers under each clause are the states and not private persons and the rights created by the Fourteenth Amendment protect only against the initiatives of the states.[5]

Nevertheless, from the very inception of the modern state action doctrine in the Court's early civil rights activism, it was clear that the Court was fashioning a doctrine to overcome those limitations and to allow the federal courts to hear actions against altogether private parties accused of violating the guarantees provided by the Fourteenth Amendment.[6] Though the facts of *Brentwood* bring the case somewhat close to the

4. Though fine distinctions in this regard among the Court's constitutional jurisprudence would be difficult. *See, e.g.*, Jed Rubinfeld, *Usings,* 102 YALE L.J. 1077, 1081 (1993) ("Throughout constitutional jurisprudence, only the right of privacy can compete seriously with takings law for the doctrine-in-most-desperate-need-of-a-principle prize."). One could easily say the same for substantive due process, the incorporation doctrine, the dormant commerce clause, the establishment clause, and indeed much of what followed the enactment of the Fourteenth Amendment including, and largely as a result of, the Court's decision in the *Slaughter-House Cases*, 83 U.S. 36 (1872) (effectively depriving the Privileges or Immunities Clause of any significance).

5. It is yet a distinct question whether any of those guarantees might impose a duty on the states to provide protection in their state laws to persons against some purely private initiatives. But those would be protections administered in the first instance in the state courts under state law. I have argued elsewhere that the Fourteenth Amendment, through the Privileges or Immunities Clause, was intended to require the states to provide protection against some private conduct. Alan R. Madry, *Private Accountability and the Fourteenth Amendment; State Action, Federalism and Congress*, 59 MO L. REV. 499 (1994). The Supreme Court, in an opinion by Chief Justice Rehnquist, rejected the idea that the Constitution imposes any affirmative obligations on the states. DeShaney v. Winnebago County Dep't. of Soc. Servs., 489 U.S. 189, 203 (1989). Chief Justice Rehnquist made no effort to ascertain the original understanding of the Fourteenth Amendment.

6. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988) (5-4 decision) ("In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat the decisive conduct as state action.").

margins of the state action doctrine,[7] it is nonetheless instructive of how the Court has used the doctrine to reach groups and individuals that are not state authorities. The TSSAA was chartered in 1925 as a not-for-profit membership corporation under Tennessee law. Its members have always been both public and private schools. However, it was not created by an act of either the legislature or the Board of Education of the State of Tennessee. It was not even acknowledged officially by the Board of Education until 1972. The Association derives its entire authority over its members from their voluntary membership agreements, not from any delegation of the legislature's police power. Employees of the Association are not regarded as state employees, though by statute they are allowed to participate in the state's public retirement program. Retirement funding for Association employees, however, comes from the Association and not the state. Only four percent of the Association's funding derives from dues paid by members. [8] The remainder comes from gate receipts from tournaments sponsored by the Association.[9] Those tournaments are often held on fields owned by public bodies but the Association must contract with each public body for the use of the fields and pay for that use from its own funds.[10]

The most substantial connection between the Association and the State of Tennessee is the fact that most of the Association's member schools happen to be public schools. In 1997, when Brentwood Academy was sanctioned by the Association, 290 (roughly 84%) of the Association's 345 members were public schools. All of the members of its elected legislative council and its administrative body were public school officials, though principals, assistant principals, and superintendents from any member school were eligible to be chosen for these bodies. Additionally, in 1972, the State Board of Education by rule required the state's public schools with athletic programs to join the Association. The

7. *Brentwood* is closer to the margins of the state action doctrine because government employees, public high school administrators representing their school systems in the Association, were involved in the adoption of the norms and penalties applied to Brentwood Academy. Nevertheless, the power exerted over Brentwood Academy derived completely from its voluntary, contractual membership in the Association. The Association was not imposing rules or penalties by virtue of any measure of the State's police power delegated to it by the State legislature. Moreover, each of the public school administrators came from independent school districts. They were not brought together in an agency created by the State of Tennessee to make state policy.

8. *Brentwood Acad.*, 121 S. Ct. at 928.

9. *Id.*

10. *Brentwood Acad.*, 180 F.3d at 762.

State Board of Education rescinded that rule in 1996 making membership by public schools once again voluntary.[11]

Clearly, even after 1972 when the State Board of Education required state public schools to join the Association and submit to its rules, the only power that the Association exercised over private schools derived from its membership agreements with those schools. It did not exercise any authority that derived from the state constitution or the legislature. Nor could the rules or regulations of the Association reasonably be regarded as reflecting state policies. The Association's rules were adopted by its members, including representatives from private schools and representatives from independent public schools and public school districts across the state. Nevertheless, the Court held that the disciplinary actions taken by the Association against the private Brentwood Academy amounted to state action under the Fourteenth Amendment "owing to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way."[12]

The decision in *Brentwood* was foreshadowed thirteen years earlier in dicta in *National Collegiate Athletic Ass'n v. Tarkanian.*[13] *Tarkanian* was brought by Jerry Tarkanian, then the head basketball coach at the University of Nevada, Las Vegas (UNLV). The circumstances in *Tarkanian* were slightly more complicated than in *Brentwood.* The National Collegiate Athletic Association (NCAA) had placed the UNLV basketball team on probation for two years and ordered UNLV to show cause why the NCAA should not impose further penalties if UNLV failed to exclude Tarkanian from participating in its basketball program. As in *Brentwood*, Tarkanian sued the NCAA alleging that its action violated his due process rights under the Fourteenth Amendment. The Court held that the NCAA could not be regarded as a state actor for purposes of the Fourteenth Amendment because its actions could not be attributed to any particular state, its member public colleges having come from all of the fifty states.[14] But the Court added in dicta, in a footnote, that "[t]he situation would, of course be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign."[15]

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11. *Id.*
12. *Id. See also Brentwood Acad.*, 121 S. Ct. at 927.
13. 488 U.S. 179 (1988).
14. *Id.* at 193.
15. *Id.* at n.13.

What is most remarkable about the Court's decision in *Brentwood,* nevertheless, is that it came after almost thirty years of both the Burger Court and the Rehnquist Court systematically shrinking the state action doctrine and repeatedly rejecting efforts by plaintiffs to hold private parties liable under constitutional standards, a movement reflected even in *Tarkanian.* Given the very slim majority that found state action in *Brentwood,* the way that the decision rides against a strong contrary tide, and the prospect of a substantial change in the composition of the Court under the current conservative administration, it is worth pondering *Brentwood Academy's* scope and durability even with regard to high school athletic associations.

Section II below briefly describes the statutory context of actions like those in *Brentwood.* Section III sketches the evolution of the state action doctrine through three roughly distinct phases. Section IV considers the Court's decision in *Tarkanian* as the most immediate predecessor to *Brentwood.* Section V analyzes the Court's decision in *Brentwood* and Section VI speculates on the scope of that decision and its possible future.

II. A Brief Primer on Section 1983 Actions

Though Brentwood Academy alleged that the Association had violated rights given under the Fourteenth Amendment, the cause of action in *Brentwood,* as in virtually all actions alleging violations of Fourteenth Amendment rights, was not the Fourteenth Amendment, but 42 U.S.C. § 1983.[16] That statute reads in significant part:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ..[17]

Section 1983 thus states two elements that have to be alleged and proven to make out a cause of action: (i) that the defendant have acted under color of state law (ii) and while acting under color of state law have caused the plaintiff to be deprived of a right secured by the Constitution or other laws. Because the guarantees of the Fourteenth Amendment bind only the states, when the right alleged to have been violated

16. *Brentwood Acad.,* 121 S. Ct. at 929.
17. 42 U.S.C. § 1983 (Supp. 2000).

by the defendant is one secured by the Constitution, the defendant must be the state. This is where the state action doctrine typically operates, to convert some private parties into state actors to satisfy the second element of an action under § 1983. The Court has also repeatedly held that when the defendant is the state, or is otherwise liable under the state action doctrine, the first requirement of § 1983, that the defendant have acted under color of state law, is also automatically satisfied.[18]

An enormous and tangled thicket of jurisprudence has grown up around or closely related to § 1983 since it was enacted in 1871 as part of the Ku Klux Klan Act.[19] Much of that jurisprudence was developed in the twentieth century to overcome the Court's interpretation of the Eleventh Amendment as depriving the federal courts of jurisdiction over cases brought by a citizen against his or her own state.[20] In 1908, for instance, in the landmark case of *Ex parte Young*,[21] the Court held that a state official when named individually as a defendant was not the state

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18. *See, e.g.*, United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."). *See also Brentwood Acad.*, 121 S. Ct. at 930 n.2; Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982).

