2016

Putting Public Law into “Private” Sport

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Putting Public Law into “Private” Sport

Dionne L. Koller*

Abstract

Across all levels of sport—professional, Olympic, intercollegiate, interscholastic, and youth recreational—the prevailing view is that the government should not take an active role in regulating athletics. As a result, there are relatively few federal or state statutes directed at regulating sports, and those that are aimed at sports primarily serve to support the professional sports industry. Moreover, courts show great deference to sports leagues and administrators, most often applying law in a way that insulates and empowers them. This creates a climate where leagues and administrators are permitted wide latitude to structure and conduct their respective sports as they see fit, especially with regard to athlete regulation. With this environment in mind, this Article examines what I define as the “legal and policy response to concussions in sports,” which includes state statutes, proposed federal legislation, “bully pulpit” initiatives such as a White House summit and Congressional hearings, and substantial tort litigation. This Article explains the ways that the legal and policy response to sports concussions is consistent with the current sports law landscape and it highlights how the legal and policy response to sports concussions charts the course for a new approach to law and sports. In doing so, this Article makes two main points. First, the legal and policy response to sports concussions provides a useful vehicle for considering the underlying values that affect law and policy related to sports. These values include minimal government involvement, playing despite injury, and the view that aspects of sport are essential or fundamental. Second, the legal and policy response to concussions in sports provides an important

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pathway for future sports regulation, particularly of youth and amateur sports programs.

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I. INTRODUCTION

Recently, United States Senator John McCain appeared on the “Dan Patrick Show” to talk sports.1 When asked by Patrick how much the government should be involved in sports, Senator McCain answered: “[A]s little as possible.”2 The only exception Senator McCain allowed for was in the case of performance-enhancing drugs that Senator McCain believes provide a unique situation for government involvement to ensure fairness and protect children.3 Senator McCain’s views reflect the common wisdom about the government and sports that less government involvement is the best approach.4

2. Id.
3. Id.
Over the last several years, however, the public has shown greater interest in using law to regulate sports. This interest has grown largely because of media attention to professional and youth sports concussions. Shortly thereafter, in 2012, numerous former professional football players and their representatives brought claims against the National Football League (NFL) and the makers of Riddell football helmets alleging that the NFL was aware of the risk of concussions, negligently failed to protect players, and intentionally concealed the dangers of concussions in football. Similarly, classes of former players filed suit against the National Hockey League (NHL) and the National Collegiate Athletic Association (NCAA). More recently, a class action lawsuit was filed against FIFA, the international governing body for soccer, and the United States Soccer Federation, alleging that both entities knew of the dangers of concussions but had not modified the game to protect players.

To date, all fifty states and the District of Columbia have statutes addressing concussions in youth sports, and several bills have been introduced in Congress to set uniform federal concussion-management standards, support concussion research, and emphasize the role of schools in helping children with


7. Id. (“There is no universal agreement on the definition of the term concussion, though it is recognized as including some level of brain injury ranging from mild to traumatic.”).


11. Indeed, nearly half of the states have amended their statutes at least once. See Hosea H. Harvey, Dionne L. Koller & Kerri M. Lowrey, The Four Stages of Youth Sports TBI Policymaking: Engagement, Enactment, Research, and Reform, 43 J.L. MED. & ETHICS (SPECIAL ISSUE) 87, 89 (2015).
concussions “return to learn.” Moreover, United States President Obama convened the White House Healthy Kids and Safe Sports Concussion Summit to highlight the issue, and sports concussions also figured prominently in efforts to unionize college athletes. The state statutes and proposed federal legislation, significant tort litigation, and “bully pulpit” initiatives (such as the White House summit) amount to what I define as the “legal and policy response to sports concussions.”

This flurry of government activity related to sports, particularly in the youth and amateur context, is noteworthy. Senator McCain’s comments are representative of the prevailing view in the United States that the government—courts, Congress, executive branch agencies, and state legislatures—should defer to leagues and sports administrators to regulate themselves. As a result, the legal and policy response to sports concussions provides a useful vehicle to examine current attitudes toward government involvement in sports and to consider how law might be used to shape sports in the future, particularly in the youth and amateur contexts. To that end, this Article explores the legal and policy response to concussions in youth, professional, and intercollegiate sports by explaining how this response fits into the larger sports law landscape and what the implications are for future regulation of sports.

Part I of this Article outlines the government’s relationship to sports in the United States and explains how the legal and policy response to sports concussions fits within the current sports law landscape. Part III explains the details of the legal and policy response to concussions in sports and evaluates its effectiveness. Part IV asserts that the legal and policy response to concussions in sports has implications for sports law beyond the terms of concussion statutes and litigation and explains how it contributes to a new

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framework for future regulation of sports, specifically in the youth and amateur contexts.

II. BACKGROUND: THE GOVERNMENT’S RELATIONSHIP TO SPORTS

To properly contextualize the legal and policy response to sports concussions and evaluate its implications for future sports regulation, it is first important to provide an overview of the relationship between government and sports in the United States, particularly at the youth and amateur sports levels. Scholars have said that sport is “unique” in society in that “[n]o other institution, except perhaps religion, commands the mystique, the nostalgia, the romantic ideational cultural fixation that sport does.” This perhaps explains the government’s uneasy relationship with sports—hoping to perpetuate the magic by funding and supporting sports at various levels, but rarely seeking to regulate it directly for fear of ruining the “mystique” that entertains us.

To begin, there is, of course, much law that applies to sports. Matthew Mitten and Hayden Opie state that “virtually all areas of law (individually and in combination)” apply to sports competition. There is, however, relatively little law specifically aimed at regulating sports, especially in the youth and amateur contexts. Thus, general legal principles in areas such as contract and tort law are applied in the sports context, as are statutes in areas such as antitrust law and employment law. However, there is relatively little law enacted to regulate sports. Yet the paucity of law directed at sports, especially in the youth and amateur contexts, is remarkable given the importance of sports in American culture, the relationship between sports

18. Sport in all contexts is subject to numerous laws and regulations, most notably in areas such as constitutional law, antitrust law, contract law, tort law, disability law, labor law, and tax law. Indeed, the term “sports law” includes a wide variety of diverse substantive areas of the law. Timothy Davis, What Is Sports Law?, 11 MARQ. SPORTS L. REV. 211, 215–16 (2001).
21. Id. at 211–13, 234–35 (stating that “[t]raditionally, private law was viewed as providing the principal legal mechanism for regulating the sports industries . . . labor and antitrust law [that] represented public law incursions into a realm deemed best governed and regulated by private agreement”).
programs and educational institutions, the number of participants, and the documented benefits of sports participation to overall health and well being.23

Nevertheless, the sentiment expressed by Senator McCain and reflected in policy discussions—that the government should not be “involved” in sports—is somewhat misleading. “Government involvement” in sports can mean different things and come in different forms across a range of legal and policy contexts at both the federal and state levels. Government involvement, therefore, can include direct and indirect government funding, government affiliation through sports teams embedded in public schools and universities,24 and direct regulation through legislative and executive branch initiatives targeted at sports. All of these types of government involvement are present to varying degrees throughout American sports.25

Given the array of possible forms for government involvement in sports, it is apparent that the values expressed by Senator McCain and incorporated into the legal structure of sports is that some government involvement is, in fact, welcomed by sports leagues and regulators and provides a backbone for American sports to thrive. This includes government support of sports through funding, such as stadium financing26 and the use of tax dollars to provide sports


25. Indeed, critics have argued that “[o]ur government policies have helped develop and maintain an elite sports structure of significant support for the Olympic Games, professional sports monopolies, tax breaks for mega-stadiums, and anti-trust exemptions for pro teams. In contrast, our government is doing next to nothing for the masses.” Amateur Sports Act, supra note 4, at 90 (statement of Thomas McMillen, Co-Chair, President’s Council on Physical Fitness and Sports).

in public schools and universities. Indeed, the United States is unique in having a substantial number of sports opportunities provided by educational institutions. Also welcome is targeted government involvement that does not seek to regulate the games themselves but instead promotes sport as an industry, such as baseball’s antitrust exemption, gambling restrictions, and the antitrust exemption permitting the creation of the NFL and pooling of broadcast rights.

In contrast, the kind of government involvement that is unwelcome by both sports leagues and administrators, and most policymakers, is the type that would use law to regulate the purpose, content, or management of sports programs. Such regulation could include the purpose of sports in schools; the way in which public high schools, colleges and universities structure, manage, and pay for their sports programs and regulate their athletes; and even the rules of play.

Thus, a more precise formulation of our current understanding with respect to the government’s relationship to sports is that it is desirable for the government to financially support and use law to privilege sports leagues and regulators; however, law should not be used to directly regulate the content and conduct of sports leagues and programs, especially as they manage athletes. This formulation is reflected in the current structure of all levels of United States sports, but most visibly in the youth and amateur context that some characterize as the “Wild West.”

A. A “Hands-Off” Approach

The notion that the government should stay out of sports to a large extent

27. For instance, Mark Emmert, President of the NCAA, testified before Congress about the “collegiate model” for athletics and its importance in American culture, stating that “[t]his is a uniquely American phenomenon. There is no model elsewhere in the world where athletics are tied so directly to colleges and universities as an extension of the educational process.” Emmert, supra note 24, at 2–3.


29. See infra notes 89–92 and accompanying text (stating that courts have taken a “hands off” approach to regulation); infra notes 114–22 and accompanying text (examples of government action promoting sports).


