Matthew J. Mitten • Timothy Davis • Barbara Osborne • N. Jeremi Duru

Sports Law

Governance and Regulation

THIRD EDITION

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Authoritative and timely, ***Sports Law: Governance and Regulation*** covers the full range of topics for both amateur and professional sports. The Third Edition tracks developments from locker room to courtroom with updates on racial and gender equity, contracts, safety, and more. Examples, cases, and problems clearly illustrate the role of law and policy in sports and look at the issues from the perspective of players, managers, coaches, and society.

Sports Law: Governance and Regulation **features:**

- Thorough coverage of professional and amateur sports examining contracts, torts, agency, labor, employment and health, and safety law, as well as regulation of high school, college, and Olympic sport.
- Insightful explanatory text, notes, questions, and review problems to train students to identify and successfully navigate legal issues encountered in a career in sports.
- Well-edited cases to encourage critical thinking and discussion in the classroom.
- Definitions of key terms to aid in comprehension.
- Timely website sources that support further research and classroom discussion.

New to the Third Edition:

- Changes to the NCAA's governance and enforcement structures, and updated bylaws and cases related to student-athlete scholarships, transfer rights, and name, image, and likeness opportunities.
- Recent developments related to efforts to minimize health and safety risks from youth through professional sport arising from concussions and the liability of various institutions for concussion-related injuries.
- New sections on sexual orientation discrimination, participation rights of transgender and intersex athletes, and the obligation of organizations to protect athletes from sexual misconduct.
- Professional sport developments regarding the appropriate breadth of commissioner authority, updated MLB, NBA, NFL, and NHL collective bargaining agreements, and an expanded discussion of professional sports leagues' personal conduct, disciplinary issues, and domestic violence policies.
- Revised Olympic and international sports issues, including anti-doping, sports globalization, and athlete exploitation materials.
- A unique look at negotiating sport industry contracts, including coaches' and players' contracts.

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To Rod Smith and Ken Shropshire
for your efforts as founding authors

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Preface

Third Edition

To provide users of our book with the most current and comprehensive sports law and governance text available, we have revised and updated the third edition to include discussions of the most recent legal and governance developments affecting youth, interscholastic, intercollegiate, Olympic, and professional sports that have occurred since our second edition was published in 2016. The sports industry, at all levels, has experienced significant change in that time period. That change is captured in this text. Among other topics, this edition explores the rapidly changing collegiate sports landscape in light of NCAA bylaw revisions, nationwide bribery and admission scandals, and student-athlete agitation for expanded rights; questions about the appropriate breadth of commissioner authority in professional sports leagues; developments with respect to sports-related brain trauma litigation at the high school, collegiate, and professional levels; and transgender athletes' participation in interscholastic and intercollegiate sports as well as related issues in Olympic and international sports. We have updated historical sections of the book as well, to give students a feel for the magnitude of those changes. The Third Edition also includes new and refined problems and notes designed to broaden students' understanding and encourage them to wrestle with the kinds of legal and governance problems that are continually arising within the industry. With input from thoughtful users of past editions, we have been able to add new material without unduly expanding the length of the text. As such, the text can still be effectively used in either a two- or three-credit course. We trust you will find this Third Edition to be an excellent text for the study of sports law and governance, but if you find there are ways in which we could improve the book, we would love to hear from you. Please feel free to contact any of us at any time with your comments and suggestions: Matt Mitten (matt.mitten@marquette.edu), Tim Davis (davistx@wfu.edu), Barbara Osborne (sportlaw@unc.edu), and Jeremi Duru (duru@wcl.american.edu).

First Edition

This book, which is adapted from three of the authors' widely used law school text, is designed to introduce undergraduate and graduate students to the various and often differing legal frameworks regulating high school, college, professional, and Olympic sports competition along with important, contemporary topics such

as gender and racial equity; health, safety, and risk management; and intellectual property issues in sports. It provides an overview of the significant historical, economic, and sociological issues affecting the development of the laws regulating sports at each level of competition, as well as common sports-related legal issues. The book, which is intended for use as the text in either a two- or three-credit-hour undergraduate or graduate sports law course in sports management or other program, covers a wide variety of contemporary sports law issues of interest to future sports administrators, executives, and business managers, as well as coaches and other sports industry personnel. It has been carefully designed and written to provide undergraduate and graduate professors and students with a comprehensive, multipurpose text that gives a balanced perspective regarding a multitude of legal and regulatory issues that frequently arise in interscholastic, intercollegiate, professional, and Olympic sports industries.

This book begins by providing an introduction to the study of sports law and a brief overview of the U.S. legal system, as well as guidance on how to effectively use the case method to facilitate and enhance learning. In Chapters 2–4, 11–12, and 14, the book covers the internal governance systems for high school, college, professional, and Olympic sports, respectively. These chapters also cover the primary bodies of public law (e.g., private association, constitutional, antitrust, and labor law) that shape, regulate, and constrain each internal governance system. The remaining chapters cover various topics raising legal issues of significance in more than one of the amateur or professional sports industries: coaches' contracts (Chapter 10); gender equity (Chapter 5); racial equity (Chapter 6); health, safety, and risk management (Chapter 7); and intellectual property (Chapter 9).

This text uses the case method, which involves the study of illustrative legal disputes resolved by courts through the litigation process, and establishes a body of legal precedent regulating various aspects of the sports industry. This method of learning is designed to encourage students to engage in critical thinking by identifying the legal issues in each case, the parties' respective arguments, and the court's ruling and rationale for its decision. It stimulates the development of a dialogue between the professor and students (and frequently among students as well). It also facilitates students' understanding of the laws regulating the sports industry. In addition to the illustrative cases (which have been edited substantially), each chapter provides explanatory material, notes, questions, and review problems designed to enable students to understand how basic legal doctrines apply to problems arising in the sports context. Ideally, students can then use this knowledge to identify sports industry legal issues and to understand how they are likely to be resolved.

In addition to helping students develop an understanding of the legal framework regulating high school, college, professional, and Olympic sports and other sports-related legal issues, a sports law course provides several important educational benefits. It exposes students (some of whom may be considering law school) to several different bodies of law and provides them with a general understanding of numerous laws—knowledge that may be useful in future careers other than in the sports industry. In addition, sports law deals with broader issues that merit deeper study and reflection, such as the role of sports in our culture and whether current laws effectively promote appropriate, ethical, and just practices and behavior in

the amateur and professional sports industries. We hope that our book encourages thoughtful consideration of these and other important sports-related issues.

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1 An Introduction to the Study of Sports Law

Should sports law be recognized as an independent substantive area of the law, such as torts, contracts, or employment law? As the following excerpt reveals, scholars have debated this question.

WHAT IS SPORTS LAW?[1]

A. The Traditional View: "Sports Law" Does Not Exist

The traditional view is that sports law represents nothing more than an amalgamation of various substantive areas of the law that are relevant in the sports context. According to this perspective, the term *sports law* is a misnomer, given that sport represents a form of activity and entertainment that is governed by the legal system in its entirety. Adherents to the traditional perspective argue that "sports law simply entails the application of basic legal precepts to a specific industry" that are drawn from other substantive areas of the law. Consequently, no separately identifiable body of law exists that can be characterized as sports law.

B. The Moderate Position: "Sports Law" May Develop into a Field of Law

Other commentators have begun increasingly to question the traditional view that no corpus of law exists that can be characterized as an independent field of law called "sports law". . . . [Some] have staked out what represents a middle ground.

[1]This excerpt was originally published at Timothy Davis, 11 Marq. Sports L. Rev. 211 (2001). All citations to authority have been omitted.

Professor Kenneth Shropshire acknowledges that developments, such as state and federal legislation impacting sports (for example, state statutes regulating sports agents, and federal statutes such as Title IX), suggest a "growing sports-only corpus" of law.