19. *See generally* Act of April 20, 1871, ch.22, § 1, 17 Stat. 13. The Ku Kux Klan Act is also sometimes referred to as the Civil Rights Act of 1871. For an excellent discussion of the many vagaries of § 1983 jurisprudence, see generally Theodore Eisenberg, *§ 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982).

20. The Eleventh Amendment reads:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any foreign state.

U.S. CONST. amend. XI. Though by its terms the Amendment only bars actions against a state by a citizen of another state, the Supreme Court interpreted the Eleventh Amendment as also barring an action by a citizen against his or her own state. Hans v. Louisiana, 134 U.S. 1, 16 (1889).

The Court has held that Congress nevertheless has the power under section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity but only within the scope of rights protected by § 1 of the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 451-52 (1976). Though § 1983 was adopted under the authority of § 5, and by its terms was clearly intended to permit actions against state officials, the Court has held that Congress did not intend by the adoption of § 1983 to abrogate any part of sovereign immunity for those actions. Edelman v. Jordan, 415 U.S. 651, 674 (1974). Thus, the holding in *Ex parte Young*, 209 U.S. 123 (1908), is still crucial to actions under § 1983. For excellent discussions of the original understanding of the scope of § 1983 liability, see David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1; Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

21. 209 U.S. 123. *Ex parte Young* was not itself a § 1983 case. It was brought in part against the Attorney General of the State of Minnesota to enjoin the enforcement of new railroad rate schedules adopted by the Minnesota legislature. The Court, in an opinion by Justice Peckham, famously held that

for purposes of Eleventh Amendment immunity, at least where the relief sought was only an injunction to halt the enforcement of state law.[22] The Court has also held that the Eleventh Amendment does not protect municipal corporations,[23] counties,[24] or school boards.[25] Needless to say, when the defendant is a private organization or person, as is the TSSAA, there is no issue of Eleventh Amendment Immunity. But again, that merely highlights the incoherence of holding a private person or organization liable under the guarantees of the Fourteenth Amendment. By its clear terms, the Amendment only runs against the states. Therefore, one would think that the Eleventh Amendment would be an issue in all

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> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official.... If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id. at 159-160. The doctrine articulated by Justice Peckham is commonly referred to as the stripping doctrine of *Ex parte Young*. The stripping doctrine perversely overcomes Eleventh Amendment immunity by depriving a state agent of precisely what makes it possible for his or her conduct to be amenable to Fourteenth Amendment scrutiny, that he or she was acting as an agent of the state. Charles Alan Wright observed of *Ex parte Young* that it "created the anomaly that enforcement of the Minnesota statute is state action for purposes of the Fourteenth Amendment but merely the individual wrong of Edward T. Young for purposes of the Eleventh Amendment." CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 309 (5th ed. 1994). In the context of an action under § 1983, the stripping doctrine is doubly perverse since it would also appear to eliminate the possibility that the action is under color of state law. To revise Holmes's famous observation, the life of the law is neither logic nor experience, but the expedient ipsi dixit of a politically motivated Court.

22. The Court has explicitly held that the stripping doctrine of *Ex parte Young* does not apply in actions seeking money damages that are to be paid out of the state treasury. *See, e.g., Edelman*, 415 U.S. at 663. The Court affirmed the holding in *Edelman* in *Quern v. Jordan*, 440 U.S. 332, 334 (1979); *Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Ass'n.*, 450 U.S. 147, 150 (1981); and in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230 (1985). The Eleventh Amendment does not bar an action for damages brought against a state agent personally, however, and not as an agent of the state even for conduct alleged to be "under color of state law."

23. *Cf.* Port of Seattle v. Oregon & Wash. R.R. Co., 255 U.S. 56 (1921). The Court has also held that municipal corporations are persons as the term is used in § 1983 and is consequently subject to liability under § 1983. Monell v. Department of Soc. Servs., 436 U.S. 658, 667 (1978), *overruling in part* Monroe v. Pape, 365 U.S. 167 (1961).

24. Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

25. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 277 (1977).

§ 1983 cases in which the right alleged to have been violated is given in the Fourteenth Amendment.[26]

It is yet an interesting question why a plaintiff would chose to bring an action under § 1983 when § 1983 does not avoid the Eleventh Amendment bars and when the ultimate right being vindicated is in any event one of the self-executing guarantees of the Fourteenth Amendment.[27] *Ex parte Young* is itself an example of a non- § 1983 action brought directly under the Fourteenth Amendment. Similar actions to vindicate constitutional rights against agents of the federal government are allowed directly under particular constitutional provisions.[28] The answer to that question is altogether practical: 42 U.S.C. § 1988(b) allows attorneys fees to successful plaintiffs in actions under section 1983. There is no similar provision for attorney's fees for actions directly under the Constitution. Consequently, even though an attorney might be able to bring an action directly under the Fourteenth Amendment, it would be foolish to do so.

Regardless of how an action is brought to vindicate Fourteenth Amendment rights, i.e., directly under the Fourteenth Amendment or under § 1983, if the action is against a private defendant, it can proceed only if the defendant can be regarded as a state actor under the state action doctrine.

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26. The inconsistency is not limited to instances in which the state action doctrine converts private conduct into state action. Despite holding that the Eleventh Amendment does not protect counties, cities, and school boards, the Court nevertheless regards each of these entities as the state for purposes of the Fourteenth Amendment. *Brentwood* itself is an example of the Court treating public schools as the state. *See generally* JOHN C. JEFFRIES ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION (2000).

27. The rights created by the Fourteenth Amendment are self-executing precisely in the sense that no further action by Congress is required to make them effective. The first proposed draft of the Fourteenth Amendment read very differently from the final version in this regard. Instead of creating the guarantees that now appear in § 1, it merely authorized Congress "to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all person in the several States equal protection in the rights of life, liberty, and property." Madry, *supra* note 5, at 539 (citations omitted). This version was rejected in favor of self-executing rights out of fear that when southern members of Congress returned to power, they would quickly abrogate any civil rights laws already adopted and prevent adoption of any other. *Id.* at 539-541.

28. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 393-94 (1971). Since 1974 the Federal Torts Claims Act applies to such cases brought against federal "investigative and law enforcement officers." 28 U.S.C. § 2680(h) (1994).

III. THE STATE ACTION DOCTRINE

The state action doctrine has evolved through three roughly distinct phases since its introduction in the late 1920s. In the first phase, the Court cast about without success for a theory that might rationalize its expansion of the protections of the Fourteenth Amendment to embrace private wrongdoing. In the second phase commencing in the 1960s, the Court gave up the quest and typical of the time settled for a doctrine that made no pretense to textual or historical justification or even decisional standards. The state action doctrine in its second phase was explicitly an opportunity for the Court to do justice as it saw fit case by case. The expansive second phase abruptly gave way to the third and current phase with the emergence of the conservative Burger-Rehnquist Courts in 1972. The newly minted conservative majority immediately and sharply curtailed the state action doctrine in the first instance by limiting the doctrine to its paradigm precedents and then interpreting those precedents as narrowly as possible. Yet for all of its efforts, the Court in the most recent phase has not eliminated the doctrine, as *Brentwood* attests.

