

# Boston College Law Review

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Volume 52  
Issue 2 *The NCAA at 100: Perspectives on its  
Past, Present, and Future*

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Article 2

3-1-2011

## The NCAA as Regulator, Litigant, and State Actor

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### Recommended Citation

Vikram D. Amar, *The NCAA as Regulator, Litigant, and State Actor*, 52 B.C. L. Rev. 415 (2011),  
<https://lawdigitalcommons.bc.edu/bclr/vol52/iss2/2>

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# THE NCAA AS REGULATOR, LITIGANT, AND STATE ACTOR

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**Abstract:** As a general matter, the Constitution limits the government but not the private sector. Known as the “state action” doctrine, the idea that constitutional constraints apply only when public entities are primarily or substantially involved has been developed by the U.S. Supreme Court in scores of cases. This Article argues that the fundamental inadequacy of and dissatisfaction with the state action doctrine arises from the Court’s unwillingness to admit that state action principles are not transsubstantive—that the principles play out differently depending on the particular constitutional claim being asserted. The Article surveys state action rulings to argue that functional considerations—rather than a formalistic, abstract, and uniform quality of “stateness”—should and do dictate when the state action requirement is satisfied and the Constitution’s limits are held to apply. The Article then analyzes the Supreme Court’s 1988 decision in *NCAA v. Tarkanian* to explore how a functionalist analysis might play out in the context of the NCAA and other athletic regulatory bodies.

## INTRODUCTION

Perhaps the most famous court case involving the National Collegiate Athletic Association (NCAA) during the organization’s first century ended up being resolved by the U.S. Supreme Court in 1988 in *NCAA v. Tarkanian*.<sup>1</sup> The Supreme Court’s 5–4 ruling (which this Article discusses further below) rejected the notion that the NCAA should be considered a “state actor” for purposes of a procedural due process claim brought by a men’s basketball coach who had been suspended by his public university employer based on an NCAA investigation, findings of recruiting improprieties, and a recommendation for discipline.<sup>2</sup>

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\* © 2011, Vikram David Amar, Professor of Law and Associate Dean for Academic Affairs, UC Davis School of Law. This Article is a modified version of remarks presented at the *Boston College Law Review’s* symposium, “The NCAA at 100 Years: Perspectives on Its Past, Present, and Future,” held on October 15, 2010 in Newton, Massachusetts. I thank the organizers and participants at that symposium, who made many suggestions that helped me refine my ideas.

<sup>1</sup> 488 U.S. 179, 181–82, 199 (1988).

<sup>2</sup> *Id.* at 180–99.

The *Tarkanian* ruling is significant insofar as it remains a key element of the modern state action principles that govern lawsuits against the NCAA and other athletic regulatory bodies.<sup>3</sup> Much more fundamentally, the *Tarkanian* ruling (and a subsequent case in 2001, *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, involving a high school analogue to the NCAA in which the Court drew upon and distinguished the *Tarkanian* case<sup>4</sup>) provides a useful window into the common features—and major shortcomings—of the modern Supreme Court's doctrinal approach to the state action question more generally.

Part I of this Article provides an overview of the U.S. Supreme Court's prominent decisions involving the state action doctrine.<sup>5</sup> Part II explores functional justifications for the state action doctrine, as opposed to the formalism of the doctrine itself. The Article proposes three major justifications.<sup>6</sup> Part III then analyzes the two major U.S. Supreme Court cases involving the NCAA and athletic associations generally and highlights the unpredictability of the state action doctrine.<sup>7</sup> Finally, Part IV examines how *Tarkanian* might have been decided had the U.S. Supreme Court adopted a functionalist, as opposed to formalist, approach.<sup>8</sup>

## I. AN OVERVIEW OF STATE ACTION DOCTRINE

It is probably fair to say that the range of modern state action case outcomes and the broader doctrinal framework that generates them satisfy very few people. It might be fair to call the area a mess. As a starting point, everyone seems to agree that the Fourteenth Amendment—and indeed, its explicit text<sup>9</sup>—serves to limit what governments can do, but not what private individuals can do. This means that before we can

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<sup>3</sup> Before *Tarkanian*, a number of rulings by lower courts (though by no means all of them) had found the NCAA to be a state actor in a variety of circumstances; afterwards, the trend has been decidedly against finding the NCAA to be a state actor. See, e.g., Dionne L. Koller, *Frozen in Time: The State Action Doctrine's Application to Amateur Sports*, 82 ST. JOHN'S L. REV. 183, 205–07 (2008).

<sup>4</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 293–94, 297–98 (2001).

<sup>5</sup> See *infra* notes 9–58 and accompanying text.

<sup>6</sup> See *infra* notes 59–83 and accompanying text.

<sup>7</sup> See *infra* notes 84–107 and accompanying text.

<sup>8</sup> See *infra* notes 108–133 and accompanying text.

<sup>9</sup> The Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1 (emphasis added).

apply a constitutional prohibition to an institution or individual's conduct, we must be prepared to say, at some meaningful level, that the alleged violation is being perpetrated by the state. But how do we know such a thing, in a world where government is drawn into virtually all private disputes because of society's and government's dispreference for (indeed often prohibition of) self-help remedies?<sup>10</sup> Indeed, this question is even more difficult in a world where public and private institutions are yoked to each other in myriad complex ways involving licensing, regulation, government subsidies, privatization of traditionally governmental activities, complex business partnerships between public and private entities, and so on. Do any or all of these private-public connections transform otherwise private conduct into state action for constitutional purposes?

One might be tempted to think that the task in these cases is to determine "stateness" as an abstract and uniform quality—to develop an objective description of the activities and conduct that constitutes state action regardless of the particular constitutional claim being asserted—and then to apply this transcendent description to each setting in which a constitutional violation is alleged. And indeed, this is what the Supreme Court usually purports to be trying to do in resolving state action questions. But this is a tough—indeed undoable—job, because there is literally nothing in the Constitution's text, and very little in its history, that offers explicit criteria for distinguishing private and state action. Moreover, and relatedly, most observers (rightly) intuit that a defendant can and should be considered a state actor for purposes of one kind of constitutional claim even where the same defendant should *not* be deemed a state actor for a different kind of claim; this is true even if the essential characteristics of the defendant have not changed.<sup>11</sup> It is thus virtually impossible to apply a uniform model of state action to all constitutional claims across the board—to all equal protection, Takings Clause, First Amendment, and procedural due process claims—without regard to the substance of these provisions, be-

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<sup>10</sup> Sometimes, regrettably, the U.S. Supreme Court seems oblivious to the government's prohibitions on self-help when it decides state action cases. For example, in *DeShaney v. Winnebago County Department of Social Services*, in holding that a county was not subject to suit for its failure to protect a child from his violent father because the state did not commit any affirmative misdeed but at most was guilty of inaction, the Court ignored the fact that had the mother tried to take the child to save him, the government would have retrieved the child and placed him back with the father, and likely would have punished the attempted rescue. See 489 U.S. 189, 194–203 (1989).