31. See Amateur Sports Act, supra note 4, at 88–89 (statement of Thomas McMillen, Co-Chair, President’s Council on Physical Fitness and Sports) (describing the government’s “laissez-faire” attitude towards sports).
comes from the traditional view that sports are an individual, private pursuit\textsuperscript{32} and the idea that the games are different from commerce and, therefore, not appropriate for government regulation.\textsuperscript{33} This has translated into a generous degree of legal insulation for sports leagues, administrators, and regulators, especially in the way that they manage athletes and structure the games. This insulation is reflected in both the structure of sports, which is supported by law,\textsuperscript{34} and sport litigation, particularly in cases where athletes seek legal relief against sports regulators and administrators.\textsuperscript{35}

The legal insulation of sports also characterizes debates about the existence of “sports law” as an area of scholarly merit.\textsuperscript{36} For instance, in analyzing whether “sports law” is an academic field, Professor Burlette Carter explained that sports law has traditionally been “removed from the things that make a field a field” because of the general lack of litigation establishing a specific common law and the lack of “legislative and administrative action that creates a statutory and regulatory [legal framework].”\textsuperscript{37} Professor Carter argued that “this isolation has been no historical accident; it is deeply rooted in our assumptions about the nature of sport, the nature of those who participate in it, and our resulting treatment of both in the law.”\textsuperscript{38}

The view that the government should stay out of sports, particularly at the youth and amateur level, is prominently evidenced by the fact that most organized sports opportunities for children are provided through the private sector.\textsuperscript{39} Moreover, unlike most countries that participate in international

\textsuperscript{32} Martin Barry Vinokur, More than a Game: Sports and Politics 34 (1988) (stating that, in “liberal capitalist society,” sport is considered “the concern of the individual”).


\textsuperscript{34} See Amateur Sports Act, supra note 4, at 88 (statement of Thomas McMillen, Co-Chair, President’s Council on Physical Fitness and Sports) (stating that “what we have . . . is a situation where Government has created one situation, an elite sports structure, and on the other by benign neglect has created an America at the bottom where there are no resources, and I think it is an upside-down system”).

\textsuperscript{35} See, e.g., W. Burlette Carter, Introduction: What Makes a “Field” a “Field”, 1 VA. J. SPORTS & L. 235, 240 (1999) (“Judicial decisions protecting entities involved in sport from lawsuit have further limited sports lawyers’ practice opportunities.”). \textsuperscript{36} See id. at 240–44 (suggesting “reasons why law schools should embrace the study of sports law and encourage scholarship in the field”).

\textsuperscript{37} Id. at 244–45.

\textsuperscript{38} Id. at 245.

\textsuperscript{39} “Designing for Universal Access: How to Reach all Kids? ” Roundtable Summary, ASPEN INST. [hereinafter Designing], http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/PROJECT%
sports, the United States does not have a “ministry for sports” or similar
government agency to promote and regulate youth and amateur athletics. 40
Instead, youth and amateur sports participation is most often a function of
individual means and choices and private-sector goals.41 This fact makes it
difficult to determine how many children engage in competitive sports.42
Studies estimate that 21.5 million to 28.7 million children between the ages of
six and seventeen years old participate in private-sector competitive sports.43
Most organization at this level is achieved through non-profit groups such as
Little League, Pop Warner football, the Amateur Athletic Union, and countless
community leagues.44 One study found that such groups account for $5 billion
a year spent on youth sports.45

The structure of Olympic Movement sports in the United States is also
deliberately private.46 In an effort to better compete in international sports
against our Cold War enemies, United States President Ford established a
Commission on Olympic Sports that recommended legal reforms to encourage
“individual athletic achievement” and Olympic success through the free market
and not federal regulation (in contrast with our Communist opponents).47
Congress responded by establishing the modern United States Olympic
Committee (USOC) through what is now known as the Ted Stevens Olympic
and Amateur Sports Act (the Act).48

Congress created the USOC as a federally chartered, non-profit patriotic
corporation49 and not a federal agency. The purposes of the USOC include,
among other things, coordinating and developing amateur athletic activities
related to international amateur-athletic competition and obtaining the best

20PLAY%20Roundtable%20Summary--Universal%20Access.pdf (last visited Feb. 24, 2016); see
David K. Wiggins, A Worthwhile Effort? History of Organized Youth Sport in the United States, 2
KINESIOLOGY REV. 1, 65 (2013).
40. Dionne L. Koller, Frozen in Time: The State Action Doctrine’s Application to Amateur Sports,
41. Designing, supra note 39.
42. See Kelley & Carchia, supra note 30 (stating that “no one agency or organization monitors youth
sports either as a central part of American childhood or as an industry”).
43. Id.
44. Id.
45. Id.
46. Dionne L. Koller, How the United States Government Sacrifices Athletes’ Constitutional Rights
47. President’s Comm’n on Olympic Sports, Final Report of the President’s Commission
49. Id. § 220507.
amateur United States athletes for participation in the Olympic Games.\textsuperscript{50} To do this, the Act provided that the USOC would recognize privately incorporated National Governing Bodies (NGBs) for each Olympic Movement sport.\textsuperscript{51} Congress, through the Act, also granted the USOC the exclusive right to use the Olympic trademarks, which carry substantial economic benefit, to ensure the USOC could adequately fund its activities without government support.\textsuperscript{52} The Act, therefore, codified the private nature of Olympic Movement sports by not giving the government a role in selecting or training athletes for international competition.\textsuperscript{53} Moreover, it took the government out of the role of promoting grassroots youth sports participation by making such activities part of the USOC’s mission.\textsuperscript{54}

The Act also envisioned limited future government involvement in the Olympic Movement by circumscribing the role for courts. The statute does not include a private right of action for athletes\textsuperscript{55} and mandates that disputes be sent to binding arbitration.\textsuperscript{56} Congress amended the Act in 1998 to deny courts jurisdiction to grant an injunction allowing an athlete to compete in the Olympic Games within twenty-one days of the start of the Games.\textsuperscript{57} Moreover, the Supreme Court held that the USOC is not a state actor.\textsuperscript{58} All of this reflects the view stated by Judge Posner in \textit{Michels v. United States Olympic Committee}\textsuperscript{59} that “there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.”

\begin{footnotesize}
\begin{enumerate}
\item.[50] \textit{Id.} \textsuperscript{\textsection} 220503.
\item.[51] \textit{Id.} \textsuperscript{\textsection} 220505(c)(4).
\item.[53] The Act gives the USOC “exclusive jurisdiction” and authority over the participation and selection of athletes for Olympic Movement competition. \textit{See id.}
\item.[54] \textbf{TOM FARREY, GAME ON: HOW THE PRESSURE TO WIN AT ALL COSTS ENDANGERS YOUTH SPORTS, AND WHAT PARENTS CAN DO ABOUT IT} 184–90 (2009).
\item.[55] \textit{Michels v. U.S. Olympic Comm.}, \textit{741 F.2d} 155, 157–58 (7th Cir. 1984) (explaining that the legislative history of the Amateur Sports Act clearly shows that Congress did not intend to create a private right of action for athletes because the proposal to do so was “met with strong resistance by the high school and college communities”); \textit{see also} \textit{Slaney v. Int’l Amateur Athletic Fed’n}, \textit{244 F.3d} 580, 588 (7th Cir. 2001) (finding that the “Act did not provide for a private right of action under which [Plaintiff] could seek to have those claims addressed by the district court”); \textit{DeFrantz v. U.S. Olympic Comm.}, \textit{492 F. Supp.} 1181, 1191 (D.D.C. 1980) (concluding that it could not “find that plaintiffs [had] an implied private right of action under the Mateur Sports Act to enforce a right which [did] not exist”).
\item.[56] \textit{36 U.S.C.} \textsuperscript{\textsection} 220522(a)(4).
\item.[57] \textit{Id.} \textsuperscript{\textsection} 220509.
\item.[58] \textit{S.F. Arts & Athletics, Inc.}, \textit{483 U.S.} at 527.
\item.[59] \textit{Michels}, \textit{741 F.2d} at 159.
\end{enumerate}
\end{footnotesize}
recognized a cause of action for athletes who allege that the USOC or an NGB has not followed its own rules.  

Similarly, the United States Anti-Doping Agency (USADA), the entity that provides drug testing and results management for United States Olympic Movement sports, also is structured as a private, not-for-profit corporation and not a government agency.  Unlike the USOC, USADA was not created by statute. However, Congress “designated” USADA as the official anti-doping agency of the United States Olympic Movement and required the USADA to “ensure that athletes participating in amateur athletic activities recognized by the United States Olympic Committee are prevented from using performance-enhancing drugs or prohibited performance-enhancing methods adopted by the USADA.” Athlete disputes with the USADA are sent to binding arbitration, and as with the USOC, courts have reinforced the “private” nature of the USADA by finding that it is not a state actor subject to constitutional restraints.

Intercollegiate and interscholastic sports programs also enjoy considerable insulation from government regulation, despite the fact that nearly all of them, whether in public or private schools, are recipients of government funding. Thus, courts, Congress, and state legislatures give great deference to

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62. Id. at 124–25.


64. Id. § 2001(b)(2).


66. Armstrong v. Tygart, 886 F. Supp. 2d 572, 581 n.18 (W.D. Tex. 2012) (“[T]he Court assumes the relevant entities are government actors . . . . The Court notes, however, it is very possible neither USADA nor USA Cycling qualify as government actors for constitutional purposes.” (first citing S.F. Arts & Athletics, Inc., v. U.S. Olympic Comm., 483 U.S. 522, 546 (1987); and then citing Behagen v. Amateur Basketball Ass’n, 884 F.2d 524, 531 (10th Cir. 1989))).