A. Early State Action; the Search for a Theory

The birth and early development of the state action doctrine came with the Court's decisions in the infamous *White Primary Cases*. The *White Primary Cases* were a series of five Supreme Court decisions handed down between 1927 and 1953 involving ever more private and local efforts by the Democratic Party of Texas to exclude Blacks from its primaries. [29] In the first of these decisions, *Nixon v. Herndon* from 1927, the Court allowed an action for damages under the Equal Protection Clause against certain judges of election who had been appointed by the private Democratic Party of Texas to run its state primary. The judges had excluded Black would-be electors from the primaries as required by then existing state laws. While the discriminatory Texas statute itself was patently unconstitutional, the Court never made it clear why the private judges of elections, who would appear to have been merely regulated parties, could be sued under the Fourteenth Amendment as if they were

29. The *White Primary Cases*, in the order in which they were decided, consist of Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Grovey v. Townsend, 295 U.S. 45 (1935); Smith v. Allwright, 321 U.S. 649 (1944) (overruling *Grovey*, 295 U.S. 45); and Terry v. Adams, 345 U.S. 461 (1953). The origin of the doctrine is often attributed to the *Civil Rights Cases*, 109 U.S. 3 (1883). *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948). *See also* Madry, *supra* note 5.

agents of the State. [30] Indeed, Justice Holmes' terse, three-page opinion for the majority does not even acknowledge the issue.[31]

Gradually, over the succeeding twenty two years, the Texas legislature and the Texas Democratic Party moved the source of the policy from the state's laws to the party's bylaws exclusively. But with only one exception, later overruled, the Court relentlessly allowed actions against the private judges of election.[32] By the last decision in 1952, *Terry v. Adams*, however, a majority of the Court still could not converge on a single theory that supported applying the Constitution to concededly private parties. *Terry v. Adams* involved the exclusion of Blacks from a county-wide pre-primary selection process conducted according to local party bylaws.[33] Justice Black offered at least two distinct theories. With only one dissenting vote, the Court split over three theories, none of which attracted more than four votes. According to the first, the Fifteenth Amendment, which like the Fourteenth Amendment does not extend rights against private parties,[34] nevertheless "establishes a national policy, obviously applicable to the right of Negroes not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local."[35] Justice

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30. *Herndon,* 273 U.S. at 539.

31. Holmes did observe,

> [t]hat private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White* . . . and has been recognized by this Court. . . . If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result.

Id. at 540. However, these observations had nothing to do with the liability of the private defendants under the Fourteenth Amendment. They are rather in response to the defendants' claim that their conduct was not actionable because it was political in nature. The defendants did not appear to argue, or at least Justice Holmes did not acknowledge any argument to the effect that the Fourteenth Amendment did not apply to the defendants because they were not agents of the State of Texas. Indeed, the cases that Justice Holmes cited in this passage were decided long before the adoption of the Fourteenth Amendment.

32. The exception was the third case, *Grovey,* 295 U.S. 45. By *Grovey*, the source of the discriminatory policy was exclusively the party's bylaws. For that reason, the Court found that there was no state action, therefore no violation of the Fourteenth Amendment and dismissed the action. *Grovey* was overturned nine years later in *Allwright,* 321 U.S. 649.

33. *Terry,* 345 U.S. at 461-62.

34. Section 1 of the Fifteenth Amendment reads in its entirety:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

U.S. CONST. amend XV§ 1.

35. *Terry,* 345 U.S. at 467.

Black also claimed that the Fifteenth Amendment imposes on the states an affirmative obligation not to permit discriminatory primaries.[36] He never explained how that duty might be derived from the text or history of the Fifteenth Amendment or how such a duty, imposed by his theory on the states by the Constitution, could give rise to constitutional violations by private parties.

Justice Frankfurter, writing only for himself, essentially rejected the idea that persons who are state officials could ever act in a private capacity in any political arena free from constitutional scrutiny and moreover that their involvement in otherwise private parties converted the actions of the parties into state action. He wrote, "[i]f the Jaybird Association [which ran a discriminatory pre-primary selection process for democratic candidates] is a device to defeat the law of Texas regulating primaries, and if the electoral officials, clothed with State power in the county, share in that subversion, they cannot divest themselves of the State authority and help as participants in the scheme."[37]

Justice Clark, writing the third of the three opinions concurring in the result, revived a version of the theory of *Smith v. Allwright*, the fourth of the series and the immediate predecessor to *Terry v. Adams*. In his view *Smith v. Allwright* had established the principle that "any 'part of the machinery for choosing officials' becomes subject to the Constitution's restraints."[38] The only element shared by each of these various theories is that they are narrowly tailored to elections. None addresses more generally the problem of holding private parties liable under constitutional provisions that clearly limit their scope to the actions of the states. None, too, has lived much beyond *Terry v. Adams*.

One of the most interesting opinions from this same early period had nothing to do with voting rights. *Marsh v. Alabama*,[39] from 1946, was an appeal from a conviction for criminal trespass. The defendant-appellant, a Jehovah's Witness, had been proselytizing in Chickasaw, Alabama, a company town wholly owned by the Gulf Shipbuilding Corporation. When she refused to cease and leave the town, the town's deputy sheriff arrested her and she was tried and convicted for trespass.[40] Writing for the majority, Justice Black again offered a number of theories, none

36. *Id.* at 469 ("For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment.").

37. *Id.* at 475-76.

38. *Id.* at 481.

39. 326 U.S. 501 (1946).

40. *Id.* at 502-03.

clearly distinct from the others.[41] Anticipating the Court's later opinion in *Shelley v. Kramer*,[42] he focused on the role of the state in enforcing the private decision. He wrote that "a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution."[43] Justice Black also anticipated his opinion in *Terry v. Adams* and appeared to suggest that the states have an affirmative obligation to prevent a company town from attempting to stop people from proselytizing. He said, again without any supporting argument, that, "[i]n our view the circumstance that the property rights to the premises where the deprivation of liberty . . . took place, were held by others than the public, is not sufficient to justify the

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41. *Id.* at 502-10.

42. 334 U.S. 1. *Shelley* is not itself technically a state action case. It did not extend constitutional liability to private parties nor did it attribute private motives to the state. Nevertheless, *Shelley* did contribute one enormous misunderstanding to Fourteenth Amendment jurisprudence. Chief Justice Vinson, writing for the majority, claimed that

> Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*

334 U.S. at 13 (emphasis added). Chief Justice Vinson was surely correct that, in the absence of the state action doctrine, the Fourteenth Amendment directly inhibits only action by the states. But it does not follow from that fact that the Amendment erects no shield against merely private conduct. Nor was that the holding in the *Civil Rights Cases*. To the contrary, Justice Bradley in the *Civil Rights Cases* made it abundantly clear that the Fourteenth Amendment was intended to protect people against private conduct. *See generally Civil Rights Cases*, 109 U.S. 3. The mechanism, however, was not to create constitutional rights against people but to compel the states to create and enforce laws that would protect people against people. He wrote, "[t]his abrogation and denial of rights [running between private parties], for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied." *Id.* at 18. Bradley's opinion for the Court in the *Civil Rights Cases* can easily be read as an effort to overturn the Court's earlier decision in the *Slaughter-House Cases*, 83 U.S. 36, that effectively annulled the Privileges or Immunities clause of section 1 of the Fourteenth Amendment. Justice Bradley's interpretation of the Fourteenth Amendment finds substantial support in the record of the adoption of the Fourteenth Amendment. *See generally* Madry, *supra* note 5.

Shelley was an action to enforce a racially restrictive deed covenant. 334 U.S. at 4. The Court refused to apply the Equal Protection Clause to nullify the covenant, for the reason mentioned above. But it held that the action of the state court in enforcing the covenant was state action, as it plainly was, and that the state court's enforcement of the covenant violated the Equal Protection Clause. *Id.* at 21. The decision in *Shelley* is unique. Both before and after that decision, the Court insisted that a state violates the Equal Protection Clause only when it engages in intentional discrimination or private discrimination can be attributed to the state by virtue of the state action doctrine.

43. *Marsh*, 326 U.S. at 508.

