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The University Interscholastic League of Texas: Who Are These Guys and What Can They Do Symposium on Education Law - Comment.

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I. INTRODUCTION

Public education is one of the most important functions that federal and state governments perform in today's society.[1] Educational reform of public

1. *See* Plyler v. Doe, 457 U.S. 202, 222-24 (1982) (importance of education reflected in constitutional demand of reasonable access to public education); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35-36 (1973) (education important social need in today's society, but not fundamental right); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (education of young one of most admirable and important goals of government); *see also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511-12 (1969) (public education important responsibility of modern state); Passel v. Fort Worth Indep. School Dist., 453 S.W.2d 888, 892 (Tex. Civ. App.—Fort Worth 1970, no writ) (state educational official performs important societal responsibility in educating students). Public education is an accepted government responsibility, and the debate is in regard to the proper allocation of control between federal and state interests in promoting public education. *See* Birman & Ginsburg, *The Federal Role in Elementary and Secondary Education: New Directions and Continuing Concerns,* 14 URB. LAW. 471, 473 (1982) (major conflict in public education proper role for federal concerns in state administered programs). While public education is a government obligation, parents still possess authority to remove their children from the state program. *See* Wisconsin v. Yoder,

schools is currently an important political and social issue in Texas.[2] Much of this reform centers upon deemphasizing extracurricular activities and encouraging basic academic skills.[3] As extracurricular activities are scrutinized, the position of the University Interscholastic League of Texas (League) comes to the forefront of the educational reform debate.[4] The League, which controls most extracurricular competitions in Texas public schools, functioned outside of state control until the passage of House bill 72, the major education reform package enacted in the summer of 1984.[5] This legislation dramatically altered the Texas public school system, but left confusion as to the League's status and authority.[6]

After a brief discussion of the League's history, a review of the League's current position in the Texas educational system and its internal functioning will follow. In addition, this comment will examine the problem of defining the League's status as either a private association or a state administrative entity. Finally, this comment will survey the proper standards for judicial review of League decisions and rules with an emphasis upon distinguishing between non-constitutional and constitutional challenges to League actions.

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406 U.S. 205, 212-13 (1972) (Amish parents may withdraw children from public educational system).

2. *See* Schulze, *Special Session for Education,* IV TEX. SCH. L. NEWS, June 15, 1984, at 3. On June 4, 1984, Governor Mark White convened a special session of the 68th Texas Legislature to enact a comprehensive reform of Texas public schools. *See id.* at 3.

3. *See* Tex. H.B. 984, 68th Leg., Spec. Sess. (1984) (questioning student participation in extracurricular activities when scholastic standards not met); *see also "Back-to-Basics" Educational Policy,* 70 A.B.A. J. 24 (Feb. 1984) (majority of poll favors increased emphasis on basic academic classes and skills in public schools).

4. *See* Act of June 28, 1984, ch. 28, pt. F., §§ 1-2, 1984 Tex. Sess. Law Serv. 297 (Vernon) (educational reform seeks to alter student participation requirements; League position is affected by these changes); *see also* Tex. H.B. 984, 68th Leg., Spec. Sess. (1984) (educational reform alters position of extracurricular activities in Texas public schools). Interscholastic activities are considered important parts of an overall education of the student. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 99 (1956). Interscholastic activities, while often viewed as a secondary component of public education, offer important opportunities for student development. *See* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 301 (1982) (extracurricular activities offer important educational and psychological development for participants and possible future pecuniary benefits).

5. *See* TEX. EDUC. CODE ANN. § 21.921(b) (Vernon Supp. 1985) (League rules are now subject to State Board of Education review); *see also* Schulze, *Special Session for Education,* IV TEX. SCH. L. NEWS, Aug. 1, 1984, at 7 (League now subject to standards of State Board of Education and rules promulgated by Texas Education Agency).

6. *See* University Interscholastic League v. Maroney, 681 S.W.2d 285, 287 (Tex. App.—Austin 1984, writ ref'd) (H.B. 72 did not clarify League's status). *But see* TEX. EDUC. CODE ANN. § 22.921(b) (Vernon Supp. 1985) (League classified as part of University of Texas).

II. HISTORY OF THE LEAGUE: ITS ORIGINS AND GROWTH

The organization, known today as the University Interscholastic League,[7] emerged at the University of Texas at Austin (University) in 1912.[8] The League arose from the merger of two contest-oriented organizations which operated under the direction of University officials.[9] The first "parent" of the League was the Debating League of Texas, organized to promote public speaking and debate in Texas public schools.[10] The Debating League's founder sought to encourage good citizenship and academic excellence through the Debating League's competitions.[11] After forming the Debating League, University officials recognized the need for a similar athletic organization to promote athletic contests in public schools.[12] From this motivation, the second "parent" of the League arose, the Texas Interscholastic Athletic Association.[13] The Athletic Assocation governed track and field

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7. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 1 (75th anniv. ed. 1984-1985).

8. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255 S.W.2d 177, 178-79 (1953) (League began as part of University of Texas); UNIVERSITY INTERSCHOLASTIC LEAGUE, UNIVERSITY INTERSCHOLASTIC LEAGUE PAMPHLET 1 (Jan. 20, 1984) (available from University Interscholastic League, Austin, Tex.) (League origins at University of Texas).

9. *See* Saenz v. University Interscholastic League, 487 F.2d 1026, 1027-28 (5th Cir. 1973). The University of Texas exercised extensive control over the formation and growth of the League, which is currently celebrating its 75th anniversary. *See* Marshall, *Introduction* to UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES 16 (75th anniv. ed. 1984-1985).

10. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INERSCHOLASTIC LEAGUE OF TEXAS 28 (1956); *see also* UNIVERSITY INTERSCHOLASTIC LEAGUE, UNIVERSITY INTERSCHOLASTIC LEAGUE PAMPHLET 1 (Jan. 20, 1984) (League can trace beginnings to Debating League). Dr. S.E. Mezes was the president of the University of Texas and principal organizer of the Debating League. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 28-29 (1956).

11. *See* Marshall, *Introduction* to UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES 16 (75th anniv. ed. 1984-1985). The Debating League operated under the auspices of the Bureau of Public School Service, Division of Extension, University of Texas, which Dr. Mezes formed in 1909 to promote interest in higher education. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 31 (1956).

12. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 31-32 (1956).

13. *See* Marshall, *Introduction* to UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES 16 (75th anniv. ed. 1984-1985); *see also* UNIVERSITY INTERSCHOLASTIC LEAGUE, UNIVERSITY INTERSCHOLASTIC LEAGUE PAMPHLET 1 (Jan. 20, 1984) (Athletic Association was one component of League). The Texas Interscholastic Athletic Association was formed in 1905 to offer an informal organization for track and field activities in a few Texas public schools. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 32 (1956). In 1909-10, the Associa-

competitions in public schools, but exercised little actual authority for most athletic activities.[14] The Debating League and the Athletic Association merged in 1913 because their directors realized the pecuniary benefits of a merger and the need for a single entity to exercise greater control over the expanding areas of athletic and academic contests in Texas schools.[15] Following the merger, the League operated from the University under the direction of the Extension Division, Bureau of Public School Services,[16] and regulated all existing extracurricular activities in its member schools.[17]

Three factors prompted the League's swift growth in its early years: (1) the increasing number of Texas public schools seeking membership, (2) the burgeoning variety of athletic activities, and (3) the need to address substantial conflicts and improprieties in contests.[18] The League has always characterized itself as "a voluntary, non-profit association"[19] composed of member schools with its total membership varying annually.[20] At its beginning, the League was composed of twenty-eight schools, and by 1951 the

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tion was officially adopted by the Extension Agency of the University of Texas to govern athletic activities in Texas public schools. *See id.* at 31.

14. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 31-33 (1956).

15. *See id.* at 31; *see also* UNIVERSITY INTERSCHOLASTIC LEAGUE, UNIVERSITY INTERSCHOLASTIC LEAGUE PAMPHLET 1 (Jan. 20, 1984) (two parent organizations consolidated activities to form League). The Texas State Teacher's Association was also involved in the League's formation by encouraging uniformity in academic contests. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255 S.W.2d 177, 178 (1953). For a thorough examination of the League's formation, see R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 28-42 (1956).

16. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255 S.W.2d 177, 178 (1953) (League operated under University of Texas auspices); *see also* UNIVERSITY INTERSCHOLASTIC LEAGUE, UNIVERSITY INTERSCHOLASTIC LEAGUE PAMPHLET 1 (Jan. 20, 1984) (League operated under University of Texas control). The League operates today under the Division of Continuing Education of the University of Texas. *See* Marshall, *Introduction* to UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES 16 (75th anniv. ed. 1984-1985).

17. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255 S.W.2d 177, 179 (1953).

18. *See id.* at 127, 255 S.W.2d at 179; *accord* Sims v. University Interscholastic League, 111 S.W.2d 814, 821 (Tex. Civ. App.—Beaumont 1937, writ ref'd n.r.e.) (League growth demanded by abuses in athletic competitions). *See generally* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 43-56 (1956) (discusses League growth in early years).

19. *See* Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981); *see also* Saenz v. University Interscholastic League, 487 F.2d 1026, 1027 (5th Cir. 1973) (League may be considered voluntary organization).

20. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 10, 11 (75th anniv. ed. 1984-1985); *see also* Saenz v. University Interscholastic League, 487 F.2d 1026, 1027 (5th Cir. 1973) (League membership fluctuates with payment of annual dues).

membership had risen to 2647.[21] This rapid growth is attributable initially to the consolidation of small public schools into larger schools and school districts.[22] In turn, these larger schools and school districts, emphasizing athletic and academic contests as educational tools, sought League membership because the League offered a uniform system for managing these competitions.[23]

The growth and diversity of athletic and academic contests in public schools also spurred the League's expansion because with each new competition the need for uniformity demanded League attention.[24] The League likewise extended its authority and control by developing a decentralized, community-based network of committees to enforce its regulations while maintaining a centralized State Executive Council to formulate policy.[25] The League grew into such an integral part of the state's educational system that the Texas Supreme Court observed that League membership was considered an essential policy for a Texas public school.[26] By far, however, the major stimulus to League growth was the educators' desire to gain control over unregulated and inequitable competitions and contests.[27]

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21. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255 S.W.2d 177, 178-79 (1953).

22. *See id.* at 127, 255 S.W.2d at 179; *see also* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 33 (1956) (League growth coincided with consolidation of public schools).

23. *Cf.* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255 S.W.2d 177, 178 (1953) (expansion of activities coincided with League growth). Other associations arose during this time as athletics became an important part of public education. *See, e.g.,* NEW YORK PUBLIC HIGH SCHOOL ATHLETIC ASS'N, CONSTITUTION AND CONTEST RULES 18 (1984-1985) (New York organization established to accommodate athletic competitions); WASHINGTON INTERSCHOLASTIC ACTIVITIES ASS'N, CONSTITUTION, RULES, AND REGULATIONS 4 (1984-1985) (Washington association established to manage athletic competitions); WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMM'N, RULES AND REGULATIONS 6-8 (1984-1985) (organization founded to govern school athletics).

24. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 365-68 (1956) (examining parallel growth of League and sports).

25. *See id.* at 43-44. This same basic structure of the League still exists today. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 20-33, 40-41 (75th anniv. ed. 1984-1985) (League composed of district executive committees, legislative state council, and state executive committee).

26. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 135, 255 S.W.2d 177, 183 (1953). *See generally* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 45-56 (1956) (discussing League's solidification of authority).

27. *See, e.g.,* Kite v. Marshall, 494 F. Supp. 227, 229 (S.D. Tex. 1980) (League authority expanded in response to specific abuses in recruiting and competitive misconduct in athletics), *rev'd,* 661 F.2d 1027 (5th Cir. 1981), *cert. denied,* 457 U.S. 1120 (1982); Doe v. Marshall, 459 F. Supp. 1190, 1192 (S.D. Tex. 1978) (League regulations arise to combat specific practices that are seen as harmful to equitable competitions), *vacated as moot,* 622 F.2d 118 (5th Cir.

The League arose and grew to combat abuses present in both academic and athletic competitions.[28] Before the League was formed, many academic contests were burdened with local favoritism in judging, lack of centralized schedules, and failure to have uniform competition standards.[29] Pre-League athletic competitions were plagued with problems, such as the lack of a uniform playoff system, no age limitation for participants,[30] and no uniform regulations for football or track contests.[31] These conditions demonstrated the need for an organization like the League to exercise a unified regulatory scheme to promote equitable competitions.[32] In response to these problems, the League drafted its first eligibility and participation requirements.[33] The League brought uniformity to extracurricular activities and continued to expand its regulatory power by addressing new problems, such as recruiting and coaching improprieties.[34]

By the mid-1950s, the League established itself as the sole governing body of all interscholastic activities in public schools.[35] The League's financial

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1980); Sullivan v. University Interscholastic League, 616 S.W.2d 170, 173 (Tex. 1981) (rules promulgated by League sought to prevent disruptive, inequitable conduct).

28. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 350 (1956) (unfair competitions in most activities prompted League growth).

29. *See id.* at 145-60.

30. *See id.* at 348. Pre-League athletics often amounted to lopsided contests between semi-professional teams and ordinary students. *See id.* at 348.

31. *See id.* at 353 (noting lack of athletic regulations).

32. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255 S.W.2d 177, 179 (1953); *see also* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 294-96 (1982) (interscholastic associations' purpose to offer uniform management of high school activities).

33. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 373 (1956) (League rules sought equal and fair competitions). These initial eligibility rules controlled student transfers and age limitations. *See id.* at 373. The League also regulated the activities of the students during the summer months. *See* Kite v. Marshall, 494 F. Supp. 227, 229-30 (S.D. Tex. 1980) (League restricting summer camp participation beginning in 1962), *rev'd,* 661 F.2d 1027 (5th Cir. 1981), *cert. denied,* 457 U.S. 1120 (1982).

34. *See* Sullivan v. University Interscholastic League, 616 S.W.2d 170, 173 (Tex. 1981) (transfer rules sought to discourage recruiting activities). *See generally* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 292-97 (1982) (discussing justifications for associations' regulations, especially transfer rules).

35. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 135, 255 S.W.2d 177, 183-84 (1953). Organizations in other states had also solidified their control over their students' extracurricular activities by this time. *See* WASHINGTON INTERSCHOLASTIC ACTIVITIES ASS'N, CONSTITUTION, RULES, AND REGULATIONS 4 (1984-1985) (association's authority recognized state-wide); WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMM'N, RULES AND REGULATIONS 6-8 (1984-1985) (strength of association consolidated over all extracurricular activities).

successes, arising from increasing membership dues[36] and increasing attendance at League-sponsored sport events, solidified the League's independent regulatory authority.[37] Through its increased financial strength, the League was able to sponsor additional competitions, such as music, drama, and swimming, which had not previously been emphasized in Texas schools.[38] The League also began to offer athletic competitions for girls.[39] The League's sponsorship of girls athletics accomplished two important goals: first, female students were accorded an opportunity to participate in athletic contests, and second, it completed the League's assumption of control over all student extracurricular activities in Texas public schools.[40]

III. THE LEAGUE TODAY: WHAT IS IT?

A. *Description of the League and Its Functioning*

The League is presently the largest contest-oriented organization in the world.[41] The current membership includes every public school in Texas.[42] Over 750,000 Texas school students are subject to League regulation when participating in extracurricular activities.[43] The League sponsors over fifty-five official contests or events annually and also conducts pilot programs for other activities to determine if official sponsorship is feasible.[44] Since 1969,

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36. R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 33-34 (1956) (additional member schools paid new annual dues).

37. *See* id. at 372 (financial stability of League aided consolidation of League authority).

38. *See id.* at 378-79 (pilot programs in minor sports, such as baseball and golf, added with increased financial strength).

39. *See id.* at 382-95.

40. *See id.* at 382-95 (previously all students were not subject to League regulation).

41. *See* Marshall, *Introduction* to UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES 16 (75th anniv. ed. 1984-1985); UNIVERSITY INTERSCHOLASTIC LEAGUE, UNIVERSITY INTERSCHOLASTIC LEAGUE PAMPHLET 1 (Jan. 20, 1984) (League largest organization of its kind).

42. Telephone interview with Bailey Marshall, Ph.D., Executive Director of University Interscholastic League (Feb. 11, 1985) (discussing League's composition). Total League membership during the 1984-1985 term is 1157 high schools and 4250 junior high and elementary schools. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, UNIVERSITY INTERSCHOLASTIC LEAGUE PAMPHLET 2 (Jan. 20, 1984). Membership in the League is set annually through dues and Texas Education Agency accreditation requirements. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 10-11 (75TH ANNIV. ED. 1984-1985).

43. *See* F. HOWARD, ELIGIBILITY 110 (1984) (compilation of private and public athletic-oriented associations, including National Federation of State High School Associations; specifies number of students attending League-member schools).

44. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 380(a) (75th anniv. ed. 1984-1985). The League often works in conjunction with private associations to develop a contest or sport for official League adoption. *See* Texas High School

the League has been a member of the National Federation of State High School Associations, which encourages uniformity in all interscholastic activites throughout the United States and abroad.[45] Not only does the League exercise extensive authority state-wide,[46] it also functions much like an administrative entity.[47]

The League today functions as an ordinary administrative agency, exercising legislative,[48] executive,[49] and judicial[50] powers in governing extracurricular activities in Texas schools.[51] The League has only recently restructured its internal functioning mechanisms so as to increase the efficiency of League decisionmaking.[52] The most important recent reforms of League rules involve intra-League procedures for hearings and appeals.[53] The new League

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Gymnastics Coaches Ass'n v. Andrews, 532 S.W.2d 142, 145 (Tex. Civ. App.—San Antonio 1975, writ dism'd) (gymnastics coaches' association worked with League to develop gymnastics as official sport).

45. *See* F. HOWARD, ELIGIBILITY 108-11 (1984) (notes League membership and purposes of National Federation). The National Federation of State High School Associations regulates athletic and academic associations from all 50 states, the District of Columbia, Guam, the Virgin Islands, and Canada. *See id.* at 108-11.

46. *See* Blue v. University Interscholastic League, 503 F. Supp. 1030, 1033 (N.D. Tex. 1980) ("UIL manages and governs all interscholastic league activities . . . in Texas public high schools.").

47. Interview with Bailey Marshall, Ph.D., Executive Director of the University Interscholastic League, in Austin, Tex. (Jan. 16, 1985) (described internal working of League like that of administrative agency).

48. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 32 (75th anniv. ed. 1984-1985). The Legislative Council is the primary body for the enactment of League rules and policies. *See id.* § 24. The scope of the Legislative Council's authority is now circumscribed by the State Board of Education. *See* TEX. EDUC. CODE ANN. § 21.921(b) (Vernon Supp. 1985) (League rules subject to State Board of Education review).

49. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 25 (75th anniv. ed. 1984-1985) (District Executive Committee primary enforcement mechanism for League rules and regulations).

50. *See id.* § 28 (State Executive Committee final arbiter within League for all rule disputes).

51. *Cf.* F. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 27 (1982) (administrative agencies exercise combination of legislative, executive, and judicial powers); Harriman, *The Development of Administrative Law in the United States,* 25 YALE L.J. 658, 665 (1916) (administrative agencies are combination of all governmental powers).

52. Interview with Bailey Marshall, Ph.D., Executive Director of the University Interscholastic League, in Austin, Tex. (Jan. 16, 1985) (discussing recent revisions in League's internal functioning).

53. *Id.* The League previously provided no specific provisions for hearings and appeals. *Compare* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 9-1-3 (1983-1984) (providing for appeal within League but without description of proper procedural methods to do so) *with* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 100-123 (75th anniv. ed. 1984-1985) (hearing and appeal procedures explicitly created).

procedures provide for a hearing in any contested case,[54] an opportunity to present evidence,[55] a right to cross-examination,[56] a compilation of a written record,[57] and the opportunity to appeal to the State Executive Committee.[58] The League also adopted the standards established by the Administrative Procedure and Texas Register Act (APTRA)[59] to govern many areas of League decisionmaking.[60]

The League also modified its rule-making process in the 1984-1985 term.[61] The provision for public hearings on rule changes is a major alteration in the League's rule-making process since the procedure previously had been closed to the public.[62] The League rule-making system is now directed to-

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54. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 102(a) (75th anniv. ed. 1984-1985). A contested case is one in which an application of the constitution or rules to a person is in dispute. *See id.* § 101. All parties must be given adequate notice of the evidentiary hearing. *See id.* § 102(b) (notice must be written and inform party of dispute).

55. *See id.* § 103. All relevant evidence, regardless of federal or state rules of evidence, is admissible. *See id.* § 110. During a League hearing, evidentiary privileges will be recognized. *See id.* § 110(b). Only upon a showing of good cause will discovery be permitted. *See id.* § 116(a).

56. *See id.* § 112. Each party is also allowed legal representation. *See id.* § 114(a).

57. *See id.* § 105. The written record contains (1) all pleadings, motions, and interlocutory rulings, (2) evidence received and considered, (3) statement of officially noticed facts, (4) offers and questions of proof, objections, and appropriate rulings, (5) findings of facts and conclusions of rule applicability, (6) decisions, reasons, or reports of hearing officer, and (7) all League memoranda and material. *See id.* § 105(a).

58. *See id.* § 122. The State Executive Committee will affirm the lower decision if it is reasonable, but will reverse if the League has no jurisdiction or if its decision is arbitrary. *See id.* § 122(b). The appeal decision is made from the written record; a new evidentiary hearing is not allowed. *See id.* § 122(b).

59. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1985). APTRA applies to administrative agencies with state-wide jurisdiction. *See id.* § 1. *See generally* Comment, *Administrative Law: Journey Through the Administrative Process and Judicial Review of Administrative Actions,* 16 ST. MARY'S L.J. 155, 159-72 (1984) (discussing APTRA's requirements and effects in Texas).

60. *Compare* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 13(f) (Vernon Supp. 1985) (requires written record composed of pleadings, motions, rulings, objections, and agency correspondence) *with* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 105 (75th anniv. ed. 1984-1985) (League record requirements specifically track APTRA's standards). The League also prohibits *ex parte* communications and expressly provides that APTRA's standards will govern. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 123 (75th anniv. ed. 1984-1985).

61. *Compare* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 15-1-1 (1983-1984) (rule-making authority vested in legislative council with no provisions for public hearings) *with* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 332 (75th anniv. ed. 1984-1985) (providing amendment process for constitution or rules with public hearings).

62. *Compare* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 15-1-1 (1983-1984) (providing for private member referendum of rules proposed by

ward deliberate, evidence-supported decisions and rules.[63] The League has also instigated a "Five Year" Development Plan to encourage public participation in the League rule-making process.[64] The goal of the Plan is to promote further uniformity in League decisions, flexibility in application of League standards, and decentralized authority.[65] Although the League presently exercises state-wide authority through an organization functioning as an administrative body, its legal status is ambiguous.[66]

B. *Determining the League's Legal Status*

1. League Defined as a Private Association

A private association is generally characterized as a voluntary collection of contracting individual members.[67] An organization is classified as an independent, private association when its members freely consent to member-

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legislative council) *with* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 302 (75th anniv. ed. 1984-1985) (all rule changes require open public discussion). The new public hearing provision allows any interested person, including the State Board of Education representatives, to participate in the public hearing. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 302(a) (75th anniv. ed. 1984-1985). Twenty days notice is required before a hearing may be convened. *See id.* § 302 (b).

63. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 300(a) (75th anniv. ed. 1984-1985). The current League rules requiring open public meetings in contested cases and rule amendment proceedings appear to satisfy the Open Meeting Act for state administrative entities. *See* TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1985); *cf.* University Interscholastic League v. Payne, 635 S.W. 2d 754, 758 (Tex. App.—Amarillo 1982, writ dism'd) (question whether League's previous practice of closed meetings undercut its claim of administrative status posed by court but not addressed); Spain v. Louisiana High School Athletic Ass'n, 398 So. 2d 1386, 1391 (La. 1981) (athletic association must comply with state's open meeting law).

64. Interview with Bailey Marshall, Ph.D., Executive Director of the University Interscholastic League, in Austin, Tex. (Jan. 16, 1985). The encouragement of public participation in the agency rule-making process is also an underlying purpose of APTRA. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 1 (Vernon Supp. 1985).

65. Interview with Bailey Marshall, Ph.D., Executive Director of the University Interscholastic League, in Austin, Tex. (Jan. 16, 1985).

66. *Compare* University Interscholastic League v. Maroney, 681 S.W.2d 285, 287 (Tex. App.—Austin 1984, writ ref'd) (League not state agency for purpose of exemption from appeal bond requirement) *and* University Interscholastic League v. Payne, 635 S.W.2d 754, 758 (Tex. App.—Amarillo 1982, writ dism'd) (League not agency of state and must file appeal bond) *with* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) (League is "imbued with ample characteristics to warrant the trial court's determination that the organization is an agency of the State of Texas") *and* University Interscholastic League v. Green, 583 S.W.2d 907, 909 (Tex. Civ. App.—Corpus Christi 1979, no writ) (League is state agency).