68. Cohen v. Brown Univ., 991 F.2d 888, 907 (1st Cir. 1993) (stating that universities should be able to “pursue their missions free from governmental interference”).
institutions to establish and administer their programs with little legal interference,69 which allows voluntary associations, such as the National Collegiate Athletic Association (NCAA) and the National Federation of State High School Associations (NFSHSA), to take primary responsibility in setting the agenda for the way education-based sports programs will be structured.70

Such a view has early roots. United States President Theodore Roosevelt responded to the crisis of violence and deaths in college football by calling a White House summit to urge colleges and universities to regulate themselves and make the game safer.71 This began a period of what commentators call “tremendous judicial deference and goodwill” that the NCAA enjoys in regulating intercollegiate athletics.72 Professor Gary Roberts made the point clear to Congress in a hearing regarding the NCAA and the way in which it enforces its rules, stating “the NCAA’s enforcement process and procedures are unconstrained by either federal constitutional or state law.”73

The federal government has continued its deferential posture toward the NCAA, even in the face of persistent concerns over fairness to student-athletes. For instance, in 2004, Congress held hearings on “Due Process and the NCAA” and, in doing so, emphasized that the NCAA should be left to establish and enforce its own rules.74 Representative Tom Osborne, a former University of Nebraska football coach, stated the prevailing sentiment that Congress should not regulate college sports:

70. See Heckman, supra note 69, at 6–10.
71. LOWE, supra note 33, at 5 (explaining that the summit did not reach any “definite conclusions” but that the president gave “the ball of reform a push”); Christopher Davis, Jr. & Dylan Oliver Malagrin, Hold Your Fire: The Injustice of NCAA Sanctions on Innocent Student Athletes, 11 VA. SPORTS & ENT. L.J. 432, 439 n.21 (2012).
74. Id. at 8 (statement of Rep. Steve Chabot, Chairman, H. Subcomm. on the Constitution) (“Let me state at the outset what this hearing is not about. It is not about the wisdom of any particular NCAA substantive rule. Nor is it about the NCAA’s authority to enforce its rules. The NCAA provides a valuable function in policing collegiate athletics, and we are not here to relitigate any particular decision that the NCAA has made.”).
A common misconception is that the NCAA is a separate authority that governs college athletics. However, the NCAA is a voluntary organization composed of member institutions that are involved in its self-governance. It is certainly appropriate for Congress to conduct hearings to gain a better understanding of the NCAA. However, I believe that the NCAA is best situated to understand its governance needs.75

More recently, in hearings on the “legal issues relating to football head injuries,” several members of Congress stated that the government could help to encourage discussion of the issues but should not regulate them.76 One congressman stated that “[w]e should also avoid the temptation to legislate in this area . . . . We cannot legislate the elimination of injuries from the games without eliminating the games themselves.”77 Similarly, in the same hearing, Congressman Bob Goodlatte stated that “while we do want to pay close attention to what is going on here,” Congress should not “engage in legislation that would allow or prohibit certain types of plays from taking place in high school or college or major league athletics.”78 He went on to state that Congress “should not take up that kind of micromanagement of American athletics.”79 Chairman Conyers replied that “[o]f course, we would never do anything like that.”80 Similarly, in recent hearings on college sports and the well being of college athletes, Senator John Thune made clear that Congress should defer to the NCAA and its member institutions, stating that:

[I]t is my hope that the NCAA, its member institutions . . . and other stakeholders will seek solutions . . . and seek to preserve amateurism in collegiate athletics. This is an area where Congress can provide a forum—but the solutions are most likely to come from those most directly involved in the education and development of student-

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75. Id. at 110 (statement of Rep. Tom Osborne, Member, H. Subcomm. on the Constitution).
76. See id.; see also infra note 77 and accompanying text.
77. Legal Issues Relating to Football Head Injuries (Part I & II): Hearings Before the H. Comm. on the Judiciary, 111th Cong. 5 (2010) (statement of Rep. Lamer Smith, Member, H. Comm. on the Judiciary) (“Congress can highlight the potential long-term consequences of playing professional football through hearings like this one, but the NFL does not need Congress to referee this issue.”).
78. Id. at 19 (statement of Rep. Bob Goodlatte, Member, H. Comm. on the Judiciary).
79. Id.
80. Id. at 5 (statement of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary).
The National Labor Relations Board (NLRB) also has taken a deferential stance toward the NCAA. In 2015, the NLRB decided an appeal from a Regional Director’s decision that Northwestern University’s scholarship football players are “employees” within the meaning of the National Labor Relations Act. The NLRB decided that “even if the scholarship players were statutory employees . . . we have concluded that it will not effectuate the policies of the Act to assert jurisdiction in this case.” The NLRB relied on the unique nature of league sports and the NCAA’s oversight of college sports, as well as the fact that the NCAA had undertaken reforms to address the needs of scholarship football players, in concluding that asserting jurisdiction “would not promote stability in labor relations.”

Although it certainly has taken an “interest” in the area, Congress also has shown deference to professional sports leagues. This deference is especially evident in the case of baseball. One commentator has explained that Congress’s attitude toward professional sports leagues can be explained as a function of the public’s perception of the particular sport. While Congress’s “legislative inactivity concerning professional sports . . . is typical in the life of the national legislature,” it is still noteworthy because it is evident that such inactivity can be linked, at least somewhat, to a belief that government should not take a role in regulating sports. Moreover, deference shown by Congress to sports leagues is shared across other levels and branches of government.

Like Congress, courts also take a “hands off” approach to regulating sports by using law to insulate the decisions of sports regulators. For example, the Supreme Court has held that the NCAA is not a state actor and is therefore not subject to constitutional constraints.

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83. Id. at 3, 7.

84. Id. at 3.

85. Lowe, supra note 33, at 5.

86. Id. at 80, 131 (explaining that, “[i]n short, many members of Congress have felt that organized baseball deserved a status above the law” and that “baseball’s image as the patriotic, pastoral and innocent national pastime paralyzed legislative attempts to place it under the antitrust laws”).

87. Id. at 131–32.

88. Id. at 27.

college athletes, courts have held that participation in athletics is a “privilege” and not a right.\textsuperscript{90} Courts also take the position that they are not in the best position to decide sports disputes over issues such as an athlete’s eligibility and should instead defer to sports regulators and voluntary associations to make decisions according to their own rules.\textsuperscript{91} Courts will only step in to ensure that regulators are following their established procedures.\textsuperscript{92}

Similarly, in cases involving athletes who seek to participate in sports despite an enhanced risk of harm because of a physical disability, courts have deferred to the institution to determine eligibility. For instance, in \textit{Knapp v. Northwestern University}, a basketball player brought a claim under the Rehabilitation Act challenging Northwestern’s decision that the athlete was not eligible to play because of a potentially fatal cardiac defect.\textsuperscript{93} Although the athlete and his parents were willing to assume the risk of harm, the court stated that “medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality and with full regard to possible and reasonable accommodations” and that “the university has the right to determine that an individual is not otherwise medically qualified to play.”\textsuperscript{94}

Courts also are careful in applying tort law to conduct that occurs during sports. Scholars have explained that generally “sports participants are . . . immune . . . from ordinary negligence actions” because robust play makes it impossible to exercise reasonable care.\textsuperscript{95} Voluntary participants in athletic

\textsuperscript{90} See Sisson v. Va. High Sch. League, Inc., No. 7:10-cv-00530, 2010 WL 5173264, at *3 (W.D. Va. Dec. 14, 2010) (citing cases stating that the “privilege” of participating in interscholastic athletics is not protected by the due process clause); Equity in Athletics, Inc. v. Dep’t of Educ., 504 F. Supp. 2d 88, 110 n.10 (W.D. Va. 2007) (citing cases holding that the privilege of participating in interscholastic athletics is not protected by the Fourteenth Amendment).


\textsuperscript{92} See Brandon D. Morgan, Oliver v. NCAA: NCAA’s No Agent Rule Called out, but Remains Safe, 17 SPORTS L.J. 303, 306 (2010) (explaining that “courts generally give great deference to voluntary associations” and that “courts are reluctant to tell the NCAA what to do”).

\textsuperscript{93} 101 F.3d 473, 484 (7th Cir. 1996).

\textsuperscript{94} Id.

\textsuperscript{95} MICHAEL J. COZZILO ET AL., SPORTS LAW: CASES AND MATERIALS 988 (2d ed. 2007); see also Hackbart v. Cincinnati Bengals, 601 F.2d 516, 524 (10th Cir. 1979) (adopting a recklessness standard).
activities are said to assume the usual, inherent risks of participation. The exception is where a participant is injured by intentional or deliberate conduct outside the scope of the game. Notably, courts recognize that conduct that intentionally violates the rules of a given sport may also be part of the game, and they consider a player injured by such conduct to have assumed the risk. This standard extends to coaches and institutions, such as leagues and school districts, that sponsor athletic activity.

Finally, deference to sports regulators is even evident in previous efforts to use tort law to provide a remedy to athletes harmed by sports concussions. For instance, in the professional context, athletes have faced numerous barriers to recovery. Similarly, in Cerny v. Cedar Bluffs Junior/Senior Public School, a high school football player brought a claim alleging that he suffered a head injury because his coaches were negligent in allowing him to return to play. The court held that the coaches’ conduct was reasonable for football coaches.

In another case, a high school student’s claim against a state public high school athletic association was dismissed because the court found the student could not show that the organization’s failure to implement rules for concussions was the cause of his injury. The school districts and individual schools were responsible for such rules.