State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute."[44]

Both theories would appear to apply to the state alone. Each would effect private conduct, in the first instance by preventing state enforcement of a private choice, in the second by requiring the states to prevent private initiatives, but neither justifies a cause of action against the private actor. Black went further however. "The more an owner, for his advantage, opens up his property for use by the public in general," he claimed, "the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[45] The only explanation he offered for this novel idea was that whoever owned the property, a corporation or an arm of the state "the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free."[46]

The doctrine that Black announced in *Marsh* has come to be known as the "public function doctrine." It would appear to set some limits, as Justice Black developed his argument, not only to private liability under the Fourteenth Amendment, but also to the obligation of the government to prevent private initiatives that are said to violate the Constitution.[47] Private liability and the obligation of the state to vigilantly protect its citizens arises only when the private actor opens its property to public use. A similar intuition surfaces in many of the opinions in the *White Primary Cases* — when the challenged conduct can be characterized as somehow "public," either because traditionally it has been regarded as "infected with a public purpose" (*Marsh*) or because it concerns matters of governance or politics (the *White Primary Cases*), it will be subject to constitutional standards.[48] But if the focus is really on the interests of people effected by the private initiative, it is not obvious why the public function is significant. Even a single person, after all, can effectively prevent another from voting or proselytizing. And that is the direction that the doctrine took in the second, expansive phase of state action. *Marsh*, for example, was extended in the second phase of state

44. *Id.* at 509.

45. *Id.* at 506.

46. *Id.* at 507.

47. *See generally id.*

48. *See generally Terry*, 345 U.S. 461; *Marsh*, 326 U.S. 501; *Allwright*, 321 U.S. 649; *Grovey*, 295 U.S. 45; *Condon*, 286 U.S. 73; *Herndon*, 273 U.S. 536.

action in 1968 to include a shopping mall.[49] That decision was overturned in the third phase and *Marsh* and its public function doctrine were limited to the precise facts in *Marsh*, company towns.[50] Such has been the history of state action.

B. Freewheeling State Action; The Second Phase.

The opinion that inaugurated the second phase of the state action doctrine, and is among the doctrine's high water marks, came in 1961 in *Burton v. Wilmington Parking Auth.*[51] *Burton* was an action for declaratory and injunctive relief brought by a Black man who had been denied service in a privately owned and operated restaurant in Wilmington, Delaware. Because the restaurant was located in a parking structure owned by the City of Wilmington, the Court held that the City could be held responsible for the discrimination and that the owner could be sued for a violation of the Fourteenth Amendment.[52] It was in *Burton* that the Court for the first time offered something of a general test, if not a theory, for finding state action in private conduct. It held, "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."[53] Should a state become sufficiently involved in the private initiative, then the initiative becomes state action and the private actor can be held liable under constitutional standards. Correlatively, when the state becomes involved in the private conduct, by virtue of its involvement the state can be held accountable for the private initiative.[54]

While the touchstone of the doctrine thus came to be state *involvement* in private conduct, the Court refused to define with any particular-

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49. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 309 (1968).

50. Hudgens v. NLRB, 424 U.S. 507, 516 (1976).

51. 365 U.S. 715 (1961).

52. *Id.*

53. *Id.* at 722. The quote reveals a curious lack of rigor in thinking about the nature of rights. The individual rights that the quote alludes to are those given by the Equal Protection Clause. But if those rights impose their correlative duties only to the states, then private parties cannot possibly abridge them. The logic, or lack of logic, in *Burton* is in sharp contrast to Justice Bradley's discussion in the *Civil Rights Cases*. Bradley usefully distinguished between the violation of a right and the abrogation of a right. Legal rights were understood positivistically as creatures of the state. A private person violated a right when he or she acted in a way that upset the interests protected by the right. A state, on the other hand, abrogated a right when it removed the law from the books.

54. *Id.* at 725.

ity what constituted "involvement." The Court explained its refusal as follows:

> Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "This Court has never attempted."[55]

The test thus became no test at all but merely an opportunity for the Court, case-by-case, to extend the guarantees of the Bill of Rights to altogether private agents and purely private initiatives. *Burton* itself is an example of how the doctrine could be used to find responsibility and a kind of quasi-agency where the law had never before found them and for which no sound explanation was ever offered.

Over the succeeding decade the Court invoked the involvement test most notably to overturn a series of criminal trespass convictions that were initiated by the owners of private lunch counters. These decisions, now commonly referred to as the "Lunch Counter Cases," each began with events similar to those in *Burton*: one or more Black patrons were denied service at private lunch counters. In each case, the Black patrons refused to leave the restaurant when requested by the owner. The owner then called the police and the patrons were ultimately convicted of criminal trespass in the state courts. The defendants in each case raised the state action doctrine to challenge the criminal complaint. Because of the posture of the cases, the state action doctrine played a somewhat narrower role than in *Burton.* These decisions did not hold private parties to constitutional standards. Rather, they used the involvement of the state in the enforcement of private discrimination to attribute the private discriminatory purpose to the state. Thus the state's use of the neutral criminal trespass statute to enforce private discrimination became tainted by the private intentions.[56]

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55. *Id.* at 722 (quoting Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

56. The *Lunch Counter Cases* include, in the order in which they were decided, Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Robinson v. Florida, 378 U.S. 153 (1964); Bell v. Maryland, 378 U.S. 226 (1964); and Adickes v. Kress & Co., 398 U.S. 144 (1970). *Adickes* differed from the other decisions in that it was a § 1983 action against a restaurant and not an appeal from a criminal conviction for trespass. In *Bell v. Maryland* the Court never reached the state action issue because it held that a new

As in every case after *Burton*, the inquiry focused on the nature and extent of the state's involvement in the private initiative. In the first of the Lunch Counter Cases, *Peterson v. City of Greenville*[57] in 1963, the Court found state involvement in a local ordinance that required restaurant owners, if they were to serve patrons of different races, to maintain separate facilities for each race.[58] The statute thus involved the state in the private discrimination by compelling it, even if, Chief Justice Warren wrote, "the manager would have acted as he did independently of the existence of the ordinance."[59] Similarly, in *Robinson v. Florida*,[60] the third of the Lunch Counter Cases from 1964, the State of Florida involved itself in private discrimination by virtue of a state health regulation that required restaurants serving both races to maintain separate toilet facilities.[61] The regulation may not have required segregated restaurants but the Court found it created a disincentive for owners to serve all races and thus involved the state in the private discrimination.[62]

The last of the Lunch Counter Cases was *Adickes v. Kress & Co.* in 1970.[63] *Adickes* was also the last of the pre-Rehnquist era state-action cases and it demonstrated how far the Court at that time was willing to go to find involvement, as well as the oddness of the doctrine in general. Unlike the other Lunch Counter Cases, *Adickes* was brought as a § 1983 action against the restaurant that had refused to serve the plaintiff. The facts in *Adickes* were also substantially different from the facts in all of the other decisions. The plaintiff was a white teacher who came to defendant's restaurant with a group of her Black students. The restaurant took orders from the students but refused to serve the plaintiff because she made the group racially mixed. When the restaurant refused to serve the plaintiff, the entire group voluntarily left the restaurant. The defendant never called the police. Nevertheless, as the plaintiff and her students left the restaurant, a police officer who happened to have been

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state civil rights act probably effectively eliminated the crime. It reversed the conviction and remanded the case to the state court for an authoritative determination. 378 U.S. 226.

57. 373 U.S. 244.

58. *Id.* at 248.

59. *Id.*

60. 378 U.S. 153.

61. *Id.* at 156.

62. *Id.* Arguably, the ordinance in *Peterson*, 373 U.S. 244, did not compel whites-only restaurants, as the Court held. But like the state regulation in *Robinson*, 378 U.S. 153, it too made it more difficult for a restaurant so inclined to serve patrons of both races.

63. 398 U.S. 144.

in the restaurant and observed the plaintiff sitting down with her students, arrested plaintiff as a vagrant.[64]

Clearly responding to the requirements of § 1983, the plaintiff alleged, among other things,[65] that the restaurant had acted pursuant to a custom of segregation in the community, a custom that was enforced by state law.[66] The district court directed a verdict for defendants when plaintiff failed to show that the state regularly used its criminal trespass statute against people like the plaintiff who attempted to eat in a racially mixed group. Going well beyond its earlier decisions, the Court reversed and held that a custom of segregation was enforced by the state when the state tolerated threats of violence against those who would violate the custom, including against a restaurant that served racially mixed groups.[67] It also held that a custom of segregation, enforced by police lassitude, provided the state action necessary to make out a violation of the Equal Protection Clause.[68] Writing for the majority, Justice Harlan concluded "that [plaintiff] would show an abridgement of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom of segregating the races in public restaurants."[69]

What makes *Adickes* radical, and takes it even beyond the scope of *Burton,* is that the Court appears explicitly to endorse the idea that a private person can be held to constitutional standards, and sued for damages under § 1983, even if the private conduct is compelled by the state. *Adickes* was not the first case in which the Court held a private party to constitutional standards for merely complying with state laws. That was the circumstance in the very first state action case, *Nixon v. Condon* in 1927.[70] But in *Nixon v. Condon*, Justice Holmes failed to even acknowl-

64. *Id.* at 146-50.