Professor Burlette Carter argues that sports law is in the midst of an exciting, yet challenging, transformative process. According to Professor Carter, this process parallels the increased focus by law schools on sports and the growing significance of sports regulation to participants, organizations, and communities. She believes that these developments will better shape the contours of this emerging field of study. This, in turn, will eventually transform sports law from "a course without a corpus" to a widely recognized independent substantive area of law.

C. "Sports Law": A Separate Field of Law

Others argue that sports law currently exists as a field of law. Adherents to this view emphasize the growing body of case and statutory law specific to the sports industry as evidence of the existence of a separately identifiable body of law. Pointing to the increasing body of judicial and legislative law specific to sports, Professor [Simone] Gardiner argues:

> It is true to say that [sports law] is largely an amalgam of interrelated legal disciplines involving such areas as contract, taxation, employment, competition and criminal law but dedicated legislation and case law has developed and will continue to do so. As an area of academic study and extensive practitioner involvement, the time is right to accept that a new legal area has been born—sports law.

Commentators also propose that references to sports law as merely an amalgamation of various other substantive areas of the law ignore an important present-day reality—very few substantive areas of the law fit into separate categories that are divorced from, and independent of, other substantive areas of the law. Doctrinal overlap exists not only within sports law, but within other areas of law as well. According to Professor Carter, "the field of sports law has moved beyond the traditional antitrust and labor law boundaries into sports representation and legal ethics, sports and corporate structure, sports and disability, sports and race, sports and gender, sports and taxation, international issues in sports law, and numerous other permutations."

Proponents of the sports law designation and those sympathetic to the view also argue that reticence to recognize sports law as a specific body of law may reflect attitudes regarding the intellectual seriousness of sports. In this regard, they emphasize the tendency to marginalize the study of sports rather than treat it as any other form of business. The intellectual marginalization of sport has been attributed, in part, to the belief that social relations extant in sports were not deemed proper subjects for reconstruction into legal relationships. Thus, private and public law were considered "inappropriate [mechanisms for] controlling the social norms of sport." The competing and increasingly predominant view, however, casts sports as a significant economic activity suitable, like other big businesses, to regulation, whether it be internal or external.

In the end, whether sports law is recognized as an independent field of law may turn on the perceptions of those who practice, teach, and engage in scholarship related to sports law. Professor Carter asks that we consider the following:

> But what makes a field a field? The answer is that a field becomes a field not because it is inherently so but because in our public legal dealings we shape it as such, defining the concepts and legal norms that will prevail uniquely in that context. It becomes a field because enough people with power on all sides are so affected by it to require some special treatment of it in the law.

Regardless of the position that is adopted regarding the ''what is sports law'' debate, most would agree that matters arising in the sports law context implicate diverse substantive areas of law. Whether sports law is a separate field of law, a reflection of substantive law related to the sports industry, or some combination, the vast array of substantive legal topics presented in a basic sports law course can sometimes prove surprisingly challenging. To enjoy and ultimately excel in this area, it will be helpful for you to have an introduction to legal basics.

Sports law involves both public and private law. Public law can be broadly described as the law that governs the relationships between the government and individuals, as well as the relationships between individuals that directly affect society. Constitutional law, administrative law, and criminal law are areas of public law that intersect with sports law. Private law governs the relationships between individuals (or corporations); sports law applications include contracts, torts, and the law of private associations. However, you will learn that distinctions in law are rarely clear. Public and private law often intersect in areas such as labor and antitrust. For undergraduate and graduate students interested in working in some capacity in the amateur or professional sports industries, this introduction will help you better understand the legal landscape and will aid you in your work with lawyers, who should be consulted whenever you deal with legal issues.

FUNDAMENTALS OF THE LEGAL SYSTEM

The United States has a federalist government, which means power is shared between the national and state (and local) governments. The basic operating principles for the federal and state governments are embodied in the Constitution. The federal Constitution identifies the fundamental rights of citizens of the United States and delineates limits on the government's ability to interfere with those rights. The federal Constitution applies to all states, and is preeminent; states may grant additional rights, but they may not limit rights that the federal Constitution guarantees. Constitutional cases are based on the interpretation of state constitutions or the federal Constitution. Federal laws that are inconsistent with the U.S. Constitution are invalid—in our legal hierarchy, constitutional provisions are the most significant. That is what is meant when it is said that the U.S. Constitution is the law of the land. State laws that are inconsistent with the state or federal constitutions are also held to be unconstitutional and invalid.

The foundation of the federal government is based upon a balance of power between the executive, legislative, and judicial branches. Each of these branches is a source of law. The executive branch is the President of the United States. The President is ultimately responsible for implementing and enforcing federal laws, through executive orders and through the regulations set forth by the administrative agencies. For example, the U.S. Department of Education promulgates Title IX regulations dealing with gender discrimination under the auspices of administrative legal authority that provides part of the substantive basis of sports law. The President appoints the heads of the federal agencies, who also serve on the President's cabinet.

The legislative branch is responsible for writing, debating, and passing bills. Demonstrating balance of power, bills only become law when the President has signed them. If the President vetoes a bill, Congress has the ability to vote to override the veto.

The role of the judicial branch is to interpret the Constitution or legislation. Balance of power is demonstrated through judicial interpretation of legislation (statutes) or regulations (regulatory materials developed by administrative or regulatory bodies). In these instances, judicial decisions often involve interpreting or determining the applicability and reach of a given regulation or piece of legislation. The judiciary also creates law, known as the common law, through the precedent established in case decisions. The concepts of common law and precedent will be discussed later in this chapter.

State governments are organized similarly. The state constitution embodies the principles upon which the state government operates. Balance of power exists within each state, with the governor of each state representing the executive branch and enforcing the law, state representatives to the legislature who enact the law, and the state (and local) judiciary interprets the law.

There are also local and regulatory decision-making bodies that make law. County governments and school districts, for example, regularly promulgate laws that may provide the grist for a decision in the sports area. High school and collegiate athletic associations may also pass and enforce regulations that provide the basis for decisions in the sports law area.

JURISDICTION AND THE FEDERAL AND STATE COURT SYSTEMS

In the United States, there are two dominant court systems—the federal courts and the state courts. Jurisdiction is the power of the court to hear and determine the outcome of a case. A court establishes this power because of the subject matter of the case or the parties who are involved. Subject matter jurisdiction refers to the particular category of the case, for example, a dispute involving land or the right to use a corporate logo. Personal jurisdiction refers to the court's power over the various parties to the case. Cases in the federal court system or the state courts may involve civil law or criminal law. Disputes between public or private parties are

civil law matters which are decided on a preponderance of the evidence standard. Criminal law involves acts that are harmful to society as a whole, so the government represents the people in putting forward a case against a criminal defendant. The government must prove that the defendant committed the crime beyond a reasonable doubt.

Broadly too, particularly in sports law-related cases, parties will seek remedies in "law" or "equity." A remedy at law is primarily one where money damages are sought as a means of compensating the injured party. For example, if a coach feels that he or she is owed an additional salary payment, money would resolve that issue and constitute a remedy at law. However, if a team wanted to retain a coach with special skills or keep him or her from coaching for another team, that would require an equitable remedy, including a court's issuance of an order of specific performance or an injunction. Specific performance would be an order for the coach to continue coaching, and the injunction would bar the coach from coaching another team.