The limited amount of government involvement in sports, as well as the deliberate insulation of sports from government interference, provides powerful space for sports regulators to structure their programs, manage athletes, and enforce sports rules and norms through tools such as collective bargaining agreements, bylaws, and contracts that set the terms and conditions for

96. COZZILLO ET AL., supra note 95, at 988.
97. Id.
98. See Avila v. Citrus Cmty. Coll. Dist., 131 P.3d 383, 394 (Cal. 2006) (explaining that, “[f]or better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball”); Gauvin v. Clark, 537 N.E.2d 94, 96 (Mass. 1989) (“The problem of imposing a duty of care on participants in a sports competition is a difficult one . . . . The courts are wary of imposing wide tort liability on sports participants, lest the law chill the vigor of athletic competition.”).
99. See Avila, 131 P.3d at 387.
102. 679 N.W.2d 198, 200 (Neb. 2004).
103. Id.
105. Id.
participation. Sports administrators and regulators advance several reasons for why they must be insulated from government regulation. First, with respect to sports programs in schools, there is an argument that courts and legislatures should not interfere with the “educational process.” The second rationale for limiting the state’s role in regulating sports is that regulation will make sports administration too costly, thereby limiting participation opportunities. For instance, the court in Nabozny v. Barnhill stated that “the law” should not “place unreasonable burdens on the free and vigorous participation in sports by our youth.” It is also suggested that greater legal regulation will make sports as currently constructed (and publicly beloved) impossible to administer. Finally, the NCAA frequently invokes patriotic values with respect to intercollegiate sports, stating that the “collegiate model” that uses sports as an extension of the educational process “is a uniquely American phenomenon” and that “[s]ome countries . . . desire to emulate our model.” The NCAA also stresses that “a valuable untold story” is that the model for sports in

106. Albach v. Odle, 531 F.2d 983, 985 (10th Cir. 1976) (“The educational process is a broad and comprehensive concept . . . . It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity.”); Carter, supra note 72, at 69–70 (discussing reasons why courts traditionally have deferred to the NCAA).
107. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 304 (2001) (addressing the high school athletic association’s argument that holding the entity to be a state actor would “trigger an epidemic of unprecedented federal litigation”); Woodman v. Kera LLC, 785 N.W.2d 1, 42 (Mich. 2010) (stating that holding parental pre-injury waivers unenforceable will increase sports-related litigation and cause youth sports opportunities to “dwindle out of a reasonable fear of tort liability” and that youth sports providers will be subject to increased liability and insurance costs which will lead to a reduction in sports opportunities or increased participation costs).
109. See Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes: Hearing Before the H. Comm. on Educ. and the Workforce, 113th Cong. (2014) (statement of Kenneth W. Starr, President and Chancellor, Baylor University) (responding to decision by Regional Director of the NLRB allowing Northwestern University football players to form a labor union, stating that allowing such an outcome would lead to “unfortunate outcomes, including programmatic cutbacks or escalating tuition—at a time when many institutions of higher learning are struggling to keep costs low and thereby maintain college affordability”); IHSA Responds to Concussion Lawsuit, ILL. HIGH SCH. ASS’N (Dec. 3, 2014), http://www.ihsa.org/NewsMedia/Announcements/tabid/93/ID/558/IHSAResponds-To-Concussion-Lawsuit.aspx (stating that “potential repercussions” of a concussion lawsuit would “threaten the future of all high school sports for the millions of students around the country who annually benefit from their participation experiences”); Transcript of Comments from U.S. Senators Richard Burr, Lamar Alexander, NCAA (Apr. 11, 2014), http://www.ncaa.org/about/resources/media-center/news/transcript-comments-us-senators-richard-burr-lamar-alexander (responding to NLRB Regional Director’s decision on Northwestern football players’ unionization petition and arguing that allowing college athletes to unionize, combined with Title IX, “may result in further reductions of athletic programs and opportunities on college campuses”).
colleges and universities “helped shape many leaders and great citizens of America” and that it is a model that “has served this country.” In all, across a range of contexts, it is evident that the prevailing norm is for the government to limit its involvement in sports.

B. Using Law to Promote Sports and Reaffirm the Power of Sports Regulators

There are, of course, areas that might appear to be exceptions to the government’s hands-off approach to sports regulation where statutes are specifically directed to regulating sports or where law is applied by courts to regulators’ actions. However, this use of law usually is aimed at promoting and facilitating the growth of sports leagues and programs and is generally welcomed by sports regulators. Moreover, courts applying law in areas such as civil rights and antitrust generally reaffirm the role of sports regulators as the primary and best authority to determine who is eligible to play and under what conditions.

There are several early examples of statutory and common law being used to promote or privilege the professional sports industry. There is baseball’s legendary antitrust exemption and, more recently, the Curt Flood Act. Similarly, federal statutes allowing for the pooling of broadcasting rights and the merger of the NFL and American Football League are aimed at

111. Id. at 6.
112. See Lowe, supra note 33, at 81 (explaining that regulation can give a sport a place of “legitimacy and importance” in American life); Rosenthal, supra note 26, at 73, 87 (stating that “owners, not consumers, with the help of court decisions and the U.S. Congress, have established cartels” for the four major sports leagues and that “legislation to create a free and open market for professional sports has never been passed by Congress; in fact, when Congress has acted, it has been to extend protections to the sports leagues”); Amateur Sports Act, supra note 4, at 90 (statement of Thomas McMillen, Co-Chair, President’s Council on Physical Fitness and Sports) (stating that “our government policies have helped develop and maintain an elite sports structure of significant support for the Olympic Games, professional sports monopolies, tax breaks for mega-stadiums, and antitrust exemptions for pro teams”).
114. See Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200, 200 (1922) (holding that baseball games are not interstate commerce and therefore are not subject to the antitrust laws); see also Flood v. Kuhn, 407 U.S. 258 (1972) (holding that baseball is interstate commerce but an antitrust exemption stands as a matter of stare decisis for which Congress, not the courts, is the remedy); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (holding that baseball is exempt from antitrust laws). The stage was set for this “jurisdictional volleyball” over baseball’s monopolistic practices in the 1951 baseball hearings before Congress where Congress chose not to take action on issues such as the reserve clause, preferring instead to defer to courts. Lowe, supra note 33, at 17–24.
facilitating the growth and protecting the integrity of professional sports, as are statutes that prohibit sports bribery and gambling and regulate boxing. Congress and individual states have enacted laws to aid NCAA member institutions through the Sports Agent Responsibility and Trust Act (SPARTA) and the Uniform Athlete Agent Act (UAAA). Additionally, state statutes aimed at discrete areas or specific sports—such as statutes regulating sports agents, boxing, and mixed martial arts or statutes providing stadium financing—all work towards supporting the professional sports industry.

Likewise, as discussed above, Congress also has regulated Olympic Movement sports through the Ted Stevens Olympic and Amateur Sports Act and appropriations for, and recognition of, the USADA. These initiatives are meant to reinforce the private status of the USOC and USADA and enable them to flourish as independent corporations that do not owe athletes constitutional protections. It also allows the USOC to set priorities for amateur sports in the United States—such as winning Olympic medals over broad-based, grassroots sports participation—largely unhampered by other public policy goals. Moreover, in both cases, law was used to insulate the USOC and the USADA as much as possible from court intervention, at least with respect to managing athletes.

The fight against doping in sports, however, seemingly provides a type of “national interest” exception to the usual “hands off” approach the government takes with sports. Yet even this “exception” of sorts is limited. The

121. Critics have explained that the effect of both the UAAA and SPARTA is to provide a cause of action to NCAA member institutions against athlete agents who make contact with players in a way that jeopardizes their amateur status and NCAA eligibility. Marc Edelman, Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform Its Sports Agent Laws to Conform with True Agency Principles, 4 HARV. J. SPORTS & ENT. L. 145, 169 (2013).
125. See supra notes 36–40, 55–60 and accompanying text.
126. See Koller, supra note 123, at 112–17.
intervention in this area does not include a government agency or formal legal regulation through statutes or court decisions. Instead, it exists in a “legal twilight zone,” where the federal government has used its influence over the United States Olympic Movement to shape private outcomes. Thus, although USADA was established as a private corporation, both Congress and the Office of National Drug Control Policy (ONDCP) had a significant role in creating it by influencing the USOC. In doing so, ONDCP expressed the concern that while the new entity needed important status in the United States Olympic Movement: “[W]e have to be very respectful of the notion of amateur sports and the independence of amateur sports from Federal intervention.” The federal government’s influence was used again prior to the 2004 Athens Olympic Games when a Senate Committee subpoenaed documents from the Department of Justice that were part of the infamous Bay Area Laboratory Cooperative investigation. The Committee turned the documents over to USADA so that USADA could prevent certain athletes from competing in the upcoming Olympic Games. USADA continues to partner with federal agents to target athletes involved with performance-enhancing drugs, and the government has sought to use criminal law to punish athletes for issues related to performance-enhancing drug use.

The anti-doping exception to the government’s usual deferential approach to sports leagues and regulators also is limited because of the scope of the athletes covered by such an intervention. Indeed, despite having the

127. Id. at 117–23.
128. Koller, supra note 40, at 184.
129. Id.
130. Koller, supra note 46, at 1465, 1493 (explaining that both ONDCP and Congress had “direct influence over how USADA would be structured and what its mission would be’’); see Drugs in Sports: Compromising the Health of Athletes and Undermining the Integrity of Competition: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 110th Cong. 3 (2005) (statement of Jim Scherr, Chief Executive Officer, U.S. Olympic Comm.) (explaining that the Committee had a role in creating the USADA).
133. Id. at 214.
134. Id. at 215.
135. Those athletes include Marion Jones, Roger Clemens, Barry Bonds, and Lance Armstrong.
authority, Congress has refused to mandate that American professional sports
and other sports leagues outside of the Olympic Movement submit to testing by
USADA. This was made clear when the Senate ratified the International
Convention Against Doping in Sport (ICADIS) in 2008. In doing so, the
Senate limited the definition of an athlete for doping control purposes to
“particularly exclude from ICADIS’s coverage U.S. professional athletes,
and . . . college and high school athletes.”

There is also an apparent exception to the government’s usual “hands off”
approach to sports for statutes that are aimed at sports health and safety. These
statutes are directed primarily at professional, not youth or amateur, sports.
The most significant of these types of initiatives are statutes regulating boxing
and mixed martial arts. In addition, federal regulation of performance-
enhancing drugs, particularly steroids, is often justified as necessary to promote
athletes’ health and safety. However, while health and safety is certainly a
feature of these statutes, it is apparent that they also serve to support regulated
sports by making them safer and enhancing their commercial legitimacy.
Moreover, anti-doping measures also are crucial for legitimizing the United
States’ participation in international sports and preserving the commercial
viability of professional sports as a forum for “fair” competition.