65. The plaintiff in a separate count also alleged that the defendant had entered into a conspiracy with the police to deprive her of the Equal Protection of the law. *Id.* at 148. Based upon the affidavits of the police and deposition testimony of the store manager that the store had not called the police, the district court granted summary judgement to the defendants on this count. *Id.* The Court reversed and held that the depositions and affidavits failed to foreclose the possibility that the arresting officer had communicated his disapproval of the situation to an employee of the defendant while in the store. *Id.* at 157. It also held that had there been a meeting of the minds, there would have been a conspiracy and the conspiracy would have satisfied the state action requirement. *Id.* at 152, 158.

66. Recall that § 1983 requires that the offending action have been committed "under color of any statute, regulation, *custom or usage*, of any State . . . ." 42 U.S.C. § 1983 (1994 & Supp. VI 2000) (emphasis added).

67. *Adickes*, 398 U.S. at 173.

68. *Id.* at 170.

69. *Id.* at 171.

70. 286 U.S. 73.

edge the state action issue.[71] *Adickes* is distinctive in that the Court addressed the state action issue and endorsed this peculiar principle. Justice Harlan wrote, "there is much support in lower court opinions for the conclusion that discriminatory acts by private parties done under the compulsion of state law offend the Fourteenth Amendment."[72]

Quite clearly, were a state to require a private party to discriminate against someone on account of race, the state requirement would violate the Equal Protection Clause and it would not be unnatural to say that the state was responsible for the private discrimination. But it is yet a different move to hold the private party liable for damages under the Fourteenth Amendment for essentially complying with a state law. It is that second move that the state action doctrine makes possible but which the Court never attempted to justify.

C. The Rehnquist Revolution.

In 1972, the political composition of the Supreme Court began to shift dramatically and with it the state action doctrine. Chief Justice Warren Burger joined the Court in 1969, replacing Chief Justice Earl Warren. Both Justice Powell and Justice William Rehnquist were appointed to the Court in 1972, replacing respectively Justice Black and Justice Harlan.[73] Over the ensuing twenty-nine years, Justice Rehnquist penned five of the roughly twelve decisions applying the state action doctrine[74] as well as the first, *Moose Lodge No. 107 v. Irvis,*[75] which reshaped the test into roughly its present form.

Moose Lodge arose when Leroy Irvis, a Black man, sued the Moose Lodge of Harrisburg, Virginia and the Pennsylvania Liquor Control Board to enjoin the Lodge's liquor license so long as it excluded Blacks as members or guests. The Lodge refused to admit Irvis when a white

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71. *Id.*

72. *Adickes,* 398 U.S. at 170-71.

73. The shift was complete in 1975 when Justice Stevens replaced Justice Douglas. The only remaining justices from the Warren Court were Justices Brennan, Marshall, White and Stewart. Justice Stewart was replaced by Justice O'Connor in 1981.

74. They include: *Brentwood Acad.*, 121 S. Ct. 924; American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999); Edmonson v. Leesvill Concrete Co., 500 U.S. 614 (1991); *Tarkanian,* 488 U.S. 179; West v. Atkins, 487 U.S. 42 (1988); Blum v. Yaretsky, 457 U.S. 991 (1982); *Lugar*, 457 U.S. 922; Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); *Hudgens*, 424 U.S. 507; Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Of the twelve decisions, Chief Justice Rehnquist dissented in three (*Lugar, Edmondson,* and *Brentwood*). Thus, of the nine decisions in which Chief Justice Rehnquist was in the majority, he wrote over half of the opinions for the Court.

75. 407 U.S. 163.

friend brought him to the Lodge as a guest. A three-judge district court panel granted the injunction. Invoking *Burton*, it found that the Liquor Control Board had sufficiently involved itself in the business of the Lodge so that the private discrimination had to be regarded as state action. The Liquor Authority, the panel held, had involved itself in business of the Lodge in two respects. First, by the mere grant of the liquor license and secondly through a regulation that required each licensed club to "adhere to all the provisions of its constitution and bylaws"[76] which in the case of the Moose Lodge, mandated the exclusion.[77]

One of the great dangers of standardless, intuitive doctrines, like the state action doctrine, is that when the intuitions of a newly constituted Court depart from the intuitions and goals of those who created the doctrine, little has to be done to change course. And so it was with *Moose Lodge*. Justice Rehnquist first read the preceding decisions as discrete types, creating a limited and together an exclusive set of kinds of involvement. He then read those precedents as narrowly limited to their particular facts. Thus, *Burton* came to represent involvement through a symbiotic relation. *Moose Lodge* failed the symbiotic relation test because "while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building."[78] With one exception, the Liquor Control Board also did not "foster or encourage racial discrimination" as had occurred in earlier cases.[79]

The one exception was the fact that the Liquor Control Board's regulations, by requiring licensed clubs to abide by their bylaws, coincidentally required the Moose Lodge to abide by its discriminatory rules. But even though Justice Rehnquist here conceded that the regulations sufficiently involved the State in the private discrimination, he significantly departed in the way that he remedied the involvement. In the earlier cases, a finding of involvement converted the private discrimination to state action making both the private defendant and the state liable under the Fourteenth Amendment. The remedy would focus on the complained of private conduct, converted by the state action doctrine into state action. The approach is evident in the dissents of both Justices Douglas and Brennan. Justice Brennan in no uncertain terms declared that "[w]hen Moose Lodge obtained its liquor license, the State of Pennsylvania became an active participant in the operation of the Lodge

76. Irvis v. Scott, 318 F. Supp. 1246, 1250 (M.D. Penn. 1970), *rev'd,* 407 U.S. 163 (1972).
77. *Moose Lodge*, 407 U.S. at 164-71.
78. *Id.* at 175.
79. *Id.* at 176-77.

bar."[80] Justices Douglas, Brennan and Marshall would have upheld the injunction issued by the district court, precisely the remedy requested by Mr. Irvis.[81] Justice Rehnquist and the majority, however, looked only to the action of the state itself and merely enjoined the enforcement of the Liquor Control Board's regulation "insofar as that regulation requires compliance by the Moose Lodge with provisions of its constitution and bylaws containing racially discriminatory provisions."[82] Thus the conditions for finding state action in private initiatives became tightly limited and the relief if state action were found a mere shadow of what it had been.

In subsequent decisions, Justice Rehnquist added a rhetorical element that tied together the conditions for finding state actions and simultaneously superficially made more sense of the doctrine, but also underscored its essential oddness. The rhetorical element was the notion of attribution. In general, for state action to be found in a private initiative, the private decision had to be fairly attributable to the state. For example, in *Jackson v. Metropolitan Edison Co.*,[83] in 1974, in which the plaintiff alleged that a private utility had terminated her electricity without due process of law, Justice Rehnquist concluded his analysis by observing that "the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment."[84] Justice Rehnquist had earlier explained. "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself."[85]

Eight years later, Justice Rehnquist explicitly and emphatically grounded the test of state action in ordinary notions of state responsibility. In an opinion for the majority in *Blum v. Yaretsky*[86] he explained that "[t]he purpose of this requirement [from *Jackson*] is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff com-

80. *Id.* at 184 (Brennan, J., dissenting).

81. On the strength of earlier decisions, Mr. Irvis could easily have requested and received even greater relief, including damages against the Moose Lodge. *Compare Burton*, 365 U.S. 715, *with Atkins*, 487 U.S. 42.

82. *Moose Lodge*, 407 U.S. at 179.

83. 419 U.S. 345.

84. *Id.* at 358-59.

85. *Id.* at 351 (citing *Moose Lodge*, 407 U.S. at 176).

