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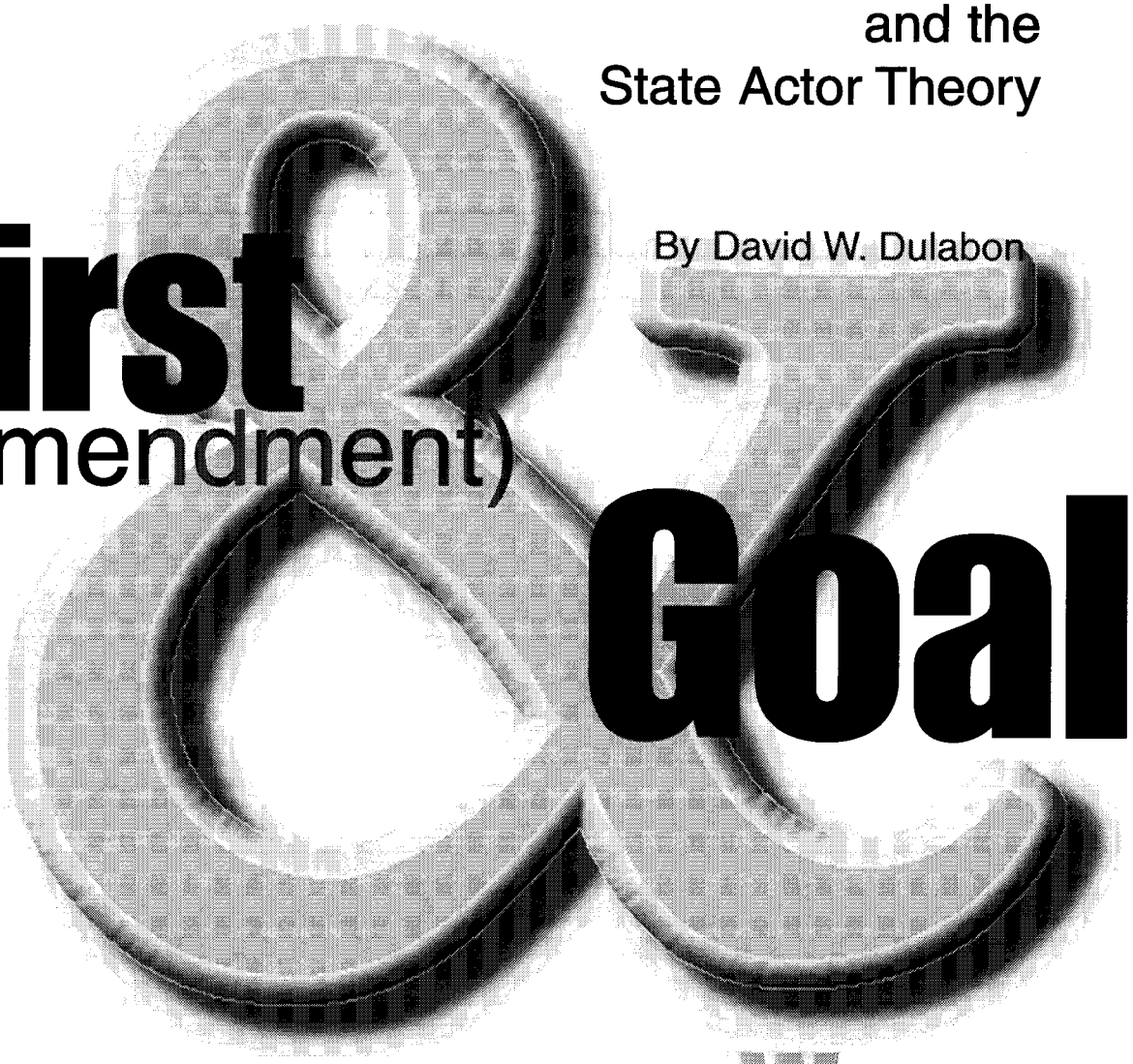
First (Amendment) Goal

High School Recruiting and the State Actor Theory

By David W. Dulabon



When a sports team wins regularly, it inevitably becomes subject to scrutiny. It may be a reflection of cynical American society, but sports fans often question whether successful teams are winning fairly. This cynicism prevails when one high school manages to stockpile a disproportionate amount of the local talent and dominates other teams in the region. Rumors then spread through the community that the high school may have illegally recruited certain athletes on its way to yet another state championship.

This scrutiny may be justified in certain situations. According to one national sports publication, "fishy transfers and illicit recruiting are nothing new to high school sports, but they are becoming alarmingly commonplace."[1] High schools are putting significant pressure on student-athletes in their pre-teen and early teen-age years. As a result, these young, innocent students are exploited by overzealous high school coaches who place a higher value on athletic prowess than on academic excellence and ethics.

This behavior in high school athletic programs causes serious concern. As the District Court for Middle Tennessee stated in a recent case, "High school [recruiting] is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist for an entirely different reason. High school coaches should not view 12, 13, 14 year old students in the same manner as college coaches view high school seniors."[2] Educators stress that the general purpose of the primary and secondary school system is to educate America's youth, as education is compulsory at this stage in one's life.[3] In turn, athletics at the high school level exist only as a part of the total educational process, whereas sports may dominate one's nonmandatory collegiate experience.[4] While many student-athletes aspire to play sports in college or on a professional team, only two percent of high school students actually continue with competitive athletics beyond high school graduation.[5] Therefore, athletics contribute only a single piece to a child's total experiences during the formative years. According to one school administrator, if illicit recruiting is allowed to distract high school student-athletes from simply "growing up," then these children may develop misconceptions about what life and the educational system realistically have to offer.[6]

In response to concerns over high school recruiting, every state has established a secondary school athletic or activity association to prescribe rules for member schools,[7] often encompassing both public and private schools.[8] One rule found consistently in 40 states is a recruiting rule designed to protect middle school students from being threatened, harassed, or otherwise improperly motivated to attend a particular high school.[9] The recruiting rule usually extends its protection to high school students currently enrolled at other schools as well.[10] Though each jurisdiction has its own specific recruiting guidelines, these rules generally prohibit a school's athletic program from talking to any students outside the school zone.[11] However, critics have raised First Amendment concerns over the recruiting rules' restrictions on speech.

High School Recruiting

Is the Recruiting Rule a Content-Based Restriction on Free Speech?

The inspiration for this Note stems from a current case in Brentwood, Tennessee – a suburb of Nashville – which is representative of a national problem. Brentwood Academy, a private high school, is a perennial powerhouse in football and other sports.[12] However, Brentwood Academy, as well as all other public and private schools in Tennessee, is limited in what it may convey about its athletic program because of its voluntary association with the Tennessee Secondary School Athletic Association (TSSAA) – a non-profit corporation that promulgates rules to regulate high school recruiting and other aspects of high school sports. Like other private schools participating in the TSSAA, Brentwood Academy may invite all students in public and private middle schools to an "open house" to convey the benefits of a private high school education.[13] This information session allows prospective students and their parents to visit the school and learn about almost all aspects of the high school experience.[14] Yet the public, independent, and parochial schools from across the state that comprise the TSSAA are restricted in what they can say about athletics by the association's rules designed "to stimulate and regulate the athletic relations of the secondary schools in Tennessee."[15]

The current conflict arose when the TSSAA penalized Brentwood Academy for allegedly violating its recruiting rule, designed to prohibit the illicit recruiting of middle schoolers and other high schoolers. In the spring of 1997, an eighth-grade student was accepted to Brentwood Academy, and he had committed to attend in the fall as an incoming freshman. The student's father requested permission for his son to participate in Brentwood Academy's spring football practice.[16] In turn, Brentwood Academy's then-head football coach Carlton Flatt sent a letter to all incoming male students, including the eighth-grade student, informing them about the dates of the spring football practice.[17] After receiving further inquiries about the practice, Coach Flatt made follow-up

telephone calls to all those who received the initial letter, which he claims was sent to only 13 students.[18] While it is not a violation of the TSSAA's recruiting rule for incoming students to participate in the spring practice, the TSSAA claimed that contacting the students through a letter and a phone call before they were officially "enrolled" constituted a violation.[19] The TSSAA cited article 2, § 21 of its bylaws, which states, "[t]he use of *undue influence* on a student ... to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule (emphasis added)."[20]

The TSSAA charged Brentwood Academy with a second recruiting rule violation under the same section of the bylaws. This problem arose when Coach Flatt provided three high school football tickets to a public middle school coach free of charge.[21] Coach Flatt claimed that this public middle school coach requested tickets in order to learn more about the high school game, a typical request within the athletic community.[22] Coach Flatt believed that he was merely helping a colleague.[23] However, contrary to Coach Flatt's admonitions,[24] the middle school coach invited two students from his eighth-grade football team to accompany him to the game.[25] Based on the actions of the middle school coach, the TSSAA determined that Brentwood Academy exerted "undue influence" on the two students, thus violating the recruiting rule.[26] As a result of the two infractions, as well as a third violation unrelated to the recruiting rule,[27] the TSSAA put the entire Brentwood Academy athletic program on probation for four years, suspended the football team from the playoffs, and fined the school $3,000.[28]

Brentwood Academy sued to enjoin enforcement of the TSSAA penalty. It asserted that the TSSAA's recruiting rule is a content-based restriction on free speech and a violation of the First Amendment brought under 42 U.S.C. § 1983, the civil action for deprivation of rights.[29] Brentwood Academy claims that the current structure of the TSSAA's recruiting rule prohibits *any* independent school representative from initiating contact, outside the open house, with *any* prospective student enrolled in public school.[30] Brentwood Academy argues that the current rule prohibits its administrators from participating in general discussions about the overall advantages of an independent school education, which includes athletics.[31] Brentwood Academy only contests the restrictions on its coaches' and administrators' speech, conceding that "rules prohibiting the recruitment of athletes that are unrelated to speech, such as financial inducements or other non-speech-related conduct, are not at issue."[32]

In response to the First Amendment claim, the TSSAA counters that the recruiting rule is, at most, a content-neutral restriction placing reasonable time, place, and manner limitations on contacts with students.[33] The TSSAA argues that the recruiting rule advances substantial government interests, including protecting young student-athletes from the pressures associated with unethical recruiting.[34] Finally, TSSAA Executive Director Ron Carter claims that the rule is consistent with the notion that athletics should exist only as one part of the total educational process for middle school and high school students.[35]

After hearing the arguments of both sides, the District Court for Middle Tennessee held that the recruiting rule violates the First Amendment, making the sanctions imposed by the TSSAA on Brentwood Academy void and unenforceable.[36] On appeal, the Sixth Circuit failed to address the First Amendment issue due to its holding that the TSSAA did not constitute a state actor for constitutional law purposes.[37] The Sixth Circuit concluded that the TSSAA's actions are not fairly attributable to the state of Tennessee.[38] The court also noted that Brentwood Academy's purely voluntary association with the TSSAA prevented the private high school from bringing a § 1983 claim.[39]

Just what is wrong with high school recruiting? High schools often put significant pressure on student-athletes in their pre-teen and early teenage years. As a result, some students are exploited by high school coaches who place a higher value on athletic prowess than on academic excellence and ethics.