As with professional and Olympic Movement sports, what little
government action there is directed to youth and amateur sports is meant to
courage participation in such programs and not influence the content. For

63, 63–64 (2008).
137. Id.
138. ICADIS was intended to “throw the sovereign power of nation-states behind the fight against
performance enhancing drugs in sport” by requiring nations “to adopt measures that will give force to
the principles of the World Anti-Doping Code (WADC) and support the work of the World Anti-Doping
Agency (WADA).” Id. at 64.
139. Id. at 75–76 (explaining that limiting the coverage of ICADIS was a “political necessity” in the
United States because the professional leagues “do not want to be governed by the terms of the World
Anti-Doping Code, nor turn over testing to an entity entirely outside of their control,” so the Senate
defined the athletes subject to the Code as those competing in Olympic Movement sports).
49030 (West 2007) (banning certain substances from being used by students participating in high school
sports); R.I. GEN. LAWS §16-21.4-2 (2015) (banning promotion of dietary supplements to students).
142. See LOWE, supra note 33, at 81 (discussing the “legitimacy” that boxing would gain if it was
federally regulated).
143. Koller, supra note 123, at 112–17. In addition, nations who hope to host the Olympic Games are
now required to adopt the ICADIS and the World Anti-Doping Code and support the work of the World
Anti-Doping Agency. Straubel, supra note 136, at 63–64.
144. See Straubel, supra note 136, at 87.
instance, United States President Dwight Eisenhower created the President’s Council on Youth Fitness in 1953 in response to reports on the poor state of youth physical fitness in the United States.\textsuperscript{145} The goal was for the Council to be a “catalytic agent” focused on creating public awareness of the benefits of youth physical fitness.\textsuperscript{146} United States President Lyndon Johnson subsequently changed the name to the President’s Council on Physical Fitness and Sports to encourage greater youth fitness through participation in sports.\textsuperscript{147} The Nixon administration established the Presidential Sports Award to motivate participation in physical activity.\textsuperscript{148} Subsequent administrations have continued to promote awareness and involvement in youth sports to enhance physical fitness,\textsuperscript{149} and in 2002 United States President George W. Bush issued an Executive Order directing the Department of Health and Human Services to “develop and coordinate” a national program to stimulate sports participation and physical fitness as well as good nutrition.\textsuperscript{150} The goals of the President’s Council have been to promote awareness and generate interest in sports participation.\textsuperscript{151} The Council does not seek to use law to create a sports structure that would promote greater participation or otherwise shape sports participation opportunities that are currently being provided.\textsuperscript{152}

\begin{itemize}
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} Id.
  \item \textsuperscript{148} Id.
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} President Bush’s original program was limited to sports participation and physical fitness. Exec. Order No. 13,265, 67 Fed. Reg. 39,841 (June 6, 2002). A revised order, signed by President Barack Obama, expanded the program to include nutrition and stated that HHS should seek to:
    \begin{itemize}
      \item (a) [E]xpand national interest in and awareness of the benefits of regular physical activity, fitness, sports participation, and good nutrition;
      \item (b) stimulate and enhance coordination of programs within and among the private and public sectors that promote physical activity, fitness, sports participation, and good nutrition;
      \item (c) expand availability of quality information and guidance regarding physical activity, fitness, sports participation, and good nutrition; and
      \item (d) target all Americans, with particular emphasis on children and adolescents, as well as populations or communities in which specific risks or disparities in participation in, access to, or knowledge about the benefits of physical activity, fitness, sports participation, and good nutrition have been identified.
    \end{itemize}
  \item \textsuperscript{151} See Amateur Sports Act, supra note 4, at 90 (statement of Thomas McMillen, Co-Chair, President’s Council on Physical Fitness and Sports) (stating that the President’s Council is the “sole federal agency devoted to physical fitness and sports”).
  \item \textsuperscript{152} See Farrey, supra note 54, at 75–76 (describing the President’s Council on Physical Fitness as a “barely funded, strictly advisory committee that works with the Department of Health and Human Services to recommend programs to encourage sports participation”).
\end{itemize}
Additionally, the government has supported youth sports through initiatives that include Congress incorporating Little League baseball and granting liability protections for volunteers who serve in nonprofit and other associations, such as youth sports organizations. Moreover, there are state statutes in a handful of areas that address issues related to youth and amateur sports, such as encouraging youth sports providers to obtain criminal background checks on coaches, establishing athletic codes of conduct to regulate behavior of observers at youth sporting events, limiting liability for youth sports program volunteers, and allowing certain minors to officiate youth sports activities. Notably, state law initiatives aimed at regulating the NCAA were struck down for being in violation of the dormant Commerce Clause. None of the regulations that do exist, however, serve to shape what sports will be offered or the way youth and amateur sports are played.

Case law also evidences a deferential posture toward professional leagues and youth and amateur sports. In most cases, litigation has served to reaffirm and insulate the authority of private regulators—not courts or legislators—to structure and manage sports. For instance, with the exception of Major League Baseball, antitrust law potentially has important application to professional and intercollegiate sports. While courts have held that antitrust

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153. 36 U.S.C. § 130502 (2012) (explaining that Little League’s purposes are promoting the game of baseball, “developing qualities of citizenship and sportsmanship,” and using baseball to “teach spirit and competitive will to win, physical fitness through individual sacrifice, the values of team play, and wholesome well being”).


155. OR. REV. STAT. § 418.696 (2013) (encouraging “youth sports provider[s]” to “adopt a list of crimes that disqualify” an individual from coaching, complete criminal background checks, and “complete a sports education program”).

156. See, e.g., GA. CODE ANN. § 20-2-319.2 (West 2015) (requiring physical examination to participate in extracurricular sports); MD. CODE ANN., EDUC. § 7-436 (LexisNexis 2013) (requiring schools to implement programs that provide awareness of sudden cardiac arrest); N.J. STAT. ANN. § 5:17-2 (West 2015) (granting power to the school board to ban any student, coach, parent or game official who violates athletic code of conduct).


158. 820 ILL. COMP. STAT. 205 / 2.5 (2014).

159. See, e.g., Nat’l Collegiate Athletic Ass’n v. Miller, 10 F.3d 633, 640 (9th Cir. 1993); Nat’l Collegiate Athletic Ass’n v. Roberts, No. TCA 94-40413-WS, 1994 WL 750585, at *1 (N.D. Fla. Nov. 8, 1994).

160. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 n.23 (1984) (“[A]s the guardian of an important American tradition, the NCAA’s motives must be accorded a respectful presumption of validity . . . .”).

161. See supra Part II.A.
principles apply to challenged restraints, courts also grant leagues and regulators deference because of what courts find is the unique nature of the product—competition itself. Courts therefore use a “Rule of Reason analysis” in all cases, even those where a per se analysis would apply. As the Supreme Court has stated: “[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.” The Court also recognized that the need to maintain competitive balance amongst teams in a league is an important feature of sports because it insulates agreements from antitrust liability.

In cases involving the NCAA’s commercial dealings, and not player regulation, courts have generally taken an approach that is “unremarkable and consistent with more traditional antitrust methodology.” The Supreme Court applied antitrust law to the NCAA in 1984 when it held in NCAA v. Board of Regents of the University of Oklahoma that the NCAA’s restraint on the number of college football games that its members could broadcast violated the Sherman Act. However, the Court also suggested what would become a “dichotomous” approach to regulating the NCAA through antitrust litigation by reaffirming the NCAA’s “critical” role in preserving the “revered tradition of amateurism in college sports.” The Court stated that it was beyond question that the NCAA “needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics.” Consistent with this reasoning, in cases challenging NCAA rules affecting players, such as recruiting and eligibility, courts have given the NCAA “special treatment.” Professor Gabe Feldman has explained how the Supreme Court essentially granted the NCAA an

164. Id. at 249 n.2, 251.
166. Am. Needle, 560 U.S. at 204.
170. Bd. of Regents, 468 U.S. at 120.
171. Id.
172. Feldman, supra note 163, at 250 (explaining the “muddled, incoherent deference to the NCAA” under the Sherman Act and the “special treatment” that the NCAA receives due to the “myth of amateurism”).
antitrust defense in player restraint cases based on “amateurism and academic ideals”\textsuperscript{173} despite the fact that these principles have “no place in the equation and . . . no impact on the legality of a restraint.”\textsuperscript{174} Thus, since Board of Regents, courts for varying reasons largely have declined to hold that NCAA player restraints violate antitrust law, affording the NCAA “anomalous antitrust deference.”\textsuperscript{175}

Courts also have applied federal civil rights statutes and constitutional law to sports, which some commentators state “play an increasingly important role in governing legal relationships in sports.”\textsuperscript{176} Although not directly aimed at sports, the Americans with Disabilities Act and Rehabilitation Act, Title VI, and constitutional law principles—such as the First, Fourth, and Fourteenth Amendments—all have been applied in the sports context.\textsuperscript{177} However, in nearly all of these cases, courts have held that sports regulators should be left to determine the structure of their sports programs. For instance, in Bloom v. NCAA, the court found that Bloom, a student-athlete, had standing to challenge the NCAA’s application of amateurism rules that prevented him from competing as a professional skier while also playing football for the University of Colorado.\textsuperscript{178} However, the court ultimately held that the NCAA’s rules in this regard and their application specifically to Bloom were reasonable, and it declined to issue an injunction that would have allowed Bloom to ski competitively and play NCAA football.\textsuperscript{179}

Likewise, in Knapp v. Northwestern University, discussed above, while the court held that the Rehabilitation Act applied to Northwestern University, it found that the university did not violate the Act with respect to athlete Nicholas Knapp because the court deferred to the university’s determination that Knapp

\textsuperscript{173} Id. at 251–53.

\textsuperscript{174} Id. at 257.

