SUPREME COURT OF THE UNITED STATES

No. 99–901

BRENTWOOD ACADEMY, PETITIONER *v.*
TENNESSEE SECONDARY SCHOOL
ATHLETIC ASSOCIATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February 20, 2001]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

We have never found state action based upon mere "entwinement." Until today, we have found a private organization's acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government. The majority's holding– that the Tennessee Secondary School Athletic Association's (TSSAA) enforcement of its recruiting rule is state action– not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect. I respectfully dissent.

I

Like the state-action requirement of the Fourteenth Amendment, the state-action element of 42 U. S. C. §1983 excludes from its coverage "merely private conduct, however discriminatory or wrongful." *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U. S. 40, 50 (1999) (internal quotation marks omitted). "Careful adherence to the 'state action' requirement" thus "preserves an area of

individual freedom by limiting the reach of federal law and federal judicial power." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 936 (1982). The state-action doctrine also promotes important values of federalism, "avoid[ing] the imposition of responsibility on a State for conduct it could not control." *National Collegiate Athletic Assn.* v. *Tarkanian*, 488 U. S. 179, 191 (1988). Although we have used many different tests to identify state action, they all have a common purpose. Our goal in every case is to determine whether an action "can fairly be attributed to the State." *Blum* v. *Yaretsky*, 457 U. S. 991, 1004 (1982); *American Mfrs.*, *supra*, at 52.

A

Regardless of these various tests for state action, common sense dictates that the TSSAA's actions cannot fairly be attributed to the State, and thus cannot constitute state action. The TSSAA was formed in 1925 as a private corporation to organize interscholastic athletics and to sponsor tournaments among its member schools. Any private or public secondary school may join the TSSAA by signing a contract agreeing to comply with its rules and decisions. Although public schools currently compose 84% of the TSSAA's membership, the TSSAA does not require that public schools constitute a set percentage of its membership, and, indeed, no public school need join the TSSAA. The TSSAA's rules are enforced not by a state agency but by its own board of control, which comprises high school principals, assistant principals, and superintendents, none of whom must work at a public school. Of course, at the time the recruiting rule was enforced in this case, all of the board members happened to be public school officials. However, each board member acts in a representative capacity on behalf of all the private and public schools in his region of Tennessee, and not simply his individual school.

The State of Tennessee did not create the TSSAA. The State does not fund the TSSAA and does not pay its employees.[1] In fact, only 4% of the TSSAA's revenue comes from the dues paid by member schools; the bulk of its operating budget is derived from gate receipts at tournaments it sponsors. The State does not permit the TSSAA to use state-owned facilities for a discounted fee, and it does not exempt the TSSAA from state taxation. No Tennessee law authorizes the State to coordinate interscholastic athletics or empowers another entity to organize interscholastic athletics on behalf of the State.[2] The only state

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[1] Although the TSSAA's employees, who typically are retired teachers, are allowed to participate in the state retirement system, the State does not pay any portion of the employer contribution for them. The TSSAA is one of three private associations, along with the Tennessee Education Association and the Tennessee School Boards Association, whose employees are statutorily permitted to participate in the state retirement system. Tenn. Code Ann. §8–35–118 (1993).

[2] The first formal state acknowledgement of the TSSAA's existence did not occur until 1972, when the State Board of Education passed a resolution stating that it "'recognizes and designates [the TSSAA] as the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate in on an interscholastic basis.'" App. 211. There is no indication that the TSSAA invited this resolution or that the resolution in any way altered the actions of the TSSAA or the State following its adoption in 1972. In fact, it appears that the resolution was not entirely accurate: The TSSAA does not supervise or regulate regular season interscholastic contests. In any event, the resolution was revoked in 1996. Contrary to the majority's reference to its revocation as being "winks and nods," *ante*, at 12, the repeal of the 1972 resolution appears to have had no more impact on the TSSAA's operation than did its passage.

The majority also cites this resolution to support its assertion that "'[e]ver since the Association was incorporated in 1925, Tennessee's State Board of Education . . . has acknowledged the corporation's function "in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee."'" *Ante*, at 3. However, there is no evidence in the record that suggests that the State of Tennessee or the State Board of Education had any involvement or

pronouncement acknowledging the TSSAA's existence is a rule providing that the State Board of Education permits public schools to maintain membership in the TSSAA if they so choose.[3]

Moreover, the State of Tennessee has never had any involvement in the particular action taken by the TSSAA in this case: the enforcement of the TSSAA's recruiting rule prohibiting members from using "undue influence" on students or their parents or guardians "to secure or to retain a student for athletic purposes." App. 115. There is no indication that the State has ever had any interest in how schools choose to regulate recruiting.[4] In fact, the TSSAA's authority to enforce its recruiting rule arises solely from the voluntary membership contract that each member school signs, agreeing to conduct its athletics in accordance with the rules and decisions of the TSSAA.

B

Even approaching the issue in terms of any of the Court's specific state-action tests, the conclusion is the same: The TSSAA's enforcement of its recruiting rule against Brentwood Academy is not state action. In applying these tests, courts of course must place the burden of persuasion on the plaintiff, not the defendant, because

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interest in the TSSAA prior to 1972.