While the issue of state action is potentially dispositive for this First Amendment claim, this Note also will explore the very serious restrictions that the TSSAA recruiting rule places on free speech. This Note asserts that the recruiting rule is a content-based, rather than a content-neutral, restriction on speech that would violate the First Amendment, if state action is found. The rule allows a high school to present most of the potential benefits associated with that school, except the benefits associated with the athletic program.

Thus, it prevents parents and prospective students from making an informed decision about where to attend school. If the TSSAA is a state actor, its recruiting rule would violate the First Amendment because it denies schools, administrators, coaches, parents, and students the right to contribute to, or benefit from, the marketplace of ideas.[40]

However, as this Note explores, the TSSAA is not a state actor with respect to Brentwood Academy based on logic gleaned from the Sixth Circuit's decision.

How can recruting rules help solve the problem? They curb and regulate the recruiting activities of high schools, administrators, and coaches, positivly affecting the world of high school athletics. Without an adequate policing system, zealous high school coaches and fans may go too far in enticing the best middle school talent to their high schools.

Circuit Split on the State Actor Issue

Before analyzing any substantive constitutional law claims brought against secondary school athletic and activities associations under 42 U.S.C. § 1983, courts must first resolve the issue of whether these boards constitute state actors. Courts have looked at this issue in a number of ways, and the next section of this Note examines three model states (California, Illinois, and Texas) and shows why their secondary school athletic associations have been deemed state actors.[41] In addition, six circuits specifically have held that these types of associations constitute state actors, and numerous state courts have concurred.[42] The courts have emphasized the boards' responsibility for controlling virtually all aspects of interscholastic athletics or activities in public, and often private, high schools.[43] Thus, the courts have found that a board's promulgation, adoption, and enforcement of rules should be considered "state action" for purposes of constitutional analysis.[44]

However, the Sixth Circuit introduced a new inquiry regarding secondary school athletic boards when it held that the TSSAA is not a state actor for constitutional law purposes.[45] It focused on the voluntary nature of a school's membership in the TSSAA and on the notion that the actions of the TSSAA cannot be attributed to the state.[46] This created a split in the circuits as to the state actor question. Therefore, before addressing the merits of the First Amendment claim, it is crucial to analyze the structure and source of power of the TSSAA and other similarly situated boards to determine whether they are state actors.

Protecting the Student- Athlete

The primary purpose behind recruiting rules is preserving the innocence of young middle school and high school athletes. The main emphasis for school administrators must be the students' education, with athletics a secondary priority in a child's development. A child's formative years are short-lived and must be protected. Those athletes with the best chances of "making it" to the collegiate and professional ranks will have their share of difficult decisions to make along the way: which college to attend, whether to accept a gift from an agent and risk losing college eligibility, whether to succumb to the numerous other temptations available to talented athletes, or whether to leave one professional team for another for more money. These are decisions that must be made by mature adults. In turn, when the student is still developing as a child, he should not have to face this type of decision, albeit in a milder form, when deciding where to participate in high school athletics.

Therefore, the existence of rules to curb and regulate the recruiting activities of high schools, through their administrators and coaches, has a positive impact in the world of high school athletics. Without an adequate policing system, zealous high school coaches and fans may go too far in their attempts to entice the best middle school talent to their high school. As a result, athletics would receive a disproportionate emphasis in the child's educational process.[47] Furthermore, as stated by the TSSAA's Executive Director Ron Carter, children may develop a skewed view of reality if they are subjected to illicit recruiting.[48]

Rules protecting the child athlete, however, must not contravene the basic fundamental rights provided in the United States Constitution. For example, a parent's right to send his child to a private school is protected by the Fourteenth Amendment.[49] This same parent has a right to learn about the opportunities available for his child at private schools.[50] However, the parent cannot exercise this right unless private high school administrators are allowed to exercise their First Amendment right of

free speech to convey the benefits of their system. Rules prohibiting this speech should be deemed unconstitutional–if the secondary school athletic association is deemed a state actor.

Yet how can the right to free speech be reconciled with the legitimate state interest in protecting children from illicit high school recruiting? The answer lies in determining what is truly being regulated. Regulations forbidding non-speech conduct, such as financial inducements, should remain in effect to protect the innocence of the child.[51] On the other hand, regulations forbidding a private school from merely communicating all the positive aspects of its educational experience, including athletics, should be viewed as a First Amendment violation, if the state actor requirement is met. Thus, the state-actor secondary school athletic associations responsible for drafting these rules have a delicate task of defining permissible and impermissible recruiting. However, schools challenging rules promulgated by secondary school athletic associations must overcome the formidable Supreme Court precedent relied on by the Sixth Circuit in concluding that the TSSAA is not a state actor.[52]

This Note examines the extent of the Sixth Circuit's holding in relation to the TSSAA and secondary school athletic associations across the country, in light of the fact that the United States Supreme Court has granted Brentwood Academy's petition for a writ of certiorari in this case.[53] This important state actor issue will be determined by the Court's ruling, expected in the fall of 2000. This Note anticipates and explores the arguments of both sides and predicts the best resolution of law and policy. Following the logic of the Sixth Circuit, this Note first advances the proposition that the TSSAA is not a state actor with respect to Brentwood Academy and all other private high schools. As a result, the relationship between the TSSAA and Brentwood Academy is governed by pure contract law; therefore, a First Amendment claim cannot be brought since the state actor threshold question is not met. Second, this Note examines Brentwood Academy's best arguments in response to this proposition. Brentwood Academy could argue that the TSSAA is a state actor because it is a semi-monopoly; thus, a private school's decision to join is really not "voluntary" since it cannot conduct a fully developed interscholastic athletic program without the association. Brentwood Academy also may assert a public policy argument: the significance of the First Amendment violation in this case should prohibit a state from hiding behind the veil of a "private entity" while contravening the basic rights set forth in the First Amendment. If the Court denies that the TSSAA is a state actor, though, then constitutional claims brought against the association will not and cannot be heard.

Are High School Athletic Boards State Actors?

The fundamental right embodied in the Free Speech Clause of the First Amendment protects against invasion by state action through the Fourteenth Amendment.[54] Specifically, the Fourteenth Amendment states that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[55]

As the Supreme Court has explained, "because the Fourteenth Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as state action."[56] The rationale behind this requirement is that state action "reflects judicial recognition of the fact that most rights secured by the Constitution are protected only against infringement by governments."[57] The specific statutory provision for bringing a civil action for deprivation of rights, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[58]

Therefore, the TSSAA and similarly situated secondary school athletic boards must be deemed state actors before any constitutional claims can be brought against them.

Traditional View: Boards Constitute State Actors

Every state, as well as the District of Columbia, has established a secondary school athletic or activities board to enhance the educational experiences of high school students.[59] In turn, when confronted with issues concerning these boards, state and federal courts generally have held that secondary school athletic boards constitute state actors.[60] Three theories have emerged to support this conclusion. First, courts rely on a membership theory to find state action.[61] Generally, public schools comprise a greater portion of the state athletic organization's constituency. Due to the role of the state in public education, courts are willing to find that the athletic organization is a state actor based on the higher percentage of members that are public schools.[62] Second, courts focus on the membership of the governing board of these athletic associations.[63] It is typical to find more public high school administrators serving on these governing boards than private high school administrators, since public schools contribute more to the available pool of potential board members and potential voters.[64] In turn, because these boards are responsible for controlling virtually all aspects of interscholastic athletics in public and private high schools, the boards' promulgation, adoption, and enforcement of rules can be considered "state action" for purposes of constitutional analysis.[65] Finally, courts look to those states which have established these boards by statute or through a state board of education. While state creation may not be enough for state action, legislative recognition provides additional support that the association is a state actor.[66] Under each of these theories, courts have demonstrated a willingness to find state action despite the fact that many of these organizations are merely voluntary.[67]

Since athletic associations share a common goal regarding athletic opportunities in every state, many similarities have emerged among them. This section of the Note discusses three representative states, analyzing the specific source of authority for each state's athletic board. California, Illinois, and Texas serve as model states, based on the prominence of high school athletics within each state. These states also help illustrate the three most common lines of reasoning that courts use to find state action. Given the centrality of Brentwood Academy v. Tennessee Secondary School Athletic Association (TSSAA) to this discussion, the TSSAA is analyzed extensively and serves as the model to which other states are compared.

California

The California Interscholastic Federation (CIF) is authorized by state statute.[68] The CIF is "a voluntary organization consisting of school and school related personnel with responsibility, generally, for administering interscholastic athletic activities in schools."[69] It draws members from public, private, and parochial secondary schools.[70] The governing body of the CIF is the Federalist Council, whose members are elected by representatives of the regions throughout the state.[71] However, the State Department of Education has the ultimate authority over interscholastic athletics and the CIF to ensure compliance with both state and federal law.[72] Since the CIF is responsible for administering interscholastic athletics in all California secondary schools, state courts have found that the "enforcement of its rules constitutes 'state action' for purposes of constitutional analysis."[73] Thus, both the state creation theory and the governing board theory lend support to the CIF's status as a state actor in California.