\textsuperscript{175} Id. at 261–62. Most recently, in O’Bannon v. NCAA, the Ninth Circuit held that while the NCAA is not exempt from antitrust scrutiny, the preservation of amateurism is a legitimate pro-competitive basis for regulation. 802 F.3d 1049, 1078–79 (9th Cir. 2015). Accordingly, the court found that restraints on cash payments in the form of deferred licensing payments to college athletes for the use of their image and likeness was permitted, but that the NCAA must allow schools to provide scholarships to players up to the full cost of attendance—something the NCAA had done while litigation was pending. \textit{Id.} at 1075; Melissa Lipman, \textit{NCAA Can Block Cash Payments to Athletes, 9th Circ. Says}, Law360 (Sept. 30, 2015, 10:27 AM), http://www.law360.com/articles/677977/ncaa-can-block-cash-payments-to-athletes-9th-circ-says.

\textsuperscript{176} Davis, \textit{supra} note 18, at 234.

\textsuperscript{177} See, e.g., \textit{id.}; \textit{infra} notes 178, 180–81, 183.


\textsuperscript{179} Id. at 628.
was not an “otherwise qualified” athlete. In Vernonia School District 47J v. Acton, the Supreme Court stated that drug testing high school athletes constituted a search subject to the Fourth Amendment but held that the drug testing policy did not violate the Fourth Amendment. Other courts have held similarly in the intercollegiate and interscholastic contexts, deferring to sports regulators to set the terms of participation.

Perhaps the highest-profile example of law directed to sports is Title IX. Although the statute itself does not mention sports, the regulations and policy clarifications that make up the law of Title IX all are directed at education-based sports programs. Title IX’s central purpose is to require institutions to provide “equal athletic opportunit[ies]” to male and female students, and its impact in changing the face of education-based sports programs is undeniable. However, even Title IX, which is considered one of the most important government initiatives with respect to sports, does not regulate the

182. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 291 (2001) (holding that NCAA rule against undue influence in recruitment of middle school students for athletic programs did not violate the First Amendment); Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 182 (1988) (holding that the NCAA would not be held liable for university disciplinary actions against a coach in compliance with NCAA rules because they did not constitute state action); Cureton v. Nat’l Collegiate Athletic Ass’n, 198 F.3d 107, 109 (3d Cir. 1999) (ruling that the NCAA did not have controlling authority over its members in this Title VI action; therefore, regulations protecting against disparate impact discrimination only applied to individual programs that the NCAA did not have control over); Banks v. Nat’l Collegiate Athletic Ass’n, 977 F.2d 1081, 1081 (7th Cir. 1992) (rendering claims moot if they addressed the NCAA rule withdrawing an athlete’s eligibility for signing professional contracts violated the Sherman Act); Menora v. Ill. High Sch. Ass’n, 683 F.2d 1030, 1032 (7th Cir. 1982) (rejecting a free exercise challenge by Orthodox Jewish basketball player that banned headwear during games); Shelton v. Nat’l Collegiate Athletic Ass’n, 539 F.2d 1197, 1198 (9th Cir. 1976) (reversing decision to suspend enforcement of rule that declared a college basketball player who signed a professional contract ineligible to participate in intercollegiate athletics); Bowers v. Nat’l Collegiate Athletic Ass’n, 9 F. Supp. 2d 460, 461 (D.N.J. 1998) (holding that the Sherman Act does not apply to NCAA’s promulgation of eligibility requirements); Tatum v. Nat’l Collegiate Athletic Ass’n, 992 F. Supp. 1114, 1114 (E.D. Mo. 1998) (denying student’s claim for preliminary injunction against the NCAA for administering tests that triggered the student’s generalized anxiety disorder); Genden v. Nat’l Collegiate Athletic Ass’n, No. 96 C 6953, 1996 WL 680000, at *1 (N.D. Ill. Nov. 21, 1996) (denying preliminary injunction against NCAA that prohibited a collegiate swimmer from participating in competitions because of a learning disability); Gaines v. Nat’l Collegiate Athletic Ass’n, 746 F. Supp. 738, 739 (M.D. Tenn. 1990) (holding NCAA rules were not subject to antitrust analysis).
183. The statute states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2012).
184. 34 C.F.R. § 106.41(c) (2015); 45 C.F.R. § 86.41(c) (2015).
actual content of sports programs themselves. Instead, the law requires that programs meet the regulatory definition of providing “equal athletic opportunity” for men and women.\textsuperscript{186} Title IX does not require that covered educational programs give preferential treatment to women,\textsuperscript{187} have the same sports teams for men and women,\textsuperscript{188} or spend equally on men and women’s sports.\textsuperscript{189} The law only requires that where a school has separate programs for men and women, those opportunities must be equitable.\textsuperscript{190} Importantly, however, while the equality mandate itself has been defined through case law and Title IX’s implementing regulations and policy clarifications, institutions that sponsor athletic programs define the content of that equality mandate.\textsuperscript{191}

None of these apparent areas of exception, where law seemingly is directed at or applied to sports, regulates the content or purpose of sports programs—at what sports are played, the rules of play, the athletic eligibility of those who wish to participate, or otherwise how sports themselves are conducted and managed.\textsuperscript{192} Also significant is that none of these apparent areas of exception are aimed at defining the content or purpose of youth and amateur sports programs.

\textsuperscript{186} See 34 C.F.R. § 106.41(c); 45 C.F.R. § 86.41(c).
\textsuperscript{187} See, e.g., Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930, 933 (D.C. Cir. 2004); Neal v. Bd. of Trustees of Cal. State Univs., 198 F.3d 763, 771 (9th Cir. 1999) (“After all, § 1681(b) states that Title IX does not require ‘any education institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity.’”); Cohen v. Brown Univ., 991 F.2d 888, 894–95 (1st Cir. 1993) (explaining that Title IX prohibits gender discrimination but it shall not “be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number of persons or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity.”); Pederson v. La. State Univ., 912 F. Supp. 892, 908 (M.D. La. 1996) (“After establishing that sex discrimination is prohibited, Title IX then proceeds to clarify that efforts to remedy historical sex discrimination shall not include preferential or disparate treatment of one sex over another.”), aff’d in part & rev’d in part, 201 F.3d 388 (5th Cir. 2000), vacated and superseded on reh’g, 213 F.3d 858 (5th Cir. 2000).
\textsuperscript{189} See id.
\textsuperscript{190} See Mary Frances O’Shea, Dear Colleague Letter: Bowling Green State University, U.S. DEP’T EDUC. (July 23, 1998), http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html.
\textsuperscript{191} The Office for Civil Rights has explained that the three-part test allows institutions to maintain “flexibility and affords them control over their athletic programs.” Russlynn Ali, Dear Colleague Letter, U.S. DEP’T EDUC. 13 (Apr. 20, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html; see Koller, supra note 185, at 403.
\textsuperscript{192} See Ali, supra note 191.
programs differently from the content and purpose articulated by the private actors who structure, manage, and staff such programs. Accordingly, the government’s relationship to sports in the United States is primarily characterized by initiatives aimed at enhancing the sports industry, facilitating its popular appeal, and protecting those who make the games happen. Law, then, has been effectively used in the service of sports, or more specifically in the service of the goals of sports leagues, administrators, and regulators. By and large, the government has not used sports in the service of other public values.

The legal and policy response to concussions in sports, however, can be viewed as an exception. As explained below, several factors combined to put the issue of concussions in sports, at both the youth and professional levels, on state and national government agendas. This has resulted in a legal and policy response that is worth evaluating for three reasons. First, the concussion issue has challenged the widely held view that law and government have only a limited role to play in sports. Second, the concussion issue has led some to rethink a widely held sports norm that violence and injury to players, and subsequently playing while injured, is a fundamental aspect of sports. Third, and perhaps most significantly, the concussion issue has provided a blueprint for future government initiatives aimed at sports, particularly in the youth and amateur context.

III. THE LEGAL AND POLICY RESPONSE TO CONCUSSIONS IN SPORTS

The legal and policy response to concussions in sports includes statutes, proposed federal legislation, and “bully pulpit” initiatives by the President and Congress. It is significant not just because it is high-profile government action aimed at sports but because it is wide reaching. It is government involvement that is occurring across varying legal and policy platforms, crossing sports contexts, and covering more than just players in a single sport.

A. Defining the Problem

As a threshold matter, it is important to understand how concussions, unlike so many other sports issues, broke through the usual “hands off” approach and developed to the point of prompting legal change. Public policy scholars offer useful explanations for the way law is shaped through
exploration of the theory of “problem definition.”

Problem definition is concerned with “what we choose to identify as public issues” and the resulting characterization of such issues in the political process. Problem definition explains how social problems rise or fall on the government’s agenda, and it explains the legal solutions that result from the legislative process.

Policy scholars have explained that before a law is enacted, social conditions must be defined as public “problems” that reach the government’s policy agenda. A public problem is defined as a “condition or situation that produces needs or dissatisfaction among people and for which relief or redress by governmental action is sought.” Policy scholars have explained that social conditions do not, without more, become policy problems. Instead, Professors Baumgartner and Jones stated that “[c]onditions become defined as problems when we believe we should do something about them.”

The actual process of a condition being defined as a problem is a result of interpretation, and this “translation” happens as a result of the values that shape one’s perceptions and whether, consistent with those values, government action should be used to address the issue. Problem definition is not just important in the political process; it is important to understanding the resulting legal solution.

195. Id. at vii.
196. Id.
198. JAMES E. ANDERSON, PUBLIC POLICYMAKING 85 (7th ed. 2010).
199. Id. at 640.
200. FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS 27 (2d ed. 2009) (explaining that “before a problem is likely to attract the attention of government officials, there must be an image, or an understanding, that links the problem with a possible governmental solution”).
202. Id. at 110–11.
203. Janet A. Weiss, The Powers of Problem Definition: The Case of Government Paperwork, 22 POL’Y SCI. 97, 97–98 (1989) (“Z problem definition at the outset of the policy process has implications for later stages: which kinds of evidence bear on the problem, which solutions are considered effective and feasible, . . . how policies are implemented, and by which criteria policies are assessed . . . .