A. Federal Courts

The federal court system is established by Article III of the U.S. Constitution and consists of three levels. At the trial level, the federal courts are divided into 94 districts, with at least one district in each state, the District of Columbia, and Puerto Rico. District courts have original jurisdiction over cases involving federal issues, issues that are based on the U.S. Constitution, federal legislation, regulations, treaties, or cases arising in states that implicate other states and their citizens and residents. Federal judges are nominated by the President, confirmed by the U.S. Senate, and typically serve for life. Decisions of the district court may be appealed to the appropriate circuit court. The federal court of appeals is organized into 12 regional circuits plus a court of appeals for the Federal Circuit. The circuit courts also hear appeals of decisions by the federal administrative agencies. Typically, a panel of three judges hears the arguments on appeal and renders a decision. Parties that are not satisfied may appeal to the Supreme Court, which has discretionary jurisdiction; it selects which cases it will hear. The highest court within the federal judiciary, the Supreme Court consists of nine justices, including the Chief Justice. A Supreme Court decision is final unless there is a constitutional amendment to overturn its decision, Congress alters the Court's decision by changing the law, or the Supreme Court overturns its own decision through a decision in a later case.

B. State Courts

State court systems are established by the state constitution of their respective state. State cases, in turn, involve state issues, issues that are based on state legislation, regulation, and the provisions of that state's constitution. State court systems are also typically three-tiered systems with a trial court, appellate court, and a court of final decision. The names of the appellate level courts vary by state, so a Court of Appeals in one state may be the Supreme Court of another. Because state

courts have unique jurisdiction, a party that is not satisfied with the final decision in a state court may not appeal to the federal court. One exception is when there is some conflict between state and federal law such as state constitutional provisions that are inconsistent with federal constitutional law or that deprive citizens and residents of other states of their federal constitutional rights. Judges in the state courts may be elected or appointed, depending upon state law.

C. Tax and Other Specialized Courts

There are other specialized courts and decision makers at the state, federal, and international levels. For example, there are specialized tribunals or courts that decide cases in particular areas of law such as tax. Those specialized tribunals exist at the state and federal levels, and sometimes even at the local and international levels.

While the government legislates, and the judiciary enforces the laws that regulate the sports industry, the majority of regulation occurs within the sports industry. Most sport organizations belong to a league or association that establishes rules for membership and competition. Community recreation and sport programs, as well as some high school athletics associations, are considered state actors (see Chapter 2). However, the National Collegiate Athletic Association (NCAA) (Chapter 3), the U.S. Olympic Committee and national sport governing bodies (Chapter 14), and professional sports leagues (Chapter 11) are all considered private organizations. Generally, courts give tremendous deference to sports organizations to govern their own affairs and create and enforce their own rules. Under the principle of limited judicial review, the courts will intervene in a sport organization's affairs only if the association's rules: (1) violate constitutional rights (when the association is considered a state actor); (2) violate basic notions of fairness or public policy (for private associations); (3) exceed the scope of the association's authority; (4) violates one of the association's own rules; or (5) are applied unreasonably or arbitrarily and capriciously. Generally, the court will not review the merits of a rule, or whether there is a better way for the organization to achieve the same goal.

CIVIL PROCEDURE

The term *procedure* refers to the mechanics of the legal process. Procedure varies between the civil court system and the criminal law system. Although criminal activity occurs within the sport industry, the overwhelming majority of sport law issues fall within the civil law. Civil procedure is the legal method, including rules of practice, which must be strictly adhered to in order to advance through the legal process. This section provides a quick overview of the Federal Rules of Civil Procedure.

The succession of events constituting civil procedure includes complaint, service, answer, discovery, motions, trial, judgment, and appeal. The complaint is the formal legal document that lists the pleadings, or claims, that the plaintiff

is bringing forth against the defendant. The purpose of the complaint is to provide notice to the defendant and the court as to the nature of the claims that are asserted. Service is the delivery of a legal document, such as a pleading or complaint, to the adverse party in a legal action. Completion of service requires strict adherence to the rules of the court of that jurisdiction. Upon completion of service, the defendant is subject to the rules of the court in resolving the issue. The defendant must file a formal answer to the complaint; the answer must address all of the allegations in the complaint, whether confirmed or denied, and include any defenses or counterclaims that the defendant will assert. After the answer has been properly filed, the parties may advance to discovery or file motions with the court. The defendant may file a motion to dismiss based on inadequacy of the pleadings. In that case, a court will determine whether the basic outline for a case has successfully been set forth by the plaintiff. If not, a court may dismiss the action.

Assuming the case proceeds, discovery is the process of sharing information between the parties. Interrogatories, written questions for the opposing parties, may be submitted. Similarly, depositions, statements of potential witnesses, may be acquired either orally or in writing. Oral depositions are made under oath, with representatives of both parties present and having the opportunity to cross-examine while the procedure is recorded and/or transcribed. The parties may also request additional information and documents from the opposing party. The purpose of discovery is for all parties to share information to achieve a fair and just resolution.

Either party, or sometimes both parties, may submit a motion for summary judgment. In this situation, the court will apply the law to the facts of the case in the light most favorable to the nonmoving party to determine whether the motion is granted or denied.

Should the case proceed to trial, the parties are required to follow the rules of the court in presenting evidence to support their positions. The trial may be heard by a judge, called a *bench trial,* or by a jury. Civil trials most commonly have six citizens serve on a jury. Throughout the trial, there may be additional motions made by either party. At the end of a bench trial, the judge will render a decision. In a jury trial, the judge will provide the jury with the rules of law upon which they are required to make their decision.

If a party, plaintiff or defendant, loses in a lower court, that party may have a right to appeal. An appeal involves a right by one or both of the parties to contest the legal ruling that was reached at the preceding stage of the litigation process. Generally, appellate courts are quite deferential to the findings of fact made by the trial court because the trial court actually hears the testimony of the witnesses and can evaluate their credibility firsthand. The appellate court does not hear new witnesses or review new evidence—it merely addresses whether there was an error in procedure or in application of the law that adversely affected the outcome of the trial. The appellate court may affirm the lower court decision, overturn the decision of the lower court and render a new decision, or remand the matter back to the lower court with instructions. A party may appeal an appellate court decision. However, the highest court in the process, often called the *Supreme Court,* is unlikely to hear the case unless there are conflicting decisions among the appellate court districts at the state level or among the various circuit courts at the federal level, or unless the case presents a significant legal issue.

USING THE CASE METHOD TO STUDY LAW

The study of law in American law schools is primarily done via the case method, although non-case law and policy-related materials often complement the cases. This book is designed in a manner that takes full advantage of pedagogy based on the study of cases and related materials and problems, which strengthen students' thinking and analytical skills. Going forward, you will read a case or a series of cases on a given topic. For example, in focusing on antitrust law in baseball, the first major or seminal case in the United States was *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). By proceeding, often chronologically, through a series of cases, culminating in a study of the latest cases, students learn how law develops. This method also assists students in applying the law and strengthens their capacity to anticipate future legal developments.

A. Common Law

Part of what the case method requires you to do is to bring together the meaning of the cases and to develop the law through the synthesizing of the cases, with each case building on the foundation of prior cases. Through this process, one comes to understand what cases and commentators refer to as the "common law."

1. Precedent

In applying case law, there is little more powerful than a supporting precedent, or a case that provides support for your position. *Precedent* is a holding, or ruling of a court, that establishes authority for the disposition of future similar cases. Ideally, litigants and their attorneys are thrilled to uncover a Supreme Court case addressing exactly the same facts and legal questions that comprise their situation. When they do so, there is often little need to proceed (however, this does not happen often). If one cannot find a Supreme Court decision directly on point, the next best option may be some other highly respected federal or state court with a ruling similar to your matter. Lower courts are to follow the decisions of higher courts within their jurisdiction. In the federal judiciary, district courts must adhere to the decisions of the Court of Appeals for their circuit or distinguish their case from other previously decided cases. Other circuit court or even state court decisions provide influential or persuasive authority. In this search for precedent, lawyers know that cases with slight factual variations can be supportive as well. For example, if you have a case involving an injury to a soccer player and find a case where the facts are similar but the sport is rugby, that case may be strong precedent in your case, unless you can distinguish soccer from rugby in a manner that would persuade a court that the cases should be treated differently as a legal matter.