<sup>11</sup> See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1688–91 (2d ed. 1988).

cause such undifferentiated treatment would produce absurd and untenable substantive results.

Consider, for example, one kind of prominent state action litigation—the so-called “public function” situation—in which the U.S. Supreme Court has held state action to exist even when the defendant was nominally a private actor on the ground that the defendant’s activities were inherently and quintessentially public in nature. In other words, the defendant’s activities were those we associate especially with government, and the simple fact that government has allowed them to be performed by private entities is not a sufficient reason to foreclose application of the constitutional limitations that would otherwise bind had the activity been performed in the more traditional way, by government bodies.<sup>12</sup>

Illustrative of this category are the “white primary” cases, in which states had delegated election administration responsibility to private political parties and associations. When these private groups discriminated against black voters in the administration of primary elections, the Court came to apply the Equal Protection Clause of the Fourteenth Amendment to regulate the parties’ actions.<sup>13</sup> Later, in its 1991 decision in *Edmonson v. Leesville Concrete Co.*, the Court applied and extended these cases to prevent private lawyers who were exercising peremptory challenges from violating equal protection norms by removing jurors based on their race.<sup>14</sup> As Justice Kennedy explained for the Court, in an important jury selection decision, just as government cannot escape from constitutional constraints by farming out the task of picking voters, neither can it free itself from constitutional norms by giving private parties the power to pick jurors.<sup>15</sup>

Another arguable example of a public function case is the U.S. Supreme Court’s famous 1948 decision, *Shelley v. Kraemer*.<sup>16</sup> There, the Court applied the Equal Protection Clause to invalidate racially restrictive covenants in residential property deeds that prevented landowners from selling to African-Americans who wanted to purchase in the neighborhood.<sup>17</sup> In one sense, these covenants were provisions in private agreements that private homeowners agreed to respect when they

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<sup>12</sup> See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 8–23 (1948); *Smith v. Allwright*, 321 U.S. 649, 663–66 (1944); *Nixon v. Condon*, 286 U.S. 73, 88–89 (1932).

<sup>13</sup> See, e.g., *Smith*, 321 U.S. at 663–66; *Condon*, 286 U.S. at 88–89.

<sup>14</sup> 500 U.S. 614, 625–26 (1991).

<sup>15</sup> *Id.* at 626.

<sup>16</sup> See generally 334 U.S. 1.

<sup>17</sup> *Id.* at 4, 8, 13, 18–21.

purchased their lots.<sup>18</sup> But, in a deeper sense, when the racially restrictive language in the deeds was considered alongside the systemic territorial segregation that was encouraged and supported not just by a few buyers and sellers, but also real estate developers, brokers, and lending institutions in the area, what really was going on was zoning—decisions about what entire neighborhoods (and not just particular parcels) would look and feel like. And zoning arguably falls within the “public function” domain.

Another example of the public function idea is found in *Marsh v. Alabama*, decided by the Supreme Court in 1946.<sup>19</sup> There, a company required its workers to live in a “company town,” where streets, fire protection, police security, and such were provided not by traditional government agencies, but by units technically within and owned by a private company.<sup>20</sup> Under such circumstances, the Court held that the commercial parts of the town were really the functional equivalent of a municipal downtown, and so the First Amendment applied to protect residents’ freedom of expression.<sup>21</sup>

From one angle, these decisions make eminent sense; as Justice Kennedy pointed out, it would be odd and perverse for government to be able to shed constitutional limits simply by outsourcing government functions.<sup>22</sup> But from another angle, the doctrine seems unworkable because there is no agreed-upon definition of what the function of government—especially state and local government—is. The essence of good government in our federalist system is that it evolves and adapts to grow, shrink, and flow into some areas and out of others, in response to changes in the economy, environment, and culture. For instance, when *Plessy v. Ferguson*<sup>23</sup> was decided in 1896 by the U.S. Supreme Court, state and local government had a relatively small role to play in K–12 education;<sup>24</sup> by the time *Brown v. Board of Education*<sup>25</sup> was decided by the Court in 1954, fewer than six decades later, primary and secondary education

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<sup>18</sup> *Id.* at 4, 13.

<sup>19</sup> *See generally* 326 U.S. 501 (1946).

<sup>20</sup> *Id.* at 502–03.

<sup>21</sup> *Id.* at 508–10; *see also* *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 316–25 (1968) (extending *Marsh*, in the area of labor speech, to a privately-owned large shopping center).

<sup>22</sup> *See Edmondson*, 500 U.S. at 624–28.

<sup>23</sup> 163 U.S. 537 (1896).

<sup>24</sup> The statute being challenged in *Plessy* involved, of course, railway cars rather than schools, but the Court invoked the analogy of school segregation to bolster its argument that forced separation of the races was not inherently stigmatic or problematic. *Id.* at 540–41, 544–45.

<sup>25</sup> 347 U.S. 483 (1954).

was the single biggest enterprise in which subnational government in America was engaged.<sup>26</sup> And in the fifty years since *Brown*, the nature of local and state (and national, for that matter) government has changed quite a bit more. Many things that government used to provide—sanitation, prisons, home security—are now left to private providers (though the providers are often heavily regulated and/or subsidized by government). Even K–12 education has undergone major changes in many parts of the country with the advent of charter schools and school vouchers.<sup>27</sup>

The inevitable problems with the implementation of the public function concept<sup>28</sup> have, over the past generation, caused the Court to be much less ambitious in invoking it. The 1978 U.S. Supreme Court decision in *Flagg Bros. v. Brooks*<sup>29</sup> is representative of this modern retrenchment. At issue in *Flagg Bros.* was the sale of plaintiff's goods by a warehouseman who claimed the plaintiff had failed to pay her storage bill.<sup>30</sup> State law permitted (by not prohibiting) warehousemen under such circumstances to undertake a forced sale of the personal property and to pocket whatever proceeds were required to satisfy the unpaid debt.<sup>31</sup> The plaintiff in *Flagg Bros.* argued that such a forced sale was unconstitutional because she had not been afforded procedural due process in the determination that her account was in fact overdue before her property was taken from her.<sup>32</sup> The Supreme Court rejected her claim on the ground that the warehouseman's forced sale did not constitute state action; no state employee was involved, and no government entity specifically approved or authorized the sale.<sup>33</sup> The decision to sell the goods, said the Court, was made by the private warehouseman, not the state.<sup>34</sup>

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<sup>26</sup> See *id.* at 492–93.