86. 457 U.S. 991.

plains."[87] Justice Rehnquist's interpretation of the types of sufficient state involvement is consistent with this notion. The idea appears to make some sense when the focus is on the action alone. If the action can be regarded as the action of the state, then it is more reasonable to find that the action violated a right created by the Fourteenth Amendment. Surely if the state is responsible for a private action, it is not unreasonable to hold the state responsible for the consequences of the action. Nevertheless, the effect of finding state action is not simply to allow an action against the state; it is also to hold a private party responsible under the Constitution. And there is nothing in the Rehnquist reformulation of the doctrine that rationalizes that move. Even when the private party can be said to have conspired with the government but nevertheless acted for its own reasons, the action of the private agent can be treated as a distinct act not covered by the injunctions of the Fourteenth Amendment. In cases where the private action is regarded as state action because the state encourages or especially commands the action, holding the private party responsible seems perverse.[88]

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87. *Id.* at 1004.

88. Justice Rehnquist is also responsible for one of the most bizarre twists to the state action doctrine. In *Flagg Bros., Inc.*, 436 U.S. 149, writing for the Court, Justice Rehnquist held that a state statute creating a statutory lien in favor of a warehouse accompanied by a self-help foreclosure procedure was not state action and was therefore immune to due process scrutiny. *Id.* at 153. The case was brought against a private warehouse by a woman threatened with foreclosure of the warehouseman's lien and the sale of her stored possession. *Id.* Justice Rehnquist found that the statute did not constitute state action because it did not require any state agent to participate in the foreclosure of the lien or the sale of stored goods. Because no state official participated in the execution of the lien, Justice Rehnquist reasoned there was no state involvement in the private sale and the private conduct could not be attributed to the state. *Id.* at 165. The statute was simply a declaration by the state that it would not interfere in the actions of the warehouseman.

The Court had never before used the doctrine to insulate what was obviously, literally state action. The purpose of the doctrine from the beginning was to extend the guarantees of the Fourteenth Amendment against purely private action. Justice Rehnquist also reached his conclusion only by ignoring the obvious fact that the statute made it possible for the warehouseman to convey title to the stored goods, and not just possession. The statute consequently was substantially more than a declaration by the state of its intention not to intervene in the self-help remedy of the warehouseman. The statute gave that act a significance it could not otherwise have.

The case also provided Justice Rehnquist the opportunity to limit the Court's earlier due process decisions protecting debtors against pre-judgment creditor remedies. He did so, however, at the expense of insulating from all due process scrutiny what would have been the most egregious prejudgment creditor remedy under the prior decisions. *See generally* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevins, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). Justice Rehnquist was able to distinguish *Flagg Bros.* from the rest by disingenuously

IV. THE ROAD TO *BRENTWOOD*: *NCAA v. TARKANIAN*

In late August 1977, the NCAA notified UNLV that it had placed UNLV's basketball team on probation for two years, during which time the basketball team was excluded from postseason games and could not appear on television.[89] It also ordered UNLV to show cause why the NCAA should not impose additional sanctions if UNLV did not immediately remove the team's coach, Jerry Tarkanian, from UNLV's intercollegiate athletic program during the probationary period. Faced with dire alternatives, UNLV capitulated and in September, 1977, notified Tarkanian that he was to be suspended as coach of the basketball team.[90]

Tarkanian responded by bringing a § 1983 action in the Nevada state court against UNLV alleging that his demotion by UNLV deprived him of his right to due process guaranteed by the Fourteenth Amendment. After prolonged proceedings that included an inexplicable four year delay by the Nevada district court, the joinder of the NCAA as defendant at its initiative, and a number of failed attempts by the NCAA to remove

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treating the others as involving preliminary state action issues. In fact, because of the way that the other cases arose, none presented a state action issue.

The dissenters in *Flagg Bros.*, aided by the swing vote of Justice Blackmun, turned Justice Rehnquist's ruse against him four years later in *Lugar*, 457 U.S. 922. Because the prejudgment garnishment in *Lugar* required a court clerk to issue a writ of attachment, the Court held for the first time that the debtor could sue a private creditor for money damages in a § 1983 action alleging a violation of due process. The truly unfortunate consequence of Justice Rehnquist's too clever analysis in *Flagg Bros.* was that the Court never seriously addressed the reasonableness of allowing essentially a constitutional action against a private creditor who takes advantage of a statutorily created prejudgment remedy. Alan R. Madry, *State Action and the Due Process of Self-Help; Flagg Bros. Redux*, 62 U. PITT. L. REV. 1 (2000).

89. *Tarkanian*, 488 U.S. at 186. The NCAA's investigation began in late November 1972, with a preliminary inquiry. Three years later, the preliminary investigation resulted in an Official Inquiry in which UNLV initially required itself to conduct a thorough investigation. Though Tarkanian had only joined UNLV's basketball program in the Fall of 1973, many of the violations alleged involved Tarkanian. UNLV reported its findings in 1976, clearing itself and Tarkanian of all wrongdoing. The NCAA's Committee on Infractions conducted four days of hearings and eventually found that many of the charges could not be substantiated. However, it did find 38 violations of NCAA rules, including 10 committed by Tarkanian. Many of the most serious violations committed by Tarkanian appear to have occurred in the course of investigation and concerned efforts by Tarkanian to fabricate evidence and encouraging witnesses to change their testimony. *Id.* at 185-186.

90. *Id.* at 180-81. The university's vice-president identified three options: 1) Reject the order to show cause and risk heavier sanctions, 2) Pull out of the NCAA, or 3) Suspend Tarkanian. *Id.* at 187. Tarkanian was a tenured member of the university's faculty and his suspension as coach of the basketball team did not affect his standing as a member of the faculty. It did, however, substantially affect his salary.

the action to federal court, Tarkanian finally was awarded injunctive relief and attorneys fees against both UNLV and the NCAA.[91]

In what had become something of a pattern for state action decisions during the Rehnquist years, the Supreme Court reversed the NCAA's liability by the slimmest of margins.[92] As Justice Stevens noted, writing for the majority, *Tarkanian* presented something of the mirror image of state action cases. In the typical case, as we've seen, the plaintiff is injured by the actions of a private party and seeks to convert the private conduct into state action so that the private defendant can then be accused of violating a constitutional guarantee which otherwise binds only the states. Under the Rehnquist reformulation, transubstantiation occurs only if the private action can be attributed to the state so that it is reasonable to regard the action as originating with the state or as an exercise of an exclusive state power or otherwise supporting state ends. In *Tarkanian*, however, Jerry Tarkanian was suspended by the public University of Nevada, Las Vegas, but was alleging that the real impetus for the action came from the private NCAA. According to the weird logic of the state action doctrine, it would seem that the involvement of the private organization in the public action should have converted the public action into private action and thereby insulated even the action of UNLV from constitutional scrutiny.

Though Justice Stevens noted the unusual posture of the case, the majority nevertheless went ahead and considered whether the actions of the NCAA that led to the suspension had become state action because of the involvement of UNLV in the operations of the NCAA. The majority rejected the idea that the NCAA had been converted into a state

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91. The district court awarded Tarkanian attorney's fees under 42 U.S.C. § 1988 of $196,000.00. Reasonably enough under the circumstances, the court ordered the NCAA to pay 90% of the award. Tarkanian brought the initial action against only UNLV and prevailed, a result in fact favorable to both Tarkanian and UNLV. That decision was overturned by the Nevada Supreme Court on the motion of the NCAA because, the NCAA argued, it should have been named as an additional defendant. On remand, Tarkanian amended the complaint to add the NCAA. Only when Tarkanain prevailed a second time did he move for attorney's fees. Bizarrely, given the NCAA's role in forcing a second trial, the NCAA nonetheless moved to be realigned as a plaintiff since, it claimed, it actually wanted Tarkanian to win. *Id.* at 181, 188-89.