67. *See* Chafee, *The Internal Affairs of Associations Not for Profit,* 43 HARV. L. REV. 993, 1001-02 (1930) (private associations contractual in nature); *Developments in the Law—Judicial Control of Private Associations,* 76 HARV. L. REV. 983, 1001-02 (1963) (private association's authority derived from contractual agreement of members).

ship and governance by the association's rules and regulations.[68] Several extracurricular-activities associations in other states have been accorded the status of independent, private association because membership in the organizations is voluntary.[69] The League maintains that its membership is voluntary for all Texas public schools;[70] therefore, a Texas court, following the reasoning of other jurisdictions, could classify the League as an independent association empowered by the consent of its members.[71] One Texas court has implied that the League may be a private association by stating that "the U.I.L. is a self-governing, independent entity, established by its members."[72]

In a series of appeal bond cases, Texas courts have enunciated two further justifications for classifying the League as a private association.[73] One court concluded that the failure of the League to demonstrate any legislative fund-

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68. *See* Chafee, *The Internal Affairs of Associations Not for Profit,* 43 HARV. L. REV. 993, 1001 (1930) (consent essential element of private association).

69. *See, e.g.,* Robinson v. Illinois High School Ass'n, 195 N.E.2d 38, 42 (Ill. App. 1963) (high school association private organization because schools voluntarily join or leave); Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ., 552 S.W.2d 685, 687 (Ky. App. 1977) (high school association private organization); Tennessee Secondary School Athletic Ass'n v. Cox, 425 S.W.2d 597, 602 (Tenn. 1968) (member schools voluntarily join athletic association; therefore, considered private association). Other interscholastic organizations also claim to be voluntary non-profit associations independent of state authority. *See* NEW HAMPSHIRE INTERSCHOLASTIC ATHLETIC ASS'N, HANDBOOK & CONSTITUTION art. IV (31st ed. 1984-1985) (membership voluntary); WASHINGTON INTERSCHOLASTIC ATHLETIC ASS'N HANDBOOK § 3.11 (1984-1985) (private association with voluntary membership); Letter from John E. Roberts, Executive Director of Wisconsin Interscholastic Athletic Association, to Stephen S. Goodman (Jan. 29, 1985) (Wisconsin organization voluntary association independent of any state authority).

70. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 10 (75th anniv. ed. 1984-1985); UNIVERSITY INTERSCHOLASTIC LEAGUE, UNIVERSITY INTERSCHOLASTIC LEAGUE PAMPHLET 1 (Jan. 20, 1984) (League voluntary organization of member schools).

71. *Cf.* Herbert v. Ventetuolo, 480 A.2d 403, 407 (R.I. 1984) (high school organization purely voluntary; therefore, viewed as private association).

72. *See* University Interscholastic League v. Payne, 635 S.W.2d 754, 757 (Tex. App.—Amarillo 1982, writ dism'd).

73. *See* University Interscholastic League v. Maroney, 681 S.W.2d 285, 287 (Tex. App.—Austin 1984, writ ref'd) (League not established by statute; therefore, private association for appeal bond purposes); University Interscholastic League v. Payne, 635 S.W.2d 754, 756 (Tex. App.—Amarillo 1982, writ dism'd) (League private association and required to post appeal bond because no legislative funding); *see also* University Interscholastic League v. Hardin-Jefferson Indep. School Dist., 648 S.W.2d 770, 773 (Tex. App.—Beaumont 1983, no writ) (citing University Interscholastic League v. Payne, 635 S.W.2d 754 (Tex. App.—Amarillo 1982, writ dism'd)). The appeal bond issue centered upon whether the League was exempt or "excused by law" from filing an appeal bond. *See* University Interscholastic League v. Maroney, 681 S.W.2d 285, 286 (Tex. App.—Austin 1984, writ ref'd). State entities are excused from filing appeal bonds while private litigants are not. *See* TEX. REV. CIV. STAT. ANN. art. 279a (Vernon 1973); *id.* art. 2276 (Vernon 1971); *id.* art. 2072 (Vernon 1964); *see also* TEX. R. CIV. P. 356(c) (if excused by law, litigant need not file appeal bond).

ing justified its holding that the League was a private association and not a state entity.[74] The court also reasoned that the lack of any statutory recognition of the League as a state entity supported its decision that the League was a private association.[75] In *University Interscholastic League v. Maroney,*[76] the Austin court of appeals recently rejected the League's argument that the new educational reform bill, House bill 72,[77] recognized the League's status as a state entity.[78] The legislation provided that the League was to be part of the University of Texas,[79] but the court concluded that the League was not a state entity for appeal bond purposes because the phrase merely identified the League rather than establishing its legal status.[80] The League, therefore, could be classified as a private association[81] since it possesses characteristics similar to other private associations, such as voluntary membership,[82] an apparent lack of legislative funding,[83] and failure of specific statutory recognition of the League as a state entity.[84]

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74. *See* University Interscholastic League v. Payne, 635 S.W.2d 754, 757 (Tex. App.—Amarillo 1982, writ dism'd). The court's decision, however, was based only on the record and did not entail a final judgment on the matter of legislative funding. *See id.* at 757-58. The court also noted that the League had previously filed an appeal bond in another case. *See id.* at 758 (citing University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 130, 255 S.W.2d 177, 181 (1953)).

75. *See* University Interscholastic League v. Payne, 635 S.W.2d 754, 758 (Tex. App.—Amarillo 1982, writ dism'd). *Payne* was cited as controlling authority in both *Marshall* and *Hardin-Jefferson,* without further elaboration by the courts. *See* University Interscholastic League v. Hardin-Jefferson Indep. School Dist., 648 S.W.2d 770, 772-73 (Tex. App.—Beaumont 1983, no writ); Marshall v. Brown, 635 S.W.2d 578, 580 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.).

76. 681 S.W.2d 285 (Tex. App.—Austin 1984, writ ref'd).

77. *See* Act of June 28, 1984, ch. 28, § 1, 1984 Tex. Sess. Law Serv. 269 (Vernon).

78. *See* University Interscholastic League v. Maroney, 681 S.W.2d 285, 287 (Tex. App.—Austin 1984, writ ref'd).

79. *See* TEX. EDUC. CODE ANN. § 21.921(b) (Vernon Supp. 1985). The provision, while identifying the League as a part of the University of Texas, also requires the League to submit its rules to the State Board of Education for review and approval. *See id.*

80. *See* University Interscholastic League v. Maroney, 681 S.W.2d 285, 287 (Tex. App.—Austin 1984, writ ref'd). The court also reasoned that House bill 72 did not primarily intend to deal with the League's status as part of its educational reformation. *See id.* at 287.

81. *See* University Interscholastic League v. Maroney, 681 S.W.2d 285, 286 (Tex. App.—Austin 1984, writ ref'd) (League not state agency for appeal bond purposes, but is in position of private organization). One Texas appellate court has accepted a lower court's conclusion that the League is not a state agency as a matter of law. *See* Marshall v. Brown, 635 S.W.2d 578, 580 n.3 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.).

82. *See* University Interscholastic League v. Payne, 635 S.W.2d 754, 757 (Tex. App.—Amarillo 1982, writ dism'd) (League members voluntarily submit to League authority; therefore, treated as private litigant for appeal bond purposes).

83. *See id.* at 758.

84. *See* University Interscholastic League v. Maroney, 681 S.W.2d 285, 287 (Tex. App.—Austin 1984, writ ref'd) (H.B. 72 did not recognize League as state agency).

2. League Defined as a State Administrative Entity

Activities associations have also been defined as state instrumentalities, rather than private associations.[85] The most common justification for according athletic and academic associations the status of public administrative agencies is that these organizations exercise substantial control over an important part of the educational process.[86] It is recognized that because of their degree of involvement in competitive educational activities, these associations are exercising authority normally vested in state agencies, such as boards of education or state education commissions.[87] In a similar fashion, the League exercises substantial control over extracurricular activities in Texas public schools,[88] and the League exercises authority only under the

85. *See, e.g,* Kriss v. Brown, 390 N.E.2d 193, 199, 201 (Ind. App. 1979) (high school association involved with public educational function, therefore part of state educational entity); Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 560-61 (Iowa 1972) (athletic association state entity because of substantial involvement with educational process); Anderson v. South Dakota High School Activities Ass'n, 247 N.W.2d 481, 484 (S.D. 1976) (high school association treated as part of school board). *See generally* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 308-13 (1982) (discussing high school activities associations treated as public administrative entities).

86. *See* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 246-47 (Fla. Dist. Ct. App. 1982) (association is public administrative agency because it works closely with State Department of Education and controls all extracurricular activities), *rev'd in part on other grounds,* 434 So. 2d 306 (Fla. 1983); Spain v. Louisiana High School Athletic Ass'n, 398 So. 2d 1386, 1390 (La. 1981) (athletic association controls such an important area of state sponsored education that it is treated as administrative state entity). Some state activities associations are expressly established by state statute, aligning them closely with their respective state agency. *See* NEV. REV. STAT. § 386.420 (1984) (establishing Nevada Interscholastic Activities Association and state control over activities and procedures); WASH. REV. CODE ANN. § 28A.58.125 (1984) (Washington Interscholastic Activities Association governed by State Board of Education); W. VA. CODE § 16.2 (1967) (West Virginia Secondary School Activities Commission given state authority to administer extracurricular activities). Extracurricular activities are now important educational tools in public schools. *See* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 291 (1982); R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 99 (1956) (academic and athletic competitions important motivational devices in public education).

87. *See* Bunger v. Iowa High School Athletic Ass'n, 197 N.W. 2d 555, 564-65 (Iowa 1972) (association's power comes from state through state agents like superintendents or school boards); Spain v. Louisiana High School Athletic Ass'n, 398 So. 2d 1386, 1390 (La. 1981) (organization operates under control of major educational bodies and is part of them); *see also* Brown v. Wells, 181 N.W.2d 708, 711-12 (Minn. 1970) (Minnesota High School Association state administrative entity because controls substantial amount of educational area).

88. *See, e.g.,* Blue v. University Interscholastic League, 503 F. Supp. 1030, 1033 (N.D. Tex. 1980) (League controls all extracurricular activities throughout Texas); University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255 S.W.2d 177, 179 (1953) (extracurricular activities subject to League management and control); University Interscholastic

control of the State Board of Education.[89] Texas courts' recognition of the League as a state agency[90] is consistent with other courts recognizing that an association is a state entity because it exercises comprehensive control over part of the public educational system.[91]

Another justification for classifying the League as a state administrative entity is its close relationship with a recognized state agency, the University of Texas at Austin.[92] The University was created as a state entity by the Texas Constitution,[93] with the Austin campus as the principal educational center of the University of Texas system.[94] The League currently operates under the Division of Continuing Education of the University[95] and is subject to the rules and regulations of the University.[96] The composition of the League's executive staff is controlled by the appointment power of the presi-

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League v. Payne, 635 S.W.2d 754, 757 (Tex. App.—Amarillo 1982, writ dism'd) (League has "near absolute control of competition between public schools in Texas").

89. *See* TEX. EDUC. CODE ANN. § 21.921 (Vernon Supp. 1985). The League must submit its rules and procedures to the Board of Education for approval or modification. *See id.* The League's relationship with the Board of Education was strengthened by the Texas educational reform since the Board is authorized to oversee extracurricular activities in public schools. *See id.* § 21.920.

90. *See, e.g.*, Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) ("UIL is clearly imbued with ample characteristics to warrant . . . determination that the organization is an agency of the State of Texas"); Stock v. Texas Catholic Interscholastic League, 364 F. Supp. 362, 364 (N.D. Tex. 1973) (League is state agency promulgating regulations on participation in interscholastic sports); University Interscholastic League v. Green, 583 S.W.2d 907, 909 (Tex. Civ. App.—Corpus Christi 1979, no writ) (League is state agency).

91. *See* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 246-47 (Fla. Dist. Ct. App. 1982) (association is arm of state because of substantial control over state interest in education), *rev'd in part on other grounds*, 434 So. 2d 306 (Fla. 1983); Spain v. Louisiana High School Athletic Ass'n, 398 So. 2d 1386, 1389-90 (La. 1981) (association subject to requirements as state entity in regard to open meetings law because of its involvement in public education). *See generally* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review*, 11 J.L. & EDUC. 291, 309-11 (1982) (discussing classification of athletic/academic associations as public agencies).