<sup>27</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 644–48, 656–59, 683–84 (2002) (discussing developments in the voucher movement).

<sup>28</sup> In some respects, the public function inquiry is, if not “unsound in principle,” just as “unworkable in practice” as the “traditional governmental function” test the Court abandoned in *Garcia v. San Antonio Metropolitan Transit Authority* in trying to determine which federal regulations could, consistent with federalism, be applied against state and local governmental entities. 469 U.S. 528, 531, 537–48 (1985).

<sup>29</sup> 436 U.S. 149 (1978).

<sup>30</sup> *Id.* at 151–53.

<sup>31</sup> *Id.* at 149, 151–53, 155–56.

<sup>32</sup> *Id.* at 151–53, 157–58.

<sup>33</sup> *Id.* at 157–66.

<sup>34</sup> *Id.*

On this basis, the Court distinguished an earlier procedural due process case, *Fuentes v. Shevin*,<sup>35</sup> a 1972 decision in which the Court had held that a claim and delivery (replevin) statute that allowed a creditor to get a writ from a judicial clerk to repossess a debtor's property purchased on an installment contract was unconstitutional because the creditor could obtain the repossession writ without the debtor having been given a procedural chance to challenge the creditor's claim of delinquency at a hearing.<sup>36</sup> Because the statute in *Fuentes* required each creditor to go to court and obtain a repossession writ, and the state law in *Flagg Bros.* did not require any involvement of judicial employees but rather reflected a disinclination for state involvement, *Fuentes* was not controlling.<sup>37</sup>

But what about the idea that seizing property to pay unpaid debts and to resolve disputes should be viewed as a government function that simply cannot be given away to private parties? The Court reasoned that for the public function exception to apply, the activity in question must be one that is reserved *exclusively* for the state, which was not true for commercial dispute resolution.<sup>38</sup> Relatedly, the Court suggested that it is important to distinguish between state law regimes that compel or require private parties to act against other persons (which could more easily give rise to state action) from regimes that simply permit self-help by failing to provide a regulatory regime (a situation that ordinarily does not create state action).<sup>39</sup> From the Court's perspective, all that New York had done through the adoption of its warehouseman lien statute was to deny judicial relief to debtors who protested a warehouseman's sale of their stored goods.<sup>40</sup> The state's disinclination to provide a remedy for plaintiff's asserted injury was not actionable state action any more than would be the state's decision to enforce a statute of limitations that prevented a person from pursuing private damage redress because of the delay in bringing suit.<sup>41</sup>

Putting aside the obvious irony that a plaintiff is worse off when the state does nothing to help him (as in *Flagg Bros.*) than if the state does something small but incomplete to help him (as in *Fuentes*, where the

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<sup>35</sup> 407 U.S. 67 (1972).

<sup>36</sup> *Id.* at 80–96.

<sup>37</sup> *Flagg Bros.*, 436 U.S. at 157.

<sup>38</sup> *Id.* at 157–63.

<sup>39</sup> *See id.* at 157–58, 161 n.11, 165; *id.* at 170 (Stevens, J., dissenting) (characterizing the majority decision); *see also DeShaney*, 489 U.S. at 194–97 (invoking similar reasoning).

<sup>40</sup> *See Flagg Bros.*, 436 U.S. at 161–63, 161 n.11, 162 n.12.

<sup>41</sup> *See id.* at 157–66.

state required creditors to obtain writs), there is a deeper problem with the reasoning in *Flagg Bros.*: like many other aspects of state action jurisprudence, it simply isn't—and can't be—applied consistently across the cases.

Consider, for example, takings disputes. In *Nollan v. California Coastal Commission*,<sup>42</sup> a 1987 decision by the Supreme Court, the Coastal Commission (which regulates coastal land use in California) wanted property owners to allow the public to walk directly from one public beach to another across their beachfront land.<sup>43</sup> A Commission regulation overtly imposing a public easement on the land would, under prevailing takings doctrine, likely have been considered a permanent physical invasion that required just compensation to the property owner.<sup>44</sup> But the Commission in *Nollan* instead conditioned its (required) approval of the homeowner's plans to add existing structures on provision of the desired public access.<sup>45</sup> The Commission believed that it had not violated the Takings Clause because the owner's decision to confer the easement was a voluntary, bargained-for exchange that required no additional compensation.<sup>46</sup>

When the homeowner protested, the Supreme Court ruled that the state's conditions on permission to build were unfair and amounted to a taking, as compliance with those conditions would have required the homeowner to give up control over his beachfront property.<sup>47</sup> But did this situation even constitute state action? Recall that state action is a requirement that must be satisfied before a constitutional violation can be found. The state action reasoning of *Flagg Bros.*, if applied in *Nollan*, would have allowed

a state to achieve the very result condemned in *Nollan* without paying one cent of compensation to property owners impacted by its action. All the state needs to do is to pass a law permitting, but not compelling, members of the public to cross any private beachfront property that separates public lands without fear of legal sanction. As in *Flagg Brothers*, the state would be denying judicial relief to individuals suffering a private injury. In essence, the remedy for trespass would be eliminated in certain specified circumstances, but no agent of the state would

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<sup>42</sup> 483 U.S. 825 (1987).

<sup>43</sup> *Id.* at 828–29.

<sup>44</sup> *Id.* at 831.

<sup>45</sup> *Id.* at 828–29.

<sup>46</sup> *See id.* at 831–37; *id.* at 856 (Brennan, J., dissenting).

<sup>47</sup> *See id.* at 838–42.

set foot on anyone's private property. The state would simply be refusing to act to protect property against private infringement. Since the refusal to protect property against private intrusions under *Flagg Brothers* would not constitute state action, property owners could not assert a takings claim against the governmental entity that authorized the invasion of their land.<sup>48</sup>

The inconsistency that pervades state action doctrine can also be seen when we move from the public function cases to another category of rulings involving government subsidy to, regulation of, and entanglement with private actors. In *Burton v. Wilmington Parking Authority*,<sup>49</sup> a 1961 decision by the Supreme Court, a state-owned and state-operated parking facility leased part of its grounds to a privately owned and privately run restaurant that refused to serve black customers.<sup>50</sup> Although the state had done nothing specifically to encourage the segregation policy of its tenant, the Court, in an equal protection suit against the restaurant, found state action to be present because the land and buildings in which the activity took place were owned by the state, because the state and the restaurant were financially interdependent, and because the state flag flying over the facility might have created an appearance of state control over all aspects of the property.<sup>51</sup>

To be clear, this Article does not quarrel with the holding of *Burton*. But it is worth asking whether the Court—or most observers—would think there would be even a colorable claim of state action if the plaintiff had not been a customer complaining of race discrimination under the Equal Protection Clause, but instead had been a cook employed by the restaurant who felt he was being fired without a hearing required by principles of procedural due process.