2. How to Brief a Case

Whether you are reading a case assigned in this text or cases that you find while engaged in a legal research project, briefing each case will help you to better understand the legal issues as well as how the law develops. Every brief should include the following elements: case name and citation, named parties, legal issue(s), key facts, legal rationale, and holding(s).

The case name generally identifies the plaintiff (the person who has filed a lawsuit) and the defendant (the party against whom the lawsuit has been initiated). Typically, the plaintiff's name is on the left and the defendant on the right, although these are sometimes transposed. The numbers and letters after the case name identify the reporter where a written copy of the case decision is published. Historically, law students would have gone to the law library, located the appropriate reporter (the abbreviation in the middle), then found the volume (the first numbers listed) and opened it to the correct page (the numbers after the designated reporter). When using digital legal search engines such as Lexis or Westlaw, you just type in the citation, and the case is delivered right to your computer screen. The name of the court that wrote the decision and the year the case was decided are included in parentheses after the case citation. It is important to note which court (state or federal) and level of court for precedent purposes. It is also helpful to order your cases in chronological order, as well as by jurisdiction, to see how the law develops.

Next, you should identify the plaintiffs and the defendants. All parties are not always included in the case name.

It is often helpful to identify the legal issue, or issues, in the case by posing them in the form of a question. The legal issue is the question of law that the court is deciding. Identifying the legal question is important, as you may find a case that has facts very similar to your own situation, but the court makes a decision on a legal question that is irrelevant to you. This case would not provide strong precedent.

Many students confuse the legal issue with the facts. The key facts include only the information that is necessary for the court to address the legal issue. Some judges will provide extensive background information and paint a lovely backdrop for the case. However, for briefing purposes, it is useful to pare down all of this information to just the facts that come into play in order for the court to make a decision.

The rationale section identifies the various legal theories that the court examines in order to reach a decision. Using an outline format is helpful in this section of the brief. First, identify the legal theory or legislation that the court uses. Next, define that area of law or explain the statute. Finally, show how the court applies the facts of the case to the legal definition. Some cases may address only a single area of the law, while more complex litigation may address a dozen or more legal theories. The key words identified prior to the cases in this text will often help you to identify the key legal theories addressed. If you are reading other cases, you can look at the keynotes (literally identified by a key-shaped symbol) in Westlaw or the headnotes in Lexis. The rationale section of the brief really helps you to identify and digest how the common law develops. It will also assist you in building legal explanations or arguments if you are researching a legal topic. One additional tip—if you

are briefing cases for a legal research paper, it is helpful to identify the page number in the case where you found the information in your brief. The page numbers can be found in brackets (for example, [413]) as you are reading the case. This will save you significant time in tracking down your citations for your legal paper.

The final element of the case brief is the holding, or decision of the court. There should be a holding for every legal issue that you have identified. The holding is critically important because it establishes precedent.

The following case provides you with the opportunity to brief a case, as well as learn a little about civil procedure and tort law.

KEY TERMS

In reviewing the following materials, note the definition and meaning of the following terms:

- **Answer**
- **Appeal**
- **Assumption of risk**
- **Complaint**
- **Deposition**
- **Discovery**
- **Interrogatories**
- **Negligence**
- **Recklessness**
- **Summary judgment**

Savino v. Robertson

273 Ill. App. 3d 811 (1995)

JUDGES: Justice McCormick delivered the opinion of the court: Scariano, P.J., and DiVito, J., concur.

[*812] Plaintiff John Savino brought a negligence action against defendant Scott Robertson after plaintiff was struck and injured in the eye by a hockey puck shot by defendant. The trial court granted defendant's subsequent motion for summary judgment, but allowed **[*813]** plaintiff to amend the complaint to allege that defendant's conduct was willful and wanton. Upon another motion by defendant, the trial court granted summary judgment in favor of defendant on the amended complaint. On appeal from both orders, plaintiff raises the following issues for our consideration: (1) whether a plaintiff must plead and prove willful and wanton conduct in order to recover for injuries incurred during athletic competition; and (2) whether there was a genuine issue of material fact as to whether defendant's conduct was willful and wanton in injuring plaintiff. We affirm.

Plaintiff and defendant were teammates in an amateur hockey league sponsored by the Northbrook Park District. Plaintiff and defendant also had met in various "pick-up" games prior to playing in the Northbrook league, but they were neither

friends nor enemies. On April 20, 1990, plaintiff and defendant were warming up prior to a game. During warm-up, teams skate around and behind their goal on their half of the ice. Plaintiff was on the ice, "to the right of the face-off circle in front of the net." Defendant shot a puck that missed the goal and hit plaintiff near the right eye. Plaintiff lost 80% vision in that eye.

On September 11, 1990, plaintiff filed a one-count complaint against defendant alleging that defendant was negligent and failed to exercise ordinary care in shooting the puck. Specifically, plaintiff alleged that defendant (a) failed to warn plaintiff that he was going to shoot the puck toward plaintiff; (b) failed to wait until a goalie was present before shooting the puck; (c) failed to warn others that he was shooting the puck; (d) failed to follow the custom and practice of the Northbrook Men's Summer League which required the presence of a goalie at the net before shooting; and (e) failed to keep an adequate lookout.

Defendant filed his answer to the complaint and, after interrogatories and discovery depositions were taken, defendant moved for summary judgment. . . . Defendant argued that he was entitled to judgment as a matter of law because plaintiff alleged ordinary negligence. To be entitled to relief for injuries incurred during athletic competition, defendant argued, plaintiff had to plead and prove willful and wanton conduct or conduct done in reckless disregard for the safety of others. The trial court granted defendant's motion for summary judgment and denied plaintiff leave to amend count I of the complaint. Upon reconsideration, the trial court granted plaintiff leave to file an amended complaint to allege a count II based on willful and wanton conduct.

Defendant filed his answer to plaintiff's subsequent amended complaint and the parties engaged in discovery as to count II of that **[*814]** complaint. Defendant later filed another motion for summary judgment. Defendant argued that, due to plaintiff's admission that his injury was caused by an accident, plaintiff's case presented no genuine issue of material fact with regard to defendant's alleged willful and wanton conduct. Defendant further argued that plaintiff could not show that defendant's action was anything more than an ordinary practice shot normally taken during warm-up sessions.

Plaintiff, on the other hand, argued in his response to defendant's motion that ordinary negligence should be the standard applied to his case rather than willful and wanton conduct, because, since the hockey game had not officially begun, he was not a participant at the time of his injury. Plaintiff attached the affidavit of Thomas Czarnik, a hockey coach at Deerfield High School, to his response. According to Czarnik, it was the custom of amateur hockey leagues to wait until the goalie was present in the net before any practice shots were taken.

Defendant also took Czarnik's deposition. In that deposition, Czarnik described himself as a 15-year acquaintance of plaintiff. . . . Czarnik further stated that he had been a hockey player since childhood and had coached various youth hockey organizations. The Northbrook Hockey League played what was known as "non-check" hockey. Non-check meant non-collision. However, there was still bodily contact in non-check hockey and, in Czarnik's opinion, hockey, regardless of the type, is a contact sport. Czarnik had no knowledge of the rules and usages of the Northbrook Hockey League and had no firsthand knowledge of the incident.

Czarnik also stated that he had seen players in adult hockey leagues take shots at open goals, that is, goals without a goalie present, during the warm-up period and that he had taken shots at open goals. According to Czarnik, the warm-up period was a part of the game of hockey even though the players are not technically playing a game. Czarnik considered plaintiff's injury an accident.