92. *See* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) ("as an integral part of the University of Texas at Austin, the UIL constitutes a governmental entity"). *But see* University Interscholasic League v. Payne, 635 S.W.2d 754, 757-58 (Tex. App.—Amarillo 1982, writ dism'd) (connection between League and University of Texas not established to warrant conclusion of relationship sufficient to make League part of University). *Payne*, however, was decided only with the historical evidence present in that record, admitted by the court to be sparse and insubstantial. *See id.* at 757.

93. *See* TEX. CONST. art. VII, § 10 (Vernon 1955) (legislature authorizes creation of state university).

94. *See* TEX. EDUC. CODE ANN. § 67.02 (Vernon 1972).

95. *See* Marshall, *Introduction* to UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES 16 (75th anniv. ed. 1984-1985).

96. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 27(a), 29(b), 30(a), 31(a), 100(a), 300(b) (75th anniv. ed. 1984-1985).

dent of the University,[97] and all employees of the League are employed and paid by the University.[98] League funds are also subject to the University's control and management.[99] The League, furthermore, specifically claims to be part of the University.[100] A similar activities association in another jurisdiction, which was closely aligned with a governmental entity, was classified as a state administrative agency.[101] It would, therefore, be consistent for the League to be accorded similar classification in light of its close association to a major state educational entity.[102]

League status as a state administrative entity can also be based upon a state entity test recently enunciated by the Fifth Circuit.[103] The Fifth Circuit stated that a court determining state entity status should consider how the organization's property is classified, how the organization's funds are controlled and by whom, whether the organization is subject to state audits, and whether the organization is subject to a state agency's control.[104] A court applying this test would first recognize that the League's property is state property controlled by the University.[105] Second, the University

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97. *See id.* §§ 27(b), 29(b) (President of University appoints Executive Director of League and nine-member executive council).

98. *See* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973); *see also* Lopez v. University Interscholastic League, No. 16,275, slip op. at 6 (Tex. Civ. App.—San Antonio, Mar. 12, 1980) (available May 1, 1980, on LEXIS, Texas library, Agcase file) (University controls all League funds).

99. Interview with Bailey Marshall, Ph.D., Executive Director of the University Interscholastic League, in Austin, Tex. (Jan. 16, 1985). Dr. Marshall stated the League is a state agency through the University. *Id.* The League's annual budget and expenditures are prepared and approved by University officials. *See* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973).

100. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 20 (75th anniv. ed. 1984-1985).

101. *See* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 246-47 (Fla. Dist. Ct. App. 1982) (activities organization involved with state education system so that it was part of that state entity), *rev'd in part on other grounds,* 434 So. 2d 306 (Fla. 1983); *see also* Spain v. Louisiana High School Athletic Ass'n, 398 So. 2d 1386, 1390 (La. 1981) (organization treated as state entity because of close ties to state educational field).

102. *See* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) (intimate relationship with state agency justifies League status as state agency); *see also* Lopez v. University Interscholastic League, No. 16, 275, slip op. at 6 (Tex. Civ. App.—San Antonio, Mar. 12, 1980) (available May 1, 1980, on LEXIS, Texas Library, Agcase file) (University and League are closely related and League is state agency).

103. *Cf.* United Carolina Bank v. Board of Regents, 665 F.2d 553, 558 (5th Cir. 1982) (educational institution accorded state agency status because it meets state entity requirements).

104. *See id.* at 558.

105. *See* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) (League property owned by University). The main headquarters for the League is supplied by the University, as is the majority of equipment. Interview with Bailey Marshall, Ph.D., Executive Director of University Interscholastic League, in Austin, Tex. (Jan. 16, 1985).

strictly controls the League's funds, whether they come from member schools or from the legislature.[106] Third, the origins and use of League funds are comprehensively reported and subject to state audits.[107] Finally, the League is subject to internal control by the University's standards requiring equal opportunity in employment practices and certain liability standards.[108] By applying these guidelines, the League appears to satisfy the Fifth Circuit's requirements for classification of an organization as a state administrative agency.[109]

3. Suggested Legal Definition for the League

The task of Texas courts is to choose between classifying the League as either a private association or a state administrative agency so as to define and circumscribe the League's authority.[110] No consistent legal definition of the League has yet emerged from reported cases, nor has the League's authority over extracurricular activities been adequately defined.[111]

Reexamination of the three reasons for classifying the League as a private association may suggest that the League should be identified as a state administrative agency.[112] Initially, the voluntary membership justification for treating the League as a private association has been questioned.[113] When

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106. *See* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) (University controls League funds and expenditures); *see also* Lopez v. University Interscholastic League, No. 16,275, slip op. at 6 (Tex. Civ. App.—San Antonio, Mar. 12, 1980) (available May 1, 1980, on LEXIS, Texas library, Agcase file) (all League funds directly controlled by University).

107. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 866, 867 (75th anniv. ed. 1984-1985) (League funds controlled by University and subject to University audit); *see also* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) (University controls League funds).

108. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 27(a), 29(b), 30(a), 31(a), 100(a), 300(b) (75th anniv. ed. 1984-1985) (League rules and practices must meet standards required by University).

109. *Cf.* United California Bank v. Board of Regents, 665 F.2d 553, 558 (5th Cir. 1983) (university classified as state entity when its relationship to state established).

110. *Cf.* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 306-07 (1982) (courts must define organization's status in order to determine if organization has acted within its authority); Comment, *State High School Athlethic Associations: When Will A Court Interfere?,* 36 MO. L. REV. 400, 402-06 (1971) (in choosing appropriate standards of review, courts must define association's status).

111. *Compare* Marshall v. Brown, 635 S.W.2d 578, 580 n.3 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.) (League not state agency; like private organization) *with* University Interscholastic League v. Green, 583 S.W.2d 907, 909 (Tex. Civ. App.—San Antonio 1979, no writ) (League is state agency for some purposes).

112. *Cf.* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 320-21 (1982) (general propositions supporting interscholastic association as private association are questionable; classification as state entity preferable).

113. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255

an activities association restricted member schools from competing against non-member schools, thereby making it essential to join the organization to compete, one court stated that the organization was no longer consensual, and, therefore, any private association status was precluded.[114] In light of identical prohibitions promulgated by the League,[115] the involuntary quality of League membership should similarly foreclose private association status.[116]

Secondly, the justification for classifying the League as a private association, based on a lack of statutory recognition of the League as a state entity,[117] can be challenged in light of the overall intent of House bill 72 to restrict extracurricular activities and the League's power over these activities.[118] Although the *Maroney* court reasoned that the legislature did not intend to deal with the League's status or authority,[119] House bill 72, by its very language, intended to address the availability of extracurricular participation[120] and the League's authority over such activities.[121] Officials of the University and the League have stated, furthermore, that House bill 72 intended to define the League's status and authority in the Texas educational

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S.W.2d 177, 179 (1953) ("while membership in the League is 'technically' voluntary, it is actually compulsory").

114. *See* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 246 (Fla. Dist. Ct. App. 1982) (association could not be classified as private association when participation was, in effect, mandatory), *rev'd in part on other grounds,* 434 So. 2d 306 (Fla. 1983); *cf.* Spain v. Louisiana High School Athletic Ass'n, 398 So. 2d 1386, 1388 (La. 1981) (nonparticipation in athletic association meant no competition at all within state).

115. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 10, 11, 704, 902 (75th anniv. ed. 1984-1985).

116. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255 S.W.2d 177, 179 (1953) (League membership mandatory for school to compete in activities in Texas); *cf.* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 246-47 (Fla. Dist. Ct. App. 1982) (involuntary membership undercuts justification of treating organization as private association), *rev'd in part on other grounds,* 434 So. 2d 306 (Fla. 1983).

117. *See* University Interscholastic League v. Maroney, 681 S.W.2d 285, 287 (Tex. App.—Austin 1984, writ ref'd) (League not recognized by statute as part of state university); University Interscholastic League v. Payne, 635 S.W.2d 754, 757-58 (Tex. App.—Amarillo 1982, writ dism'd) (no statutory recognition of League status).

118. *Cf.* TEX. EDUC. CODE ANN. § 21.921(b) (Vernon Supp. 1985) (League is part of University of Texas and subject to Board of Education review); Schultze, *Educational Reform,* IV TEX. SCH. L. NEWS, Aug. 1, 1984, at 7 (H.B. 72 intended to reform entire extracurricular area in Texas public schools).

119. *See* University Interscholastic League v. Maroney, 681 S.W.2d 285, 287 (Tex. App.—Austin 1984, writ ref'd).

120. *See* TEX. EDUC. CODE ANN. § 21.920 (Vernon Supp. 1985) (legislature specifically modified requirements for participation in extracurricular activities).

121. *See id.* § 21.921(b) (League rules and regulations must be submitted for State Board of Education review and approval).

system by explicitly making it a part of the University.[122]

The final criterion by which a Texas court defined the League as a private association, lack of legislative funding,[123] is also subject to question in light of actual legislative funding of the League.[124] The legislature has financed the League through the University since 1915.[125] Additionally, the League receives financial support from the legislature through benefits received from the University, such as property and building usage, employees' salaries, and supplies.[126] In conclusion, when Texas courts consider the similarity of the League to other organizations classified as state administrative entities, the applicability of the Fifth Circuit's state entity test to the League, and the deficiencies underlying the private association criteria, they should legally define the League as a state administrative entity.[127] Classifying the League as an administrative agency will inevitably have ramifications on the level of judicial scrutiny accorded League decisions and rules.[128]

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122. Interview with Mark G. Yudof, Dean, University of Texas School of Law, in Austin, Tex. (Jan. 15, 1985) (educational reform laws meant to clarify League's position in Texas); Interview with Bailey Marshall, Ph.D., Executive Director of the University Interscholastic League, in Austin, Tex. (Jan. 16, 1985) (H.B. 72 intended to recognize League's position). The League claims its authority as a state entity from the Texas Education Code. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 20 (75th anniv. ed. 1984-1985); *see also* TEX. EDUC. CODE ANN. § 21.921(b) (Vernon Supp. 1985) (League part of University of Texas).

123. *See* University Interscholastic League v. Payne, 635 S.W.2d 754, 758 (Tex. App.—Amarillo 1982, writ dism'd) (League failed to demonstrate legislative funding; therefore, cannot be state administrative entity). It should be noted that the *Payne* decision was specifically made only on the record before that court. *See id.* at 757-58.

124. *See* Act of June 18, 1981, ch. 875, art. IV, 1981 Tex. Gen. Laws, Gen. & Spec. 3333, 3651 (legislative funding through grant to Extension Division of University of Texas).

125. *See, e.g.*, Act of June 14, 1979, ch. 843, art. V, 1979 Tex. Gen. Laws, Gen. & Spec. 2445, 2787 (funding to Extension Division); Act of June 5, 1957, ch. 385, art. V, 1957 Tex. Gen. Laws, Gen. & Spec. 870, 1100 (funding of League directly); Act of June 9, 1915, ch. 49, art. I, 1915 Tex. Gen. Laws 84, 97-98 (direct funding to League).

126. *See* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) (League supported by University through property grants and payment of salaries).

127. *Cf.* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 246-47 (Fla. Dist. Ct. App. 1982) (activities association classified as public entity because it exercises authority with state approval and is not consensual private association), *rev'd in part on other grounds*, 434 So. 2d 306 (Fla. 1983); Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 561-62 (Iowa 1972) (school association public entity because exercises state-like authority and receives public funding).

128. *See* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review*, 11 J.L. & EDUC. 291, 306 (1982) (judicial review of associations' decisions depends on definition of organizations).

IV. JUDICIAL INTERVENTION IN LEAGUE AFFAIRS

A. *Judicial Review of League Decisions*

Judicial review of League decisions often begins with an aggrieved student or school challenging the correctness of the League's determinations.[129] These challenges usually center upon the League's application of its rules,[130] as distinguished from constitutional objections to the rules themselves.[131] The most common methods of invoking judicial review of League decisions are temporary restraining orders and temporary injunctions.[132] The problem involved with judicial review of League decisions is determining the balance between proper judicial consideration and unnecessary invasion of the

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129. *See* University Interscholastic League v. Hardin-Jefferson Indep. School Dist., 648 S.W.2d 770, 772 (Tex. App.—Beaumont 1983, no writ) (student and school district sought to restrain League from enforcing disqualification decision); *see also* Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 559 (Iowa 1972) (student brought action to enjoin association's decision on ineligibility of student); Comment, *State High School Athletic Associations: When Will A Court Interfere?,* 36 MO. L. REV. 400, 402-06 (1971) (student often challenges association's decisions as not supported by evidence).

130. *Cf.* University Interscholastic League v. Hardin-Jefferson Indep. School Dist., 648 S.W.2d 770, 772 (Tex. App.—Beaumont 1983, no writ) (judgment based on sufficiency of evidence to support decision, not on validity of League rule); Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 307-09 (1982) (nonconstitutional challenges to association's decisions require inquiry into decisionmaking process).