Illinois

The Illinois High School Association (IHSA) is a voluntary, not-for-profit association of public and private secondary schools.[74] Public schools comprise approximately 85 percent of the membership of the IHSA; private schools comprise the remaining 15 percent.[75] The IHSA promotes and supervises interscholastic athletic and activity programs, providing services to students and member schools.[76] The association is governed by a Board of Directors, with members of the Illinois State Board of Education serving as liaison representatives to the IHSA board.[77] Although the IHSA is a purely voluntary association, courts in Illinois have followed the membership theory and have found that the organization's "overwhelmingly [85 percent] public character" makes the IHSA a state actor for constitutional law purposes.[78]

Texas

The University of Texas at Austin created the University Interscholastic League (UIL) to provide leadership and guidance to public school athletic coaches and debate teachers.[79] The UIL is a non-profit organization composed exclusively of public high schools that voluntarily decide whether to join.[80] Furthermore, the UIL is the "largest inter-

scholastic organization of its kind in the world."[81] Based on the general membership theory, the UIL constitutes a state actor for constitutional law purposes.[82]

On the other hand, the Texas Catholic Interscholastic League (TCIL) coordinates private Catholic schools.[83] Membership is voluntary with only some Catholic schools participating as members.[84] For convenience, the TCIL initially adopted the rules and bylaws of the UIL.[85] Whenever the UIL has amended its constitution or bylaws, the TCIL generally has adopted the same changes.[86] However, despite the voluntary adoption by the TCIL (a private organization) of the rules made by the UIL (also a private organization but deemed a state agency), the TCIL is not a state actor for constitutional law purposes because of its wholly private membership and administration.[87] Even though member Catholic schools hold a certificate of accreditation from the state and compete against public high schools, the TCIL has not achieved state actor status in court.[88]

Tennessee

The TSSAA, an association of public, independent, and parochial schools from across the state, is designed "to stimulate and regulate the athletic relations of the secondary schools in Tennessee."[89] The TSSAA is composed of 290 public schools and 55 independent and parochial schools.[90] Any public or private secondary school accredited by the State Department of Education may voluntarily apply for membership to the TSSAA.[91] Membership is reviewed and renewed annually.[92] At the beginning of each new calendar year, the TSSAA sends letters to all member schools regarding renewal of their memberships.[93] No school is bound to renew.[94] Upon acceptance to the TSSAA, however, "a member school agrees to abide by all the rules of the association."[95]

The administrative authority of the TSSAA is vested in a Board of Control composed of nine members.[96] Members of the Board are elected by popular vote, with each school given one vote. Only the principals, assistant principals, or superintendents of the member schools may sit on the Board.[97] During the Brentwood Academy controversy in 1997, all nine voting members of the Board were public high school administrators.[98]

The State Board of Education recognizes the TSSAA's administrative rules and regulations.[99] In 1972, the State Board of Education "designated" the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis."[100] As a result, the State Board of Education reviewed for approval the rules and regulations of the TSSAA.[101] In 1995, however, the State Board of Education amended its 1972 provision to provide that it "*recognizes* the value of participation in interscholastic athletics and the role of the TSSAA in coordinating interscholastic athletic competition. The State Board of Education authorizes the *public schools* of the state to voluntarily maintain membership in the TSSAA (emphasis added)."[102] With this in mind, the TSSAA in Brentwood Academy advanced a strict textualist argument that the TSSAA was not a state actor based on the 1995 amendment where the state simply "recognized," as opposed to "designated," the TSSAA as the official organization to regulate high school athletics.[103] Despite this change in the wording of rule, the district court in Brentwood Academy found that the relationship between the TSSAA and the State Board of Education remained the same, and thus, rejected the textualist argument.[104] Consequently, the TSSAA remained a state actor after the district court's decision, allowing Brentwood Academy to bring a civil action for deprivation of constitutional rights.[105] However, the Sixth Circuit dismissed this analysis and overturned the district court by holding that the TSSAA is not a state actor.

Are athletic boards state actors? Every state, as well as the District of Columbia, has established a secondary school athletic or activities board to enhance the educational experiences of high school students. When confronted with issues concerning these boards, state and federal courts generally have held that secondary school athletic organizations constitute state actors, despite the fact that many are merely voluntary.

The Sixth Circuit's Analysis: TSSAA Is Not a State Actor

Even though the vast majority of state and federal courts have held that secondary school athletic associations constitute state actors, the Sixth Circuit Court of Appeals in Brentwood Academy introduced a new analysis in holding that the

TSSAA is not a state actor for constitutional purposes.[106] First, the Sixth Circuit found that the TSSAA is "not an arm of the government" because it is a voluntary association which receives no funding from the government.[107] It noted that the Tennessee code does not authorize the TSSAA,[108] and it emphasized the 1995 textual change of the State Board of Education's rule from "designating" to merely "recognizing" the TSSAA's role in interscholastic athletics.[109]

Next, the Court of Appeals applied the reasoning from the Supreme Court's line of cases referred to as the "Blum trilogy" to determine what constitutes state action when dealing with "nominally private parties."[110] In the seminal case, Blum v. Yaretsky,[111] the Supreme Court decided that a nursing home was not a state actor, stating that "being subject to state regulation does not in itself convert the actions of a private organization into state action."[112] However, in Lugar v. Edmondson Oil Co.,[113] the Court found that a creditor's conduct was state action when the private party, in joint participation with state officials, seized disputed property.[114] Finally, in Rendell-Baker v. Kohn,[115] the Court held that a private school, which received 90 percent of its operating budget from public funds, "did not act under the color of state law when it discharged employees."[116]

The theory emerging from the Blum trilogy is that a private entity does not become a state actor even if it is subject to public regulations or financing, unless the state affirmatively acts in conjunction with the party.[117] This undermined Brentwood Academy's argument before the Sixth Circuit that the TSSAA is a state actor because the use of this Supreme Court precedent weakens the membership and governing board theories.[118] Instead, the Sixth Circuit applied three tests that have emerged from the Blum trilogy to determine "state action": (1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship test.[119] Each test focuses on "whether the alleged state actor's actions are 'fairly attributable' to the state."[120] First, under the Sixth Circuit's application of the public function test, Brentwood Academy had to show that regulating high school athletics is a "traditional government function that could not have been performed by a private party."[121] Based on this framework, the Sixth Circuit held that the TSSAA is not a state actor because "the conduct of interscholastic sports is not such a power" traditionally held by government.[122] Applying the state compulsion test, Brentwood Academy had to prove that Tennessee has so "coerced or encouraged" the TSSAA to act that a choice of the TSSAA "must be regarded as the choice of the state."[123] The Sixth Circuit rejected Brentwood Academy's argument under this test primarily because the Tennessee code neither mentions the TSSAA nor grants it any special authority.[124] Finally, under the symbiotic relationship test, Brentwood Academy had to show that any decision of the TSSAA is deemed automatically to be one of the state.[125] Once again, the Sixth Circuit ruled that Brentwood Academy failed to meet this burden because neither state regulation nor state funding of a private entity is sufficient to satisfy the test.[126] Thus, the Sixth Circuit dismissed Brentwood Academy's claim and refused to entertain its First Amendment arguments.

As a result of this holding, dissenting Circuit Judge Gilbert Merritt expressed that the Sixth Circuit has "created an unnecessary conflict in the circuits on an important question of constitutional law," and in turn, the "conflict will have to be remedied by the Supreme Court."[127] Judge Merritt was correct in his prediction, as the Supreme Court granted Brentwood Academy's petition for a writ of certiorari on February 22, 2000 to resolve the state actor issue in this case.[128]

Supreme Court Considerations

Brentwood Academy already has utilized language from a Supreme Court decision involving the National Collegiate Athletic Association (NCAA) which may suggest that secondary school athletic associations are state actors.[129] Like many secondary school associations, the NCAA serves as a rule-making and governing body of athletics, though at the collegiate level.[130] The NCAA also is comprised of both public and private schools.[131] However, the NCAA differs greatly from high school athletic associations in that the NCAA is a national association, while the high school boards exist independently within each of the 50 states.[132]

In NCAA v. Tarkanian,[133] the Supreme Court held that the NCAA was not a state actor, though it recognized that "a State may delegate authority to a private party and thereby make that party a state actor."[134] Furthermore, the Court stated in a footnote that "the [NCAA] situation would, of course, be differ-

ent if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign."[135] This first sentence of footnote 13 may be significant because the Court proceeded to cite Clark v. Arizona Interscholastic Ass'n[136] and Louisiana High Sch. Athletic Ass'n (LHSAA) v. St. Augustine High Sch.[137] immediately after making this statement.[138] Clark and LHSAA involved challenges by students and a private high school, respectively, to rules promulgated by Arizona's and Louisiana's secondary school athletic associations.[139] In each case, a federal appellate court held that the state athletic board was a state actor.[140]

As a result, Brentwood Academy relies heavily on this Tarkanian footnote to support the notion that the TSSAA is a state actor. Brentwood Academy argues that the first sentence of footnote 13 refers to the membership theory of state action, which it believes is the central issue in its case.[141] Applying the membership theory to the case, Brentwood Academy argues that since public school officials and entities control the TSSAA, then the regulatory conduct is "fairly attributable" to the state of Tennessee.[142]

While the district court in Brentwood Academy agreed with this reading of footnote 13 of Tarkanian, the Sixth Circuit dismissed this language and instead focused on the second sentence of footnote 13, which appears to remove state actor status when an organization deals with private schools.[143] Specifically, the Supreme Court stated that "even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationship with private universities.'"[144] In response to this conflicting dicta, the Sixth Circuit held that footnote 13 did not control in Brentwood Academy.[145] However, the rationale behind the second sentence of footnote 13 suggests that the TSSAA is a state actor vis-à-vis public high schools, but not a state actor vis-à-vis private high schools.