Defendant attached excerpts of Czarnik's deposition in support of his reply to plaintiff's response to the motion for summary judgment. Defendant argued that Czarnik's responses demonstrated that plaintiff could not show, as a matter of law, that defendant's conduct was willful or wanton. Defendant also contended that Czarnik was not a proper expert to render an opinion in this case, given his lack of familiarity with adult hockey leagues and lack of knowledge of the rules and usages of the Northbrook Summer Men's Hockey League. The trial court granted defendant's motion for summary judgment. **[*815]** Plaintiff now appeals from both orders of the trial court granting summary judgment in favor of defendant.

Our review of the trial court's grant of summary judgment is *de novo.* The granting of summary judgment is proper when the pleadings, depositions, and affidavits show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment is proper, the court must construe the evidence in a light most favorable to the non-movant and strongly against the movant.

Plaintiff first argues that he should not have been required to plead willful and wanton conduct in this case because he was not actually "playing" the game of hockey at the time his injury occurred, but rather was participating in the warm-up practice.

The seminal case on this issue is *Nabozny v. Barnhill* (1975), 31 Ill. App. 3d 212. . . . In *Nabozny,* the plaintiff was the goalkeeper for a teenage soccer league and the defendant was a forward from an opposing team. The game's rules prevented players from making contact with the goalkeeper while he is in possession of the ball in the penalty area. During the game, the ball was passed to the plaintiff while he was in the penalty area. The plaintiff fell onto his knee. The defendant, who had been going for the ball, continued to run towards the plaintiff and kicked the plaintiff in the head, causing severe injuries. The trial court directed a verdict in favor of the defendant, holding that as a matter of law the defendant was free from negligence (owed no duty to the plaintiff) and that the plaintiff was contributorily negligent.

In reversing the trial court, the *Nabozny* court held that when athletes engage in organized competition, with a set of rules that guides the conduct and safety of the players, then "a player is charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule." The court then announced the following rule:

> It is our opinion that a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful, or with a reckless disregard for the safety of the other player so as to cause injury to that player, the same being a question of fact to be decided by a jury.

[*816] Illinois courts have construed *Nabozny* to hold that a plaintiff-participant injured during a contact sport may recover from another player only if the other's

conduct was wilful or wanton. Plaintiff contends, however, that decisions subsequent to *Nabozny* have misconstrued the court's holding in that case. According to plaintiff, *Nabozny* is to be applied only to conduct during a game because *Nabozny* "involved an injury that occurred during a game and therefore, it implicitly recognizes a distinction with pre-game injuries."

Illinois has enacted a modified comparative fault statute. (*735 ILCS 5/2-1116* (West 1992).) The enactment of this statute, however, has no effect on express assumption of risk, where a plaintiff expressly assumes the dangers and risks created by the activity or a **[*817]** defendant's negligence, or on primary implied assumption of risk, where a plaintiff knowingly and voluntarily assumes the risks inherent in a particular situation or a defendant's negligence.

In the case at bar, we believe that plaintiff was no less a participant in a team sport merely because he was engaged in "warm-up" activities at the time of his injury. However, assuming *arguendo* that we were to view plaintiff's action using an ordinary negligence standard, we must find that plaintiff knowingly and voluntarily assumed the risks inherent in playing the game of hockey. Plaintiff's own testimony bears out this fact. Plaintiff was an experienced hockey player, playing from the time he was eight years old. He had played in organized adult leagues for approximately 10 years prior to his accident. Plaintiff testified that while it was "customary" for players to wait for a goalie to be present prior to taking practice shots, in his experience he had seen players take shots at open nets. There was no written rule against taking shots at open nets. Plaintiff was also aware, at the time he stepped onto the ice, that there was a risk of being hit with a puck during "warm-ups." Indeed, according to plaintiff, that risk "always" existed. Nonetheless, plaintiff chose not to wear a protective face mask, since it was not required, even though in his estimation 65–70% of his teammates were wearing protective masks during "warm-up" and despite the inherent risk of being hit with a puck, irrespective of the goalie's presence at the net. Based on plaintiff's testimony, we believe that plaintiff voluntarily consented, understood, and accepted the dangers inherent in the sport or due to a co-participant's negligence.

As we have stated, we believe that the distinction plaintiff raises, between the "warm-up" and the actual commencement of the game, to be illusory. Hockey is a contact sport. It is not made less so merely because the participants are "warming up" prior to the commencement of the game. Proof of ordinary negligence will not sustain an action against defendant in this case, merely because plaintiff alleges a violation of a rule. Moreover, the evidence suggests that defendant here did not violate the customs and rules of the league. In addition to plaintiff's testimony, plaintiff's witness Czarnik and teammate Steve Marcordes testified that players may be hit by pucks during "warm-up" and during the game . . . Marcordes, unlike Czarnik, was familiar with the customs and usages of the Northbrook **[*818]** league, so much so that plaintiff testified that he considered Marcordes a "player-coach." Marcordes also testified that it was common for players to take shots at an open net during warm-up.

We find no reason to abandon the well-established precedent of this court, and that of a majority of jurisdictions, that a participant in a contact sport may recover for injury only where the other's conduct is wilful or wanton or in reckless disregard to safety. There are a number of reasons justifying the application of this standard to sports-related injury cases. First, the risk of injury accompanies many informal contact

sports. Thus, wilful and wanton or reckless conduct allows the court to gauge what is and is not permissible conduct under the circumstances. Second, as the court recognized in *Nabozny,* courts must strike a balance between "the free and vigorous participation in sports" and the protection of the individual from reckless or intentional conduct. Third, we believe that the practical effect of applying an ordinary negligence standard would be to open a legal pandora's box, allowing virtually every participant in a contact sport, injured by another during a "warm-up" or practice, to bring an action based on the risks inherent in virtually every contact sport. This is exactly the type of result the courts have sought to avoid. . . . **[*820]** It is undisputed that plaintiff and defendant were teammates in an organized hockey league. There were rules and usages. Reviewing the evidence in a light most favorable to plaintiff, there appears to be no genuine issue of material fact that practice shots were often taken at an open net and such was the custom of the team.

For the foregoing reasons, we affirm both orders of the circuit court granting summary judgment in defendant's favor.

Affirmed.

QUESTIONS

1. How did the court in *Savino* determine whether granting summary judgment is proper?
2. What cases did the court use as precedent in this decision?
3. What legal theories are identified? How are these theories explained?
4. How would you "brief" this case?
5. Provide an example of a future case where this case might serve as a precedent.
6. How was precedent used to determine the outcome of this case?

2 Regulating Interscholastic (High School) and Youth Athletics

INTRODUCTION: THE RISE OF THE REGULATION OF INTERSCHOLASTIC AND YOUTH ATHLETICS AT THE STATE, NATIONAL, AND INTERNATIONAL LEVELS

A. Historical Overview

In 1851, the state superintendent of schools for Minnesota requested an acre or more of land be "set aside for the physical development of [students]." Mabel Lee, A History of Physical Education and Sports in the U.S.A., 1983, p. 34. A Detroit high school football team existed in 1888, and by 1892, a Detroit high school baseball team traveled to Ann Arbor for an interscholastic game. In late 1895 and early 1896, educators in Wisconsin met to discuss interscholastic athletics and the formation of an association for governance purposes. After the formal organization of the Wisconsin Interscholastic Athletic Association, state athletic associations proliferated throughout the United States, and the National Federation of State High School Associations was formed in 1923.

Participation in interscholastic athletics has grown steadily. The number of high school students participating in interscholastic athletics has increased steadily for 30 years, with a record high of 7,980,886 participants in 2017–2018. Current economic challenges likely contributed to the decline of participants in 2018–2019, and it remains to be seen whether slowing growth or declining participation in interscholastic athletics will continue.

