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Supreme Court upholds high school athletics recruiting rules

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Not too long ago, middle and/or grammar school student-athletes proceeded onto their local public or private high schools with little or no prior contact with the high school coaching staff of their respective sport(s).

However, in a country where, reportedly, a rising ninth grader just received and accepted a Division I basketball scholarship offer from the University of Southern California, high school recruiting is proliferating.

In response to concerns about the extent of recruiting in high school athletics, high school athletic associations have promulgated various rules regulating such conduct. On June 21, the U.S. Supreme Court unanimously upheld the Tennessee Secondary School Athletic Association's recruiting rules in the face of a private school's First Amendment and due process challenges, although the justices disagreed as to the basis for the decision.

The Tennessee Secondary School Athletic Association governs high school sports statewide and bars schools from contacting prospective students about their sports programs. A private school near Nashville, the Brentwood Academy, has had a highly successful football program and in 1997 its coach sent a letter to a dozen eighth graders inviting them to spring practice. The letter stated that "getting involved as soon as possible would definitely be to your advantage." The letter was sent in violation of association rules even though the eighth graders already were accepted at the academy and signed enrollment contracts.

The academy is a voluntary member of the association but it sued, claiming the coach's letter constituted protected speech and association rules prohibiting such a letter violated its due process rights.

The case first made its way to the Supreme Court in 2001, when the court found that the academy had standing to pursue its constitutional claims, generally permitted against public entities only, because the association acted in a quasi-governmental capacity.

In upholding the association's rules against contacting

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prospective students regarding sports programs, the court relied in part on its finding that "hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams and foster an environment in which athletics are prized more highly than academics."

Justice John Paul Stevens wrote the opinion for the unanimous court, stating the rules at issue help prevent undue influence, just as state bar association rules limit solicitations of accident victims by lawyers.

Justice Anthony Kennedy concurred, but wrote a separate opinion that Chief Justice John Roberts Jr. and Justices Antonin Scalia and Samuel Alito joined.

Justice Kennedy wrote that he disagreed with Justice Stevens' First Amendment principle opinion comparing the recruiting rules at issue to the limits on attorney solicitations of accident victims, as the risk of undue influence in

the latter circumstance was a unique one. Justice Kennedy also noted that the decision to uphold the association's rules under the First Amendment was supported by the simpler argument that the academy voluntarily joined the association and agreed to be bound by its rules.

Justice Clarence Thomas would have based the judgment on a reversal of the decision rendered by the court when the case was first heard in 2001, however. That decision allowed the First Amendment and due process challenges of the academy to go forward based on a finding that the association was performing quasi-governmental functions.

Justice Kennedy stated in his concurrence that such a holding conflicted with the court's earlier state action case, which limited such findings to speech by government employees and contractors. Thus, Justice Thomas argued the 2001 decision should have been reversed, dismissing both the First Amendment and due process claims. In addition, Justice Thomas stated that with Justice Kennedy's concurring opinion, Justice Stevens' application of the case upholding rules against lawyers soliciting accident victims to this matter was an error given the inappropriate recruiting rules at issue.

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An obvious and potential follow up case would be by a public secondary school with a coach who violates a similar rule to the one at issue. It appears that a majority of the current court could find constitutional problems with such a rule.

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