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In the case of sports concussions, the “condition” that players endured head trauma as part of the game was translated into a “problem” that government should address for several reasons. First, there were numerous powerful personal narratives involving both professional and youth players. The one most credited with providing the impetus for state legislation was the narrative of Zackery Lystedt. 204 In October 2006, Lystedt suffered a concussion after making a routine tackle during a school football game. 205 Coaches allowed Lystedt to return to the game, and he suffered a severe brain injury that left him with permanent disabilities. 206 In the years following the injury, the Lystedt family successfully lobbied for passage of the “Lystedt Law” in Washington State, 207 which serves as a model for other state statutes. 208

The issue also benefitted from the NFL’s lobbying activities. 209 After Washington State enacted the Lystedt Law, the NFL (and later the NCAA) worked to adopt similar laws in all states and the District of Columbia. 210 Significantly, the NFL advanced the Lystedt Law as the driving narrative for sports concussion reform because the Lystedt Law defined the issue as one of preventing re-injury to the harm already done. 211 Commentators have explained that this definition of the problem “directed attention away from a different public health problem—the initial injury.” 212 By doing so, sports concussion initiatives did not seek to directly change the games themselves as a way of decreasing the actual incidence of concussions. 213

205. See id. at 216.
207. Breck, supra note 204, at 217.
208. Brandwein, supra note 206, at 29 (stating that Washington’s statute “has become the model” for subsequent state sports concussion legislation).
209. Hosea H. Harvey, Refereeing the Public Health, 14 YALE J. HEALTH POL’Y, L. & ETHICS 66, 103 (2014) (explaining that “it seems more likely than not that the NFL’s message and influencing served as one key motivation for the adoption of youth sports [traumatic brain injury] laws”).
210. Id. at 86, 100.
211. Id. at 86, 102–03.
212. Id. at 102.
213. Id. Indeed, “youth sports concussion laws are remarkably uniform across states,” and all the laws “focus on secondary prevention efforts to mitigate the downstream effects of concussions” rather than preventing the initial injury. Kerri McGowan Lowrey & Stephanie R. Morain, State Experiences Implementing Youth Sports Concussion Laws: Challenges, Successes, and Lessons for Evaluating...

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As explained below, the legal process also played a crucial role in telling the stories and amplifying the scientific evidence of the harms of sports concussions. Former professional and college athletes brought claims detailing the alleged effects of sports concussions and mismanagement by team and league officials, which helped translate the issue from a “condition” to a “problem.”\(^{214}\) These personal narratives combined with emerging medical research that evidenced the harm done by sports concussions as well as the risks to athletes when concussions are not taken seriously.\(^{215}\)

Thus, the public transformation of the concussion issue, from an inherent feature of sports to a problem for government to address, resulted from “an increased public awareness respecting the threat posed by sports-related concussions, particularly in young athletes” and the view, supported most visibly by the NFL, that the government should take action to prevent the harm.\(^{216}\)


In a recent report, the Institute of Medicine stated that “few issues at the intersection of medicine and sports . . . have generated as much public interest as sports-related concussions,” especially among youth.\(^{217}\) Although there is some scientific debate over the exact definition, the Centers for Disease Control and Prevention define a concussion as a type of traumatic brain injury that is caused by a “bump, blow or jolt to the head or body” that causes the head to move back and forth rapidly.\(^{218}\) Sports most commonly associated with


\(^{216}\) Id. at 248.

\(^{217}\) COMMITTEE ON SPORTS-RELATED CONCUSSIONS IN YOUTH ET AL., SPORTS-RELATED CONCUSSIONS IN YOUTH: IMPROVING THE SCIENCE, CHANGING THE CULTURE 19 (Robert Graham et al. eds., 2014) [hereinafter SPORTS-RELATED CONCUSSIONS IN YOUTH].

concussions are football, soccer, ice hockey, and lacrosse.\textsuperscript{219}

The legal and policy response to concussions addresses this issue through a combination of state statutes, proposed federal legislation, significant tort litigation, and “bully pulpit” initiatives, such as a White House Summit and congressional hearings. All fifty states and the District of Columbia now have some type of concussion legislation aimed at youth sports.\textsuperscript{220} The rationale for aiming reform at youth sports is the “unique” situation presented by concussions suffered by children.\textsuperscript{221} Medical research suggests that children are more vulnerable to concussions and the risk of re-injury.\textsuperscript{222} Additionally, youth recreational and school sports often do not have team doctors and athletic trainers to assist with concussion diagnosis and management.\textsuperscript{223} Return-to-play guidelines also are considered important in preventing what is known as Second Impact Syndrome, which is where an athlete suffers an initial concussion and returns to play before it is fully healed.\textsuperscript{224}

The first of these statutes, the Lystedt Law, includes three core features that became the blueprint for youth concussion legislation in other states\textsuperscript{225} and are considered key to limiting the harm from concussions.\textsuperscript{226} The first is promoting awareness through statutes that in varying degrees mandate that athletes, parents, and coaches be educated about the dangers of concussions, such as by signing a concussion awareness form.\textsuperscript{227} The second principle requires that an athlete be removed from play if the athlete suffers, or is suspected of suffering, a concussion.\textsuperscript{228} Finally, the statutes mandate that athletes may not return to play until twenty-four hours after being removed for a concussion and until receiving sufficient medical clearance.\textsuperscript{229} Beyond this, many states require coaches to receive concussion training and mandate the development of policies for use within school districts.\textsuperscript{230}

The statutes do not aim to prevent concussions in sports because they do

\textsuperscript{219} SPORTS-RELATED CONCUSSIONS IN YOUTH, supra note 217, at 4.
\textsuperscript{221} Wilson, supra note 215, at 241.
\textsuperscript{222} Id. at 242.
\textsuperscript{223} Id.
\textsuperscript{224} Brandwein, supra note 206, at 37–38 (explaining Second Impact Syndrome).
\textsuperscript{225} Harvey, supra note 209, at 66, 86.
\textsuperscript{226} Hodge & Kadoo, supra note 220, at 184.
\textsuperscript{227} Harvey, supra note 209, at 89–90.
\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
not ban certain high-risk sports (such as football) or limit sports activity that might produce concussions (such as football tackles, soccer “headers,” or ice hockey body checking).\textsuperscript{231} Instead, the statutes aim to mitigate the severity of the harm from concussions by mandating a response once it is suspected that an athlete has suffered a concussion.\textsuperscript{232} Thus, one scholar has explained that “key features across all youth sports [Traumatic Brain Injury] laws include a focus on secondary, not primary prevention” and that all states generally relied on the three-pronged Lystedt Law model “with minimal policy experimentation.”\textsuperscript{233}

Members of Congress have proposed several bills that would address concussions in sports.\textsuperscript{234} For instance, the proposed Concussion Treatment and Care Tools Act (ConTACT Act)\textsuperscript{235} has three main provisions: First, the law would direct the Department of Health and Human Services, through the Centers for Disease Control, to develop uniform concussion management guidelines for school-aged children, including return-to-play standards.\textsuperscript{236} Second, the bill would provide for state grant funding for schools to implement concussion guidelines and assist with staff training.\textsuperscript{237} Third, it would establish data collection on the number of states that have adopted the uniform concussion management guidelines and the number of students suffering concussions.\textsuperscript{238}

\textsuperscript{231} Id. at 89 (explaining that “[t]here are no states that have banned traditional youth sports with high [traumatic brain injury] risks or that have set out legal regimes attempting to govern particular sports techniques by legislation or regulatory oversight”).

\textsuperscript{232} Brandwein, supra note 206, at 37 (explaining Second Impact Syndrome).

\textsuperscript{233} Harvey, supra note 209, at 89–90.


\textsuperscript{236} S. 307.

\textsuperscript{237} Id.

\textsuperscript{238} Id.
The narratives driving the proposed federal legislation focus on the concussion “epidemic,” the risks to children, and the connection to education. In explaining the need for federal action, Representative George Miller stated that “[m]ore than 140,000 high-school athletes sustain a concussion each year, according to the National Federation of State High School Association, and more than 40 percent of these athletes return to play before they are fully recovered.” Inconsistency among state statutes is driving the federal proposals, as is the fact that most state statutes do not address the issue of returning to the classroom: “[T]he focus must not be return to play, but return to learn.” Congressional hearings also focused on sports-related concussions and the connection to education. In a hearing on the Protecting Student Athletes from Concussions Act, Representative John Kline stated: “We know that what happens on the field can directly affect what happens in the classroom.”

Other bills focus heavily on establishing systems to collect accurate data on the incidence of sports-related concussions. Some members of Congress have taken the sports-concussion issue even further, proposing initiatives such as a “Secondary School Student Athletes’ Bill of Rights” to “protect student-athletes from the dangers of sports-related concussions” and encourage schools to adopt practices that “prevent and address student-athlete injuries.” Sports concussions also have been the cornerstone for broader proposed reforms of intercollegiate athletics programs. For instance, the Collegiate Student Athlete Protection Act would require that institutions whose athletic programs generate more than $10 million in revenue per year must give their athletes “increased protections against concussions, increased protection against scholarship reductions and increased accountability on the institutions to provide for better


240. Id.


242. Id.


The combination of “yearly concussion tests, ensuring stronger due process in scholarship reduction hearings and holding each team accountable to graduate their student athletes within 4 years” aims to provide a federal standard for protecting student-athletes both physically and academically.

The legal and policy response to concussions also included significant tort litigation, some of which is still pending. The most notable were class action lawsuits brought by former players against the NFL, NHL, NCAA, and FIFA and U.S. Soccer. In general, these claims alleged that the relevant leagues and governing bodies ignored the dangers of concussions and failed to adopt policies and procedures that would protect players from harm. The relief sought included damages, funding for future medical care, and implementation of policies and rule changes to minimize the risk of harm to players. Plaintiffs also have brought individual claims against colleges and universities and other sponsors of sports programs. Moreover, organizers attempting to unionize college athletes in revenue-generating sports cited the need to negotiate better protections for athletes who suffer concussions while playing.