In the same vein, consider the 1974 U.S. Supreme Court case, *Jackson v. Metropolitan Edison Co.*,<sup>52</sup> where the plaintiff claimed she should have received a due process hearing before the electric company terminated her service for alleged failure to pay her bill.<sup>53</sup> The electric company was a heavily regulated entity—indeed, at that time, electric utilities were essentially state-facilitated monopolies providing essential

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<sup>48</sup> Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMM. 7, 12–13 (1996).

<sup>49</sup> 365 U.S. 715 (1961).

<sup>50</sup> *Id.* at 716.

<sup>51</sup> *Id.* at 721–26.

<sup>52</sup> 419 U.S. 345 (1974).

<sup>53</sup> *Id.* at 346–48.

services; customers had no real choice but to purchase those services, and they had no real choice among service providers.<sup>54</sup> The utility needed the state, and the state needed the utility, such that the same (or a greater) level of symbiosis existing in *Burton* was arguably present here as well.<sup>55</sup> Moreover, as to the appearance of state involvement, one would expect that people were more likely to assume utilities were fully public entities than restaurants, even restaurants that operated on property over which a state flag flies.

Nonetheless, because the state in *Jackson* had no direct involvement in the decision by the utility to structure its service-termination procedures, there was no state action found.<sup>56</sup> The kind of more general connection between public and private entities that sufficed in *Burton* (and recall, in that case the state had nothing specifically to do with the restaurant's policy of exclusion either) was simply not enough.<sup>57</sup>

It is hard to reconcile *Burton* and *Jackson*, unless we focus on the nature of the claim asserted (which the Court never seems inclined to do forthrightly). It is hard to imagine, as Justice Thurgood Marshall pointed out in his dissent in *Jackson*, that if the claim had not been one of procedural due process, but rather one of race discrimination—for example, allegations that the electric company explicitly refused to serve customers of color—the result would have been the same.<sup>58</sup>

It might be tempting simply to say that where race and free speech and certain property rights claims are involved, the U.S. Supreme Court is willing to stretch state action doctrine whereas, under procedural due process, it is not. Even if descriptively accurate as a general matter, that characterization does precious little to answer the question it raises: why *should* certain claims in certain settings be treated differently than other claims in other settings for state action purposes, when the actors involved are the same and the Constitution under which the plaintiff sues is but a single unitary source of supreme law?

## II. IS A FUNCTIONAL APPROACH SUPERIOR?

A somewhat promising route in answering this question has come from those who identify the formalism of the doctrine as one of its main drawbacks.<sup>59</sup> Instead of asking the abstract “what does a state in-

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<sup>54</sup> See *id.* at 350–53.

<sup>55</sup> See *id.* at 357–58.

<sup>56</sup> *Id.* at 358.

<sup>57</sup> See *id.* at 357–58.

<sup>58</sup> *Jackson*, 419 U.S. at 373–74 (Marshall, J., dissenting).

<sup>59</sup> See, e.g., TRIBE, *supra* note 11, at 1688–1720.

herently look like?” question, perhaps we should ask why we desire to have a state action limitation at all. If we have a clear sense of the functional, rather than formalistic, justifications for limiting the scope of the Fourteenth Amendment in the first place, perhaps we can assess the extent to which these justifications for the state action parameter are implicated in each case, and thus whether the Constitution’s norms ought or ought not to be extended and applied to a given defendant.

How might we identify such functional justifications? Sometimes, there are specific, pragmatic justifications that explain why particular existing roles or relationships counsel against finding individuals to be state actors in particular settings. For example, even though government employees, when on the job and within the scope of their employment, are almost always considered state actors, a public defender who is representing an indigent criminal defendant is not considered a state actor because society values protection of the attorney-client relationship that itself finds expression in the Sixth Amendment.<sup>60</sup>

This Article focuses more globally on at least three (sets of) considerations that courts and analysts might look to as underpinnings of the state action limitation. Section A of this Part focuses on federalism as a functional justification for the state action doctrine.<sup>61</sup> Section B then discusses separation of powers as an underpinning of the state action doctrine.<sup>62</sup> Finally, Section C considers privacy and autonomy in regard to private behavior as a justification for the state action doctrine.<sup>63</sup>

#### A. *Functional Justification #1—Federalism*

The Tenth Amendment reflects the idea that some questions are better left to local legislative decision making rather than uniform national resolution.<sup>64</sup> Because the Constitution gives Congress the power to enforce the Fourteenth Amendment through Section 5,<sup>65</sup> reading the Amendment’s Equal Protection and Due Process Clauses to apply

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<sup>60</sup> The Sixth Amendment provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

<sup>61</sup> *Infra* notes 64–78 and accompanying text.

<sup>62</sup> *Infra* notes 79–82 and accompanying text.

<sup>63</sup> *Infra* note 83 and accompanying text.

<sup>64</sup> *See* U.S. CONST. amend. X.

<sup>65</sup> Section 5 of the Fourteenth Amendment provides that “Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

to all private conduct (i.e., abandoning a state action limitation) might be thought to add to Congress's powers in a way that threatens local autonomy, experimentation, and compromise that considers and balances local conditions and complexities.

Case law from the U.S. Supreme Court in the last two decades arguably moots the concern that eliminating the state action requirement will unwisely and expansively confer new powers on the federal legislature. Interestingly, this case law comes from two separate doctrinal strands, one that purports to limit federal power and one that embraces it. Falling within the former category are the Court's 1997 decision in *City of Boerne v. Flores*<sup>66</sup> and its 2001 decision in *Board of Trustees of the University of Alabama v. Garrett*.<sup>67</sup> Both cases promised limits on Congress's Section 5 power even when a Section 1 violation is found and state action is established.<sup>68</sup> Under the so-called "congruence and proportionality" test that emerged from these cases, Congress is substantially constrained from going beyond the contours of the judicially recognized Fourteenth Amendment rights.<sup>69</sup> If these two cases continue to represent the Court's attitude about Section 5, then fear of congressional domination through use of the Section 5 power is significantly reduced.

Falling within the latter category are two recent U.S. Supreme Court cases<sup>70</sup> decided under the Commerce Clause<sup>71</sup> and the Necessary and Proper Clause.<sup>72</sup> These cases may already authorize under Article I virtually any federal legislation regulating the private sphere that Congress wishes to pursue, rendering questions of Congressional power under Section 5 of the Fourteenth Amendment more or less superflu-

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<sup>66</sup> 521 U.S. 507 (1997).

