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DISREGARDING *BRENTWOOD*: STATE COURTS IGNORING THE SUPREME COURT'S DECISION ON STATE ACTION

PATRICK MCCORMICK*

I. INTRODUCTION

People commonly claim their constitutional rights have been deprived, but what if there were no constitutional rights to be protected in the first place? The question of whether a state high school athletic association (SHSAA) can deprive student athletes of constitutional rights is something courts have dealt with over the past twenty years. This is due to the decision by the United States Supreme Court in *Brentwood v. Tennessee Secondary School Athletic Association* from 2001. In *Brentwood*, the Supreme Court determined that the Tennessee Secondary School Athletic Association (TSSAA) was a state actor and therefore subject to certain constitutional restraints that a private actor is not.¹ The decision in *Brentwood* set off a firestorm in high school athletics, as most SHSAAs were likely to be found to be state actors. However, there have been some courts that have decided that their SHSAA is not subject to the Constitution and the constitutional restraints that come with it.

The question for the future is the legal status of these SHSAAs. The focus here will be on the history of how the law has developed regarding whether or not SHSAAs are state actors, and where the law is headed when courts determine whether SHSAAs must comply with the Constitution. The overall trend in the courts when dealing with a SHSAA is to hold that they are a state actor. However, some states have declined to extend the *Brentwood* decision to their SHSAA. If these states were to be challenged in a United States district

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1. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 304 (2001).

court, they would most likely be deemed to be state actors and previous decisions holding them not to be state actors would be void.

II. LEGAL HISTORY: *BRENTWOOD* AND BEYOND

A. *Pre-Brentwood Academy v. Tennessee Secondary School Athletic Association*

Before *Brentwood* and United States Supreme Court decisions looking for “pervasive entwinement” to find state action, the Court had ruled on other ways to find state action.² In three previous decisions the Court used something other than “pervasive entwinement” to find state action. In *Jackson v. Metropolitan Edison Company*, the Court found that the defendant who had an electricity contract with the Commonwealth of Pennsylvania was not a state actor.³ The Court looked to see if “there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”⁴ Due to the fact the electric company did not perform a state function, there was no attachment that made them a state actor, and therefore subject to the Constitution.⁵ The Court continued by stating that just because it is in the public interest to have this service does not mean that there always is a state actor.⁶

Another example of the Supreme Court applying a different state action test is in *Rendell-Baker v. Kohn*.⁷ Kohn was the director of a nonprofit private school who got most of their funding from public sources.⁸ Rendell-Baker argued that she had been fired without proper due process “because she [had] exercised her First Amendment rights.”⁹ To determine if the school was subject to the Constitution, the Court posed a question: “is the alleged infringement of federal rights ‘fairly attributable to the State?’”¹⁰ The Court found that the decision to fire Rendell-Baker was not induced by a “state regulation.”¹¹ The school operated not unlike other contractors in Massachusetts; therefore, they were not

2. *Id.* at 298.

3. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 347 (1974).

4. *Id.* at 351.

5. *Id.* at 353.

6. *Id.*

7. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

8. *Id.* at 831.

9. *Id.* at 834.

10. *Id.* at 838.

11. *Id.* at 841.

a state actor and not subject to the Constitution.¹² As a result, Rendell-Baker could not have her First Amendment rights violated.

A final example of the Court using a different test than *Brentwood* is in *American Manufacturers Mutual Insurance Company v. Sullivan*.¹³ The issue before the Court was whether the insurance company withholding payment for medical treatment could be attributed to the Commonwealth of Pennsylvania.¹⁴ The Court stated that whether or not there is state action can depend on factors such as “whether the State ‘has . . . provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State.’”¹⁵ Due to the fact that the insurance company regularly makes decisions like this, it was not state action.¹⁶ As a result, the insurance company was found not to be a state actor.¹⁷ Clearly, there has not been a consistent standard that has been set forth by the Supreme Court when it comes to state action. Over the course of the previous thirty-five years before *Brentwood* there were several decisions by the Court, including the three that were discussed, that applied different standards for state action. *Brentwood* would throw another wrench into the state action debate in the Court and set a standard for SHSAAs to determine if they were state actors.

B. Brentwood Academy v. Tennessee Secondary School Athletic Association

The beginning of any discussion deciding if a SHSAA is subject to state action must start with the United States Supreme Court’s decision in *Brentwood*. *Brentwood Academy* is a private school located in Tennessee, and a member of the TSSAA.¹⁸ The TSSAA determined that the school had broken the “undue influence” rule when it sent a letter to incoming students and their parents about the upcoming spring football practices.¹⁹ As a result of the violation, *Brentwood* was placed on probation and their football team was ineligible to participate in the postseason for two years.²⁰ *Brentwood* sued stating that the TSSAA’s decision had amounted to state action and, as a result, violated both the First and Fourteenth Amendments.²¹ The District Court held that the TSSAA was a state

12. *Id.* at 843.

13. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

14. *Id.* at 51.

15. *Id.* at 52.

16. *Id.*

17. *Id.*

18. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 293 (2001).

19. *Id.*

20. *Id.*

21. *Id.*

actor.²² While the United States Court of Appeals for the Sixth Circuit reversed, leading the Supreme Court to step in.²³ Justice Souter delivered the opinion for the majority, while Justice Thomas filed a dissenting opinion which was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy.²⁴

Justice Souter began his opinion by outlining what the Court is looking for when it is determining whether there is state action.²⁵ He stated that, “state action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”²⁶ Justice Souter went on to admit that the rule has a lack of simplicity; there are a range of circumstances that can be held to be sufficient to justify state action.²⁷ The opinion then goes on to identify different factors that might determine if a private association is a state actor. These factors include if the State is involved in the private association as a “willful participant,” if they are an agency that is controlled by the State, whether a public function of the State is being performed, or whether there is entwinement with governmental policies or management.²⁸ The Court goes on to explain that determining if there is state action will always be a “fact-bound inquiry,” with the Court looking to see if there is “pervasive entwinement” between the SHSAA and the state.²⁹ The facts involving the TSSAA led the Court to determine that the association was in fact a state actor.³⁰

The Court decided that the TSSAA and the state of Tennessee were pervasively entwined and, as a result, they should conform to constitutional standards.³¹ The organization is all the high schools in the state of Tennessee, the Court explained, and eighty-four percent of those schools are public.³² The Court went on to explain that the organization as a result, overwhelmingly consists of public schools and public officials.³³ Additionally, the members of the state board are assigned to serve as members on the board of control, and the legislative council at the TSSAA; also, they are treated like state employees

22. *Id.*

23. *Id.* at 294.

24. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 305 (2001) (Thomas, J., dissenting).

25. *Id.* at 295 (majority opinion).

26. *Id.*

27. *Id.* at 295-96.

28. *Id.* at 296.

29. *Id.* at 298.

30. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298 (2001).

31. *Id.*

32. *Id.*

33. *Id.* at 299-300.

and are eligible for membership in the state retirement system.³⁴ The TSSAA may not have been officially made a member of the state government, but through the actions of the association and the state, the Court believes the TSSAA is a state actor.³⁵ As a result of these circumstances, the Supreme Court reversed the decision from the Court of Appeals for the Sixth Circuit and ruled that the TSSAA was in fact a state actor and therefore subject to state action.³⁶

The majority decision did not come without some resistance by other members of the Supreme Court. Justice Thomas, writing for the dissent, argued that state action had never been found by simply looking at entwinement between the private actor and the state.³⁷ Justice Thomas stated that the Court should have been looking at whether an action taken by the TSSAA could have been attributable to the state.³⁸ The dissent believed that no matter what test the Court could have looked at they should have found that the TSSAA is, and always has been, a private corporation not subject to state action.³⁹ The rules and individuals associated with the TSSAA may be from public schools, the dissent admitted, but they represent both the interests of the public and private schools in the area.⁴⁰ Finally, the dissent pointed out that the TSSAA does not perform a traditional function of the state.⁴¹ The state did not mandate that an association be created, nor did they have an interest in it.⁴² The enforcement of the recruiting rule by the TSSAA was not attributable to the State of Tennessee and as a result this should not have been a case where the Constitution was involved.⁴³

Clearly, *Brentwood* divided the Court on whether or not the TSSAA should have been found to be a state actor. The decision by the majority meant that the TSSAA would be subject to state action and Brentwood's appeal that the recruiting rule violated the Constitution could continue. However, the other half of the Court believes that the TSSAA should not have been subject to the Constitution in the first place. As the subsequent fallout after *Brentwood* shows, a minority of courts have also taken this view.

34. *Id.* at 300.

35. *Id.* at 301-02.

36. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291, 305 (2001).

37. *Id.* at 305 (Thomas, J., dissenting).

38. *Id.* at 306.

39. *Id.*

40. *Id.* at 306-07.

41. *Id.* at 309.

42. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 300 (2001).

43. *Id.* at 312.