Brentwood Academy maintains that the Sixth Circuit misinterpreted footnote 13 of Tarkanian. Brentwood Academy asserts that the second sentence of footnote 13 refers to the joint action question; that is, "whether joint action between the TSSAA and Brentwood Academy transformed the TSSAA into a state actor."[146] It argues that this is not the issue of the litigation. Rather, Brentwood Academy believes that the true issue involves the membership theory, which transforms the TSSAA into a state actor because its members are primarily public schools.[147]

In turn, the Supreme Court will determine the actual interpretation of footnote 13 when it hears the case during the fall of 2000. While the Sixth Circuit may have misinterpreted the meaning of footnote 13, this should not necessarily undermine the Sixth Circuit's ultimate holding that the TSSAA is not a state actor in relation to Brentwood Academy, because footnote 13 may stand for the proposition that "while 'joint action' between a public school and a private association might render the private association a state actor, joint action between a private school and private association would not."[148]

State Actor Thesis and Inferences Drawn from the Sixth Circuit's Holding

While the Sixth Circuit's conclusion that the TSSAA is not a state actor with respect to private schools was probably correct, its opinion in Brentwood Academy was not sufficiently nuanced to resolve this complex and important constitutional question. The proper analysis begins with the premise that the TSSAA is a private association and that when it acts in concert with a private school, no state action has occurred. This notion derives from the general proposition that a party can be a state actor for one set of plaintiffs, but not for another set of plaintiffs. Since Brentwood Academy is a private high school that voluntarily decided to join the TSSAA, the relationship between the TSSAA and Brentwood Academy is purely contractual in nature. However, the

Where is the support for or against the theory that the board is a state actor? In NCAA v. Tarkanian, the Supreme Court stated in the first sentence of a footnote that the NCAA situation would be different if "the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign." This seems to support the notion that a board's actions can be attributed to the state. However, the second sentence of the footnote appears to remove state actor status when an organization deals with private schools.

TSSAA could be considered a state actor when acting in conjunction with public entities.

This rationale was suggested in Burton v. Wilmington Parking Authority, where the Supreme Court found that the exclusion of African-Americans from the Eagle Coffee Shop, operating in a building owned by a state agency, constituted discriminatory state action.[149] The Court emphasized that "when a state leases public property in the manner and for the purpose described in the opinion, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as though they were binding covenants written into the lease itself."[150] The Court noted that "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a government agency."[151] The state had ample opportunity to regulate and to prevent the discrimination conducted by the Eagle Coffee Shop, but it failed to do so. However, the Eagle Coffee Shop is a state actor only when dealing with the public at large in a public building, and not when dealing with its own private employees. For example, if the Eagle Coffee Shop fired its own employees on terms consistent with its contract rights, then the restaurant would not be considered a state actor even if its employees alleged that their discharges "did not meet the equal protection or due process requirements of the [F]ourteenth [A]mendment."[152] This is because the hiring of employees is a "private" activity, personal to the nature of the restaurant, and is governed by the agreement between employer and employee. Thus, the Eagle Coffee Shop scenario indicates how a party may be a state actor for one set of plaintiffs, but not for another set of plaintiffs.

These suppositions also are consistent with the situation in Rendell-Baker, from the Blum trilogy.[153] In Rendell-Baker, a counselor and five teachers were discharged from a private school which received 90 percent of its operating budget from the state.[154] This private school was established to educate troubled high school students who were referred by the public high schools or by a state drug rehabilitation agency.[155] The plaintiffs were discharged from the private school after a dispute arose over hiring practices.[156] In turn, the plaintiffs alleged First, Fifth, and Fourteenth Amendment violations in connection with the discharge.[157] These claims were denied, however, because the Court held that the private school, though funded by the state, did not act under the color of state law in this situation of dealing with its employees.[158] The Court concluded that the "school's receipt of public funds does not make the discharge decisions acts of the State."[159] The Court further noted that:

> The school is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significance or even total engagement in performing public contracts.[160]

As a result, the relationship between the private school and its teachers and counselors is not changed simply because the state pays the tuition of the students.[161] However, if current or prospective students alleged a constitutional violation in this scenario, then a court probably would find that the private school is a state actor vis-à-vis the students, analogous to the coffee shop's customers. The students, as beneficiaries of the state funding, are the ones affected by the private school's actions. Absent earmarked funding or intervention by the state, however, a private high school is not considered a state actor vis-à-vis its own private school students. Their relationship is once again governed by the pure contractual nature existing between the private high school and its students; thus, state action does not exist.

Applying this line of reasoning to Brentwood Academy, the TSSAA should not be considered a state actor with respect to Brentwood Academy. While Tennessee recognizes the TSSAA, the state does not provide the TSSAA with any funding, unlike the private school in Rendell-Baker.[162] Furthermore, the TSSAA is not a state actor in relation to Brentwood Academy or any other private school that voluntarily agrees to join and be subject to its rules. This is analogous to Rendell-Baker, where the private school was not a state actor in relation to the teachers with whom it independently contracted.[163] Thus, the decision to join the TSSAA is a private activity, particular to the goals of Brentwood Academy. As a result, the relationship between the TSSAA and Brentwood Academy is governed solely by contract. TSSAA Executive Director Carter indicates that Brentwood Academy, as well as all

(continued on page 230)

State Employee Doctrine

Despite this Note's conclusion that the TSSAA is not a state actor vis-à-vis Brentwood Academy, the same analysis reveals that when the TSSAA acts in its regulatory capacity with respect to a public school, it is a state actor, exercising authority delegated to it by the public school.[1] Thus, the TSSAA is a state actor, an agent of the state, when its rules restrict public school teachers. If the TSSAA recruiting rule serves to censor public school teachers, then the TSSAA could violate the First Amendment with respect to those state employees. Therefore, one might ask if the Brentwood Academy controversy is a valid First Amendment claim, just brought by the wrong plaintiff?

The short answer is no, and the reasoning is found in the state employee doctrine.[2] As a condition of taking a government job, just like any other job, an employee agrees to certain speech restrictions in his contract. For example, if an educator is hired to teach algebra in the public schools, then the educator is confined to teaching this subject in the classroom. If he instead espouses radical political doctrine while on the job in the classroom, then the state retains the right to discipline him. Even though this is a limitation on the teacher's speech, it is justified as a legitimate restriction by the terms of the teacher's contract.

This rationale was explored by the Supreme Court in Snepp v. United States.[3] In Snepp, the Court held that a former Central Intelligence Agency (CIA) agent, who published a book without prior approval from the agency, breached the trust clause found within his employment agreement with the CIA.[4] The trust clause only required prior approval of any book the agent wished to publish, not an absolute ban on his speech,[5] and the Court found that the agent entered into this contract willingly.[6] The Court noted that the term of the contract restricting the agent's speech advanced a significant government interest of "protecting intelligence that may contribute to national security."[7] When confronted with the agent's claim of a First Amendment violation, the Court dismissed the plaintiff's absolute right to publish the book in light of the valid restrictions to which the agent bound himself.[8] As a result, the agent remained free to convey his thoughts; however, he was subject "to express limits on certain rights by virtue of his contract with the Government."[9]

Applying this rationale to the TSSAA, the public high school teachers and coaches are employees of the state of Tennessee. When they sign their contracts with the state, they also implicitly bind themselves to the regulations that their schools have agreed to follow, including the restrictions set forth by the TSSAA. As a result, the state, or the TSSAA as an agent of the state, retains the right to discipline any public high school teacher who contacts private middle school students regarding athletics in violation of the contractual relationship. While this is a restriction on the teacher's speech, the restriction is a valid term of the contract with the state to which he voluntarily agreed to be bound.

[1] This assertion is made even though the Sixth Circuit specifically stated that "no § 1983 claim may be brought against the TSSAA by a member school that has *voluntarily associated* with the private organization" (emphasis added). See Brentwood Academy v. TSSAA, 180 F.3d 758, 766 (6th Cir. 1999). On its face, this statement appears to apply to both public and private schools that have voluntarily associated. However, the nuances of this case and the fact that public high school teachers are agents of the state indicate that the Sixth Circuit's statement only applies to private high schools.

[2] See generally Connick v. Meyers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968).

[3] Snepp v. United States, 444 U.S. 507 (1980).

[4] See id. at 511.

[5] See id.

[6] See id. at 510.

[7] Id. at 516.

[8] See id. at 513.

[9] Haig v. Agee, 453 U.S. 280, 309 (1981).

other private and public schools, is free to leave the association and not renew its membership at any time.[164]

However, it is important to note that the TSSAA can be considered a state actor vis-à-vis the *public* high schools. While membership of public schools in the TSSAA also is not mandatory, the very nature of their status as agents of the government provides the requisite nexus to find state actor status for the TSSAA. (See State Employee Doctrine, *infra*, p. 229)

Finally, it is important to view the impact of this decision on the other states. First, any secondary school athletic association which is specifically authorized by state statute should constitute a state actor with respect to both public and private high schools.[165] Thus, in California, the CIF will remain a state actor since it is a state regulatory agency governed by statute.[166] Furthermore, where an association is not authorized by state statute, the court should differentiate the state actor status of the athletic association in relation to public and private schools. The Texas courts have applied the correct analysis by holding that the organization for public schools (UIL) is a state actor,[167] while the organization governing the Catholic schools (TCIL) is not a state actor.[168] The troubling situation arises in Illinois where the Seventh Circuit in Griffin v. Illinois High Sch. Ass'n (IHSA) held that the IHSA is a state actor, even vis-à-vis a private religious school.[169] This decision is problematic because Griffin was decided five years after the Blum trilogy, yet the Seventh Circuit made no mention of this important line of Supreme Court precedent.[170] The Seventh Circuit summarily stated, "we note that the presence of state action is not in dispute in this case."[171] Therefore, courts should revisit this complex state actor issue by using existing case law and the inferences to be gleaned from the Sixth Circuit's decision.