131. *See* Comment, *State High School Athletic Associations: When Will A Court Interfere?,* 36 MO. L. REV. 400, 403-06 (1971) (state law and constitutional challenges are distinct objections to association's actions and rules).

132. *See, e.g.,* Doe v. Marshall, 459 F. Supp. 1190, 1191 (S.D. Tex. 1978) (student sought temporary injunction against League non-eligibility ruling), *vacated as moot,* 622 F.2d 118 (5th Cir. 1980); University Interscholastic League v. Green, 583 S.W.2d 907, 908 (Tex. Civ. App.—Corpus Christi 1979, no writ) (students attempted to enjoin League ruling); Texas High School Gymnastics Coaches Ass'n v. Andrews, 532 S.W.2d 142, 144 (Tex. Civ. App.—San Antonio 1976, writ dism'd) (parents sued for children to enjoin association decision through temporary restraining order). The use of temporary injunctive relief has posed considerable problems for the League and the courts. Interview with Lucius Bunton, Private Legal Counsel for the University Interscholastic League, in Austin, Tex. (Jan. 16, 1985) (discussing proliferation of injunction use in League affairs). The primary problem of temporary relief is that no definite judicial determination on the dispute is achieved because the complainant often takes a nonsuit once the competition has concluded. *Id; see also* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 59 (1956) (relief from League decisions often sought only for temporary purposes, such as allowing student to compete). Final judicial decisions on the validity of League decisions may also be foreclosed as moot. *See* University Interscholastic League v. Hardin-Jefferson Indep. School Dist., 648 S.W.2d 770, 771-72 (Tex. App.—Beaumont 1983, no writ) (challenge to disqualification moot because team defeated). In response to this problem, the League has provided that a student participating in a League event under court order who is finally determined ineligible shall forfeit that contest. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 705 (75th anniv. ed. 1984-1985).

League's authority.[133] The degree of judicial scrutiny afforded League decisions is largely dependent on the definitional status of the League as either a private association or a public entity.[134]

Organizations classified as private associations are generally given broad latitude in promulgating and enforcing their rules because the members voluntarily consent to the organization's control.[135] Courts have held that a private association's decision will not be reversed or subjected to close examination unless the decision is arbitrary, capricious, or evidences an abuse of discretion.[136] In these situations, the court presupposes the validity of the organization's decisions.[137] Applying this standard of judicial scrutiny, courts hesitate to impose their judgments on decisions of activities associations which have been considered private organizations due to their voluntary membership.[138] A Texas court has applied this standard of judicial review to a high school coaches' association because voluntary membership established its private association status.[139]

In contrast, if an interscholastic association is accorded the status of an administrative body of the state, the level of judicial examination in-

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133. *See* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 307-09 (1982) (judicial intervention in interscholastic association affairs must respect association's purposes while ensuring meaningful judicial review).

134. *See id.* at 306; *see also* Comment, *State High School Athletic Associations: When Will A Court Interfere?,* 36 MO. L. REV. 400, 402-06 (1971) (defining association's status essential to determining appropriate standard of review).

135. *See* Chafee, *The Internal Affairs of Associations Not for Profit,* 43 HARV. L. REV. 993, 1020-21 (1930) (private associations should enjoy general immunity from judicial interference); *see also Developments in the Law, Judicial Control of Actions of Private Associations,* 76 HARV. L. REV. 983, 990-94 (1963) (discussing intervention in association's decisions).

136. *See, e.g.,* Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028, 1030 (5th Cir. 1975) (court will not interfere in private association's decision unless arbitrary); Brown v. Wells, 181 N.W.2d 708, 710-11 (Minn. 1970) (organization's decisions only overturned if capricious and unsubstantiated); Texas High School Gymnastics Coaches Ass'n v. Andrews, 532 S.W.2d 142, 146 (Tex. Civ. App.—San Antonio 1976, writ dism'd) (court will not substitute its judgment for private association's decisions). Some courts have expressed this standard as contingent on the presence of fraud, mistake, or criminal misconduct in decisionmaking process. *See* Crandall v. North Dakota High School Activities Ass'n, 261 N.W.2d 921, 926 (N.D. 1978) (decision must evidence corruption or deceit to justify reversal).

137. *See* Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ., 552 S.W.2d 685, 687 (Ky. App. 1977) (association actions enjoy presumption of reasonableness and validity); *see also* Bruce v. South Carolina High School League, 189 S.E.2d 817, 820 (S.C. 1972) (private association decisions not disturbed if reasonable).

138. *See* Mozingo v. Oklahoma Secondary School Activities Ass'n, 575 P.2d 1379, 1381 (Okla. App. 1978); *see also* Marino v. Waters, 220 So. 2d 802, 806 (La. App. 1969) (private association's decision not set aside by court because of mere disagreement with decision).

139. *See* Texas High School Gymnastics Coaches Ass'n v. Andrews, 532 S.W.2d 142, 146 (Tex. Civ. App.—San Antonio 1976, writ dism'd).

creases.[140] The judicial standard of review for a public administrative entity demands that the challenged decision be the result of a reasonable and proper exercise of the entity's authority.[141] While giving deference to most administrative decisions of public entities,[142] courts require sufficient evidence that the administrative decision is justified and conscientiously made.[143] In *Kulovitz v. Illinois High School Association,*[144] a federal district court applied a public entity standard in reviewing the athletic association's decision to disqualify a student on eligibility grounds.[145] The court upheld the association's decision because the organization supported its conclusion with statistical data and a complete written record.[146] The *Kulovitz* case illustrates that the purpose of the public entity standard of judicial review is to demand that organizations, like the Illinois High School Association, be responsive to the school and student populations they govern through rea-

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140. *See* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 247 (Fla. Dist. Ct. App. 1982) (association's decisions subject to judicial review as if public administrative agency rather than private organization), *rev'd in part on other grounds,* 434 So. 2d 306 (Fla. 1983); *see also* Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 558 (Iowa 1972) (court treated athletic association as if part of state educational body).

141. *See* Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 558 (Iowa 1972) (high school organization must act reasonably in applying its rules); *see also* Barnhorst v. Missouri State High School Activities Ass'n, 504 F. Supp. 449, 457, 463-64 (W.D. Mo. 1980) (organization closely aligned with state educational system must act reasonably and within scope of power).

142. *See* Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 564-65 (Iowa 1972) (court will not ordinarily overturn association's decision); *see also* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 247 (Fla. Dist. Ct. App. 1982) (internal decisions of activities association subject to reasonable judicial scrutiny), *rev'd in part on other grounds,* 434 So. 2d 306 (Fla. 1983). *See generally* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 309-12 (1982) (discussing public entity standard of judicial review as applied to activities associations).

143. *See* Kulovitz v. Illinois High School Ass'n, 462 F. Supp. 875, 879 (N.D. Ill. 1978); *see also* Kriss v. Brown, 390 N.E.2d 193, 196, 202 (Ind. App. 1979) (decision of association will not be overturned by court if reasonable). The public entity standard of review is not a demanding requirement, and most association decisions would survive unless they are completely unwarranted. *Cf.* Barnhorst v. Missouri State High School Activities Ass'n, 504 F. Supp. 449, 457, 463-64 (W.D. Mo. 1981) (reasonably substantiated decision upheld); Kulovitz v. Illinois High School Ass'n, 462 F. Supp. 875, 878 (N.D. Ill. 1978) (decision of athletic association upheld if record of formal deliberation present); Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 559 (Iowa 1972) (court required athletic association to factually support decision).

144. 462 F. Supp. 875, 878-79 (N.D. Ill. 1978).

145. *See id.* at 878.

146. *See id.* at 879; *accord* Hebert v. Ventetuolo, 638 F.2d 5, 6 (1st Cir. 1981) (athletic association decision upheld as supported by sufficient evidence of reasonableness); Kriss v. Brown, 390 N.E.2d 193, 196 (Ind. App. 1979) (organization's decision supported by reasonable deliberation; therefore, upheld).

sonable and factually supported decisionmaking.[147]

The choice between these two possible legal definitions of the League will determine which standard of judicial review Texas courts should employ in examining League decisions.[148] If the League is classified as a private association, then League decisions will be presumed valid and rarely subject to judicial reversal.[149] Alternatively, if the League is accorded an administrative entity status, courts will require League decisions to be factually supported and reasonable.[150] Several factors support application of the public entity standard in reviewing League decisions.[151] First, the League's membership, while " 'technically' voluntary,"[152] is, in fact, a requirement for public schools if they wish to offer extracurricular activities for their students.[153] This de facto membership requirement undercuts the League's status as a private, consensual association.[154] Second, while deference is generally accorded a private association's decisions because the members exercise control over the policies of the organization, students exercise no such

147. *See* Kulovitz v. Illinois High School Ass'n, 462 F. Supp. 875, 878 (N.D. Ill. 1978) (association decisions as to student must be reasonable); Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 311-12 (1982) (public entity standard requires that association's decisions be reasonable exertion of authority). Courts applying the public entity standard have generally upheld the association's decisions, but some have been reversed as capricious or outside of the association's authority. *See* Bunger v. Iowa High School Athletic Ass'n, 197 N.W. 2d 555, 564 (Iowa 1972) (eligibility rule prohibiting any consumption of alcohol by student participant invalidated as outside association's scope of authority).

148. *See* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 306-07 (1982) (defining legal status of organizations determines appropriate standard of judicial review).

149. *Cf.* Chabert v. Louisiana High School Athletic Ass'n, 323 So. 2d 774, 777 (La. 1975) (private high school association's decisions presumed reasonable and valid); Hebert v. Ventetuolo, 480 A.2d 403, 407-08 (R.I. 1984) (high school association's decisions upheld as valid in most situations).

150. *Cf.* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 246-47 (Fla. Dist. Ct. App. 1982) (state administrative entity's decision must be reasonable and factually supported), *rev'd in part on other grounds,* 434 So. 2d 306 (Fla. 1983); Kriss v. Brown, 390 N.E.2d 193, 196-97 (Ind. App. 1979) (association's decision upheld because supported by sufficient evidence).

151. *Cf.* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 320-21 (1982) (public entity standard offers reasonably effective judicial review of high school association's decisions).

152. *See* University Interscholastic League v. Midwestern Univ., 152 Tex. 124, 127, 255 S.W.2d 177, 179 (1953).

153. *See id.* at 135, 255 S.W.2d at 183 (membership in League essential to compete in extracurricular activities in Texas).

154. *See* Spain v. Louisiana High School Athletic Ass'n, 398 So. 2d 1386, 1388 (La. 1981) (mandatory membership in organization result of necessity of membership to participate in any event or contest).

power within the League's structure.[155] The League's decisions affecting students, therefore, are not levied against consenting members, but are more analogous to public regulations than to a private association's decisions.[156] Third, the League is more aptly defined as a public administrative agency because it exercises authority under the control of the State Board of Education,[157] the Texas Education Agency,[158] and the University.[159] Finally, the League is similar to other interscholastic organizations which have been classified as public entities and whose decisions have been subjected to the public entity standard of review.[160] By adopting the public entity standard, Texas courts would ensure a meaningful form of judicial scrutiny of League decisions, while affording these decisions a sufficient degree of respect to avoid unnecessary entanglement in League affairs.[161] While this standard of

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155. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 1, 10 (75th anniv. ed. 1984-1985) (only public schools are members of League and have control of organization); *see also* University Interscholastic League v. Payne, 635 S.W.2d 754, 757 (Tex. App.—Amarillo 1982, writ dism'd) (League exists for benefit of member schools).

156. *Cf.* Chabert v. Louisiana High School Athletic Ass'n, 323 So. 2d 774, 777 (La. 1981) (student not member of association yet subject to regulation by association). *See generally* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 320 (1982) (high school associations' rules and decisions form of public regulation rather than private affairs).

157. *See* TEX. EDUC. CODE ANN. § 21.921(b) (Vernon Supp. 1985) (League authority subject to State Board of Education review); *cf.* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 246-47 (Fla. Dist. Ct. App. 1982) (association closely related to state education authority, classified as state administrative entity), *rev'd in part on other grounds,* 434 So. 2d 306 (Fla. 1983).

158. Interview with Bailey Marshall, Ph.D., Executive Director of the University Interscholastic League of Texas, in Austin, Tex. (Jan. 15, 1985) (discussed Texas Education Agency regulatory authority over extracurricular activities and League); *see also* Tex. Educ. Agency, 9 Tex. Reg. 6400-03, 6413-15 (1984) (amending 19 TEX. ADMIN. CODE § 97.113) (TEA changes as to participation in League-sponsored activities).

159. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 30, 300(b) (75th anniv. ed. 1984-1985) (League authority subject to University policies).

160. *Compare* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973) (League a state agency because closely related to University and controls important part of educational activities) *with* Florida High School Activities Ass'n v. Thomas, 409 So. 2d 245, 246-47 (Fla. Dist. Ct. App. 1982) (high school association closely aligned with state education authority is state administrative entity), *rev'd in part on other grounds,* 434 So. 2d 306 (Fla. 1983).

161. *See* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 311 (1982) (public entity standard recognizes need to offer meaningful examination of athletic associations' decisions). If adopted by Texas courts, the public entity standard could function adequately in light of League reforms in intra-League hearings and appeal processes because a sufficient record would be established. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 100-123, 300-333 (75th an-

judicial review focuses on factual League decisions based on its rules and regulations, other challenges based upon constitutional provisions center upon the substance and effect of the rules.[162]

B. *Constitutional Challenges to League Rules*

1. Due Process Claims

League rules are often subject to challenges in federal and state courts based upon a violation of due process of law.[163] A party seeking judicial review of the constitutionality of League rules must establish the League's status as a "state actor."[164] Classification of the League's activities as "state action" is a distinct legal question from the League's status as a state agency or private association.[165] State action is a broader category which may include conduct of an organization or individual that is not part of the state.[166] Courts have held that the League's rule-making process and enforcement conduct is state action[167] sufficient to implicate constitutional limitations on

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niv. ed. 1984-1985) (League rules encourage development of written record of League decisions).

162. *Compare* University Interscholastic League v. Hardin-Jefferson Indep. School Dist., 648 S.W.2d 770, 772 (Tex. App.—Beaumont 1983, no writ) (challenge to League decision based on sufficiency of evidence to support decision) *with* Blue v. University Interscholastic League, 503 F. Supp. 1030, 1034 (N.D. Tex. 1980) (student challenge to constitutionality of 19-year-old rule not challenge to League's ineligibility decision).

163. *See, e.g.*, Niles v. University Interscholastic League, 715 F.2d 1027, 1029-30 (5th Cir. 1983) (League's "one year" transfer rule challenged as denial of due process and equal protection), *cert. denied*, __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984); Kite v. Marshall, 661 F.2d 1027, 1028 (5th Cir. 1981) (14th amendment challenge to League's "summer camp" rule), *cert. denied*, 457 U.S. 1120 (1982); Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981) (League transfer rule challenged as violating equal protection). *See generally* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review*, 11 J.L. & EDUC. 291, 313-19 (1982) (discussing constitutional challenges to interscholastic leagues' rules).

164. *See* Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981) (League actions must be classified as state action before constitutional limits relevant). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 497-523 (2d ed. 1983) (discussing state action requirements necessary to raise constitutional questions).

165. *See* University Interscholastic League v. Payne, 635 S.W.2d 754, 757 n.5 (Tex. App.—Amarillo 1982, writ dism'd) (state action different legal question from state agency status).

166. *See id.* at 757. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 517 (2d ed. 1983) (discusses breadth of state action classification).

167. *See, e.g.*, Niles v. University Interscholastic League, 715 F.2d 1027, 1029-30 (5th Cir. 1983) (League activities state action), *cert. denied*, __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984); Blue v. University Interscholastic League, 503 F. Supp. 1030, 1034 (N.D. Tex. 1980) (League regulations state action for constitutional purposes); Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981) (League is state actor).

such actions.[168] The League's state actor status arises from its substantial relationship with the Texas educational system.[169] This close relationship causes the League's conduct to be colored with official governmental authority for constitutional purposes.[170] The League's status as a state actor also gives rise to potential liability under section 1983 of the federal civil rights statutes,[171] which can be the basis for injunctive relief and damages if a constitutional violation is present.[172]

A substantive due process challenge to a state actor's activities centers upon whether these activities abridge a personal fundamental right protected by the fourteenth amendment's due process clause.[173] A state actor cannot trample a recognized constitutional right through its rules and enforcement procedures unless the regulations are strictly drawn to promote a substantial and compelling state interest.[174] Due process challenges to League rules have centered principally upon eligibility requirements, including the student transfer/residency rule,[175] summer camp prohibition rule,[176] and five year participation rule.[177] In these challenges, three grounds were advanced

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168. *See* Kite v. Marshall, 661 F.2d 1027, 1028 (5th Cir. 1981) (League actions must meet constitutional standards), *cert. denied,* 457 U.S. 1120 (1982); Blue v. University Interscholastic League, 503 F. Supp. 1030, 1034 (N.D. Tex. 1980) (constitutional requirements must be met by League actions).

169. *See* Blue v. University Interscholastic League, 503 F. Supp. 1030, 1033-34 (N.D. Tex. 1980); *accord* Florida High School Activities Ass'n, 409 So. 2d 245, 247 (Fla. Dist. Ct. App. 1982) (high school associaton linked to state educational system so that action considered state action), *rev'd in part on other grounds,* 434 So. 2d 306 (Fla. 1983).

170. *See* Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (5th Cir. 1973).

171. *See* 42 U.S.C. §§ 1983, 1988 (1982).

172. *See* Blue v. University Interscholastic League, 503 F. Supp. 1030, 1034 (N.D. Tex. 1980) (§ 1983 action seeking injunctive and damage relief based on League violation of constitutional right).

173. *See* Niles v. University Interscholastic League, 715 F.2d 1027, 1029 (5th Cir. 1983), *cert. denied,* __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984); *see also* Blue v. University Interscholastic League, 503 F. Supp. 1030, 1034 (N.D. Tex. 1980) (fundamental right must be involved in League's rule enforcement for due process challenge); Hebert v. Ventetuolo, 480 A.2d 403, 407 (R.I. 1984) (high school association rule must abridge fundamental right to violate due process).

174. *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (due process requires fundamental right of privacy not be burdened by regulation unless substantial state interest promoted); *see also* Korematsu v. United States, 323 U.S. 214, 218-19 (1944) (classification based on national origin permissible during armed conflict). *See generally* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories,* 89 YALE L.J. 1063, 1070 (1980) (discussing fundamental due process rights and methods of recognizing them).

175. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 408-409 (75th anniv. ed. 1984-1985) (residency required for eligibility).

176. *See id.* § 414 (prohibits participation in summer camps to remain eligible for League competitions).

177. *See id.* § 413 (student cannot compete after fifth year of participation in extracurricular activities in high school).

to support claims of due process violations: (1) a fundamental right to participation in competitions,[178] (2) a fundamental right to interstate travel,[179] and (3) a fundamental right to privacy.[180]

Unsuccessful due process challenges based upon the right to participate stem from *San Antonio Independent School District v. Rodriguez,*[181] in which the United States Supreme Court refused to recognize education as a fundamental right protected by the due process clause.[182] Consequently, lower courts have concluded that there is no constitutionally protected right to participate in extracurricular activities.[183] The right to participation is not a "legitimate claim of entitlement"[184] protected by due process, but is a mere

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178. *See* Niles v. University Interscholastic League, 715 F.2d 1027, 1031 (5th Cir. 1983) (challenge based on right to participate), *cert. denied,* __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984).

179. *See* Sullivan v. University Interscholastic League, 599 S.W.2d 860, 863 (Tex. Civ. App.—Austin 1980) (transfer rule challenged as violating right to interstate travel), *rev'd in part on other grounds,* 616 S.W.2d 170 (Tex. 1981).

180. *See* Kite v. Marshall, 494 F. Supp. 227, 232 (S.D. Tex. 1980) (challenge based on right to family privacy lodged against League rule), *rev'd,* 661 F.2d 1027 (5th Cir. 1981), *cert. denied,* 457 U.S. 1120 (1982).

181. 411 U.S. 1 (1973).

182. *See id.* at 35-39 (1973); *see also* Goss v. Lopez, 419 U.S. 565, 572-73 (1975) (procedural due process requirements protect students at school but education not fundamental right).

183. *See, e.g.,* Niles v. University Interscholastic League, 715 F.2d 1027, 1031 (5th Cir. 1983) (participation in League football not fundamental right), *cert. denied,* __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984); Blue v. University Interscholastic League, 503 F. Supp. 1030, 1034 (N.D. Tex. 1980) (football participation not fundamental right); Sullivan v. University Interscholastic League, 599 S.W.2d 860, 863 (Tex. Civ. App.—Austin 1980) (athletic participation not fundamental due process right), *rev'd in part on other grounds,* 616 S.W.2d 170 (Tex. 1981). For a collection of reported cases concluding that there is no fundamental right to participation, see Bailey v. Truby, 321 S.E.2d 302, 314-15 (W. Va. 1984). *See generally* Comment, *Judicial Review of NCAA Decisions: Does the College Athlete Have a Property Interest in Interscholastic Athletics,* 10 STETSON L. REV. 483, 499-505 (1981) (discussing fundamental right to participate in athletics). Some courts have recognized a limited property right in athletic competition because of future potential professional benefits. *See* Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1299 (8th Cir. 1973) (cognizable constitutional right to participate); *see also* Lee v. Florida High School Activities Ass'n., 291 So. 2d 636, 638 (Fla. App. 1974) (denial of athletic participation constitutes due process violation). *But see* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 316 (1982) (criticizing decisions finding fundamental right to participation).

184. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978); *see also* Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972) (legitimate fundamental rights protected by due process, but expectation of employment not). The right to participate in athletic activities is termed an expectation, rather than a privilege, because the Supreme Court has abandoned the right-privilege distinction for due process considerations. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (due process protects entitlements but not mere expectation of governmental largess); Walsh v. Louisiana High School Athletic Ass'n., 616 F.2d 152, 159 (5th Cir. 1980)

expectation of a benefit derived from attending public school.[185] In this respect, participation in extracurricular activities is analogous to untenured employment in that neither involve a constitutionally protected interest or entitlement.[186]

The League's transfer rule has been attacked on a claim that it unconstitutionally restricts the fundamental right to interstate travel.[187] The transfer rule generally restricts student eligibility to participate in a sponsored activity by requiring one year of continuous residence in the school district.[188] It has been argued that the constitutional right to interstate travel is affected by a transfer rule because the student is not allowed to change residences between states and remain eligible to participate.[189] The courts, however, have rejected challenges based upon interference with interstate travel because they find only the most incidental burden placed upon this right by a transfer regulation reasonably related to ensuring the legitimate League interest of prohibiting recruiting.[190] These decisions are consistent with other judi-

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(participation in athletic activities properly termed expectation not privilege), *cert. denied,* 449 U.S. 1124 (1981).

185. *See, e.g.,* Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152, 159 (5th Cir. 1980) (participation in athletic activities benefit arising from school attendance), *cert. denied,* 449 U.S. 1124 (1981); Blue v. University Interscholastic League, 503 F. Supp. 1030, 1035 (N.D. Tex. 1980) (participation mere expectation, not constitutional right); Sullivan v. University Interscholastic League, 599 S.W.2d 860, 863 (Tex. Civ. App.—Austin 1980) (participation not constitutional right but benefit of school attendance), *rev'd in part on other grounds,* 616 S.W.2d 170 (Tex. 1981).

186. *Compare* Blue v. University Interscholastic League, 503 F. Supp. 1030, 1035 (N.D. Tex. 1980) (participation in activities not fundamental right because only benefit) *with* Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (desire to continue employment not protected right but mere expectation).

187. *See* Niles v. University Interscholastic League, 715 F.2d 1027, 1029-30 (5th Cir. 1983) (transfer rule challenged as burdening interstate travel right), *cert. denied,* __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984); *see also* Sullivan v. University Interscholastic League, 599 S.W.2d 860, 864 (Tex. Civ. App.—Austin 1980) (transfer rule challenged as violating right to interstate travel), *rev'd in part on other grounds,* 616 S.W.2d 170 (Tex. 1981).

188. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES §§ 408, 409 (75th anniv. ed. 1984-1985). Purpose of the transfer rules has been to prevent and dissuade recruiting students for athletic competitions and to deemphasize the pressure on students to compete in athletics, rather than concentrating on academic requirements. *See* Kite v. Marshall, 661 F.2d 1027, 1030 (5th Cir. 1981) (transfer rules seek to equalize competitions between schools), *cert. denied,* 457 U.S. 1120 (1982); Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 294-98 (1982) (discussing basic purposes of transfer rule).

189. *See* Niles v. University Interscholastic League, 715 F.2d 1027, 1029-30 (5th Cir. 1983) (transfer rule claimed to obstruct interstate travel right), *cert. denied,* __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984); Sullivan v. University Interscholastic League, 599 S.W.2d 860, 864 (Tex. Civ. App.—Austin 1980) (transfer rule challenged as violating right to interstate travel), *rev'd in part on other grounds,* 616 S.W.2d 170 (Tex. 1981).