<sup>67</sup> 531 U.S. 356 (2001).

<sup>68</sup> See generally *Garrett*, 531 U.S. 356; *Flores*, 521 U.S. 507.

<sup>69</sup> See *Garrett*, 531 U.S. at 365; *Flores*, 521 U.S. at 520. It should be noted that two more recent cases apply the "congruence and proportionality" test somewhat leniently—*Nevada Department of Human Resources v. Hibbs* and *Tennessee v. Lane* create substantial uncertainty about the direction of the current doctrinal momentum. *Tennessee v. Lane*, 541 U.S. 509, 516–34 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726–40 (2003).

<sup>70</sup> See generally *United States v. Comstock*, 130 S. Ct. 1949 (2010); *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>71</sup> The Commerce Clause says that "[t]he Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

<sup>72</sup> The Constitution authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [previously mentioned], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

ous.<sup>73</sup> In 2005, in *Gonzales v. Raich*,<sup>74</sup> the Court upheld Congress's power to prohibit local marijuana production, seemingly on either of two grounds: first, the prohibition was part of the federal Controlled Substances Act, a comprehensive integrated regulation of the entire narcotics industry; second, cultivation of marijuana, even for personal use, constituted commercial or economic activity subject to regulation under the Commerce Clause power because homegrown marijuana can serve as a substitute for market-purchased marijuana.<sup>75</sup> In 2010, in *United States v. Comstock*,<sup>76</sup> the Court upheld Congress's power to civilly commit sexually dangerous federal prisoners whose prison terms have expired, on the ground that their federal prison stints might make states less likely to deal with these sexually dangerous persons.<sup>77</sup> Blunting a problem that the federal government itself arguably helped create by incarcerating these prisoners pursuant to valid federal criminal laws is, opined six justices, within Congress's Article I power to make laws necessary and proper for execution of its authorized powers (in this case, its power to make and implement criminal laws).<sup>78</sup>

Taken together, the expansive Commerce Clause and Necessary and Proper Clause powers seem to make the question of Congress's ability to regulate under Section 5 much less important. As discussed below, however, some questions remain about how far the recent permissive cases should reach.

#### B. *Functional Justification #2—Separation of Powers*

To the extent that the Constitution governs private conduct as well as government activity, rules regulating behavior and accommodating competing private interests will be developed, implemented, and then revised by the courts (especially the federal courts), rather than legislatures and executive agencies. But does that give courts too large a role in lawmaking? The nub of this formidable separation of powers rationale for a state action doctrine—which appears to be the weightiest generic justification for the Constitution's values being limited to state actors—is that in a democracy, there should be a wide sphere of activity as to which the directly accountable governmental institutions should be the primary decisionmakers. To offer but a single example, it is one

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<sup>73</sup> See *Comstock*, 130 S. Ct. at 1951–52, 1965; *Raich*, 545 U.S. at 10–33.

<sup>74</sup> 545 U.S. 1.

<sup>75</sup> See *id.* at 10–33.

<sup>76</sup> 130 S. Ct. 1949.

<sup>77</sup> *Id.* at 1951–52, 1965.

<sup>78</sup> *Id.* at 1965.

thing for Congress to pass a law like Title VII and for the U.S. Equal Employment Opportunity Commission to adopt regulations under that law. It would be a very different thing for a federal court to mandate Title VII's substantive regulations on all public and private employers as a matter of fixed constitutional doctrine with which the elected branches could not even tinker.

The concern about authorizing judges to do too much is particularly acute where rules regulating private conduct must balance many competing interests and thus will likely need to vary a great deal from actor to actor. Judges might not be as adept as legislatures at gathering the kind of comprehensive and reliable empirical information upon which to craft rules and carve out exceptions that make sense across the entire range of relevant human conduct. Again, Title VII may be a good example: the kind of detailed, nuanced, setting-specific rules needed to govern employers varying by size, industry, local demographics, and culture might have been easier for Congress—with its broad data-gathering powers and the access that various lobbying interests have to it—than for judges, who see but one case at a time when deciding whether to adopt or amend a regulatory rule. The situation presented by *Shelley v. Kraemer*,<sup>79</sup> by contrast, perhaps made it easier to extend state action broadly than in the employment setting because in *Shelley* there were not as many competing interests to balance, and a simple no-discrimination-in-any-residential-purchase-transaction rule might have been easier to implement and thus more attractive to adopt.<sup>80</sup>

Relatedly, separation of powers concerns might be heightened in areas where substantive constitutional doctrine is “softer” and thus harder to predict. For example, one reason why race discrimination equal protection norms have been more readily extended by the U.S. Supreme Court than procedural due process limits is that the latter have less predictable content. The *Mathews v. Eldridge* balancing test,<sup>81</sup> established by the U.S. Supreme Court in 1976, is much more manipulable, and thus probably more erratic, than equal protection racial-classification doctrine.<sup>82</sup>

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<sup>79</sup> 334 U.S. 1 (1944).

<sup>80</sup> See generally *id.*

<sup>81</sup> 424 U.S. 319, 332–35 (1976) (identifying three factors—what the individual has at stake in a dispute, how much additional procedures will enhance the accuracy of the ultimate result of the dispute, and the cost of such additional procedures—that must be weighed in a cost-benefit balance to determine what process is constitutionally due).

<sup>82</sup> For example, many were surprised by the invocation and specific application of the *Mathews* test in the War on Terror setting in *Hamdi v. Rumsfeld*. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). This is not to say that equal protection doctrine, by comparison, is always

C. *Functional Justification #3—A Cluster of Privacy, Autonomy, and Liberty Concerns*

Finally, the need for state action limits might in part be attributable to the fact that many constitutional rules would be unreasonably intrusive if we applied them to all private behavior. For example, firing and disciplining government employees properly triggers procedural due process requirements. But very few people think that parental punishment of children should implicate formal procedural protection.

This cluster of privacy and autonomy considerations seems powerful, but the case law, because it clings to the formalistic approach to state action discussed above, offers very little guidance as to what institutions, relationships, or individuals should benefit from this zone of freedom from governmental norm imposition.