C. Courts Following the Brentwood Decision

The Supreme Court in *Brentwood* stated that the TSSAA was a state actor and therefore subject to the restraints of the Constitution.⁴⁴ This followed decisions where lower courts in previous years ruled that various SHSAs were state actors.⁴⁵ Clearly, some SHSAs must follow the Constitution. The TSSAA and Brentwood Academy still had to resolve whether the association's rule prohibiting recruiting violated the Constitution. The result of the case was also decided in the United States Supreme Court. The facts of the case were the same, but now the Court had to decide whether the TSSAA violated the First Amendment.⁴⁶ The Court held that the TSSAA banning Brentwood from reaching out to student athletes in their school is nowhere near a violation of the First Amendment.⁴⁷ The opinion went on to state that Brentwood made the voluntary decision to join the association and they were not forced to do so; as a result, they should be subject to some of their speech rights being restricted.⁴⁸ The TSSAA is not allowed to ban free speech of these schools altogether, but they should be able to ban some speech where that speech will create a harm.⁴⁹ The result of the second case between these two parties demonstrates a conclusion that it will be hard for plaintiffs bringing similar constitutional claims to succeed. According to *Brentwood II*, the courts will be very deferential to a SHSAA when they determine that they are a state actor.

Courts have now gone on to look at the *Brentwood* decision as a compare-and-contrast test when looking at whether SHSAA's should be deemed to be state actors.⁵⁰ One example of *Brentwood* being used is in *Communities For Equity v. Michigan High School Athletic Association*. The plaintiff brought a complaint that the Michigan High School Athletic Association ("MHSAA") scheduled girls' sports during disadvantageous and nontraditional seasons.⁵¹ While the plaintiff was mainly concerned with whether or not MHSAA violated any Title IX rules, they also brought a claim under the Equal Protection

44. *Id.* at 302.

45. See *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982); *La. High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224, 228-29 (5th Cir. 1968); *Ind. High Sch. Athletic Ass'n v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997).

46. *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 294 (2007).

47. *Id.* at 296.

48. *Id.* at 299.

49. *Id.* at 300.

50. See *Entwistle v. S.D. High Sch. Activities Ass'n*, No. 06-4030, 2006 WL 8453556, at *1-3 (D.S.D. Mar. 24, 2006).

51. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 679 (6th Cir. 2006).

Clause.⁵² But for the MHSAA to be liable under the Equal Protection Clause, it must be found to be a state actor.⁵³ To come to a decision on whether the MHSAA is a state actor, the Court relied heavily on the *Brentwood* decision.⁵⁴ It noted the pervasive entwinement meant that the TSSAA was a state actor and focused extensively on the fact that public schools comprised eighty-four percent of the TSSAA.⁵⁵ The Court found that the majority of MHSAA members and leadership were public schools and public school officials.⁵⁶ Students were able to satisfy physical education requirements by participating in MHSAA sports, which signified that there was a “close nexus” between the state and the MHSAA.⁵⁷ As a result, it was determined that the MHSAA was a state actor and therefore was subject to the Equal Protection Clause.⁵⁸ Clearly, any SHSAA arguing it is not a state actor will have to find a way to distinguish itself from the TSSAA. They are going to have the burden to distinguish themselves from the TSSAA and relying on the evidence that has been presented thus far it seems that all SHSAA will all one day be found to be state actors. However, there have been some courts that have seen things a different way.

D. Courts Not Following Brentwood

While most courts in the United States have found when a SHSAA enters their courtroom they enter as a state actor, there are some outliers. These state courts have found, for a variety of reasons, that the *Brentwood* decision does not apply to their SHSAA. In some cases, the problem of whether a SHSAA is a state actor has not been brought up or it has been assumed a state actor exists. In other cases, courts have found that the SHSAA in their state is simply not a state actor. Whatever the reason, there are a minority of courts that are disregarding *Brentwood*. The question becomes whether this will start a movement or whether one day all SHSAAs will be deemed to be state actors?

1. Wisconsin

One state where a SHSAA has been found by a court not to be a state actor is Wisconsin. *Bukowski v. Wisconsin Interscholastic Athletic Association*, was brought by a high school student seeking an injunction against the Wisconsin

52. *Id.*

53. *Id.* at 691-92.

54. *Id.* at 692.

55. *Id.*

56. *Id.*

57. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 459 F.3d 676, 692 (6th Cir. 2006).