Responses to the Sixth Circuit's Holding

State Monopoly Theory

The existence of the Blum trilogy and the strong inferences drawn from the Sixth Circuit's decision will make it difficult for private member schools like Brentwood Academy to convince the Court that the TSSAA and similarly situated secondary school athletic boards are state actors. However, this conclusion is far from obvious, and persuasive arguments lie to the contrary. In order to advance the argument that these boards are state actors, a member school should assert a state monopoly theory, similar to the one advanced in Moose Lodge No. 107 v. Irvis.[172] In Moose Lodge, a national fraternal organization refused to serve food and beverages to an African-American. The plaintiff argued that the "licensing of Moose Lodge to serve liquor by the Pennsylvania Liquor Control Board amounts to such state involvement with the club's activities as to make its discriminatory practices forbidden by the Equal Protection Clause of the Fourteenth Amendment."[173] Two theories emerge from this: (1) the state had an opportunity to regulate Moose Lodge's activities based on the license, similar to the situation in Burton; and (2) the state conferred a monopoly on Moose Lodge since only one retail liquor license could be issued for each 1500 citizens in the municipality.[174] The Court rejected the plaintiff's argument, though, and held that Moose Lodge was not a state actor.[175] Despite this result, the state monopoly argument is a valid theory. It is premised on the notion that where a semi-monopoly is created due to state regulation, such as from the state's liquor control board in Moose Lodge, the private entity subject to the regulation begins to look and act like the state.

Therefore, in order to overcome the state actor threshold, a private high school such as Brentwood Academy should assert that the TSSAA is a semi-monopoly in Tennessee in its regulation of high school athletics. As a practical matter, Brentwood Academy had to join the TSSAA in order to develop a legitimate, worthwhile athletic program; thus, the choice to join the TSSAA was not truly voluntary.[176] Specifically, Coach Flatt indicated that, prior to 1991, the TSSAA did not allow member schools to play non-member schools, thereby severely limiting the teams that a non-member school could play.[177] Even though the TSSAA later changed this rule and now allows non-member schools to compete against member schools,[178] Coach Flatt believes that the tremendous control the TSSAA exerts over high school athletic programs across the state makes joining the league essential for maintaining a healthy athletic program.[179] Non-member schools still are not allowed to participate in the TSSAA playoffs, and this may be the best remaining argument for the lack of "voluntariness," especially to a powerhouse like Brentwood Academy which defines itself by its athletic success.[180] Brentwood Academy should assert that this unequal treatment between member and non-member schools

forces them to join the TSSAA, since this private school places a great value on interscholastic athletic competition. Without the playoffs, there is no real gauge for athletic success. In short, joining the TSSAA is not truly "voluntary;" and without voluntary action, the contract law theory governing the relationship between the private school and the TSSAA is disrupted. Therefore, the rules promulgated by the TSSAA have the effect of state action when applied to private member schools.[181]

In response to this argument, TSSAA Executive Director Carter indicates that any school, public or private, may quit the association or decide not to renew its membership.[182] Membership is renewed annually, and the TSSAA sends letters to all the member schools at the beginning of the calendar year for membership renewal.[183] In turn, the principal or headmaster of each school is responsible for signing and submitting the renewal form, binding the school to obey the TSSAA's rules.[184] If a school, public or private, decides not to enroll, Carter claims that this particular school still can have a worthwhile interscholastic athletic program, despite not being allowed to participate in TSSAA-sanctioned playoffs or tournaments.[185] Since high school athletics are only a part of the entire academic experience, the playoffs should not alter the value of the athletic program in the overall context of the school. Therefore, the TSSAA believes that the mere opportunity to participate in the regular season advances the goals that high school athletics set out to attain.[186]

Public Policy Argument

A private high school could advance a public policy argument and claim that overriding considerations dictate that the TSSAA acts under the color of state law, despite the Sixth Circuit's decision and the inferences drawn from the Blum trilogy. The impact of the "state actor" threshold question goes far beyond whether to allow Brentwood Academy to have its First Amendment claim heard. The larger issue concerns the troubling message the Sixth Circuit seems to have given "that other public and private institutions may organize as private associations to regulate their fields without concern for the constitutional rights of the member[s]..."[187] As the Fifth Circuit has stated, "it would be a strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or support a 'private' organization to which they have relinquished some portion of their power."[188] Given the passionate disagreement between the District Court for Middle Tennessee and the Sixth Circuit on whether the TSSAA is a state actor, the Supreme Court may want to err on the side of state action when important First Amendment considerations are implicated.

In short, while the state actor issue is one that may be very difficult to overcome for private schools after the Sixth Circuit's holding in Brentwood Academy, the state monopoly theory and public policy considerations are sound arguments to attach state action to the decisions of secondary school athletic boards vis-à-vis private schools. The consequence of overcoming the state action prerequisite is that private schools like Brentwood Academy may raise First Amendment challenges to athletic board regulations. It is to the merits of that challenge that this Note now turns.

First Amendment Claim

Doctrinal Background of the First Amendment

Assuming, *arguendo*, that a private high school in a state such as Tennessee can show that the secondary school athletic association is a state actor, the school then can develop its claim that the recruiting rule violates the First Amendment's free speech guarantee. Before discussing the constitutional claims, though, it is important to look at the basic theoretical construct of the First Amendment. Americans place a high value on the right to freedom of speech. As a result, the United States generally has given even more protection to speech than our other rights and liberties.[189] Speech is placed higher than our other rights because speech occupies a systemic

What is the First Amendment claim? Speech affecting a student's decision where to attend school is very important given our society's emphasis on education. If a school is denied the opportunity to inform others about educational benefits, then both the speaker and listener will be prevented from engaging in the free exchange of ideas. Therefore, rules and regulations restricting this valuable source of information contravene the basic goals of First Amendment protection.

role in our form of government, a popular democracy, by ensuring the free flow of information in the marketplace of ideas.[190] Due to the impact of speech on our government, the benefits of speech to society outweigh the personal benefits speech may have to any single person.

While political speech is at the pinnacle of First Amendment protection, the Supreme Court has extended First Amendment protection to various other forms of speech.[191] Regardless of the type of speech protected, all forms of expression have some impact on how we evaluate our surroundings. From paintings to music to commercials, all kinds of expression inform Americans about how society is ordered, about how we live, and about what our future may be. Specifically, speech affecting a student's decision where to attend school is very important given our society's emphasis on education. If a school is denied the opportunity to inform others about educational benefits, then both the speaker and listener will be prevented from engaging in the free exchange of ideas. Therefore, rules and regulations restricting this valuable source of information contravene the basic goals of First Amendment protection.

When is the First Amendment implicated? Many parents and prospective students are strongly interested in the athletic program of a school. Students and parents are allowed to obtain information about the music and English departments of a school, but the recruiting rule prohibits athletic coaches from discussing the benefits of the athletic program on a one-on-one basis with students.

TSSAA's Recruiting Rule: Undue Influence

The specific provision of the TSSAA's recruiting rule alleged to violate the right to free speech states:

> The use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or notconnected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.[192]

After this provision, the TSSAA bylaws provide some guidance to understanding the rule.[193] For example, undue influence should be interpreted as "a person or persons exceeding what is appropriate or normal and offering an incentive or inducement to a student with or without an athletic record."[194] The bylaws also state that "a coach may not contact a student or his or her parents prior to his enrollment in the school."[195] An example of a recruiting rule violation is "any initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete enrolled in any member school except where there is a definite feeder pattern."[196] While the language of the bylaws is tailored to fit the TSSAA's particular needs, approximately 40 states have established similar recruiting rules to deal specifically with the overreaching associated with illicit recruiting.[197] Therefore, other state boards may be subject to the same First Amendment challenges as the TSSAA.

Arguments that the Recruiting Rule is Unconstitutional

Evaluating the TSSAA's recruiting rule in light of the First Amendment, a school like Brentwood Academy first may attempt to show that the rule is a content-based restriction, subjecting it to the most exacting scrutiny under First Amendment doctrine.[198] As the Court stated in R.A.V. v. City of St. Paul, "content-based regulations are presumptively invalid."[199] Concern-ing content-based restrictions generally, Professor Geoffrey Stone of the University of Chicago School of Law has stated:

> Any law that substantially prevents the communication of a particular idea,viewpoint, or item of information violates the [F]irst [A]mendment except, perhaps, in the most extraordinary of circumstances. This is so, not because such a law restricts "a lot" of speech, but because by effectively excising a specific message from public debate, it mutilates "the thinking process of the community..."[200]

Additionally, the Court has noted that "the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic."[201]

As a result, Brentwood Academy argued before the District Court for Middle Tennessee that the recruiting

rule proscribed *any* independent school representative from initiating discussions about athletics with *any* prospective student enrolled in the public schools.[202] Brentwood Academy maintains that the recruiting rule deliberately interferes with a private school's athletic-related speech directed towards public school students.[203]

Furthermore, Brentwood Academy argues that the TSSAA's use of "undue influence" is overbroad and that it bans too much athletic-related speech outside the school's zone.[204] The TSSAA should only ban non-speech conduct that interferes with the development of the young student-athlete. Based on these arguments, the district court in Brentwood Academy noted that "the TSSAA does not have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school."[205] In conclusion, that court held that the TSSAA's recruiting rule was a content-based restriction that violated the First Amendment.[206]

The recruiting rule also stifles the potential listeners' First Amendment right to hear speech. As the Supreme Court stated in Stanley v. Georgia, "it is now well established that the Constitution protects the right to receive information and ideas."[207] Thus, the First Amend-ment also is implicated when a prospective student is denied the opportunity to learn everything he can about a private high school. Many parents and prospective students are strongly interested in the athletic program of a school.[208] Students and parents are allowed to obtain information about the music and English departments of a school, but the recruiting rule prohibits athletic coaches from discussing the benefits of the athletic program on a one-on-one basis with students.[209] This is particularly troubling because the rule denies a parent information about an opportunity to send a student to a high school based on its athletic program, which will often expose the student to other opportunities beyond athletics.[210] Coach Flatt reports many instances when a student came to Brentwood Academy solely for athletics, and then left with an entirely different set of values, focusing on educational attainment.[211] This concern also is consistent with the Court's recognition of the liberty interest of parents to guide the education of their children, which is protected by the Fourteenth Amendment.[212] As a result, these parents and students are entitled to all the information regarding the educational institution, including the athletic program, that they can obtain.