There appear to be a number of factors that might militate in favor of a state action limit. For example, intimate settings and associations (small employers, families, romantic relationships, friendships), expressive associations and organizations, and commercial arrangements between parties who have decided between themselves—and in ways that do not spill over to others—which rules should govern interactions between them are all good candidates as beneficiaries of some state action limitations.<sup>83</sup>

III. WHAT WE CAN LEARN FROM *TARKANIAN* AND OTHER CASES INVOLVING ATHLETIC ASSOCIATIONS

The NCAA, an unincorporated association that in 1989 comprised 960 public and private member colleges and universities, conducts investigations and makes factual determinations in order to impose penalties upon member institutions that have violated the organization's

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easy to apply. Even tests like “strict scrutiny” mean different things in different contexts, and do try to take account, in their implementation, of relevant differences between different kinds of harms and different kinds of state interests. Moreover, there may be additional reasons why equal protection is an easier setting in which to extend state action; there may be broader national consensus on certain equal protection antidiscrimination norms than on what constitutes fair procedural treatment.

<sup>83</sup> This “private ordering” rationale is the best defense of an otherwise questionable result in *Flagg Bros. v. Brooks*, 436 U.S. 149, 155–66 (1978). There was an agreement between the warehouseman and the person whose goods were being stored about how disputes over missed payments would be resolved and how debts would be satisfied. *See id.* at 153. Unless we are prepared to void that agreement as unconscionable, then respect for the private decisions of the contracting parties weighs heavily against ex post government intervention through extension of the state action doctrine.

rules concerning fair athletic competition.<sup>84</sup> The NCAA is not authorized to impose sanctions directly upon the student-athletes or employees who attend or work at the member academic institutions and whose conduct typically gives rise to NCAA rules violations.<sup>85</sup> After a lengthy investigation in the 1970s into the men's basketball program at the University of Nevada, Las Vegas (UNLV), the NCAA found thirty-eight violations, including at least ten committed by the men's basketball coach, Jerry Tarkanian.<sup>86</sup> The NCAA imposed sanctions on UNLV and threatened to impose additional punishments on the university if the school did not suspend Coach Tarkanian for a period of time.<sup>87</sup> The school ultimately gave in to the pressure from the NCAA to suspend Tarkanian; Tarkanian then brought suit against the university and the NCAA, alleging a deprivation of his Fourteenth Amendment procedural due process rights.<sup>88</sup> In 1988, the U.S. Supreme Court in *NCAA v. Tarkanian* ultimately rejected his claim against the NCAA by a 5–4 vote, concluding that the NCAA was not a state actor for these purposes.<sup>89</sup>

Prior to the *Tarkanian* ruling the courts were split on the characterization of the NCAA. Initially, in the 1970s, federal courts of appeals held that the NCAA was a state actor, and then during the 1980s, the trend was the opposite.<sup>90</sup> Since the *Tarkanian* ruling, the legal principles concerning the applicability of the Constitution to the NCAA have been “frozen in time.”<sup>91</sup>

The Court's finding of no state action in the *Tarkanian* case is at the very least open to question. Most of the NCAA's members—that is, most of the Associations' policy formulators—were (and remain today) public institutions.<sup>92</sup> And there is no real question about whether the NCAA

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<sup>84</sup> *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988).

<sup>85</sup> *Id.* at 184.

<sup>86</sup> *Id.* at 185–86.

<sup>87</sup> *Id.* at 186.

<sup>88</sup> *Id.* at 187–88.

<sup>89</sup> *Id.* at 180, 191–99.

<sup>90</sup> See *Tarkanian*, 488 U.S. at 182 n.5.

<sup>91</sup> See Koller, *supra* note 3, at 183.

<sup>92</sup> See *Differences Among the Three Divisions: Division I*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/differences+among+the+divisions/division+i> (last updated Dec. 20, 2010) (stating 66% of Division I schools are public and 34% are private); *Differences Among the Three Divisions: Division II*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/Differences+Among+the+Divisions/Division+II> (last updated Dec. 20, 2010) (stating 53% of Division II schools are public and 47% are private).

was the “but for” and proximate cause of Tarkanian’s public employer’s decision to suspend him.<sup>93</sup>

Nonetheless, a five-member majority saw no state action by the NCAA that implicated constitutional due process.<sup>94</sup> The vote lineup in the case was unique: Justices Stevens, along with Chief Justice Rehnquist and Justices Blackmun, Scalia, and Kennedy made up the majority. Justice White wrote a dissent in which Justices Brennan, Marshall, and O’Connor joined.<sup>95</sup> These nine justices heard about 350 cases from the time Justice Kennedy joined the Court (in February 1988) until the time Justice Brennan left the Court and was replaced by Justice Souter (in the fall of 1990). In no other case during the time these nine justices served together was the *Tarkanian* lineup repeated, even though there were about seventy or more 5–4 rulings during this period.<sup>96</sup>

The lineup was not the only strange aspect of the case. The majority’s reasoning was quite unusual, whether or not the result was correct (a question on which this Article takes no firm position). Justice Stevens’ majority opinion offered a few main reasons to explain why the Constitution does not apply to the NCAA. One justification, and the most conclusory one, was that although promoting and administering college athletics is “critical,” it is “by no means . . . a traditional, let alone an exclusive, state function.”<sup>97</sup> Another justification was that because Nevada was but one state among many whose public universities were members of the NCAA (with the vast majority of NCAA member institutions being located outside of Nevada), holding the NCAA to be an agent of Nevada law was untenable.<sup>98</sup> The third justification was that UNLV—the public university that actually imposed the sanctions on Coach Tarkanian—was not in agreement with the NCAA. Instead, it resisted the NCAA’s demands and could have withdrawn from the NCAA if it chose, such that the NCAA was not really forcing any harm upon Coach Tarkanian at the hands of government agents.<sup>99</sup>

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<sup>93</sup> See *Tarkanian*, 488 U.S. 185–88.

<sup>94</sup> See *id.* at 191–99.

<sup>95</sup> See *id.* at 180.

<sup>96</sup> The only way to prove a negative assertion like this is to examine the statistics at the end of each of the October 1987, 1988, and 1989 Terms. These statistics can be found in a number of places, but I consulted the first issues of the *Harvard Law Review* (which compiles year-end statistics in the issue featuring its foreword, for each of these years). See *The Statistics*, 104 HARV. L. REV. 359, 361, 362 (1990); *The Statistics*, 103 HARV. L. REV. 394, 396–97 (1989); *The Statistics*, 102 HARV. L. REV. 350, 350–53 (1988).

<sup>97</sup> *Tarkanian*, 488 U.S. at 197 n.18.

<sup>98</sup> *Id.* at 193.

<sup>99</sup> *Id.* at 196–99.

None of these justifications withstands reason. As to the first, as explained above, it is hard to say anything is an exclusive public function, especially if states are permitted to experiment the way the laboratory vision of federalism would seem to permit. As for the second, surely states cannot join each other in a multi-state organization and escape the Constitution's limits because the organization speaks for all states but no one in particular. For example, agencies created by interstate compacts under Article I, Section 10<sup>100</sup> ought to be "state actors" when they regulate. And, as to the third, to speak of UNLV's "option" to leave the NCAA (and thus to leave big-time sports) was silly in 1989; it is even more laughable today.