58. *Id.*

Interscholastic Athletic Association (WIAA) so he could compete in gymnastics.⁵⁹ While Bukowski did not specifically plead an Equal Protection Claim, the court allowed him to bring forward his argument.⁶⁰ The WIAA argued that Bukowski failed to bring a claim proving that the WIAA is a state actor.⁶¹ The court agreed with that argument, and held that the plaintiff must establish through evidence that in fact state action exists.⁶² The court used *Brentwood* as an example of where a plaintiff showed enough evidence that a state actor exists; in the present case however, Bukowski did no such thing.⁶³ He failed to produce any document that showed the WIAA is a state actor.⁶⁴ He only provided evidence that the WIAA received federal funds.⁶⁵ The court found that only showing the WIAA received federal funds was not enough to create “pervasive entwinement.”⁶⁶ As a result, the WIAA was not established as a state actor and an Equal Protection Claim could not be brought.⁶⁷

2. West Virginia

West Virginia is another state where courts have determined a SHSAA is not a state actor. The West Virginia Supreme Court heard the case after the West Virginia Secondary Schools Activities Commission (WVSSAC) appealed a lower court ruling declaring it a state agency.⁶⁸ The case involves O.J. Mayo, a former NBA player, who was seeking an injunction to the suspension he received from the WVSSAC.⁶⁹ The reason Mayo sought to establish the WVSSAC as a branch of the state government was to get attorney’s fees.⁷⁰ The Court applied several factors and determined that the WVSSAC was not a state actor in this situation.⁷¹ First, the Court stated that the WVSSAC was not created nor controlled by the legislature.⁷² While it is still a statewide agency the state

59. *Bukowski v. Wis. Interscholastic Athletic Ass’n*, No. 2005AP650, 2006 WL 3437313, at *1 (Wis. Ct. App. Nov. 30, 2006).

60. *Id.* at *2.

61. *Id.*

62. *Id.* at *3.

63. *Id.*

64. *Id.*

65. *Bukowski v. Wis. Interscholastic Athletic Ass’n*, No. 2005AP650, 2006 WL 3437313, at *3 (Wis. Ct. App. Nov. 30, 2006).

66. *Id.*

67. *Id.* at *6.

68. *Mayo v. W. Va. Secondary Sch. Activities Comm’n*, 672 S.E.2d 224, 226 (W. Va. 2008).

69. *Id.*

70. *Id.* at 230-31.

71. *Id.* at 232.

72. *Id.* at 231-33.

government does not have a hand in how members are picked.⁷³ Additionally, the WVSSAC does not receive funding from the state, all of its funds come from members fees and tickets at sporting events.⁷⁴ As a result, the Court determined that the WVSSAC was not a state actor and therefore Mayo was not entitled to attorney's fees for prevailing in the case.⁷⁵

3. Illinois

Illinois is another example of where courts have found a SHSAA to not be a state actor. In *Better Government Association v. Illinois High School Association*, an Illinois Appellate Court found that the Illinois High School Association (IHSA) was not a state actor and therefore not subject to the Freedom of Information Act (FOIA).⁷⁶ The plaintiff argued that the IHSA was a “public body” under the FOIA and therefore was required to produce documents they had requested.⁷⁷ The IHSA argued that it was not a public body; it included its constitution and bylaws, an affidavit, and a letter from the Illinois Attorney General's Office to prove that it was under no obligation to release its records.⁷⁸ The question for the Court was whether or not the IHSA is a public body who is required to release its documents.⁷⁹ The Court used a three-part test to come to its answer.⁸⁰ The first part of the test is to determine if the IHSA was an association that exists independent of the government.⁸¹ The Court held that the IHSA was in fact an independent body: it filed its own tax returns and had its own employees that operated outside the view of the government.⁸² Second, the Court looked at “the nature of the functions performed by the entity,” to find if these functions were governmental.⁸³ The Court found that participation in sports is voluntary and schools do not have to be a member of the IHSA.⁸⁴ The Court stated that the IHSA was similar to the National Collegiate Athletic Association (NCAA), which was also found to not have “governmental powers”

73. *Id.* at 232.

74. *Mayo v. W. Va. Secondary Sch. Activities Comm'n*, 672 S.E.2d 224, 232 (W. Va. 2008).

75. *Id.* at 233.

76. *Better Gov't Ass'n v. Ill. High Sch. Ass'n*, 56 N.E.3d 497, 499 (Ill. App. 1st Dist. 2016), *aff'd*, 89 N.E.3d 376 (Ill. 2017).

77. *Id.*

78. *Id.*

79. *Id.* at 503.

80. *Id.*

81. *Id.*

82. *Better Gov't Ass'n v. Ill. High Sch. Ass'n*, 56 N.E.3d 497, 503-04 (Ill. App. 1st Dist. 2016), *aff'd*, 89 N.E.3d 376 (Ill. 2017).

83. *Id.* at 503.