[3]The rule provides: "The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association." Tenn. Comp. Rules & Regs. §0520–1–2–.08(1) (2000).

[4]The majority relies on the fact that the TSSAA permits members of the State Board of Education to serve ex officio on its board of control to support its "top-down" theory of state action. But these members are not voting members of the TSSAA's board of control and thus cannot exert any control over its actions.

state action is an element of a §1983 claim. *American Mfrs.*, 526 U. S., at 49–50; *West* v. *Atkins,* 487 U. S. 42, 48 (1988).

The TSSAA has not performed a function that has been "traditionally exclusively reserved to the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 352 (1974). The organization of interscholastic sports is neither a traditional nor an exclusive public function of the States. Widespread organization and administration of interscholastic contests by schools did not begin until the 20th century. See M. Lee, A History of Physical Education and Sports in the U. S. A. 73 (1983) (explaining that what little interscholastic athletics there was in the 19th century "came almost entirely in the closing decade of the century and was largely pupil inspired, pupil controlled, and pupil coached"); *id.*, at 68, 146 (stating that no control of high school sports occurred until 1896, when a group of teachers in Wisconsin set up a committee to control such contests, and pointing out that "[i]t was several years before the idea caught on in other states"). Certainly, in Tennessee, the State did not even show an interest in interscholastic athletics until 47 years after the TSSAA had been in existence and had been orchestrating athletic contests throughout the State. Even then, the State Board of Education merely acquiesced in the TSSAA's actions and did not assume the role of regulating interscholastic athletics. Cf. *Blum*, 457 U. S., at 1004–1005 ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives . . ."); see also *Flagg Bros., Inc.* v. *Brooks,* 436 U. S. 149, 164–165 (1978). The TSSAA no doubt serves the public, particularly the public schools, but the mere provision of a service to the public does not render such provision a traditional and exclusive public function. See *Rendell–Baker* v. *Kohn,* 457 U. S. 830, 842 (1982).

It is also obvious that the TSSAA is not an entity cre-

ated and controlled by the government for the purpose of fulfilling a government objective, as was Amtrak in *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 394 (1995). See also *Pennsylvania* v. *Board of Directors of City Trusts of Philadelphia*, 353 U. S. 230 (1957) *(per curiam)* (holding that a state agency created under state law was a state actor). Indeed, no one claims that the State of Tennessee played any role in the creation of the TSSAA as a private corporation in 1925. The TSSAA was designed to fulfill an objective– the organization of interscholastic athletic tournaments– that the government had not contemplated, much less pursued. And although the board of control currently is composed of public school officials, and although public schools currently account for the majority of the TSSAA's membership, this is not required by the TSSAA's constitution.

In addition, the State of Tennessee has not "exercised coercive power or . . . provided such significant encouragement [to the TSSAA], either overt or covert," *Blum*, 457 U. S., at 1004, that the TSSAA's regulatory activities must in law be deemed to be those of the State. The State has not promulgated any regulations of interscholastic sports, and nothing in the record suggests that the State has encouraged or coerced the TSSAA in enforcing its recruiting rule. To be sure, public schools do provide a small portion of the TSSAA's funding through their membership dues, but no one argues that these dues are somehow conditioned on the TSSAA's enactment and enforcement of recruiting rules.[5] Likewise, even if the TSSAA

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[5]The majority emphasizes that public schools joining the TSSAA "give up sources of their own income to their collective association" by allowing the TSSAA "to charge for admission to their games." *Ante*, at 10–11. However, this would be equally true whenever a State contracted with a private entity: The State presumably could provide the same service for profit, if it so chose. In *Rendell-Baker* v. *Kohn*, 457

were dependent on state funding to the extent of 90%, as was the case in *Blum*, instead of less than 4%, mere financial dependence on the State does not convert the TSSAA's actions into acts of the State. See *Blum*, *supra*, at 1011; *Rendell-Baker*, *supra*, at 840; see also *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 173 (1972) ("The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State . . ."). Furthermore, there is no evidence of "joint participation," *Lugar*, 457 U. S., at 941–942, between the State and the TSSAA in the TSSAA's enforcement of its recruiting rule. The TSSAA's board of control enforces its recruiting rule solely in accordance with the authority granted to it under the contract that each member signs.

Finally, there is no "symbiotic relationship" between the State and the TSSAA. *Moose Lodge*, *supra*, at 175; cf. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). Contrary to the majority's assertion, see *ante*, at 10–11, the TSSAA's "fiscal relationship with the State is not different from that of many contractors performing services for the government." *Rendell-Baker*, *supra*, at 843. The TSSAA provides a service– the organization of athletic tournaments– in exchange for membership dues and gate fees, just as a vendor could contract with public schools to sell refreshments at school events. Certainly the public school could sell its own refreshments, yet the

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U. S. 830 (1982), for example, the State could have created its own school for students with special needs and charged for admission. Or in *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), the State could have created its own nursing homes and charged individuals to stay there. The ability of a State to make money by performing a service it has chosen to buy from a private entity is hardly an indication that the service provider is a state actor.

existence of that option does not transform the service performed by the contractor into a state action. Also, there is no suggestion in this case that, as was the case in *Burton*, the State profits from the TSSAA's decision to enforce its recruiting rule.