More generally, the *Tarkanian* case illustrates major pitfalls of modern doctrine in that it lacks any discussion of first principles. The majority and dissenting opinions discussed only cases, not constitutional values or objectives. In that sense, the case was not unusual at all; it fit in all too well with the formalist approach the Court has taken. And, even if the precedent game were the right one to play, the *Tarkanian* decision could easily have fit the test from the Court's 1961 decision in *Burton v. Wilmington Parking Authority*.<sup>101</sup> There is a clear symbiosis between public universities and the NCAA (neither can support a sports program—something both want to do for a variety of commercial, fundraising, and *esprit de corps* reasons—without the help and participation of the other). Moreover, many outside observers—indeed, all but the most avid readers of the *U.S. Reports*<sup>102</sup>—would probably think the NCAA in its regulatory capacity partakes of governmental authority and status.

The other major U.S. Supreme Court ruling involving state action and athletic associations—the 2001 *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*<sup>103</sup> decision, which held a high school athletic association whose membership consists of public and private high schools within a single state to be a state actor<sup>104</sup>—is no better in these regards, notwithstanding the fact that it reaches a result that is probably correct. Again, there was no discussion of why we have a state action limitation in deciding what its contours should be. Even the dissent paid

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<sup>100</sup> This provision implies that with the consent of Congress, a state is permitted to "enter into . . . Agreement[s] or Compact[s] with another State, or with a foreign power . . . ." U.S. CONST. art. I, § 10, cl. 3.

<sup>101</sup> See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721–26 (1961).

<sup>102</sup> Cf. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 689 (1981) (Rehnquist, J., dissenting) (sarcastically referring to "casual readers of this Court's Commerce Clause decisions").

<sup>103</sup> 531 U.S. 288 (2001).

<sup>104</sup> *Id.* at 290–91, 295–305.

only lip service to functional values. It initially mentioned liberty and federalism as justifications for limiting the Constitution,<sup>105</sup> but then never returned to them to resolve the case. Again, the only game the justices seemed to be playing is the analogy/distinction game with respect to past cases. And the big distinction of *Tarkanian* that purports to explain the opposite result in *Brentwood*—that all the member high schools who comprised the association were located within a single state—should not carry the weight it was assigned.<sup>106</sup> As discussed above, the interstate character of an organization should not bear much on whether it is a governmental actor for constitutional purposes.<sup>107</sup>

#### IV. HOW SHOULD THE NCAA HAVE FARED IN THE *TARKANIAN* CASE UNDER A MORE SOPHISTICATED FUNCTIONAL APPROACH?

What should the result in *Tarkanian* have been if a more functional and more nuanced approach had been used? Although the purpose of this Article is not to provide a definitive answer to this question, the Article does assert that to answer it intelligently, we need to return to and apply the functional values themselves.

##### A. Federalism

Given that the NCAA is a national association (and seems committed to remaining one) and its members want national standards of conduct, there appears to be little or no value in having states or localities work out how the NCAA should treat individual employees or athletes. The federalism justification for limiting the Constitution's reach presupposes some utility in diverse local regulation, a utility that here is seemingly lacking.

Indeed, there is some question as to whether state and local governments even have the *power* to regulate the NCAA's dispute resolution activities. After the *Tarkanian* case, the legislature of Nevada attempted to regulate the NCAA's operation in the state, and in 1993 the U.S. Court of Appeals for the Ninth Circuit, in *NCAA v. Miller*, struck down the effort as an undue and impermissible burden on interstate commerce under the balancing test articulated by the U.S. Supreme Court in its 1970 decision in *Pike v. Bruce Church, Inc.*<sup>108</sup>

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<sup>105</sup> *Id.* at 306 (Thomas, J., dissenting).

<sup>106</sup> *See id.* at 295–98 (majority opinion); *Tarkanian*, 488 U.S. at 193.

<sup>107</sup> *See supra* notes 70–78 and accompanying text.

<sup>108</sup> *See NCAA v. Miller*, 10 F. 3d 633, 637–40 (9th Cir. 1993); *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

### B. *Separation of Powers*

As noted earlier, some compromises in regulating conduct are better left to legislatures than courts. Is that value implicated in the NCAA procedural due process setting? First, we must decide whether any legislature is even empowered to act here. If none is, the choice about regulation is not between courts and legislatures (which is a true separation of powers decision), but rather between courts and no one at all.<sup>109</sup> As just observed, there is a question whether state legislatures can prescribe NCAA procedures. What about Congress?

Congress ordinarily can regulate dispute resolution. It does so in federal labor law,<sup>110</sup> and it does so in the Federal Arbitration Act.<sup>111</sup> But these laws arguably constitute parts of larger, integrated regulations of the larger economic systems, and thus might be easier to sell under Congress's Commerce Clause powers and the Court's 2005 decision in *Gonzales v. Raich*.<sup>112</sup> What if Congress did not regulate much or all of college sports economics but adopted a "single-subject" law prescribing NCAA procedures for dealing with coaches and/or athletes? Would that be permissible?

There may not be a clear answer to that question, in part because it is unclear whether dispute resolution and sanction imposition by a voluntary unincorporated (and not-for-profit) association would be considered "economic activity" by the Court under the Commerce Clause. It seemed as though that question would be answered eight years ago in the 2003 U.S. Supreme Court case *Pierce County, Washington v. Guillen*, but that case ended up being resolved on different grounds.<sup>113</sup>

At issue in *Guillen* was a congressional scheme that required each state seeking federal funding for roadways to study, compile and collect information concerning "hazardous locations, sections and elements" of "all public roads" within the state.<sup>114</sup> Congress desired this information

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<sup>109</sup> Of course, libertarians might still find virtue in a state action limitation here, for reasons addressed below involving the cluster of autonomy and privacy concerns that might underlie doctrinal instincts.

<sup>110</sup> See, e.g., Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006).

<sup>111</sup> 9 U.S.C. §§ 1–16 (2006).

<sup>112</sup> See generally 545 U.S. 1 (2005). Should it even really matter that federal labor law regulates so broadly? Shouldn't Congress be able to regulate labor disputes without also regulating wages and hours? Justice O'Connor's dissent in *Raich* doubtless had some force here, even if there is value in encouraging Congress to think about federalism as it decides how to draft and combine statutory regulations.

<sup>113</sup> 537 U.S. 129, 140–48 (2003).