84. *Id.* at 504.

even though it has rules governing members.⁸⁵ The Court concluded by stating that while a public body could perform the same tasks as the IHSA, the IHSA is not a public body because it did not perform a governmental function in this case.⁸⁶ Finally, the Court looked at the degree of control the government has over the IHSA.⁸⁷ The analysis compared the *Brentwood* decision and the TSSAA to the IHSA to determine that the IHSA was not a state actor.⁸⁸ The IHSA executive director and administrative staff, unlike the TSSAA, were not eligible for state retirement benefits and they were not subject to the same rules as public employees.⁸⁹ Further, the Court found that the IHSA did not receive member dues from schools and as a result did not receive government funding.⁹⁰ As a result, the Court held the IHSA was not a public body and therefore not subject to the FOIA.⁹¹ Admittedly this case does not deal directly with a constitutional issue, but if the IHSA were to be sued as a state actor, it is likely that it would bring a similar defense to the one it brought here.

III. SHSAA'S SIMILARITIES AND DIFFERENCES

An important aspect of any investigation by a court into whether or not a SHSAA is a state actor is looking at the organization's makeup. A court will look to see if the SHSAA is similar to that of the TSSAA in the *Brentwood* decision. If a SHSAA tries to argue it is not a state actor, it is going to want to look for as many differences from the TSSAA as possible. That would mean looking at factors such as whether or not the majority of the schools are public, whether the officials working for the organization are affiliated with the state government, and where funding for the organization comes from. If the court were to find that a majority of the factors weigh towards the argument that the SHSAA is not sufficiently affiliated with the state, the SHSAA would be held not to be a state actor. This section will focus initially on the composition of the TSSAA and how the makeup of the association made it a state actor. Then it will compare and contrast the TSSAA to the SHSAAs in Wisconsin, West Virginia, and Illinois to continue working towards the solution on whether SHSAAs are all destined to be state actors.

85. *Id.*

86. *Id.* at 505.

87. *Id.*

88. *Better Gov't Ass'n v. Ill. High Sch. Ass'n*, 56 N.E.3d 497, 505-06 (Ill. App. 1st Dist. 2016), *aff'd*, 89 N.E.3d 376 (Ill. 2017).

89. *Id.*

90. *Id.* at 506.

91. *Id.* at 507.

A. TSSAA

The TSSAA is the SHSAA for the state of Tennessee. The TSSAA states that it belongs to member schools and serves them.⁹² There are three branches within the TSSAA. Those branches are the legislative council, board of control, and executive staff.⁹³ These branches have authority over items like the TSSAA Constitution and Bylaws, the ability of the association to spend money, and to execute the policies that are put in place.⁹⁴ The Legislative Council is made up of representatives from three divisions of the state and at least one of those representatives must be from a non-public school.⁹⁵ To be a member of the Council, the representative must be a full-time employee of a school; including principals, athletic directors, and district level administrators.⁹⁶ The Board of Control is similar to the Legislative Council in which the members must be full-time employees and there must be one non-public school representative from each division of the state.⁹⁷ Clearly, public school officials have a hand in how the TSSAA operates and the rules and standards that it puts forward. Additionally, the amount of public schools in the association would play a role in whether a court would continue to find that it is a state actor.⁹⁸

B. WIAA

The WIAA is the SHSAA that Wisconsin high schools belong to in order to compete for state championships. It is governed by the member schools who have the ability to change the Constitution and the Bylaws.⁹⁹ Each school has a vote when a proposal is brought by the WIAA and its committees to change either the Constitution or a Bylaw.¹⁰⁰ Additionally, the WIAA has a Board of Control and Executive Staff who are involved in running events and determining the setup for each sport that is sponsored.¹⁰¹ The Board of Control

92. *About TSSAA*, TENN. SECONDARY SCH. ATHLETIC ASS'N, <https://tssaa.org/about-tssaa> (last visited May 2, 2023).

93. *Id.*

94. *Id.*

95. *History of the Legislative Council*, TENN. SECONDARY SCH. ATHLETIC ASS'N, <https://tssaa.org/history-of-the-legislative-council> (last visited May 2, 2023).

96. *Id.*

97. *History of the Board of Control*, TENN. SECONDARY SCH. ATHLETIC ASS'N, <https://tssaa.org/history-of-the-board-of-control> (last visited May 2, 2023).

98. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 289 (2001).

99. *About WIAA*, WIS. INTERSCHOLASTIC ATHLETIC ASS'N, <https://www.wiaawi.org/About-WIAA> (last visited May 2, 2023).