Arguments that the Recruiting Rule is Constitutional

A secondary school athletic board such as the TSSAA is likely to counter that the recruiting rule is merely a content-neutral restriction, providing a valid "time, place, and manner" regulation.[213] As the Court observed in United States v. O'Brien,[214] a content-neutral speech restriction must demonstrate a governmental interest "unrelated to the suppression of free expression."[215] Furthermore, "a regulation that serves the purposes unrelated to the content of the message is deemed content-neutral, even if it has an incidental effect on certain messages or speakers."[216] In turn, the Court uses the O'Brien balancing test to weigh the importance of the state's regulatory interest against the effect of the regulation on the speaker.[217] If the state's interest is significant enough, then the Court will uphold the regulation despite its incidental interference with free speech rights. Prior to conducting this balancing test, however, the Court first must answer the threshold question of whether the interference is accidental or deliberate.[218] Only if the regulation is accidental will the Court engage in the O'Brien balancing; deliberate interferences are per se illegal.[219]

Applying this standard to the Brentwood Academy case, the TSSAA's recruiting rule is probably a deliberate interference with speech. As previously discussed, the rule explicitly prohibits discussions concerning athletics outside the high school's feeder system, but not discussions regarding other aspects of the educational experience. Thus, the TSSAA deliberately targets messages regarding athletics with its rule, while allowing other messages.

However, the TSSAA will argue that the recruiting rule is an accidental interference with speech because high schools still are afforded the opportunity to convey all information to young student-athletes, despite minimal time, place, and manner restrictions. For example, a private high school coach may contact a student about participating in athletics when the student is "enrolled" in the private high school; that is, when the student actually attends the school for at least three days.[220] Thus, the TSSAA will assert that it "was not seeking to

make communication more difficult or to promote or retard any particular viewpoint in the marketplace of ideas."[221]

If the Court accepts that the recruiting rule is an accidental interference, then the secondary school association will attempt to justify the regulation. It could assert that the regulatory objective protects young student-athletes from intrusive recruiting that might hinder their education.[222] By doing so, it will argue that it is justified in limiting the "time, place, and manner" in which a coach or administrator contacts a student about playing sports in high school.[223] It will also attempt to minimize the importance of the speech to the schools and the students: the schools still are allowed to communicate all *vital* aspects of the educational experience,[224] and the students also can obtain information about athletics from other sources, like current Brentwood Academy students or their middle school advisors and coaches. Based on these reasons, the district court in Brentwood Academy acknowledged that the "TSSAA has a substantial interest in preventing a student from being threatened, coerced, or harassed."[225]

How can recruiting rules be structured so that they do not infringe on the First Amendment? The simple answer to the problem is to create a rule designed to prevent recruiting practices unrelated to speech. State regulations that focus on non-speech acts of recruitment, such as financial inducements or other remunerations, are likely to be upheld as constitutional, advancing a valid governmental interest irrespective of speech.

Additionally, a secondary school association may cite the long line of cases upholding the validity of transfer rules – regulations imposing a period of athletic ineligibility upon students who voluntarily transfer from one school to another.[226] For example, a public high school student may be denied the opportunity to immediately participate in athletics at a private high school due to the transfer rule, despite his claim that the rule violates his right to the free exercise of religion at the private school.[227] Transfer rules generally have been upheld based on the rationale that the "incidental burden imposed by the rule on the free exercise of religion was constitutionally justified by the magnitude of the state's interest in deterring or eliminating the recruitment of high school athletes."[228] This state interest was unrelated to any intent to suppress religion, and thus the state's interest in eliminating inappropriate recruitment resulted in merely an accidental interference.

The constitutionality of transfer rules may provide a strong indication that recruiting rules restricting the time, place, and manner of speech also are constitutionally permissible. Since the courts have found an interest which is strong enough to deny transfer students the opportunity to participate in athletics for one full year, it seems reasonable to conclude that the courts also will restrict recruiters who pose a compelling threat to that interest.

Transfer rules are distinguishable from recruiting rules, however, since they regulate the actions of a student, while recruiting rules regulate the speech of coaches and administrators. Even though students affected by transfer rules often claim a violation of freedom of religion in their attempts to transfer to private schools, the regulation does not prohibit them from attending the school or from practicing the religion.[229] The transfer rule only prevents the student from participating in athletics at the new school for one year.[230] In contrast, the TSSAA's recruiting rule imposes a flat ban on the speech of coaches and administrators in their attempts to convey the positive aspects of their schools to both athletes and non-athletes. Thus, despite the compelling interest in "ensuring that athletics do not interfere with a student-athlete's ability to obtain a high quality education" that underlies transfer rules, a secondary school athletic association cannot control school choice through censorship.[231]

Based on the arguments advanced by Brentwood Academy and the TSSAA, it appears that the district court in Brentwood Academy was correct in holding that the recruiting rule would violate the First Amendment, if the TSSAA is a state actor. Despite the legitimate goal of protecting the innocence of the young student-athlete, this interest should not outweigh the significance of free speech in society. Information relevant to one's choice of school should be considered of great importance in the marketplace of ideas, and thus, deserves First Amendment protection. Finally, though the Sixth Circuit in Brentwood Academy did not address the First Amendment argument because it held that the TSSAA is not a state actor, the Sixth Circuit did note that, "Brentwood has made strong arguments that the

rule is vague and not well-tailored to the perceived evil sought to be avoided, which in turn may lead to arbitrary enforcement."[232] Though not conclusive of a First Amendment violation, the Sixth Circuit's remarks suggest a possible free speech violation had the state actor requirement been satisfied.

Proposed Rule that May Survive First Amendment Challenge

Given the potential of a First Amendment violation, the question remains as to what a secondary school athletic board can do to protect the innocence of the young student-athlete while operating within the parameters of the Constitution. While this Note does not attempt to engage in regulation drafting, the TSSAA and similarly situated boards will need to devise rules that are narrow enough to satisfy the First Amendment. Other states, however, will not provide much help to the TSSAA in its attempt to tailor content-neutral regulations since many follow the "undue influence" version of the TSSAA. Like the TSSAA, for example, California's recruiting rule is defined by "undue influence."[233] Additionally, Illinois bases its recruiting rule violations on whether the student-athlete is offered "remunerations of any kind" that are not offered to every other prospective student.[234] While this rule targets non-speech aspects of recruiting, the IHSA also forbids encouraging a prospective student to attend even when special remuneration or inducement is not given.[235] For example, a school cannot make a presentation which states or implies that its athletic program is better than any other school's program, but a school may conduct recruitment programs based on the school's overall educational and extracurricular programs.[236] Thus, it is easy to see that these states may be subject to the same free speech attacks that the TSSAA has faced. From the broad term "undue influence" used by the CIF to the specific coach restrictions of the IHSA, these rules do not provide the TSSAA with much guidance on how to draft recruiting rules that do not violate the First Amendment.

Therefore, the question remains as to how an athletic association can protect the innocence of children from overly aggressive recruiting and yet not infringe the right to free speech. The simple answer to the problem is to create a rule designed to prevent recruiting practices unrelated to speech.[237] State regulations that focus on non-speech acts of recruitment, such as financial inducements or other remunerations, are likely to be upheld as constitutional, advancing a valid governmental interest irrespective of speech. For example, the IHSA prohibits special inducements such as offering money and free transportation to a student or offering reduced rent to the parents.[238] Furthermore, California's recruiting rule forbidding the use of any act, gesture, or communication which may be "objectively seen as an inducement" also probably would survive a First Amendment challenge, despite its limitation on communication, because the CIF is not enacting a flat ban on communication.[239] Rather, the CIF prohibits only that which rises to the level of "objective inducement." A coach or administrator still may advance the strengths of his or her school, but a "reasonable manner" restriction is placed on that speech which rises to the level of "objective inducement" in order to advance the legitimate public interest of protecting students from the problems of recruiting. In any event, and particularly if the secondary school athletic board is considered a state actor, each board should revisit its recruiting rules and consider tailoring rules that do not infringe on First Amendment rights.

Fair Play, Free Speech

The case between Brentwood Academy and the TSSAA implicates issues that extend far beyond the state of Tennessee. Because education is mandatory in the United States at the middle school and high school level and because sports inspire such passions and profits, two competing views emerge. One view is that athletic associations should recognize the problems associated with illicit recruiting and be sincere in their efforts to protect the best interests of the young students by promulgating recruiting rules. The other view, as supported by Coach Flatt, argues that overbroad recruiting rules inflict more harm than good on the student – parents and children should be exposed to all the information available to them, including information concerning a school's athletic program, when making a decision about where to go to school.

Of course, schools cannot presume that these boards necessarily constitute state actors. A private high school like Brentwood Academy may have a difficult time convincing a court that its secondary school athletic association is a state actor if the school voluntarily joined the league.

The Sixth Circuit's decision and the inferences drawn from it set forth the proper analysis: a private school's voluntary association with one of these leagues must be governed by contract law, not the provisions of the Constitution as an actor for the state.

The controversy between Brentwood Academy and the TSSAA is not yet settled. The Supreme Court has granted Brentwood Academy's petition for a writ of certiorari, and the Court will hear the case in the fall of 2000 to resolve the state actor issue.[240] What appeared on the surface to be a local concern about high school recruiting has developed into two complex and probing legal issues. The impact of the decision will affect each state with a secondary school athletic association and a recruiting rule. As the final outcome looms, educators, parents, and fans of high school sports must remember that while protecting the innocence of America's youth is a noble goal, free speech in our democratic society should not be silenced to deny one the opportunity to learn everything associated with the educational system. ◆

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[1] Grant Wahl and Paul Zimmerman, *Traveling Violations*, SPORTS ILLUSTRATED, Monday, September 21, 1998, at 27.

[2] Brentwood Academy v. Tennessee High Sch. Athletic Ass'n (TSSAA), 13 F. Supp. 2d 670, 675 (M.D. Tenn. 1998) (quoting TSSAA By-Laws, art. II, § 21).

[3] Telephone Interview with Ron Carter, Executive Director of the TSSAA (Jan. 24, 2000).

[4] Id.