Youth athletics continues to proliferate at all levels, with approximately 60 million children playing a variety of sports. A broad array of associations governs youth athletics in the United States, ranging from local park and recreational organizations and YMCAs to national associations such as Little League baseball (*http://www.littleleague.org/Little_League_Online.htm*), American Youth Soccer Association (AYSO; *https://ayso.org/about-us/about/*), and Pop Warner football

(*http://www.popwarner.com/About_Us/orgchart.htm*). The Amateur Athletic Union (AAU) has also become increasingly involved in youth athletics. See *http://image.aausports.org/codebook/article_I.pdf* (Article I of the Constitution of the AAU). The National Football League (NFL) formed USA Football in an effort to improve coaching in youth football at the interscholastic and nonscholastic levels (see *https://usafootball.com/programs/national-team/coach/* for a discussion of the role of the NFL with youth coaches). Youth athletics in other countries are often overseen by governmental entities (see, e.g., *http://www.sport.gov.tt/* for the national governing body in Trinidad). With concerns rising regarding head and related injuries, as well as other health and safety issues at all levels, governmental bodies are becoming more involved in regulating and exercising increasing oversight in this area.

Increases in participation and the competitiveness in our culture have spawned significant regulation. State and youth associations have also developed increasingly sophisticated and elaborate regulations to govern youth athletics. State and federal legislation will continue to affect interscholastic and youth athletics, with courts playing a role in overseeing the operation of interscholastic and youth athletics.

B. Interscholastic and Youth Athletics Regulatory Structure, Governance, and Administrative Processes

Interscholastic athletics is largely regulated under the rules formulated by public and private high schools that are members of state athletic associations. Youth athletics, in turn, is generally governed by entities that are wholly private (nonpublic) in nature. The presence of public schools in state athletic associations often raises issues of whether the association is public, and hence subject to more judicial scrutiny, or private in nature. Rules governing the playing of the game and participation by boys and girls in interscholastic athletics are adopted by athletic associations at the statewide level. Occasionally, conferences or other groups of schools on a regional basis may adopt rules as well. At the interscholastic level, school boards and local school officials may also adopt rules that will apply to participation in interscholastic athletics. The courts may intervene to deal with disputes, particularly if the governing or state athletic association is deemed to be public. Some state legislatures have been willing to intervene and enact laws pertaining to some aspects that apply to both interscholastic and youth athletics, particularly health and safety issues.

Actions by youth-governing bodies, state athletic associations, conferences and regional bodies, school districts, school officials, and coaches may be challenged in court. In this chapter, we examine cases that will provide the reader with a sense of how courts (and occasionally legislative bodies) act with regard to interscholastic and youth athletics. If the governing body is determined to be acting in a public capacity, it will be held to higher judicial accountability. Courts, on the other hand, are very deferential to actions taken by private associations, such as nearly all nonscholastic youth athletic associations (e.g., Pop Warner football or Little League baseball), largely permitting them to govern themselves. State-level athletic associations, local school districts, and individual high schools are subject to more oversight, but the courts generally defer to such entities. Courts, nevertheless, have long been reluctant to get involved in academic decisions made by those who are directly involved in overseeing or governing

schools from the kindergarten through 12th-grade levels. Courts, as you will note, generally consider participation in athletics to be a privilege and not a right and provide those who oversee interscholastic and youth athletics with broad authority or deference. Courts often see schools and those who directly govern the activities of schoolchildren as extensions of the home and parents and are reluctant to substitute a court's wisdom for that of school officials and parents, even though they are much more willing to get involved in matters involving public institutions.

JUDICIAL REGULATION OF INTERSCHOLASTIC AND YOUTH ATHLETICS

KEY TERMS

- Dictum
- Due process
- Entwinement
- Free speech
- State action

The majority of interscholastic athletics programs operate within public schools, raising the issue of "state action." The rights enumerated in the U.S. Constitution protect against state or governmental action, but not against private action. A government official must recognize a person's federal constitutional rights, but non-governmental officials or persons acting privately are not required to do so. For example, a court may recognize a right to speak in a public place, but it will not generally extend that right to speak in private contexts. In these materials, we examine whether a state high school athletic association is a state actor for federal constitutional law purposes. Athletic associations are generally considered to be private associations made up of public and private schools in the interscholastic athletics context. Nevertheless, their actions are often so closely related to state or government action that courts must decide whether an athletic association is a state actor for constitutional purposes. If the athletic association is a state or government actor, then it has to act in a manner that respects the constitutional rights of sports participants.

We begin by exploring what is often the threshold question of whether an association or individual is acting on behalf of the state. We also examine several rules and regulations established by a state athletics associations, local school districts, or high schools that deal with student-athletes' eligibility to participate in interscholastic sports, including cases challenging mandatory drug testing and asserting claims alleging infringement of free speech, association, and religious rights.

A. State Action

In the early nineteenth century, prior to the Civil War, the Bill of Rights (the first ten amendments to the U.S. Constitution) were held to apply only as against federal

action. There were state constitutional provisions that applied at the state level, but the Bill of Rights—including the First Amendment rights of freedom of speech and religion—applied only against the national or federal government. They were not applicable at the state or private level. After the Civil War, which dealt in part with states' rights, the Civil Rights Amendments (Amendments 13 to 15 to the U.S. Constitution) were adopted and ratified. The Fourteenth Amendment, which secured equal protection of law against state action (government action at any level) subsequently came to be read, in a series of cases, that rights included in the first ten amendments (the Bill of Rights) were applicable against state officials or those acting in a governmental capacity at the state or local level. This clause-by-clause or right-by-right determination is referred to as *incorporation,* meaning the incorporation of each of the rights included in the Bill of Rights as against government action at any level. The reason why this is referred to as "state action" is that the Fourteenth Amendment used the language "state action" when it secured the right of equal protection of law to all citizens.

A prerequisite to bringing a claim alleging infringement of a federal constitutional right is that the deprivation of the right occurred as the result of state action. The Fourteenth Amendment to the U.S. Constitution, under which the Bill of Rights has been made applicable to the states, limits enforcement of those rights to cases in which the right has been deprived or limited by a state actor (someone acting on behalf of the state or in some public capacity). If an educational institution or state interscholastic sports association is deemed to be a state actor, it is held to a higher level of judicial accountability than it would be if it were not deemed to be a state actor. State actors are held accountable under the U.S. and state constitutions—private associations generally are not. The *Brentwood I* and *II* cases, discussed *infra*, effectively illustrate this dynamic between state action (the actions of associations that are held to be state actors) and substantive constitutional claims.

The question of whether a state athletic association is a state actor was a troublesome issue for many years, with lower courts reaching differing conclusions on this point. In 2001, in a 5-4 decision in *NCAA v. Tarkanian*, 488 U.S. 179 (1988), the United States Supreme Court held that the National Collegiate Athletic Association (NCAA) is not a state actor. It was not clear, however, whether state interscholastic associations would be considered state actors for purposes of the enforcement of constitutionally protected rights, because the decision in the *Tarkanian* case dealt with the NCAA. The issue of whether a state interscholastic athletic association is a state actor was raised before the Supreme Court in *Brentwood v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288 (2001) (*Brentwood I*).

The *Brentwood I* case raises the question of whether the Tennessee Secondary School Athletic Association (TSSAA) is a state actor. The Court had to resolve this issue before it could examine the claim that the TSSAA had deprived individuals of their constitutional rights of due process and freedom of speech. As you read *Brentwood I*, do not worry about the underlying substantive constitutional issue regarding recruitment and free speech, because those issues cannot be addressed until the court determines whether the high school athletics association is a state actor subject to constitutional requirements. State action cases are often quite fact specific, with courts closely examining the facts to determine

whether the association is effectively acting as a state or governmental actor. As you read *Brentwood I*, think of the outcome-determinative facts (the facts that influenced the decision). The Court is closely divided, 5-4, in the *Brentwood* and the *Tarkanian* cases. As you read the *Brentwood I* case, think of facts that might cause the Court to decide differently and hold that a state association or other entity is not a state actor subject to actions by individuals or groups seeking enforcement of their constitutional rights.