100. *Id.*

101. *Id.*

is made up of eleven members; ten of the members are administrators from high schools.¹⁰² Only one of those members must be from a non-public school.¹⁰³ The Board has the ability to interpret the WIAA Constitution and to hear appeals of decisions by the Executive Director of the WIAA.¹⁰⁴ There is also an executive staff at the WIAA that includes the Executive Director.¹⁰⁵ The Executive Director is not a public school official, and there is no indication that any member of the executive staff has any current affiliation with a school or the government of the state of Wisconsin.¹⁰⁶ When reviewing the WIAA school directory list, it indicates that a majority of the schools within the association are public.¹⁰⁷ It is clear that the TSSAA and the WIAA have a number of similarities that could be brought by a plaintiff looking to bring a claim that involves state action. The makeup of the WIAA will be an important inquiry into determining if it is a state actor.

C. WVSSAC

In West Virginia, the WVSSAC is not without controversy, but operates the high school sports within the state.¹⁰⁸ The WVSSAC has a different makeup in some ways compared to the TSSAA and the WIAA. Even with this distinctive makeup, the WVSSAC has been found to not be a state actor by the West Virginia Supreme Court.¹⁰⁹ They have a Board of Directors that make most of the decisions for the commission and a small staff not affiliated with the Board.¹¹⁰ The Board of Directors is made up of a variety of different people within the state. First, the five regions of the state are represented by a principal of a high school.¹¹¹ Additionally, members of the Board include athletic directors, the West Virginia State Superintendent, and the West Virginia State

102. *Board of Control*, WIS. INTERSCHOLASTIC ATHLETIC ASS'N, <https://www.wiaawi.org/About-WIAA/Board-of-Control> (last visited May 2, 2023).

103. *Id.*

104. *Id.*

105. *Executive Staff*, WIS. INTERSCHOLASTIC ATHLETIC ASS'N, <https://www.wiaawi.org/About-WIAA/Executive-Staff> (last visited May 2, 2023).

106. *Id.*

107. *School Directory List*, WIS. INTERSCHOLASTIC ATHLETIC ASS'N, <https://schools.wiaawi.org/Directory/School/List?Letter=B> (last visited May 2, 2023).

108. See Lowell Browning, *WVSSAC: One Bad Choice After Another*, BLEACHER REP. (Mar. 31, 2009), <https://bleacherreport.com/articles/148011-wvssac-one-bad-choice-after-another>.

109. *Mayo v. W. Va. Secondary Sch. Activities Comm'n*, 672 S.E.2d 224, 233 (W. Va. 2008).

110. *WVSSAC Board of Directors*, W. VA. SECONDARY SCH. ACTIVITIES COMM'N, <https://www.wvssac.org/wvssac-board-directors/> (last visited May 2, 2023).

111. *Id.*

Board of Education.¹¹² Finally, the staff of the WVSSAC is all represented on the Board; these members are not affiliated with any school or state government.¹¹³ It does not appear that the WVSSAC has any rules that give non-public schools any representation on the Board within the state. The state government also appears to be somewhat involved because the State Superintendent and State Board of Education are given positions on the Board.¹¹⁴ The West Virginia State Legislature has also set up the rules the WVSSAC follows. The WVSSAC has been given authority to control and supervise any interscholastic athletic events within the state, and the commission is allowed, with the consent of the State Board of Education, to spend money and require dues.¹¹⁵ The WVSSAC has a checkered history and clearly has some entwinement with the state government; the question in the future will be: whether the commission's ties with the state are enough to make it a state actor?

D. IHSA

The IHSA is another SHSAA that has been found not to be a state actor by courts.¹¹⁶ Its composition is somewhat similar to the WIAA, in terms of operation. First, the IHSA Constitution and Bylaws are amendable only by the membership of schools, which includes public and non-public schools.¹¹⁷ The Board of Directors within the IHSA approves any policies and interprets rules.¹¹⁸ Members of the Board are principals and athletic directors from different schools around the state, with one member being from a private school.¹¹⁹ Additionally, the Board of Directors hires an Executive Director that carries out the programs of the IHSA.¹²⁰ In 1985, public schools made up about eighty-five percent of the IHSA membership, this number is similar to the

112. *Id.*

113. *WVSSAC Staff*, W. VA. SECONDARY SCH. ACTIVITIES COMM'N, <https://www.wvssac.org/wvssac-staff/> (last visited May 2, 2023).

114. *Id.*; *see Mayo*, 672 S.E.2d at 233.

115. W. VA. CODE ANN. § 18-2-25 (2023).

116. *See Better Gov't Ass'n v. Ill. High Sch. Ass'n*, 56 N.E.3d 497, 499 (Ill. App. 1st Dist. 2016), *aff'd*, 89 N.E.3d 376 (Ill. 2017).

117. *Constitution, By-laws & Policies*, ILL. HIGH SCH. ASS'N, <https://www.ihsa.org/About-the-IHSA/Constitution-By-laws-Policies> (last visited May 2, 2023).