190. *See* Niles v. University Interscholastic League, 715 F.2d 1027, 1031 (5th Cir. 1983)

cial determinations that the right to interstate travel may be burdened by reasonable state regulations without violating due process requirements.[191]

The League's transfer rule and summer camp prohibition have been challenged by claims based upon the right to familial privacy.[192] In *Kite v. Marshall,*[193] a federal district court in Texas, recognizing the family privacy doctrine, struck down the League's summer camp prohibition as violating the due process clause.[194] The Fifth Circuit, however, rejected the family privacy argument and upheld the validity of the summer camp rule in reversing the district court.[195] The League's authority to regulate students through eligibility standards would have been drastically curtailed by the family privacy doctrine if the district court's decision had been affirmed.[196] The district court opinion recognized the possible superiority of private family decisons concerning the athletic development of the student over the League's determinations.[197] Such an approach would have marked a broad

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(transfer rule reasonable regulation not impermissibly burdening interstate travel right), *cert. denied,* __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984); *see also* Sullivan v. University Interscholastic League, 599 S.W.2d 860, 864 (Tex. Civ. App.—Austin 1980) (transfer rule not meant to deter right to interstate travel), *rev'd in part on other grounds,* 616 S.W.2d 170 (Tex. 1981).

191. *Compare* Niles v. University Interscholastic League, 715 F.2d 1027, 1031 (5th Cir. 1983) (incidental burden placed on right to interstate travel by transfer rule constitutional), *cert. denied,* __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984) *and* Sullivan v. University Interscholastic League, 599 S.W.2d 860, 864 (Tex. Civ. App.—Austin 1980) (transfer rule incidentally burdens right to interstate travel, but constitutional), *rev'd in part on other grounds,* 616 S.W.2d 170 (Tex. 1981) *with* Zobel v. Williams, 457 U.S. 55, 60-62 (1982) (constitutional right to interstate travel not abridged if no direct penalty or prohibition placed upon right) *and* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 258-59 (1974) (some regulation of interstate travel possible).

192. *See* Kite v. Marshall, 494 F. Supp. 227, 229 (S.D. Tex. 1980) (summer camp rule attacked as violating right to family privacy), *rev'd,* 661 F.2d 1027 (5th Cir. 1981), *cert. denied,* 457 U.S. 1120 (1982); *cf.* Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172, 173 (Tex. 1981) (transfer rule challenged as violating family privacy, but claim not reached by court).

193. 494 F. Supp. 227 (S.D. Tex. 1980), *rev'd,* 661 F.2d 1027 (5th Cir. 1981), *cert. denied,* 457 U.S. 1120 (1982).

194. *See id.* at 232, 234.

195. *See* Kite v. Marshall, 661 F.2d 1027, 1029-30 (5th Cir. 1981), *cert. denied,* 457 U.S. 1120 (1982). The Fifth Circuit noted that no fundamental right was involved once the family privacy doctrine was rejected and, therefore, subjected the summer camp rule to a standard of reasonableness. *See id.* at 1029-30.

196. *See* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 327 (1982) (if *Kite* had been affirmed, each form of eligibility standard would have been subject to challenge of invasion of family decisionmaking).

197. *See* Kite v. Marshall, 494 F. Supp. 227, 230-31 (S.D. Tex. 1980), *rev'd,* 661 F.2d 1027 (5th Cir. 1981), *cert. denied,* 457 U.S. 1120 (1982). The district court rejected any application of the *in loco parentis* doctrine to support the League's summer camp prohibition. *See id.* at 232. The *in loco parentis* doctrine recognizes that school officials act in place of the

expansion of the family privacy doctrine which normally applies to decisions concerning the basic family structure, such as abortion or private education.[198] The interest in developing a child as an athlete with a potential professional career, however, is certainly distinguishable from the serious family interests generally protected by the family privacy doctrine.[199] The viability of family privacy challenges to League regulations may not be foreclosed by the Fifth Circuit decision in *Kite*.[200] The Fifth Circuit has implied, in fact, that a family privacy challenge to a high school association's residence requirement may be a justified argument if the rule makes a substantial intrusion into a basic family relationship, such as child residency between divorced parents.[201] This recognition of a potentially viable family privacy challenge is consistent with family privacy decisions which struck

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parent in the education process, but the court rejected this as a justification for allowing the League to disrupt family decisions. *See id.* at 232.

198. *Compare* Kite v. Marshall, 494 F. Supp. 227, 230-31 (S.D. Tex. 1980) (right of family privacy extends to protect family choice to develop child's athletic prowess), *rev'd*, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982) *with* Roe v. Wade, 410 U.S. 113, 153 (1973) (choice of abortion within privacy rights of family or individual). The family privacy doctrine stands for the recognition that the state's authority to regulate intra-family decisions has constitutional limits inherent in the ninth and tenth amendments. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 497 (1977) (city ordinance invalidated as violating family privacy right to choose residency); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (parents possess constitutional rights to direct and nurture children's education); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (Constitution recognizes inherent parental rights over children). The family privacy doctrine has been applied in the education area. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968) (right of parents to educate and rear their children recognized by Constitution); *cf.* Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (right to choose method of education within parental authority). The Supreme Court has not fully embraced the family privacy doctrine, however, and parental decisionmaking is subject to official intrusion. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 662 (1977) (state may enforce corporal punishment without parental consent); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (parent does not have veto power over child's abortion decision); Runyon v. McCrary, 427 U.S. 160, 176 (1976) (parent does not have constitutionally protected right to send child to racially segregated school).

199. *Compare* Kite v. Marshall, 494 F. Supp. 227, 230-31 (S.D. Tex. 1980) (right of family privacy to develop child's athletic prowess asserted), *rev'd*, 661 F.2d 1027 (5th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982) *with* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (family privacy doctrine protects right to contraceptive choice). *See generally* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review*, 11 J.L. & EDUC. 291, 328-29 (1982) (interests involved in *Kite* not as serious as other family privacy interests).

200. *Cf.* Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ., 552 S.W.2d 685, 688-89 (Ky. App. 1977) (transfer rule may intrude on family decision of child custody).

201. *See* Laurenzo v. Mississippi High School Activities Ass'n, 662 F.2d 1117, 1119-20 (5th Cir. 1981) (even though dismissed as moot, family privacy challenge to association's rule raised substantial federal question); *see also* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review*, 11 J.L. & EDUC. 291, 328-29 (1982) (family privacy challenge to high school association rules survives *Kite* decision).

down a statute or regulation because an important family matter was obstructed.[202]

2. Equal Protection Objections

A second method of constitutional challenge to League rules invokes the equal protection clause of the fourteenth amendment.[203] An equal protection challenge examines whether the law or regulation promulgated by a state actor is rationally based.[204] The purpose of equal protection is to ensure that similarly situated persons are not arbitrarily subjected to discriminatory laws or regulations.[205] The courts review the rules promulgated by a state actor, such as the League,[206] with different levels of scrutiny depending on the interests or persons affected.[207] There are three recognized standards of judicial scrutiny utilized in equal protection cases: strict scrutiny, intermediate review, and a rationally related standard.[208]

The highest level of judicial scrutiny employed in equal protection cases demands a substantial state justification to uphold the challenged rule or regulation.[209] The general standard states that if either a fundamental

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202. *Compare* Laurenzo v. Mississippi High School Activities Ass'n, 662 F.2d 1117, 1119 (5th Cir. 1981) (choice of child's residence important family decision possibly protected by family privacy doctrine) *with* Moore v. City of East Cleveland, 431 U.S. 494, 497 (1977) (regulation prohibiting family residency choices struck down on basis of right to family privacy and integrity).

203. *See* U.S. CONST. amend. XIV, § 1. The equal protection clause reads, "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See id.*

204. *See* Parham v. Hughes, 441 U.S. 347, 351-52 (1979) (equal protection demands regulation be reasonable not exact); *see also Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1163-64 (1969) (rules that create classes of persons must have reasoned basis).

205. *See, e.g.,* City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (equal protection demands persons be treated fairly, but not exactly same in all situations); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (regulations need not be perfect, only reasonable in treatment of persons); Sullivan v. University Interscholastic League, 616 S.W.2d 170, 173 (Tex. 1981) (equal protection demands persons similarly situated be treated equally); *see also* Dittfurth, *A Theory of Equal Protection,* 14 ST. MARY'S L.J. 829, 894 (1983) (goal of equal protection to ensure freedom from capricious treatment).

206. *See* Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981) (League actions for constitutional purposes).

207. *See* Kite v. Marshall, 661 F.2d 1027, 1030 (5th Cir. 1981) (discusses different equal protection tests for League rules), *cert. denied,* 457 U.S. 1120 (1982); *see also* Blue v. University Interscholastic League, 503 F. Supp. 1030, 1035-36 (N.D. Tex. 1980) (League rules subject to different levels of review depending on rights or parties involved). For a thorough examination of the Supreme Court's equal protection tests and when they apply, see Dittfurth, *A Theory of Equal Protection,* 14 ST. MARY'S L.J. 829, 852-73 (1983).

208. *See* Seoane v. Ortho Pharmaceuticals, 660 F.2d 146, 149-50 (5th Cir. 1981) (three standards of judicial review in equal protection discussed).

209. *See* Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (any restriction on fundamental marriage privacy right must be justified by substantial state interest); *see also* Korematsu v.

right[210] or a suspect class[211] is burdened by the state action, courts strictly scrutinize the regulation, and it is upheld only if a compelling state interest is effectively promoted by the regulation.[212] While no League rule has been subjected to this strict scrutiny standard, the associations of two other states have had rules invalidated as violating equal protection because their rules discriminated on the basis of race.[213] A non-discriminatory policy was required of these organizations by the courts.[214] [215] The League's recently adopted non-discriminatory policy on student eligibility appears to be consistent with these racially neutral demands and, if followed, would probably foreclose strict scrutiny examination of most League rules.[216] Furthermore, few League rules burden fundamental constitutional rights, with the possible exception of the right to family privacy; thus, courts will rarely apply strict scrutiny in reviewing League rules.[217]

The intermediate level of judicial scrutiny is normally applied in cases

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United States, 323 U.S. 214, 216 (1944) (any restriction based upon race or alienage presumed unconstitutional and will only be allowed if substantial state interest promoted).

210. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 567 (1964) (right to vote fundamental and protected by equal protection clause from unreasonable obstruction); NAACP v. Alabama, 357 U.S. 449, 462 (1958) (right to association fundamental); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (fair access to courts and appellate review fundamental right).

211. *See* Brown v. Board of Educ., 347 U.S. 483, 497 (1954) (race always suspect class); *see also* Graham v. Richardson, 403 U.S. 365, 376 (1971) (alienage suspect class). De facto classifications based upon national origin have also been considered suspect and subject to strict scrutiny. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

212. *See* Blue v. University Interscholastic League, 503 F. Supp. 1030, 1035 (N.D. Tex. 1980); *cf.* Korematsu v. United States, 323 U.S. 214, 218-19 (1944) (relocation law based on Japanese heritage of persons upheld because of compelling state interest of World War II security).

213. *See* Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 228 (5th Cir. 1968); Lee v. Mason County Bd. of Educ., 283 F. Supp. 194, 199 (M.D. Ala. 1968); *see also* Comment, *State High School Athletic Associations: When Will A Court Interfere?*, 36 MO. L. REV. 400, 408 (1971) (high school association's rules based on racial segregation violative of equal protection).

214. *See* Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 228-29 (5th Cir. 1968) (association's segregated policy invalid as violating equal protection); Lee v. Macon County Bd. of Educ., 283 F. Supp. 194, 199 (M.D. Ala. 1968) (association's rules must not be based upon racial considerations).

215. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 384 (75th anniv. ed. 1984-1985). The rule states that eligibility shall not be denied based upon race, alienage, religion, sex, or national origin. *See id.* § 384(a).

216. *Cf.* Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 228-29 (5th Cir. 1968) (association must maintain racially neutral policies or rules will be invalidiated by strict judicial scrutiny).