92. The vote was 5-4. Justice Stevens wrote the opinion for the Court joined by then Chief Justice Rehnquist and Justices Blackmun, Scalia and Kennedy. Justice White filed a dissenting opinion joined by Justices Brennan, Marshall, and O'Connor. *Id.* at 199. Justice O'Connor's vote in *Tarkanian* departs from an otherwise consistent pattern of voting with the conservatives. Beginning with *Rendall-Baker,* 475 U.S. 830, decided the year after her appointment to the Court, Justice O'Connor joined the conservatives in all four decisions before *Tarkanian.* Following *Tarkanian*, she joined the conservatives in the next two additional decisions before providing the swing vote in *Brentwood.*

actor by virtue of the fact that UNLV had embraced the NCAA's rules and thereby converted them into state rules.[93] Because the University freely accepted the NCAA's rules when it could have done otherwise, the Court held, "[n]either UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athletic recruitment, eligibility, and academic performance."[94]

The Court also rejected the idea that UNLV and the NCAA should be regarded as partners or coventurers, like the Eagle Diner and the City of Wilmington in *Burton*.[95] The majority observed, that in fact the interests of UNLV and the NCAA were more accurately regarded as opposed to one another in the proceedings.[96] Nor had UNLV delegated any state authority to the NCAA: "UNLV delegated no power to the NCAA to take specific action against any university employee. The commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself."[97]

Finally, and most pertinent to *Brentwood*, the Court also refused to find that the NCAA was a state actor because UNLV, a public school, was a member. The NCAA's membership, Justice Stevens observed, consisted of several hundred other public and private schools, each of which contributed to the promulgation of the NCAA's rules.[98] And those institutions, Justice Stevens wrote, "the vast majority of which were located in States other than Nevada, did not act under color of Nevada law. It necessarily follows that the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular State."[99]

At this point, however, Justice Stevens dropped a footnote and added dicta that would later come to haunt the other members of the majority

93. *Tarkanian*, 488 U.S. at 194.

94. *Id.* at 195. The quotation also reveals a unique aspect of Justice Stevens' analysis. Conceding that "under color of state law" was satisfied whenever there was state action, he used the standards for "under color of state law" to inform the standards for state action.

95. *Id.* at 196 n.16.

96. *Id.* at 196.

97. *Id.* at 195-96 (contrasting the situation in *Tarkanian* with the circumstances in *Atkins*, 487 U.S. 42, in which a private physician was held to be a state actor when hired by a state prison to provide medical care to inmates).

98. *Tarkanian*, 488 U.S. at 183.

99. *Id.* at 193.

in *Brentwood.* "The situation would, of course, be different," he said, "if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign."[100] He cited as examples, and apparently thereby endorsed, decisions from the Fifth and Ninth Circuits. Each case dealt with statewide high school athletic associations similar to the Association in *Brentwood.*[101]

V. THE DECISION IN *BRENTWOOD*

Even under the Rehnquist-era reformulation of the state action doctrine, and particularly after footnote 13 in *Tarkanian,* it is not difficult to see how a justice might find state action in the decision of the Tennessee Secondary School Athletic Association. Thus, Justice Stevens who wrote the majority opinion in *Tarkanian* could consistently join the majority opinion in *Brentwood.* Under the Rehnquist-era reformulation of state action, the touchstone is whether the action of the private defendant can reasonably be attributed to the state. Prior decisions have come to stand for a set of paradigms in which the state either compels or encourages the conduct, makes the conduct possible by delegating an exclusive power of the state, or is in a symbiotic relationship with the private actor so that the state in fact facilitates, and in return reaps some benefit from, the action. In those circumstances it is naturally intuitive to say of the action that it belongs to the state. One still looks in vain, however, for an explanation why the private agent ought to be held liable for the state's action but as long as the Court is stingy in finding state action, as a practical matter, the oddness of the doctrine has no victims.

In *Brentwood* there was both a symbiotic relationship between the State of Tennessee and the TSSAA, as well as something more that perhaps even overcomes the strangeness of the doctrine. The symbiotic relationship consisted, on the one hand in the regulatory role that the TSSAA played for the public schools in Tennessee, and Tennessee alone, unlike with the NCAA in *Tarkanian.*[102] That role had at one time been acknowledged by the State Board of Education and the majority in *Brentwood* made much of the declarations of the Board of Education.

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100. *Id.* at 193 n. 13.

101. *See generally* Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), *cert. denied,* 464 U.S. 818 (1983); La. High Sch. Athletic Ass'n v. St. Augustine High Sch., 396 F.2d 224 (5th Cir. 1968).

102. *See generally Tarkanian,* 488 U.S. 179; *Brentwood Acad.,* 121 S. Ct. 924.

On the other hand, the Association undoubtedly benefited from the membership of the public schools and their participation in its programs.

The something more was the fact that if we pull aside the Association's corporate veil, the Association was substantially dominated by representatives of public schools in Tennessee. Eighty-four percent of the members of the Association were Tennessee public schools.[103] The state through these schools "infiltrated" and used the Association in a way not seen in any other state action decision. In all earlier state action decisions, the private party was an entity distinct from the state. The state appeared as a landlord, as a regulatory body, as the enforcer of informal community customs, i.e., as an entity distinct from the defendant and acting upon the defendant from the outside. In no case did the state so thoroughly involve itself in the internal operations of the private defendant.

The integration of the State of Tennessee and the TSSAA falls somewhere between the typical state action case and the more extreme case of *Lebron v. National Railroad Passenger Corp.*[104] In *Lebron,* eight of the nine Justices found not merely that the actions of Amtrak constituted state action but that Amtrak was in fact an agency of the federal government for purposes of the Fourteenth Amendment. The Court was impressed by the fact that Amtrak had been created by Congress, to further government objectives and the government retained the power to appoint a majority of Amtrak's board of directors.[105] The TSSAA in *Brentwood* was not created by the state, nor did the state have any authority to appoint more than a single representative to the TSSAA. Nevertheless, the vast majority of members of the TSSAA were public schools and the TSSAA, for its public school members, served the important role of regulating high school athletics. Within the looking glass world of the state action doctrine, those facts surely can reasonably be viewed as creating the kind of causal and symbiotic relationship that is the touchstone of the Rehnquist doctrine.

This is not to say that there is anything unreasonable in refusing to find state action in *Brentwood* either. One would have to overcome the dicta in footnote 13 of *Tarkanian*, but after all it was dicta about a set of

103. *Brentwood Acad.*, 121 S. Ct. at 932.

104. 513 U.S. 374 (1995). Justice O'Connor alone dissented. I have not discussed *Lebron* as a state-action decision because the Court itself in *Lebron* distinguished the problem in that case from the typical state action inquiry, whether the action of a private party could be attributed to the state. The Court regarded the issue in *Lebron* as whether Amtrak was a government agency purposes of the Constitution.

105. *Id.* at 385.

facts not before the Court. Much more depends in the first instance on how one views the character of the public schools and their membership in the TSSAA. The majority never questioned the nature of the participation of the public schools. It treated them collectively as the State of Tennessee. But the public schools were not involved in the TSSAA by virtue of any mandate from the State. Nor were they as members either representing the State of Tennessee or setting state policy. The TSSAA remained a private organization that served both public and private schools. The principals, assistant principals and athletic directors who sat on TSSAA committees presumably represented their own schools and not the State. Particularly with regard to private schools it would be a stretch to regard the TSSAA's rules as exercises of state authority. The only authority that the TSSAA had over its members was contractual, and that was true for public as well as private schools.

What is perhaps most interesting about the majority's opinion in *Brentwood* is that with only a bare and ephemeral majority, made possible because of the mercurial vote of Justice O'Connor,[106] Justice Souter took the conception and test of the state action doctrine decidedly back in the direction of the intuitive, ad hoc doctrine of the pre-Rehnquist Vinson and Warren Courts. We've seen that under the guidance of Justice Rehnquist, over the past thirty years, the guiding question has become whether one can fairly say that the challenged private action is attributable to a state. Fair attribution here is a matter of factual accuracy — did the state bring about, encourage or support the activity, or did the state benefit from the activity so that it is natural to say of the action that the state is responsible either causally or because the state is a willing, beneficial participant. Justice Souter, however treated the question as normative. He said, "[w]hat is fairly attributable is a matter of normative judgment. . . ."[107] Alone, this does not necessarily represent a departure from the Rehnquist formulation. One can, after all, rephrase the Rehnquist formulation as asking whether it is normatively fair to attribute the private conduct to the state in light of the involvement of the state in the private conduct. The focus of the inquiry remains on the ways in which the state might be viewed to have become involved in the private activity. More significant is how Justice Souter

106. Recall that Justice O'Connor consistently voted with the conservatives in every state action decision except *Tarkanian* and *Brentwood.* Because she did not a submit a separate opinion in *Tarkanian*, her decision to join the liberals in that case and part with her conservative colleagues is opaque. Given her vote in *Tarkanian* in favor of treating the NCAA as a state actor, her decision in *Brentwood* is at least consistent.