118. *Id.*

119. *Board of Directors*, ILL. HIGH SCH. ASS'N, <https://www.ihsa.org/About-the-IHSA/Board-of-Directors> (last visited May 2, 2023).

120. *Id.*

number that the TSSAA had at the time of the *Brentwood* decision.¹²¹ Illinois is another state where if a plaintiff was to bring a state action claim, they would have some strong arguments for why the IHSA is a state actor.

IV. WHAT DOES THE FUTURE HOLD?

The major dilemma facing SHSAAs that have not been declared state actors is whether their future is that of a private association or a state actor. Immediately after the *Brentwood* decision, scholars stated that there is not a clear line on what defines a state actor and what does not.¹²² It seems that for SHSAAs the line is pretty clear; most, if not all, will be determined to be state actors by courts. There is a split between the federal and state courts in this situation. The federal courts seem intent on upholding *Brentwood* as they have consistently ruled that SHSAAs are state actors, and SHSAAs have admitted to being state actors.¹²³ If a plaintiff were to bring a constitutional claim against a SHSAA in federal court, it appears that the court would hear it. State courts seem to be a little more skeptical on if their SHSAA is a state actor. They are more protective of the SHSAA and make it more difficult for the plaintiff to bring their constitutional claims. *Brentwood* is not even mentioned in some of these cases, and in other cases the court largely ignores the ruling and uses their own methodology.¹²⁴ That could make the legal status of SHSAAs in states not following *Brentwood* a little more difficult to predict. However, going through a *Brentwood* analysis for the SHSAAs in Wisconsin, West Virginia, and Illinois, it seems they would all most likely fail in their attempt to remain a state actor when they are compared with the TSSAA. The *Brentwood* holding, as long as it stands, will most likely force all SHSAAs to adhere to the United States Constitution as state actors.

A. WIAA

The WIAA's current status is in the most danger of being reversed in the future. First, the only decision in the state that determined that the WIAA is not a state actor was done by a state Court of Appeals.¹²⁵ Additionally, that decision

121. Jerry Shnay & John Hoellen, *IHSA Asked to Separate Public, Private Schools*, CHI. TRIB. (Oct. 24, 1985, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-1985-10-24-8503120829-story.html>.

122. Robin Petronella, Comment, *A Comment on the Supreme Court's Machiavellian Approach to Government Action and the Implications of its Recent Decision in Brentwood Academy v. Tennessee Secondary School Athletic Association*, 31 STETSON L. REV. 1057, 1073 (2002).

123. See *Wis. Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 616 (7th Cir. 2011).

124. *Mayo v. W. Va. Secondary Sch. Activities Comm'n*, 672 S.E.2d 224, 226 (W. Va. 2008).

125. *Bukowski v. Wis. Interscholastic Athletic Ass'n*, 298 Wis. 2d 246 (Wis. App. 2006).

was unpublished.¹²⁶ The WIAA has also admitted in the United States Court of Appeals in the Seventh Circuit that it is a state actor.¹²⁷ It seems that the Association believes that it will one day become a state actor, and they are not taking a position to fight that determination. If they were to attempt to fight that designation, they would most likely fail. Looking at the WIAA compared with the TSSAA, there are clearly more similarities than there are differences. While the WIAA might point out that they have received stimulus money as part of coronavirus relief, they are likely to be a state actor.¹²⁸ If a court were to do a *Brentwood* analysis on the WIAA, which has not been done, a plaintiff would be able to make the WIAA a state actor. The majority of the WIAA's member schools are public; the entwinement between public school membership and the SHSAA is a major indicator on if a SHSAA is a state actor. Similar to the TSSAA, the WIAA also has public school officials who are in major decision-making roles at the organization. There is no evidence that the WIAA has similar retirement benefits that the TSSAA provided to their employees. However, the totality of the public involvement in the WIAA makes it likely they will be found to be a state actor in the future. As a result, it would be wise for the WIAA to begin acting like a state actor—if it has not already. Leaving themselves open to blatant constitutional claims because of the decision in *Bukowski* would be a major mistake because it appears they are a state actor under a *Brentwood* analysis.

B. WVSSAC

The WVSSAC is the most likely SHSAA to not to be found a state actor; however, that is only true when a case is brought in a West Virginia state court. In West Virginia, the state court has applied a different test to find if a state actor exists.¹²⁹ The highest court in West Virginia in *Mayo v. West Virginia Secondary School Activities Commission* determined that the WVSSAC is not a state actor.¹³⁰ That precedent seems to indicate that the state courts are intent on keeping the WVSSAC from being subject to the Constitution. There is no indication that the courts will be changing their mind in the near future; as a result, the WVSSAC's legal status in a West Virginia court is likely to remain that they are not a state actor. That outcome seems less likely if they were to

126. *Id.*

127. *See Wis. Interscholastic Athletic Ass'n*, 658 F.3d at 616.