You will note, as you read the *Brentwood I* case, that five of the nine (a mere majority) justices on the United States Supreme Court agreed that the TSSAA is a state actor. To reach this decision, the five justices in the majority had to distinguish the TSSAA from the NCAA, which the Supreme Court had held not to be a state or government actor required to provide protection for the constitutional rights of student-athletes and others affected by the NCAA's decisions. As you read the majority and the dissenting opinions, think about whether the court is right. With a change in the makeup of the Court, is it possible that a majority of the Court would agree with the dissenting opinion, which would result in a future decision holding that no state athletic associations are state actors subject to the constraints of the Constitution? Reflect as well on the implications of an association being held to be a state actor in subsequent cases.

Brentwood Academy v. Tennessee Secondary School Athletic Association

531 U.S. 288 (2001)

Justice SOUTER delivered the opinion of the Court.

[Editors' note: We have intentionally retained the discussion of the *Tarkanian* decision in this case, which deals with intercollegiate athletics, believing that "state action" should be considered jointly with high school and intercollegiate sports issues. It is important to remember that interscholastic athletic associations have often been held to be state actors, and therefore subject to constitutional restrictions, while the NCAA has not been determined to be a state actor. As you read, think about why the NCAA is not a state actor, but state athletic associations often are.]

The issue is whether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school. The association in question here includes most public schools located within the State, acts through their representatives, draws its officers from them, is largely funded by their dues and income received in their stead, and has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority. We hold that the association's regulatory activity may and should be treated as state action 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.

I

. . . [I]n *Tarkanian* . . . we found no state action on the part of the NCAA. We could see, on the one hand, that the university had some part in setting the NCAA's rules, and the Supreme Court of Nevada had gone so far as to hold that the NCAA had been delegated the university's traditionally exclusive public authority over personnel. But on the other side, the NCAA's policies were shaped not by the University of Nevada alone, but by several hundred member institutions, most of them having no connection with Nevada, and exhibiting no color of Nevada law. Since it was difficult to see the NCAA, not as a collective membership, but as surrogate for the one State, we held the organization's connection with Nevada too insubstantial to ground a state action claim.

But dictum in *Tarkanian* pointed to a contrary result on facts like ours, with an organization whose member public schools are all within a single State. "The situation would, of course, be different if the [Association's] membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign."

B

Just as we foresaw in *Tarkanian*, the "necessarily fact-bound inquiry," leads to the conclusion of state action here. The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it. . . .

[T]o the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms. . . .

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

The entwinement down from the State Board is therefore unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it.

The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, with whom The Chief Justice, Justice SCALIA, and Justice KENNEDY join, dissenting.

We have never found state action based upon mere "entwinement." The majority's holding — that the Tennessee Secondary School Athletic Association's (TSSAA) enforcement of its recruiting rule is state action — not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect. I respectfully dissent.

Commonsense dictates that the TSSAA's actions cannot fairly be attributed to the State, and thus cannot constitute state action. The TSSAA was formed in 1925 as a private corporation to organize interscholastic athletics and to sponsor tournaments among its member schools.

The State of Tennessee did not create the TSSAA. The State does not fund the TSSAA and does not pay its employees. In fact, only 4% of the TSSAA's revenue comes from the dues paid by member schools; the bulk of its operating budget is derived from gate receipts at tournaments it sponsors. The State does not permit the TSSAA to use state-owned facilities for a discounted fee, and it does not exempt the TSSAA from state taxation. No Tennessee law authorizes the State to coordinate interscholastic athletics or empowers another entity to organize interscholastic-athletics on behalf of the State. The only state pronouncement acknowledging the TSSAA's existence is a rule providing that the State Board of Education permits public schools to maintain membership in the TSSAA if they so choose.

[T]he State of Tennessee has never had any involvement in the particular action taken by the TSSAA in this case: the enforcement of the TSSAA's recruiting rule prohibiting members from using "undue influence" on students or their parents or guardians "to secure or to retain a student for athletic purposes."

Because I do not believe that the TSSAA's action of enforcing its recruiting rule is fairly attributable to the State of Tennessee, I would affirm [the decision by the lower court holding that the TSSAA is not a state actor].

QUESTIONS

Justice Souter and the majority hold that the TSSAA is a state actor because "[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition." Do you agree with Justice Souter and the majority, or with Justice Thomas? Why? Can you develop other persuasive arguments not made here? What constitutes sufficient "entwinement" for an association to be held to be a state actor under Justice Souter's test? Does that test clearly articulate a basis on which interscholastic athletic associations can know whether or not they are state actors? Why did the TSSAA aggressively resist being held to be a state actor?

NOTES

The courts in Tennessee continue to rely on the general reasoning in the *Brentwood* case. In *City Press Communs., LLC v. Tenn. Secondary Sch. Ath. Ass'n*, 447 S.W.3d 230, 2014 Tenn. App. LEXIS 256, 2014 WL 1778191 (Tenn. Ct. App. 2014), the

court extended the reasoning in the *Brentwood* case in holding that the TSSAA acted as a government agency and therefore was required to produce records under the Tennessee Public Records Act.

Having held in *Brentwood I* that the TSSAA is a state actor, in *Tennessee Secondary School Athletic Assn. v. Brentwood Academy*, 127 S. Ct. 2489 (2007) (*Brentwood II*), the Court considered the merits of the plaintiff high school's federal constitutional law challenges to the TSSAA's anti-recruiting rule on free speech and due process grounds. Brentwood argued that it had a free speech right to send a letter seeking to recruit a potential student to attend and play for Brentwood. The First Amendment of the U.S. Constitution states that "Congress [which has been broadly interpreted to include government generally] shall make no law . . . abridging the freedom of speech. . . ." This provision has been read broadly to protect the freedom of expression in its many forms. Written communications such as letters are protected as a form of speech. In the case, however, the Court declines to find that Brentwood's freedom of speech was abridged.

The Court also examines whether Brentwood was denied due process. The due process clause of the Fourteenth Amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property without due process of law." Due process has been interpreted as requiring that a state or government actor afford certain procedures ("due process") before it deprives a person of certain interests: life, liberty, or property. If a person's liberty or property interest is affected by a decision, that party must be afforded fair process, which is generally defined as notice of the fact that his or her interest may be affected or deprived by a decision and a fair hearing prior to that deprivation. In the interscholastic sports context, students and their parents have unsuccessfully asserted that they have a protectable interest or right to participate in interscholastic athletics, which would trigger the due process requirement. However, they have been able, on occasion, to assert that due process is triggered because they have a property interest in the possibility of earning a scholarship.

Tennessee Secondary School Athletic Association v. Brentwood Academy (Brentwood II)

127 S. Ct. 2489 (2007)

Justice Stevens delivered the opinion of the Court with respect to Parts I, II-B, III, and IV, concluding:

I

[Editors' note: With one judge dissenting, the Court of Appeals held that the TSSAA's anti-recruiting rule is a content-based regulation of speech that is not narrowly tailored

to serve its permissible purposes. It also concluded that the TSSAA Board improperly considered *ex parte* evidence during its deliberations, thereby violating Brentwood's due process rights.]

The First Amendment protects Brentwood's right to publish truthful information about the school and its athletic programs. It likewise protects the school's right to try to persuade prospective students and their parents that its excellence in sports is a reason for enrolling. But Brentwood's speech rights are not absolute. . . .

II [Speech]

Brentwood made a voluntary decision to join TSSAA and to abide by its anti-recruiting rule. Just as the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights, so too can an athletic league's interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants. . . .