Because I do not believe that the TSSAA's action of enforcing its recruiting rule is fairly attributable to the State of Tennessee, I would affirm.

II

Although the TSSAA's enforcement activities cannot be considered state action as a matter of common sense or under any of this Court's existing theories of state action, the majority presents a new theory. Under this theory, the majority holds that the combination of factors it identifies evidences "entwinement" of the State with the TSSAA, and that such entwinement converts private action into state action. *Ante,* at 7–8. The majority does not define "entwinement," and the meaning of the term is not altogether clear. But whatever this new "entwinement" theory may entail, it lacks any support in our state-action jurisprudence. Although the majority asserts that there are three examples of entwinement analysis in our cases, there is no case in which we have rested a finding of state action on entwinement alone.

Two of the cases on which the majority relies do not even use the word "entwinement." See *Lebron*, *supra*, at 374; *City Trusts*, *supra*, at 230. *Lebron* concerned the status of Amtrak, a corporation that Congress created and placed under Government control for the specific purpose of achieving a governmental objective (namely to avert the threatened extinction of passenger train service in the United States). 513 U. S., at 383, 386. Without discussing any notion of entwinement, we simply held that, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for

itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.*, at 400. Similarly, in *City Trusts*, we did not consider entwinement when we addressed the question whether an agency established by state law was a state actor. See 353 U. S., at 231. In that case, the Pennsylvania legislature passed a law creating a board of directors to operate a racially segregated school for orphans. *Ibid.* Without mentioning "entwinement," we held that, because the board was a state agency, its actions were attributable to the State. *Ibid.*

The majority's third example, *Evans* v. *Newton*, 382 U. S. 296 (1966), lends no more support to an "entwinement" theory than do *Lebron* and *City Trusts*. Although *Evans* at least uses the word "entwined," 382 U. S., at 299 ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action"), we did not discuss entwinement as a distinct concept, let alone one sufficient to transform a private entity into a state actor when traditional theories of state action do not. On the contrary, our analysis rested on the recognition that the subject of the dispute, a park, served a "public function," much like a fire department or a police department. *Id.*, at 302. A park, we noted, is a "public facility" that "serves the community." *Id.*, at 301–302. Even if the city severed all ties to the park and placed its operation in private hands, the park still would be "municipal in nature," analogous to other public facilities that have given rise to a finding of state action: the streets of a company town in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), the elective process in *Terry* v. *Adams*, 345 U. S. 461 (1953), and the transit system in *Public Utilities Comm'n of D. C.* v. *Pollak*, 343 U. S. 451 (1952). 382 U. S., at 301–302. Be-

cause the park served public functions, the private trustees operating the park were considered to be state actors.[6]

These cases, therefore, cannot support the majority's "entwinement" theory. Only *Evans* speaks of entwinement at all, and it does not do so in the same broad sense as does the majority.[7] Moreover, these cases do not suggest that the TSSAA's activities can be considered state action, whether the label for the state-action theory is "entwinement" or anything else.

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Because the majority never defines "entwinement," the scope of its holding is unclear. If we are fortunate, the majority's fact-specific analysis will have little bearing

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[6] We have used the word "entwined" in another case, *Gilmore* v. *Montgomery*, 417 U. S. 556, 565 (1974), which the majority does not cite. In *Gilmore*, we held that a city could not grant exclusive use of public facilities to racially segregated groups. *Id.*, at 566. The city, we determined, was "engaged in an elaborate subterfuge" to circumvent a court order desegregating the city's recreational facilities. *Id.*, at 567. The grant of exclusive authority was little different from a formal agreement to run a segregated recreational program. *Ibid.* Thus, although we quoted the "entwined" language from *Evans* v. *Newton,* 382 U. S. 296 (1966), we were not using the term in the same loose sense the majority uses it today. And there is certainly no suggestion that the TSSAA has structured its recruiting rule specifically to evade review of an activity that previously was deemed to be unconstitutional state action.

[7] The majority's reference to *National Collegiate Athletic Assn.* v. *Tarkanian,* 488 U. S. 179 (1988), as foreshadowing this case, *ante*, at 8, also does not support its conclusion. Indeed, the reference to *Tarkanian* is ironic because it is not difficult to imagine that application of the majority's entwinement test could change the result reached in that case, so that the National Collegiate Athletic Association's actions could be found to be state action given its large number of public institution members that virtually control the organization.

beyond this case. But if the majority's new entwinement test develops in future years, it could affect many organizations that foster activities, enforce rules, and sponsor extracurricular competition among high schools– not just in athletics, but in such diverse areas as agriculture, mathematics, music, marching bands, forensics, and cheerleading. Indeed, this entwinement test may extend to other organizations that are composed of, or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties. I am not prepared to say that any private organization that permits public entities and public officials to participate acts as the State in anything or everything it does, and our state-action jurisprudence has never reached that far. The state-action doctrine was developed to reach only those actions that are truly attributable to the State, not to subject private citizens to the control of federal courts hearing §1983 actions.

I respectfully dissent.