128. Mark Stewart, *WIAA Receives \$300,000 in Stimulus Money, Discusses Changes to Make Ends Meet*, MILWAUKEE J. SENTINEL (June 1, 2020, 12:58 PM), <https://www.jsonline.com/story/sports/high-schools/2020/05/15/wiaa-gets-300-000-stimulus-money-discusses-cost-saving-measures/5199915002/>.

129. *See Mayo*, 672 S.E.2d at 226-27.

130. *Id.* at 233.

defend themselves in federal court. Federal courts have been known to use *Brentwood* in a compare and contrast for SHSAAs and it seems as though the WVSSAC would fall under a state actor.¹³¹

When looking at the WVSSAC, a court would likely find there is enough of a connection with the state to be a state actor, although this would have to be a different connection than the one found in *Brentwood*. The WVSSAC has legislative involvement that would more likely than not qualify it as a state actor. The state legislature and state superintendent help determine who is on the board and who makes the rules for the WVSSAC. That involvement would most likely be enough for a federal court because there would be similar entwinement characteristics that were discussed in *Brentwood*. The WVSSAC's status as a state actor seems a little less certain than other states not following *Brentwood*, but in federal court the result would most likely be similar. As a result, it would, again, be in the interest of the WVSSAC to get ahead of this issue. They should be making decisions like they are a state actor to future litigation. If they operate as though they are state actor, that is one less avenue a student athlete will have for a claim against them.

C. IHSA

The IHSA is likely to be determined a state actor as a result of the majority of their members being public schools.¹³² One of the keys in the *Brentwood* decision was that the majority of TSSAA members were public schools.¹³³ It seems that the legal status of the IHSA as a state actor would be in question based on the holding in *Brentwood*. The IHSA would have to show a court that even though they have similarities to the TSSAA, they have more differences that prevent them from becoming a state actor. They would begin this process by pointing out that their members do not receive state retirement benefits like the TSSAA. The IHSA would also most likely argue that they do not perform a governmental function and, as a result, don't fall within the reach of a state actor. Being able to convince a court that these differences are enough that the IHSA should not be a state actor seems unlikely. Public officials are clearly involved in the operation of the association and make fundamental decisions that affect the entire state. This entwinement with the ISHA and the state makes it likely that even though the IHSA has not been officially recognized as a state actor, a court following the *Brentwood* analysis would find them to be. While there is no court that has confirmed that the IHSA is a state actor, the prediction

131. *See* *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 692 (6th Cir. 2006).

132. *Shnay & Hoellen*, *supra* note 121.

133. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001).

they should be making for the future is that they are. Having a majority of members be public schools makes it almost a certainty that the IHSA will be a state actor. In *Brentwood*, the Court relied extensively on the fact that a majority of the schools were public actors. If a plaintiff were to bring in the same information about the IHSA coupled with the other facts about the association, their future as not being recognized as a state actor would be unlikely. Accordingly, the association should be taking preventative measures to insulate themselves from potential constitutional challenges that could arise in the future.

V. CONCLUSION

Overall, following a *Brentwood* analysis, it is only a matter of time before all SHSAAs are found to be state actors. The SHSAAs that have not been forced to follow the *Brentwood* decision are just one constitutional challenge away from being forced to in the future. These organizations should begin acting as if they are state actors to prevent future lawsuits. It appears that in Wisconsin the WIAA has already begun doing this, admitting they were a state actor in federal court.¹³⁴ While arguing they were not a state actor was a savvy move to avoid litigation in *Bukowski*, it is highly unlikely to work again. There are not enough differences between the TSSAA at the time of the *Brentwood* ruling and these SHSAAs. When a court looks for entwinement between the state and the organization, it will most likely find it. All the SHSAAs that have been investigated have similar characteristics to the TSSAA. State officials are too involved in these organizations for them to declare that they are completely independent of the state. Involvement of state officials is not the only thing that SHSAAs not found to be state actors have going against them. The majority of members in these associations are public schools, which means that for a vast majority of decisions, public schools, who are subject to the Constitution, are making them. It seems most likely that a court would find that these organizations take on the qualities of their members. As a result, they will be found to be state actors and therefore subject to the Constitution. There could be the infrequent outlier to this proclamation, but for the most part, SHSAAs should operate as if they are state actors, even if a court has not declared so. If they were to challenge that they are not, they will most likely fail. Being proactive and assuming that they are state actors is the best decision these organizations can make for their legal future.

134. See *Wis. Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 616 (7th Cir. 2011).