<sup>114</sup> *Id.* at 133.

so that it could decide which roadway safety improvements to fund.<sup>115</sup> States complained that assembling and retaining this information might hurt them in civil litigation brought by persons injured at any of the areas studied and documented.<sup>116</sup> Congress responded to this concern by enacting another provision saying that the information “compiled or collected” to satisfy federal requirements “shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding . . . .”<sup>117</sup> A plaintiff who later sued Washington County for dangerous roadway conditions after his wife was killed in an automobile accident challenged the congressional prohibition on disclosure of the state’s studies as beyond Congress’s Article I enumerated powers.<sup>118</sup>

The Court upheld Congress’s power to insulate this information from discovery or introduction into evidence under the Commerce Clause.<sup>119</sup> Justice Thomas explained that the case fell into a specific strand of doctrine dealing with transportation networks:

Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement of [the statute] would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation’s roads. Consequently, . . . [the law] can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for [roadways.]<sup>120</sup>

Putting aside the roadway aspect, *Guillen* is particularly interesting when contrasted with the two other major Commerce Clause cases decided by the U.S. Supreme Court since the mid-1990s—*Lopez v. United States*<sup>121</sup> and *Morrison v. United States*.<sup>122</sup> In 1995, in *Lopez*, the Court held that the federal Gun Free Schools Zone Act, which made it a crime to possess a gun near a school, did not fall within Congress’s Commerce Clause powers.<sup>123</sup> And, in 2000, the Court in *Morrison* held the same for

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 133–34.

<sup>117</sup> *Id.* at 135–36.

<sup>118</sup> *Id.* at 136–39.

<sup>119</sup> See *Guillen*, 537 U.S. at 143–48.

<sup>120</sup> *Id.* at 147.

<sup>121</sup> 514 U.S. 549 (1995).

<sup>122</sup> 529 U.S. 598 (2000).

<sup>123</sup> 514 U.S. at 552–68.

the Federal Violence Against Women Act.<sup>124</sup> In both cases, the Court found that Congress was not entitled to much leeway because the activities Congress was attempting to regulate were not themselves economic: possessing guns near schools and committing violence for misogynistic reasons simply are not economic actions.<sup>125</sup>

The Court in *Guillen* makes no reference to this question. Justice Thomas does not ask whether the discovery of information or its introduction into evidence—the very activity regulated by the federal statute—is economic or not.<sup>126</sup> Whether litigation is an economic activity within the meaning of *Lopez* and *Morrison* seems to me an interesting, and perhaps complex, question.

Even if Congress could regulate the NCAA, would it be better than courts in fashioning procedures? Procedural due process doctrine can be volatile and unpredictable. For example, the standards concerning War on Terror detainees that emerged in the 2004 U.S. Supreme Court decision *Hamdi v. Rumsfeld*<sup>127</sup> came seemingly out of nowhere. The Court has had quite a journey in the procedural due process arena, with no sure footing.<sup>128</sup> Racial segregation settings, by contrast, seem at least somewhat more doctrinally predictable and straightforward.

Additionally, procedural due process rights often amount to a bargaining chip that competing organizations or institutions use as they work out deals. In the labor setting, for example, a union may give up procedural due process protections for its members in order to get better substantive benefits. Shouldn't we respect that private tradeoff ordering, as in *Flagg Bros. v. Brooks*?<sup>129</sup> Perhaps this concern is irrelevant in the particular context of the *Tarkanian* case, as the coaches (and athletes) whose fates are affected are not themselves members of or bargainers with the NCAA, and there are serious questions about whether the member universities can be trusted to fully represent their interests.

Finally, in defense of the majority's result in *Tarkanian*, procedural due process may be a setting in which periodic tinkering in light of

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<sup>124</sup> 529 U.S. at 607–27.

<sup>125</sup> See 529 U.S. at 610–13; 514 U.S. at 560–61.

<sup>126</sup> See generally *Guillen*, 537 U.S. at 132–48.

<sup>127</sup> 542 U.S. 507, 509, 540–41, 553 (2004).

<sup>128</sup> On all three of the major procedural due process questions courts must ask—when there is property or liberty that triggers procedural due process, what constitutes a deprivation of that property or liberty, and what precise process is due at which times—the Court's path has been anything but a straight line and at times is seemingly lacking in confidence. For general background, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 545–604 (3d ed. 2006).

<sup>129</sup> 436 U.S. 139, 155–66 (1978).

empirical experience is particularly helpful, and legislatures can tinker with procedural rules more readily than can courts. Ever since the U.S. Supreme Court made clear in 1985 in *Cleveland Board of Education v. Loudermill*<sup>130</sup> that procedural due process requirements are a constitutional minimum that state legislatures cannot supplant even when they think other procedures make more sense, legislatures have been less able to engage in a dialogue with courts over the proper mix of procedures.<sup>131</sup> On the flip side, of course, one can argue that courts are particularly good at crafting procedure. Indeed, procedure and dispute resolution is what constantly occupies judges' time. Thus, courts may have experience and expertise in this area that legislatures lack.

### C. *The Autonomy, Privacy, Private Ordering Cluster*

A look at NCAA's Constitution suggests that it is neither an intimate association nor an expressive association that should partake of autonomy under the principles discussed earlier. Instead, it appears to be essentially a regulatory association.<sup>132</sup> Moreover, as already mentioned, because the coaches and student athletes are themselves not members of the association who have agreed to be regulated in exchange for certain consideration, and because the universities who are the members and who presumably do exercise some clout cannot be seen as full representatives of the coaches and athletes within the schools, there does not seem to be a private ordering in the *Tarkanian* case that is worthy of respect.<sup>133</sup> If a private university member of the NCAA itself were to bring a procedural due process claim to resist sanctions, that might very well present a different situation.

## CONCLUSION

The purpose of this Article is not to suggest, of course, that the NCAA should be a state actor for all purposes. For example, the Article does not argue that the NCAA should be a state actor in the case of private ordering relating to NCAA employees, and maybe even member schools. The Article does not even argue that the NCAA should be a state actor for all procedural due process purposes when sued by disciplined student athletes or coaches. The Article argues only that we

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<sup>130</sup> 470 U.S. 532, 538–48 (1985).

<sup>131</sup> *Id.*

<sup>132</sup> NCAA CONST. art. 1.2, in DIVISION I MANUAL (2010) (statement of purpose), available at <http://www.ncaapublications.com/productdownloads/D111.pdf>.

<sup>133</sup> See *supra* note 83.

need to go beyond facile invocations of a few of the many hard-to-reconcile cases and ask why or why not the extension of formal procedures to protect employees and athletes in particular settings makes constitutional sense.