We need no empirical data to credit TSSAA's common-sense conclusion that hard-sell tactics [in a letter] directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics. . . . [T]he First Amendment does not excuse Brentwood from abiding by the same anti-recruiting rule that governs the conduct of its sister schools. To hold otherwise would undermine the principle, succinctly articulated by the dissenting judge at the Court of Appeals, that "[h]igh school football is a game. Games have rules."

III [Due Process]

The decision to sanction Brentwood for engaging in prohibited recruiting was preceded by an investigation, several meetings, exchanges of correspondence, an adverse written determination from TSSAA's executive director, [and] a hearing before the director and an advisory panel composed of three members of TSSAA's Board of Directors. During the investigation, Brentwood was notified of all the charges against it. At each of the two hearings, Brentwood was represented by counsel and given the opportunity to adduce evidence. No evidence offered by Brentwood was excluded.

Even accepting the questionable holding [of the Sixth Circuit] that TSSAA's closed-door deliberations were unconstitutional, we can safely conclude that any due process violation was harmless beyond a reasonable doubt. . . .

QUESTIONS

1. Is the fact that the students were generally younger than 18 critical to the decision (i.e., if the letter came from a college coach, might it be protected speech)? Should impressionable young people be shielded from recruiting efforts? Do parents have a role in insulating their children from recruiting efforts? Should students have access to the information contained in such a letter to help them make important decisions in their lives?

2. The court held that Brentwood (the school) had a right or interest in the writing and sending of its letter (speech) and was entitled to due process. It then held that Brentwood had been afforded due process by the TSSAA. Why? This case is a good example of how little process (i.e., notice and a fair hearing) must be offered to satisfy due process in such cases.

B. Eligibility Issues

KEY TERMS

- Arbitrary and capricious
- Common law
- Equal protection
- State constitution
- Transfer rules

The remainder of this chapter deals with substantive issues that have been raised by student-athletes and participants in youth sports and their parents challenging the nature of associational and institutional governance of interscholastic and youth athletics. The principal cases consider eligibility issues arising out of the application and enforcement of transfer, outside competition, good conduct, maximum age, personal appearance and grooming, and home school rules. Other cases address mandatory random drug testing and alleged infringement of student-athletes' federal constitutional rights to freedom of expression and religion. There is also a discussion of efforts to regulate youth athletics, particularly with regard to health and safety issues. Think about the different types of rules and actions typically challenged by young athletes and their parents. Also, consider what the appropriate role of legislative and government administrative bodies should be in protecting young people participating in athletics. As you read these materials, think about the following question: Are courts and legislative and administrative bodies too deferential to state athletic associations, individual educational institutions, and youth organizations involved in governing younger athletes?

The Sport and Development Organization refers to evidence that supports the argument that an opportunity to participate in interscholastic and youth athletics may merit legal protection in some form. They note:

> Sport and physical education is fundamental to the early development of children and youth and the skills learned during play, physical education and sport contribute to the holistic development of young people. Through participation in sport and physical education, young people learn about the importance of key values such as:
>
> - honesty,
> - teamwork,
> - fair play,
> - respect for themselves and others, and
> - adherence to rules.

> It also provides a forum for young people to learn how to deal with competition and how to cope with both winning and losing. These learning aspects highlight the impact of physical education and sport on a child's social and moral development in addition to physical skills and abilities. *https://www.sportanddev.org/en/learn-more/sport-education-and-child-and-youth-development*

Studies have also found that "female and male students who participate in high school team sports through the 12th grade have a school-based identity that correlates to positive academic performance (e.g., an increased 12th-grade GPA and an increased probability of being enrolled in college full time at age 21). This highly positive finding is consistent with prior research evidencing that sports participation, relative to participation in other extracurricular activities such as student government and academic clubs, is "linked to lower likelihood of school dropout and higher rates of college attendance." Matthew J. Mitten and Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 Va. Sports and Entertainment L.J. 71, 113 (2009).

Consider whether athletic participation is of sufficient importance that it should be protected as a constitutional matter as you read the following materials, which deal with rules established by interscholastic associations and youth organizations. Associations, organizations, and schools promulgating rules governing youth athletics must follow those rules. Occasionally, a court will intervene when a governing body does not follow its own rules. A Mississippi case demonstrates the importance of following rules established by a school or school district. In *Miss. High Sch. Activities Ass'n v. R.T.*, 163 So. 3d 274, 2015 Miss. LEXIS 229 (Miss. 2015), the Mississippi Supreme Court held that once a school decides to create a sports program and establish eligibility rules, it must follow those rules and may be held accountable when it does not do so. The court added that young athletes are among the intended beneficiaries of high school athletic programs and the rules that govern them. Courts will largely defer to sports governing bodies in administering or interpreting their rules, but they may not refuse to follow their own rules.

1. Transfer Rules

High school athletes often challenge transfer rules and regulations adopted by state athletic associations. Transfer rules limit the eligibility of student-athletes to participate immediately in interscholastic competition after they move from one school to another. A common type of transfer rule renders a student-athlete who transfers from one high school to another within the same school district without a corresponding change in his or her parents' residence ineligible to engage in interscholastic competition for a period of time — often as long as an entire school year.

The *Carlberg* case illustrates how courts have resolved a variety of federal and state legal challenges to transfer rules. While reading this case, consider the purposes for which transfer rules are adopted. Reasons typically cited in support of transfer rules

include deterring the recruitment of student-athletes (i.e., protecting student-athletes from the pressure and harassment of zealous coaches and fans that might ensue from unregulated recruiting) and affording academics a higher priority than athletics.

In cases involving transfer and other eligibility rules, athletes often argue that the regulation is being applied in an arbitrary and capricious manner, thereby denying them due process of law or violating the law of private associations. In most cases, courts are quite deferential to athletic associations and organizations, in part because they (judges) do not generally believe that it is wise for them to substitute their judgment for that of educators and others who devote their lives to ensuring that interscholastic and youth athletic programs are wisely administered.

In many cases, young athletes claim that they are being denied equal protection. Equal protection claims are based on the Fourteenth Amendment to the U.S. Constitution, which provides that no citizen shall be denied equal protection of the law. As the court notes in *Carlberg*, parties are likely to succeed if they can argue that they have not been treated equally in a case involving a right or if they are members of a class or group that has historically been treated unequally. For example, if the distinction is based on a racial classification (what the courts refer to as a "suspect class"), courts will closely or strictly scrutinize the rule and are likely to find it to be unconstitutional unless it is supported by a compelling interest or reason and is being applied in the least restrictive manner possible. Girls (gender) are part of another class that receives heightened but not strict scrutiny (sometimes referred to as "intermediate scrutiny"). For gender-based classifications, the courts seek to determine whether there is a substantial purpose of the regulation (a less stringent requirement than the compelling interest standard used in race). Thus, gender-based regulations are examined (scrutinized) closely, but are more likely to be found to be acceptable than race-based classifications. Courts recognize that associations and regulatory bodies must draw distinctions in making and enforcing general rules that do not raise issues of racial or gender-based discrimination, so all other distinctions need only be supported by a rational reason or basis.

Indiana High School Athletic Association v. Carlberg

694 N.E.2d 222 (Ind. 1997)

SULLIVAN, Justice.

After attending Brebeuf Preparatory School as a freshman (where he swam on the varsity swim team), Jason Carlberg, who lives with his parents near Indianapolis, transferred to Carmel High School for academic reasons. The Indiana High School Athletic Association ("IHSAA") is a voluntary association of public and private high schools that adopts and enforces rules regarding eligibility and similar matters related to interscholastic athletic competition. Applying Rule 19 (the "Transfer Rule"), the IHSAA determined that Carlberg transferred for nonathletic reasons without a change