[5] See id. The NCAA also publishes statistics on a student's chances of becoming a professional athlete. For example, only 2.6 percent of high school basketball players become college basketball players. From there, only 1.9 percent of college basketball players enter the NBA. In football, 6.6 percent of high-school athletes become college athletes, and 3.3 percent of college players make it to the pros. See NCAA PROFESSIONAL SPORTS LIAISON COMMITTEE, *A Career in Professional Athletics: A Guide for Making the Transition* (1997).

[6] See id.

[7] See generally, *State/Province High School Association Links* (visited Jan. 28, 2000) <http://www.referee.com/states.htm>.

[8] See id.

[9] See Brentwood Academy, 13 F. Supp. 2d at 689.

[10] See id. at 674, 688.

[11] See generally, Tony Green, *Look Into Recruiting Allegations, Coaches Say*, ST. PETERSBURG TIMES, March 13, 1993, at 1.

[12] See Brentwood Academy v. Tennessee High Sch. Athletic Ass'n, 180 F.3d 758, 760 (6th Cir. 1999) (noting that the Brentwood Academy football team compiled a 310-43 record over the past 28 years. The football team also has won seven TSSAA state championships and has been nationally ranked in USA TODAY).

[13] See Interview with Ron Carter, *supra* note 3.

[14] Telephone Interview with Carlton Flatt, Athletic Director of Brentwood Academy (Jan. 24, 2000).

[15] Brentwood Academy, 13 F. Supp. 2d at 673 (quoting TSSAA CONST., art. I, § 2).

[16] Id. at 675.

[17] See id. at 676.

[18] Interview with Carlton Flatt, *supra* note 14.

[19] See Brentwood Academy, 13 F. Supp. 2d at 676.

[20] Id.

[21] See id. at 675.

[22] Interview with Carlton Flatt, *supra* note 14.

[23] Id.

[24] Id.

[25] See Brentwood Academy, 13 F. Supp. 2d at 675.

[26] See id.

[27] See id. The TSSAA charged Brentwood Academy with a third violation, an impermissible off-season practice conducted by the basketball coach, John Patton. This violated the Off-Season Practice Rule. See id. at 675. Since this infraction did not involve the recruiting rule

and possible First Amendment violations, this Note will not cover the third infraction.

[28] See Brentwood Academy, 13 F. Supp. 2d at 677.

[29] See id. at 672.

[30] See id. at 686.

[31] See id. at 690.

[32] James F. Blumstein, *Editorial & Comment: 6th Circuit Court Split on High-School Recruiting*, THE COLUMBUS DISPATCH, August 19, 1999, at 14A.

[33] See Brentwood Academy, 13 F. Supp. 2d at 687.

[34] See id. at 688.

[35] Interview with Ron Carter, *supra* note 3.

[36] See Brentwood Academy, 13 F. Supp. 2d at 694.

[37] See Brentwood Academy, 180 F.3d at 766.

[38] See id.

[39] See id.

[40] See Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).

[41] See Griffin High Sch. v. Illinois High Sch. Ass'n, 822 F.2d 671, 672 (7th Cir. 1987); Kite v. University Interscholastic League, 661 F.2d 1027, 1028 (5th Cir. 1981); Steffes v. California Interscholastic Fed'n, 176 Cal. App. 3d 739, 746 (Cal. Ct. App. 1986).

[42] See Brentwood Academy, 180 F.3d at 706 (Merritt, J., dissenting). See also Griffin, 822 F.2d at 672; Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1128 (9th Cir. 1982); United States, ex rel. Missouri State High Sch. Activities Ass'n, 682 F.2d 147, 151 (8th Cir. 1982); Kite, 661 F.2d at 1028; Moreland v. Western Penn. Interscholastic Athletic League, 572 F.2d 121, 125 (3d Cir. 1978); Oklahoma High Sch. Athletic Ass'n v. Bray, 321 F.2d 269, 273 (10th Cir. 1963).

[43] See generally, Florida High Sch. Activities Ass'n v. Thomas, 434 So. 2d 306, 308 (Fla. Sup. Ct. 1983).

[44] See id.

[45] See Brentwood Academy, 180 F.3d at 762. See also Burrows v. Ohio High Sch. Athletic Ass'n, 891 F.2d 122, 125 (6th Cir. 1989) (holding that the Ohio High School Athletic Association is not a state actor due to its similar nature to the NCAA).

[46] See Brentwood Academy, 180 F.3d at 766.

[47] Interview with Ron Carter, *supra* note 3.

[48] Id.

[49] See Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[50] See Pierce, 268 U.S. at 534.

[51] See Blumstein, *supra* note 32.

[52] See Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Brentwood Academy, 180 F.3d at 758.

[53] See Brentwood Academy v. Tennessee High Sch. Athletic Ass'n, 120 S. Ct. 1156 (2000).

[54] See Chaplinsky v. New Hampshire, 315 U.S. 568, 570 (1942); De Jonge v. Oregon, 299 U.S. 353, 364 (1936); Gitlow v. New York, 268 U.S. 656, 666 (1925).

[55] U.S. CONST. amend. XIV.

[56] Lugar, 457 U.S. at 923.

[57] Id. at 936.

[58] 42 U.S.C. § 1983.

[59] See *State Province High School Association Links, supra* note 7.

[60] See Brentwood Academy, 180 F.3d at 706 (Merritt, J., dissenting). See also Griffin, 822 F.2d at 672; Clark , 695 F.2d at 1128; United States, ex rel. Missouri State High Sch. Activities Ass'n, 682 F.2d at 151; Kite, 661 F.2d at 1028; Moreland, 572 F.2d at 125; Oklahoma High Sch. Athletic Ass'n, 321 F.2d at 273.

[61] See Griffin, 822 F.2d at 674.

[62] See id. at 672.

[63] See Florida High Sch. Activities Ass'n, 434 So. 2d at 307.

[64] See Chabert v. Louisiana High Sch. Athletics Ass'n, 323 So. 2d 774, 777 (La. Sup. Ct. 1975).

[65] See Florida High Sch. Activities Ass'n, 434 So. 2d at 308.

[66] See CAL. EDUC. CODE § 33353 (West 1993); Sandison v. Michigan High Sch. Athletic Ass'n, 863 F. Supp. 483, 486 (E.D. Mich. 1994); Mississippi High Sch. Activities Ass'n v. Coleman, 631 So. 2d 768, 774 (Miss. Sup. Ct. 1994).

[67] See Griffin, 822 F.2d at 673.

[68] See CAL. EDUC. CODE § 33353 (West 1993).

[69] Id.

[70] See California School Boards Association, *CIF Organizational Structure* (visited Jan. 28, 2000) <http://www.csba.org/admin/CIF/p.56.htm>.

[71] See id.

[72] See CAL. EDUC. CODE § 33354.

[73] See Steffes, 176 Cal. App. 3d at 746.

[74] See Griffin, 822 F.2d at 672.

[75] See id.

[76] See Illinois High School Association, *Mission Statement* (visited Jan. 28, 2000) <http://www.ihsa.org/mission.htm>.

[77] See id.

[78] Griffin, 822 F.2d at 674.

[79] See University Interscholastic League, *Administration* (visited Jan. 28, 2000) <http://www.utexas.edu/ftp/depts/uil/admin>.

[80] See id.

[81] Id.

[82] See Kite, 661 F.2d at 1028.

[83] See Stock v. Texas Catholic Interscholastic League, 364 F. Supp. 362, 364 (N.D. Tex. 1973).

[84] See id. at 364.

[85] See id.

[86] See id.

[87] See id. at 364-65.

[88] See id. at 365.

[89] See Brentwood Academy, 13 F. Supp. 2d at 673 (quoting TSSAA CONST. art. I, § 2). Three years ago, the TSSAA slightly altered its structure by creating "Division II," a separate division only for those schools that offer financial aid or scholarships to students. Brentwood Academy is not a member of Division II. See Jim Wojciechowski, *TSSAA Survives Amid Many Storms*, NASHVILLE SPORTS WEEKLY, Nov. 23, 1999, at 8.

[90] See Brentwood Academy, 13 F. Supp. 2d at 673.

[91] See TSSAA By-Laws, art. I, § 1.

[92] See Interview with Ron Carter, *supra* note 3.

[93] See id.

[94] Id.

[95] See TSSAA By-Laws, art. I, § 14.

[96] See id. at § 1.

[97] See id. at § 2.

[98] See Brentwood Academy, 13 F. Supp. 2d at 673.

[99] See Tenn. Bd. of Educ. Rule, 0520-1-2-.08.

[100] See Brentwood Academy, 13 F. Supp. 2d at 680 (citing Tenn. Bd. of Educ. Rule, at 0520-1-2-.26).

[101] See id. at 681.

[102] See Tenn. Bd. of Educ. Rule, 0520-1-2-.08. Note that while the State Board of Education authorizes the *public schools* to voluntarily maintain membership with the TSSAA, it said nothing of *private schools* within Tennessee.

[103] See Brentwood Academy, 13 F. Supp. 2d at 681.

[104] See id.

[105] See id.

[106] See Brentwood Academy, 180 F.3d at 762.

[107] See id.

[108] See id.

[109] See id.

[110] Id. See also Blum, 457 U.S. 991; Lugar, 457 U.S. 922; Rendell-Baker, 457 U.S. 830.

[111] Blum, 457 U.S. 991.

[112] Brentwood Academy, 180 F.3d at 762 (quoting Blum, 457 U.S. at 1004).

[113] Lugar, 457 U.S. 922.

[114] See id. at 942.

[115] Rendell-Baker, 457 U.S. 830.

[116] Id. at 831.

[117] See Lugar, 457 U.S. at 942.

[118] Even though the governing board theory is used only as support for Brentwood Academy's membership theory for state action, the governing board theory may be weakened by certain facts. If a majority of private high school administrators were elected to the TSSAA's governing board, then the governing board theory is disrupted and state actor status for the TSSAA would be repealed. Thus, if the governing board theory prevails, it is conceivable that state actor status for the TSSAA could change annually based on the outcome of the elections.

[119] See Brentwood Academy, 180 F.3d at 763 (citing Wolotsky v. Hahn, 920 F.2d 1331, 1335 (6th Cir. 1992)).

[120] Id.