107. *Brentwood Acad.*, 121 S. Ct. at 930.

treated the past decisions. Instead of regarding them as an exclusive set of paradigms bound by their tendency to show a causal or symbiotic relationship, he treated them as no more than instances in which the Court previously had found state action. He wrote, completing the quote above,

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind and 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.[108]

Justice Souter's characterization of the test of state action bears more than a passing resemblance to Justice Clark's declaration in *Burton* that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which '[t]his Court has never attempted. . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[109]

Justice Souter's treatment of past decisions as merely suggestive is evident too in his characterization of the situation in *Brentwood.* He eschewed analyzing *Brentwood* under the obvious category of symbiotic relationship and instead chose to characterize it more vaguely as revealing a significant level of "entwinement" of the State in the private Association. The vague notion of entwinement again echoes the earlier open-ended notion of "involvement" that Justice Rehnquist strove to replace with a more limited, categorical treatment. It is precisely on this point that Justice Thomas launched his dissent. Justice Souter also adds explicitly an element evident in the quote above but never explicitly stated in any other decision of the Court: the possibility that even if the facts point to state action, countervailing considerations might nevertheless lead the Court not to find state action in the particular case. Thus the test becomes not only ad hoc, open ended and again intuitive, it becomes explicitly a balancing test as well. The majority, at least for the moment, recast the Court as a tribunal dedicated to justice case by case.

The remainder of Justice Souter's opinion consists in his review of the facts and conclusion that "'the necessarily fact-bound inquiry' . . .

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108. *Id.*

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

leads to the conclusion of state action here."[110] As in every earlier state action decision, the facts undergo substantial massaging to fit the tests. For example, Justice Souter seemed to regard the ability of the Association to charge admission for tournaments as tantamount to state funding. He wrote,

> Unsurprisingly, then, the record indicates that . . . public schools have largely provided for the Association's financial support. A small portion of the Association's revenue comes from membership dues paid by the schools, and the principal part from gate receipts at tournaments among the member schools. . . . [T]he schools here obtain membership in the service organization and give up sources of their own income to their collective association. The Association thus exercises the authority of the predominantly public schools to charge for admission to their games; the Association does not receive this money from the schools, but enjoys the schools' moneymaking capacity as its own.[111]

Surely this is a substantial stretch. The Association organizes tournaments for the schools and charges admission for the tournaments that it organizes.[112] It neither needs nor reasonably can be said to be exercising any power possessed by the public schools when it charges admission to tournaments that it organizes.

Similarly, Justice Souter overstated the role of the Association in creating and enforcing state policy. Justice Souter made much of the fact that in 1972 the Tennessee Board of Education required public schools in the states with athletic programs to join the Association. That requirement was deleted in 1996. Nevertheless, "the removal of the designation language . . . affected nothing but words. . .. The most that one can say on the evidence is that the State Board once freely acknowledged the Association's official character but now does it by winks and nods."[113] Even when the Board of Education required the public schools to join the Association, however, at best that constituted the Board's use of the Association to regulate the public schools. There was no similar requirement then or ever that private schools join or submit themselves to any regulatory power possessed by the Association. The only power that the Association had over private schools, like the Brentwood Academy, was purely contractual and altogether voluntary.

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110. *Brentwood Acad.*, 121 S. Ct. 932 (quoting *Lugar*, 457 U.S. at 939).
111. *Id.*
112. *Id.*
113. *Id.* at 933.

VI. THE SCOPE AND DURABILITY OF *BRENTWOOD*

It would surely grossly exaggerate the significance of *Brentwood* to regard it as a watershed for the Court's more moderate members, or as a turning point in state action jurisprudence. *Brentwood* concluded as it did only because of the mercurial vote of Justice O'Connor, who with the exception of *Tarkanian* and *Brentwood* has consistently voted with her conservative colleagues largely against finding state action in private conduct. Should Justice O'Connor soon retire and be replaced by someone more attuned to the Chief Justice and Justices Scalia, Kennedy, and Thomas, as would seem likely, the vote even on a similar case would be five to four in the other direction.[114]

Should that happen, it would be a relatively easy task to return the state action doctrine to its more narrow interpretation and perhaps even to restrict its force for other statewide athletic organizations. Justice Souter's normative turn is still focused on the involvement of the state in the private conduct. He did not ask expansively whether it would be fair in the circumstances to require due process or equal treatment. The majority's inquiry still focused on the fairness of regarding the private conduct as the conduct of the state given the involvement of the state with the defendant. The notion of entwinement that Justice Souter introduced in *Brentwood* is also easily assimilated into the Rehnquist paradigms as yet another way in which the state might be causally responsible for the acts of a private party.

It will be more difficult to withdraw the veil of state conduct from state high school athletic organizations, at least without explicitly overturning *Brentwood.* The TSSAA is among the organizations nationally that have the least connections to their states. Fourteen of forty-six state associations polled recently report that unlike the TSSAA, they operate under the authority of their state legislatures. Thirteen of the fourteen operate under the continuing authority their states' boards of education. Twenty-seven of the forty-six, like the TSSAA, have on their boards representatives from their state departments of education and that person is uniformly appointed by the board of education or the superintendent of

114. Justice O'Connor's continued presence on the Court is a matter of some speculation. Jeffrey Rosen, in a recent article in the New York Times Magazine, reports that Justice O'Connor's husband was overheard lamenting Vice President Al Gore's short-lived apparent victory in Florida because his wife wanted to retire but Gore's victory made that impossible. Jeffrey Rosen, *A Majority of One,* N.Y. TIMES, June 3, 2001, § 6 (Magazine) at 32. Since she helped to put President Bush into the White House by joining the 5-4 majority to stop the Florida recount, the speculation is that Justice O'Connor may be favored to replace Chief Justice Rehnquist should he retire under the current administration. *Id.*

public education for the state. No data was available on the number of states that require public schools to participate in the state association but Justice Souter and the majority disregarded the fact that the State of Tennessee did not require public schools to join the Association.[115] The decisive factor was the overwhelming dominance of public schools among the Associations members. All of the factors that moved the majority – the Association's funding, management, and its role in regulating public school athletics, derived from that one fact. Consequently, any state athletic association that includes among its members a substantial proportion of public schools, comes within the ruling of *Brentwood.*

Of course it is also possible that Justice O'Connor will not only stay on the Court, but also enjoy an even greater status for some time. In any event, *Brentwood* is likely to effect state athletic associations into the foreseeable future, subjecting them to the rigors of the Fourteenth Amendment. The Court did not reach, in *Brentwood,* the substantive issue and there remains at least one further threshold question that might yet prevent state associations from having to amend their bylaws. Even if state athletic associations are regarded as state actors, the due process clause will apply to sanctions imposed by state athletic associations, and in particular to suspensions, only if members have a property interest in continuing to participate in association tournaments. In general, since the Court's decision in *Board of Regents v. Roth*[116] in 1972, government benefits, including employment or largesse, are treated as property interests protected by the due process clause only if the claimant is "entitled" to the continuation of the benefit under applicable law. Thus, if continued membership in an association is guaranteed absent cause, membership will be regarded as a property interest and the association will be required to abide by the requirements of due process as a prelude to any penalty. A more thorough discussion of this issue, alas, is beyond the scope of this brief article.

115. All information provided in this paragraph is drawn from a survey recently completed by the National Federation of State High School Associations. NAT'L FED'N OF STATE HIGH SCH. ASS'NS, *available at* www.nfhs.org (survey results not available online; however, contact information provided from which results may be requested).

116. 408 U.S. 564 (1972). *See generally* JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW § 13.5 (6th ed. 2000).