217. *See* Sullivan v. University Interscholastic League, 616 S.W.2d 170, 172 (Tex. 1981) (no fundamental rights burdened by League rules); Comment, *State High School Athletic Associations: When Will A Court Interfere?*, 36 MO. L. REV. 400, 407-08 (few high school associations' regulations subject to strict scrutiny).

involving gender-based classifications.[218] The standard is that "the regulations must serve important governmental objectives and must be substantially related to achievement of these objectives."[219] This standard does not require a compelling state interest to survive scrutiny, but it demands an identifiable and legitimate purpose behind the gender classification.[220] The League's prohibition on females competing in League sponsored football is a gender-based classification because it treats students differently on the basis of gender.[221] A similar absolute prohibition on female participation in the draft registration system was challenged on equal protection grounds.[222] In *Rostker v. Goldberg,*[223] the United States Supreme Court upheld the female exclusion provisions because the regulation promoted the government's substantial interest in providing physically capable registrants for the armed forces.[224] The Court recognized that physical differences in males and females justified the exclusion.[225] If this reasoning is applied to the League's football prohibition, it would support the rule's basic premise that females are, in general, physically unprepared for the rigors of football competitions.[226] The *Rostker* reasoning would also support the League's provisions

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218. *See, e.g.,* Craig v. Boren, 429 U.S. 190, 197 (1976) (gender classifications require intermediate level of judicial scrutiny); Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (regulations based upon gender identification subject to higher level of judicial scrutiny than general economic regulations); Reed v. Reed, 404 U.S. 71, 77 (1971) (laws based solely on gender subject to equal protection scrutiny). *See generally* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications,* 62 GEO. L.J. 1071, 1075-79 (1974) (discusses Court's tests for gender-based classifications).

219. *See* Craig v. Boren, 429 U.S. 190, 197-99 (1976). The intermediate level of judicial review has been criticized as injecting further confusion into equal protection law. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 726-28 (2d ed. 1983) (questioning effectiveness of *Craig* intermediacy test); Dittfurth, *A Theory of Equal Protection,* 14 ST. MARY'S L.J. 829, 876-77 (1983) (Court's equal protection "tests" have led to conundrum for citizens and courts).

220. *See* Craig v. Boren, 429 U.S. 190, 200-01 (1976).

221. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 384(b)(1) (75th anniv. ed. 1984-1985). The football participation prohibition is a long standing League rule. *See* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 382-85 (1956).

222. *See* Rostker v. Goldberg, 453 U.S. 57, 76 (1981).

223. 453 U.S. 53 (1981).

224. *See id.* at 83.

225. *See id.* at 79; *cf.* Michael M. v. Superior Court, 450 U.S. 464, 469 (1981) (differences in gender justifies different treatment in criminal prosecution).

226. *Compare* Rostker v. Goldberg, 453 U.S. 57, 82 (1981) (identifiable physical difference between men and women justifies male-only draft registration) *with* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 382-85 (1956) (boys-only football based on policy that girls should not engage in football). It has been noted that the level of high school football has become increasingly violent

allowing some limited female athletic competition with males[227] because *Rostker* recognized that gender-based classifications could not be maintained when physical demands of an activity could be met by both sexes.[228]

The most common form of equal protection challenge to League rules requires the courts to apply a rational basis test to determine constitutionality.[229] This level of judicial scrutiny presumes the validity of the regulations and only requires that it be reasonable.[230] In applying the rational basis test, courts do not consider every possible contingency or effect of the rule, nor do they inquire into the ultimate wisdom of the rules so long as those same rules do not evidence arbitrariness.[231] The League's nineteen-year-old eligibility restriction, the summer camp prohibition, and the one-year transfer rule have all withstood equal protection attacks in recent court decisions, due to their rational relationship to important League interests, such as deemphasizing the necessity of athletic participation, equalizing competition, and prohibiting recruitment.[232] Most courts will probably continue to defer to

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and physical, even for boys. *See* Phillips, *Fattening Them Up for Football,* TIME, Mar. 9, 1981, at 41.

227. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 384(a)(3) (A-C) (75th anniv. ed. 1984-1985). Girls are prohibited from competing in boys' baseball, basketball, or soccer except when the school does not offer corresponding girls' softball, basketball, or soccer programs. *See id.* § 384(a)(3)(A-C). The League has only recently adopted this scheme to accommodate girls in boys' sports. *Compare id.* § 384(a)(3) (allowing specific instances for inter-gender competitive teams) *with* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES arts. 20-27 (1983-1984) (no system to deal with inter-gender competitive teams provided). Other high school associations have adopted similar prohibitions and programs to govern male-female intra-team competitions. *See* WEST VIRGINIA SECONDARY SCHOOL ACTIVITIES COMM'N, RULES AND REGULATIONS 24-27 (1984-1985).

228. *See* Rostker v. Goldberg, 453 U.S. 57, 71-72, 79 (1981) (physical differences between sexes may legitimately be considered in drawing regulations, but gender-based classifications cannot survive when physical differences minimal); *see also* Craig v. Boren, 429 U.S. 190, 204 (1976) (gender-based classification unconstitutional when physical differences irrelevant).

229. *See, e.g.,* Niles v. University Interscholastic League, 715 F.2d 1027, 1031 (5th Cir. 1983) ("rationally-related" test applied to determine summer camp rule's validity), *cert. denied,* __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984); Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152, 160 (5th Cir. 1980) (minimal rationality test applied to high school association rules), *cert. denied,* 449 U.S. 1124 (1981); Denis J. O'Connell High School v. Virginia High School League, 581 F.2d 81, 84 (4th Cir. 1978) (equal protection analysis requires only reasonableness test for high school association rules), *cert. denied,* 440 U.S. 936 (1979).

230. *See* Blue v. University Interscholastic League, 503 F. Supp. 1030, 1035 (N.D. Tex. 1980).

231. *See* Western & S. Life Ins. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981) ("[W]as it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?"); *see also* Mathews v. De Castro, 429 U.S. 181, 185 (1976) (Court does not question decisionmaking so long as reasonable).

232. *See* Niles v. University Interscholastic League, 715 F.2d 1027, 1031 (5th Cir. 1983)

League rules, in applying the rational basis test, because they wish to allow educational administrators freedom to control their organizations.[233]

The Texas Supreme Court, in *Sullivan v. University Interscholastic League,*[234] however, demonstrated little deference to the League's transfer rule and held that it violated the equal protection clause.[235] The court recognized that the rational basis test applied, but concluded that the rule was overbroad and overinclusive.[236] Therefore, it could not pass constitutional requirements.[237] The court reasoned that because of the League's failure to allow an exception for those students who had not been recruited for athletic purposes, the rule was unreasonable.[238] The court concluded that the arbitrariness of the transfer rule, which did not permit exceptions, was illuminated by the League policy allowing exceptions for other eligibility rules.[239]

The *Sullivan* court, while reaching a commendable result of making the League more sensitive to the sometimes inequitable effects of its transfer rule, misapplies the appropriate equal protection analysis.[240] Rational basis analysis allows broad regulations, such as the transfer rule, if the regulators

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(one year residency rule reasonably related to interests of discouraging recruitment and equality of competition), *cert. denied,* __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984); Kite v. Marshall, 661 F.2d 1027, 1030 (5th Cir. 1981) (summer camp rule rationally related to deemphasizing sports and equalizing competition), *cert. denied,* 457 U.S. 1120 (1982); Blue v. University Interscholastic League, 503 F. Supp. 1030, 1035-36 (N.D. Tex. 1980) (five year eligibility rationally related to equalizing competitions). Similar high school associations' rules have withstood equal protection challenges because the courts concluded that reasonable administrative regulations should be respected by the courts. *See* Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152, 160-61 (5th Cir. 1980), *cert. denied,* 449 U.S. 1124 (1981) (equal protection challenge to association's rule); *see also* Hebert v. Ventetuolo, 480 A.2d 403, 407-08 (R.I. 1984) (transfer/residency rules rationally related to discouraging recruitment).

233. *Cf.* Hebert v. Ventetuolo, 480 A.2d 403, 407-08 (R.I. 1984) (courts do not inject alternative judgment when association rule reasonable).

234. 616 S.W.2d 170 (Tex. 1981).

235. *See id.* at 172-73.

236. *See id.* at 172. The court held that no fundamental right or suspect class was burdened by the rule's classification. *See id.* at 172. The court maintained that two classes of students were created: students not transferring and those who do. *See id.* at 172.

237. *See id.* at 172. The rule was held overbroad because it burdened students who had not transferred for athletic purposes, the problem sought to be eliminated. *See id.* at 173.

238. *See id.* at 173.

239. *See id.* at 173. The exceptions the court noted were the League's waiver provisions for seniors when declared ineligible. *See id.* at 173. The League, after *Sullivan,* allows a waiver determination for each eligibility rule, including the transfer rule. *See* UNIVERSITY INTERSCHOLASTIC LEAGUE, CONSTITUTION AND CONTEST RULES § 453 (75th anniv. ed. 1984-1985).

240. *See* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 323-24 (1982) (*Sullivan* court applies correct equal protection test, but misconstrues its requirement).

reasonably believe they are furthering a legitimate interest.[241] The rational basis standard does not require that every possible exception to a regulation be provided.[242] The *Sullivan* court, however, based its decision on the fact that an exception was not provided by the League for the transfer rule requirements.[243] The League officials had substantial interests in obstructing recruiting practices, and after fifty years of using the rule, the officials reasonably believed the rule furthered that interest.[244] This interest would generally be sufficient to meet the rational basis test and, furthermore, the tests would not require any exception.[245] One commentator has criticized the *Sullivan* decision as amounting to judicial fiat rather than careful constitutional analysis.[246] Courts should conscientiously review League decisions challenged as violating equal protection, but they should guard against unnecessary intrusions into League affairs when no violations are present.[247]

V. CONCLUSION

The League possesses and exercises extraordinary power over public school students in Texas through its regulation of extracurricular activities. The League is intimately involved with educating the youth of Texas by encouraging academic and athletic excellence through competition. Considering the League's authority, a clear legal definition of the League would not

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241. *See* Denis J. O'Connell High School v. Virginia High School League, 581 F.2d 81, 84 (4th Cir. 1978) (organization's rules may be broad if reasonable), *cert. denied,* 440 U.S. 936 (1979); *see also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461-63 (1981) (inquiry on rational basis test whether regulators believed legitimate purpose promoted by rule).

242. *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (equal protection does not require state to grant all reasonable exceptions to regulation because other exceptions exist); *see also* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) (regulation need not address every contingency to be constitutional).

243. *See* Sullivan v. University Interscholastic League, 616 S.W.2d 170, 173 (Tex. 1981).

244. *See* Sullivan v. University Interscholastic League, 599 S.W.2d 860, 865 (Tex. Civ. App.—Austin 1980) (League transfer rule based on officials' reasonable desire to control athletic recruiting), *rev'd in part on other grounds,* 616 S.W.2d 170 (Tex. 1981); *see also* R. BEDICHEK, EDUCATIONAL COMPETITION: THE STORY OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE OF TEXAS 359 (1956) (League transfer rule existed from beginning of League to control recruiting violations and abuses).

245. *Cf.* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (regulation supported by reasonable intentions need not provide every possible exception for certain parties).

246. *See* Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 323-24 (1982) (*Sullivan* decision not appropriate application of equal protection analysis).

247. *Cf.* Niles v. University Interscholastic League, 715 F.2d 1027, 1031 (5th Cir. 1983) (League rule challenged as violating equal protection subject to reasonable but not strict scrutiny), *cert. denied,* __ U.S. __, 104 S. Ct. 1289, 79 L. Ed. 2d 691 (1984); Weistart, *Rule-Making in Interscholastic Sports: The Bases of Judicial Review,* 11 J.L. & EDUC. 291, 324 (1982) (courts should carefully apply appropriate equal protection analysis so as to avoid unsupportable decisions).

only reinforce the legal basis for that authority, it would also circumscribe its scope. The League appears to meet the criteria of a state administrative agency because it exists as part of a constitutionally created entity, the University of Texas, and because it functions as an administrative entity. A specific legislative recognition of the League as a state entity would clarify any confusion arising from House bill 72 and the *Maroney* decision.[248]

The classification of the League as a state administrative agency will also clarify the appropriate standards for judicial review of League rules and decisions. Courts should apply a public entity standard in reviewing League decisions and demand sufficient evidence establishing the reasonableness of the League's actions. This standard will allow meaningful review of League decisions while not unnecessarily intruding upon the League's administrative authority. The overall goal of recognizing the League as an administrative entity of the State is to ensure that the League will be sensitive to the authority it possesses and to the students it so directly affects. Furthermore, constitutional challenges to League rules should require the aggrieved party to establish capriciousness in the rule itself or a substantial intrusion upon family privacy before the rule would be invalidated. The League, as an important part of the Texas educational system, should be held to a standard of verifiable reasonableness in all of its actions.

248. *See* Comment, *State High School Athletic Associations: When Will A Court Interfere?*, 36 MO. L. REV. 400, 410 (1971) (legislation needed to clarify state association status and authority).