[121] Betty Chang, *Coercion Theory and the State Action Doctrine as Applied in N.C.A.A. v. Tarkanian and N.C.A.A. v. Miller*, 22 J.C. & U.L. 133, 149 (1995).

[122] See Brentwood Academy, 180 F.3d at 762.

[123] Id. at 764.

[124] See id. But see Graham v. Tennessee High Sch. Athletic Ass'n, 1995 WL 115890, 115894 (E.D. Tenn. 1995). In Graham, the district court for eastern Tennessee decided that the TSSAA was a state actor, even after the "Blum Trilogy." The district court found that the TSSAA was not a state actor under the *public function test*; however, the court found that the TSSAA was a state actor under the *state compulsion test*. The court emphasized the original language in the Tennessee Code, which stated that the State Board of Education "designated" the TSSAA as the organization to supervise and regulate athletic activities. While Graham was decided in 1995, the decision came before the 1995 amendment where the Board merely "recognizes" the role of the TSSAA. These facts lend further credence to the TSSAA's argument that it is not a state actor since the State Board of Education amendment changed its status. As a result, the Sixth Circuit in Brentwood Academy was willing to accept this argument and hold that the TSSAA is not a state actor.

[125] See Brentwood Academy, 180 F.3d at 764.

[126] See id.

[127] Brentwood Academy, 190 F.3d at 707 (Merritt, J., dissenting).

[128] See Brentwood Academy, 120 S. Ct. 1156.

[129] See NCAA v. Tarkanian, 488 U.S. 179, 194 (1988).

[130] See id. at 183.

[131] See id.

[132] See id. But see Burrows v. Ohio High Sch. Athletic Ass'n, 891 F.2d 122, 125 (6th Cir. 1989) (finding that the Ohio High School Athletic Association is clearly an analogous organization to the NCAA).

[133] NCAA v. Tarkanian, 488 U.S. 179.

[134] Id. at 195.

[135] Id. at 194.

[136] Clark, 695 F.2d 1126.

[137] Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch., 396 F.2d 224 (5th Cir. 1968).

[138] See Tarkanian, 488 U.S. at 194.

[139] See Clark, 695 F.2d at 1128; Louisiana High Sch. Athletic Ass'n, 396 F.2d at 227.

[140] See id.; id.

[141] See generally Communities For Equity v. Michigan High Sch. Athletic Ass'n, 80 F. Supp. 2d 729, 742 (W.D. Mich. 2000). The district court for western Michigan noted that while the central issue in Brentwood Academy was the membership issue, the essential issue in Tarkanian was the joint action question. Specifically, the issue in Tarkanian was whether the NCAA's actions were so coordinated with UNLV, a public university, that they should be considered "joint actions" so that the NCAA is also a state actor. See also Brief for Appellee at 5, Brentwood Academy, 190 F.3d 705 (No. 98-6113).

[142] See Brief for Appellee at 9, Brentwood Academy, 190 F.3d 705 (No. 98-6113).

[143] See Brentwood Academy, 180 F.3d at 766; Brentwood Academy, 13 F. Supp. 2d at 682. But see Communities For Equity, 80 F. Supp. 2d at 742. In Communities For Equity, Chief Judge Richard Alan Enslen found that the Sixth Circuit's decision in Brentwood Academy was not controlling when determining whether the Michigan High School Athletic Association (MHSAA) is a state actor because the Sixth Circuit misinterpreted footnote 13 in Tarkanian. He noted that Brentwood Academy and Tarkanian dealt with two separate issues: the membership question and the joint action question, respectively. He also noted that the first sentence of footnote 13 deals with the membership theory and that the second sentence refers to the joint action theory. Finally, the court held that the MHSAA is a state actor under the state compulsion test and the symbiotic relationship test.

[144] See Brentwood Academy, 180 F.3d at 766 (quoting NCAA v. Tarkanian, 488 U.S. at 193).

[145] See id.

[146] Communities For Equity, 80 F. Supp. 2d at 742.

[147] See generally id.

[148] Id. Furthermore, Judge Enslen noted that while the Sixth Circuit's decision in Brentwood Academy could not be reconciled with footnote 13 in Tarkanian, the Brentwood Academy situation is unique on its facts. This is because a private school is alleging that the TSSAA is a state actor when it regulates that *private school*.

[149] See Burton v. Wilmington Parking Auth., 365 U.S. 715, 717 (1961).

[150] Id. at 726.

[151] Id. at 724.

[152] Thomas R. McCoy, *Current State Action Theories, The Jackson Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785, 813 (1978).

[153] See Rendell-Baker, 457 U.S. 830.

[154] See id. at 832.

[155] See id.

[156] See id. at 834.

157 See id. at 835.

158 See id. at 843.

159 Id. at 840.

160 Id. at 840-41.

161 See id. at 843.

162 See id. at 831.

163 See id. at 843.

164 Interview with Ron Carter, *supra* note 3.

165 See generally Sandison, 863 F. Supp. at 486; Mississippi High Sch. Activities Ass'n, 631 So. 2d at 774.

166 See CAL. EDUC. CODE § 33353.

167 See Kite, 661 F.2d at 1028.

168 See Stock, 364 F. Supp. at 364.

169 Griffin, 822 F.2d at 674.

170 See id.

171 Id.

172 See Moose Lodge v. Irvis, 407 U.S. 163 (1972).

173 Id. at 171.

174 See id. at 171-76.

175 See id. at 176-77.

176 Interview with Carlton Flatt, *supra* note 14.

177 Id.

178 On March 23, 1990, the legislative council of the TSSAA passed a provision allowing non-TSSAA member schools to play member schools of the TSSAA during the regular season. Executive Director Carter indicates that this was not a unilateral action, but rather an attempt by member and non-member schools to play one another. Interview with Ron Carter, *supra* note 3.

179 Interview with Carlton Flatt, *supra* note 14.

180 Id.

181 Private high schools in other states that voluntarily join secondary school athletic associations which are not authorized by statute also should assert the lack of "voluntariness" to prevail on the state actor issue.

182 Interview with Ron Carter, *supra* note 3.

183 Id.

184 Id.

185 Id.

186 Id.

187 Chang, *supra* note 121, at 173.

188 Id. (quoting Parish v. NCAA, 506 F.2d 1028, 1033 (5th Cir. 1975)).

189 See generally American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985) (finding that a balancing test is not appropriate when determining the constitutionality of an Indianapolis pornography statute because the state may not ordain preferred viewpoints under the First Amendment).

190 See generally Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

191 See generally Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (recognizing protection for live nude dancing); Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557 (1980) (recognizing protection for commercial speech); Burstyn v. Wilson, 343 U.S. 495 (1952) (recognizing First Amendment protection for motion pictures).

192 TSSAA By-Laws, art. II, § 21.

193 See id.

194 Id.

195 Id.

196 Id. Furthermore, the feeder pattern generally refers to the group of public schools (elementary, middle school, junior high school) within a district that lead to enrollment in a designated public high school within that district.

197 See Bob White, *Judge Bans Prep Recruiting Rules*, THE LOUISVILLE CARRIER-JOURNAL, July 31, 1998, at 1C.

198 See Brentwood Academy, 13 F. Supp. 2d at 687.

199 R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

200 Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983).

201 Burson v. Freeman, 504 U.S. 191, 197 (1992).

202 See Brentwood Academy, 13 F. Supp. 2d at 687.

203 See generally Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969) (finding that the school district deliberately set out to suppress black armbands worn in school to exhibit opposition to the Vietnam War.)

204 See Brentwood Academy, 13 F. Supp. 2d at 693.

205 Id. at 689.

206 See id.

207 Stanley v. Georgia, 394 U.S. 557, 564 (1969).

208 Interview with Carlton Flatt, *supra* note 14.

209 Id.

210 Id.

211 Id.

212 See Pierce, 268 U.S. at 534.

213 Brentwood Academy, 13 F. Supp. 2d at 687.

214 United States v. O'Brien, 391 U.S. 367 (1968).

215 Id.

216 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

217 See O'Brien, 391 U.S. at 377.

218 See generally Tinker, 393 U.S. at 508.

219 See generally Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

220 See Brentwood Academy, 13 F. Supp. 2d at 686.

221 Thomas R. McCoy, *A Coherent Methodology For First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1356 (1995).

222 Interview with Ron Carter, *supra* note 3.

223 See Brentwood Academy, 13 F. Supp. 2d at 686.

224 Interview with Ron Carter, *supra* note 3.

225 Brentwood Academy, 13 F. Supp. 2d at 689.

226 See generally Don F. Vaccaro, *Validity of Regulation of Athletic Eligibility of Students Voluntarily Transferring From One School To Another*, 15 A.L.R. 885 (1999).

227 See id.

228 Id.

229 See id.

230 See id.

231 See Brentwood Academy, 13 F. Supp. 2d. at 688.

232 See Brentwood Academy, 180 F.3d at 766.

233 The CIF's rule states: "The use of undue influence by any person to secure or retain a student or to secure or retain one or both parents or guardians of a student as residents may cause the student to be ineligible for high school athletics for a period of one year and shall jeopardize the standing of the high school in the CIF." Furthermore, the CIF defines undue influence as: "Any act, gesture, or communication (including accepting material or financial inducement to attend a CIF member school for the purpose of engaging in CIF competition regardless of the source) which is performed personally, or through another, which may be objectively seen as an inducement, or part of a process of inducing a student, or his or her parent or guardian, by or on behalf of, a member school, to enroll in, transfer, or remain in, a particular school for athletic purposes." See CALIFORNIA INTERSCHOLASTIC FEDERATION CONSTITUTION, art. 5, § 510.

234 The IHSA's recruiting rule specifically states: "It shall be a violation of this rule for any student athlete to receive or be offered any remunerations of any kind or to receive or be offered any special inducement or any kind which is not made available to all applicants who enroll in the school or apply to the school." See Illinois High School Association By-Laws, § 3.

235 See id. at § 3.083.

236 See id.

237 See Blumstein, *supra* note 32.

238 See Illinois High School Association By-Laws, § 3.082.

239 See CALIFORNIA INTERSCHOLASTIC FEDERATION CONSTITUTION, art. 5, § 510.

240 See Brentwood Academy, 120 S. Ct. 1156.