Finally, the legal and policy response to concussions also includes several “bully pulpit” initiatives. For instance, President Obama stated in 2013:

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246. Id.
249. See id.; supra note 10 and accompanying text.
250. Hilbert, supra note 248.
252. Solotaroff, supra note 14 (explaining that the concussion issue “galvanized” Ramogi Huma, who is leading the movement to unionize college athletes).
President Obama went on to note his particular concern for college athletes, stating: “You read some of these stories about college players who undergo some of these same problems with concussions and so forth and then have nothing to fall back on. That’s something I’d like to see the NCAA think about.” In 2014, President Obama took the “unusual step” of convening the Healthy Kids and Safe Sports Concussion Summit at the White House to promote initiatives that increase awareness of sports concussions and study the ways youth sports can be made safer. The legal and policy response to concussions also includes related legislative actions and proposals, such as congressional hearings on the NFL’s concussion policy, proposed federal regulations for sports helmet manufacturers, and funding for further research.

C. Evaluating the Legal and Policy Response to Concussions

1. The Skeptical View

There are significant critiques of the legal and policy response to concussions. Primarily, critics discount the government’s legal and policy response for being at best ineffective and at worst an example of “regulatory

255. Id.
260. Harvey, supra note 209, at 104.
capture.” From this perspective, the legal and policy response to concussions in sports fits comfortably within the current sports law landscape—government involvement that is meant to benefit the sports industry. Such a view encompasses several important criticisms.

First, critics point out that the NFL lobbied heavily for state and federal concussion legislation. Critics have explained that this led to legislative outcomes that were “directly relevant to the NFL’s private commercial goals in protecting the image and reputation of football.” The NFL’s significant lobbying efforts were used to define the issue as reducing the harmful consequences of concussions, not reducing the incidence of initial concussion injuries. This ensured that legislative outcomes did not “directly regulate the content, rules, or procedures of football itself.”

A second critique of concussion statutes is that, regardless of the motivation behind the reforms, they are simply not effective. Public health researchers have argued that the statutes do not do anything to limit the incidence of concussions in youth sports. The statutes do not mandate any changes to the games themselves, except to the extent that a player suspected of concussio

261. Id. at 99.
263. Harvey, supra note 209, at 102–03; Amy L. Bernstein, Comment, Into the Red Zone: How the National Football League’s Quest to Curb Concussions and Concussion-Related Injuries Could Affect Players’ Legal Recovery, 22 SETON HALL J. SPORTS & ENT. L. 271, 275 (2012) (“In addition to the policies implemented on the field and in the locker room, the NFL has gone to the United States Congress and to various state legislatures in the hopes of encouraging more states to adopt legislation that establishes a standard for identifying concussions for younger players and for managing their recovery and return to the field.”); Settlement Tackles NFL Concussion Problem, CITIZENS FOR RESP. & ETHICS WASH. (Aug. 30, 2013), http://www.citizensforethics.org/blog/entry/settlement-tackles-nfl-concussion-problem (stating that “congressional attention to concussions was a factor behind the league’s increased spending on lobbying and campaign contributions”); NFL, NCAA Lobby for Concussion Laws, ESPN (Jan. 12, 2012), http://espn.go.com/nfl/story/ /id/7454729/nfl-ncaa-urge-states-pass-concussion-laws (“NFL commissioner Roger Goodell and NCAA president Mark Emmert are urging 19 governors to support legislation this year aimed at cutting down on concussions in youth football.”);
264. Id. at 99.
265. Harvey, supra note 209, at 102.
266. Id. at 99.
267. Id. at 99.
268. Id. (explaining that “none of the legislative efforts has addressed prevention” and “[n]ot a single piece of any of these laws is going to keep a kid from getting a concussion in the first place”).
having a concussion must be removed from play.\textsuperscript{269} It, therefore, can be argued that concussion statutes and other concussion management guidelines provide a false sense of security to parents and athletes by giving the appearance that safety can be regulated into the games as currently played, despite the scientific evidence to the contrary.\textsuperscript{270} Moreover, because the statutes focus on managing concussions that occur, taking as a given that they will occur,\textsuperscript{271} the concussion statutes contribute to the calcified thinking around sports that the traditional games, played in traditional ways, are the only authentic sports experiences.\textsuperscript{272}

In addition to the statutes being criticized as ineffective from a public health perspective, concussion statutes have also been criticized as being legally ineffective.\textsuperscript{273} Legal scholars have asserted that because the statutes have no enforcement mechanism,\textsuperscript{274} and some even include immunity provisions for coaches and health professionals, there is little accountability for failing to manage youth concussions as required.\textsuperscript{275} The causes of action available to potential plaintiffs and immunities available to potential defendants vary from state to state depending on the language of the concussion legislation.\textsuperscript{276} However, most state statutes do not create any new cause of action and are silent on liability.\textsuperscript{277} For example, Wisconsin (along with several other states) includes provisions protecting coaches, officials, or volunteers from liability if they fail to remove an athlete from competition unless there is gross negligence or gross misconduct.\textsuperscript{278} The statute specifically states that it “does not create any liability for, or a cause of action against, any person.”\textsuperscript{279} Similarly, concussion legislation in Texas offers no new cause of action and gives express immunity to school district officials or employees, emergency

\textsuperscript{269} Harvey, supra note 209, at 96–98.
\textsuperscript{270} But see Brandwein, supra note 206, at 30 (explaining that state legislation is “properly focused on an achievable goal of preventing [Second Impact Syndrome]”).
\textsuperscript{271} Harvey, supra note 209, at 107 (explaining that state concussion statutes “all take the existence of a concussion for granted”).
\textsuperscript{272} Id.
\textsuperscript{273} Lowrey & Morain, supra note 213, at 294.
\textsuperscript{274} Id. at 290, 294.
\textsuperscript{275} Id. at 296.
\textsuperscript{277} Lowrey & Morain, supra note 213, at 296; see also Summary Matrix of State Laws Addressing Concussions in Youth Sports, NETWORK FOR PUBL. HEALTH L., http://www.networkforphl.org/_asset/7xwh09/StateLawsTableConcussionsFINAL.pdf (last visited Jan. 12, 2016).
\textsuperscript{278} Wis. Stat. § 118.293.
\textsuperscript{279} Id.
responders, and members of the concussion oversight team.\textsuperscript{280} Arizona’s concussion legislation also offers express immunity for volunteer healthcare providers making return-to-play decisions, the school district, its agents, and others.\textsuperscript{281}

The tort litigation that is a significant part of the legal and policy response to concussions also is subject to the familiar critique that tort law is an inefficient means of providing compensation for past harm and preventing future concussions.\textsuperscript{282} A related critique reflects the “hands off” view of government involvement in sports, with some scholars and others making the case that the statutes and litigation are an unwarranted intrusion into sports regulation.\textsuperscript{283} From this view, sports governing bodies and administrators are in the best position to manage the concussion issue.\textsuperscript{284}

Thus, the significance of the legal and policy response to concussions might be discounted because in some respects it fits comfortably within the current paradigm for government involvement in sports. The legal and policy response to concussions, heavily driven by the NFL, can be viewed as simply another example of law in support of the professional sports industry. Moreover, it can be said that the statutes, litigation, and “bully pulpit” initiatives only regulate at the margins of the games and, in so doing, serve to restore confidence that games as traditionally constructed are safe to play, despite considerable scientific evidence to the contrary. However, as explained below, several features of the legal and policy response to concussions can have an important impact on the future of sports regulation.

2. The Broader View: Changing the Future of Sports Regulation

Despite the valid critiques of the legal and policy response to sports concussions, there is another perspective on the issue that is significant not only for the management of sports concussions but also for all of sports law. The legal and policy response to concussions evidences important breaks from the

\begin{footnotesize}
\begin{enumerate}
\item[280.] TEX EDUC. CODE ANN. §§ 38.151, 38.159.
\item[281.] ARIZ. REV. STAT. ANN. § 15-341.
\item[283.] See Brandwein, supra note 206, at 38. But see Lowrey & Morain, supra note 213, at 296.
\item[284.] Abrams, supra note 282, at 82–83; see also IHSA Responds to Concussion Lawsuit, supra note 109 (“Those who oversee safety measures on a day-to-day basis are the people best equipped to address these improvements, not those operating within the courts.”).
\end{enumerate}
\end{footnotesize}
usual sports law landscape. The result is that the legal and policy response to concussions helps change sports norms that can provide a new pathway for productive government regulation of youth and amateur sports in the future.

Several aspects of the legal and policy response to concussions in sports make it significant. First, the legal and policy response to concussions places the government in a key position to prevent and remedy harm to athletes. Thus, with the legal and policy response to concussions, an aspect of sports was successfully translated into a problem for government to solve. While it is clear there is an element of “regulatory capture” to the statutory and bully pulpit initiatives, it is equally apparent that the posture of the legal and policy response to concussions is government action serving as a check on problematic features of sports and not simply promoting or supporting sports. This feature of the legal and policy response to concussions is made even more powerful because of the fact that the response is not limited to an individual sport. Unlike targeted antitrust exemptions or niche legislation in areas such as boxing, the legal and policy response to concussions places government—courts, Congress, state legislatures, and the executive branch—in the heart of multiple sports at multiple levels.

In addition, the statutes are aimed at youth, and not professional, sports. This is an important break from the privatized “Wild West” tradition of youth and amateur sports in the United States. Rather than simply using law and policy to foster individual achievement and urge participation in youth and amateur sports, the legal and policy response to concussions evidences a government interest in promoting athletes’ well being. Moreover, although they do not ban any sport or specific practices in sports that can cause concussions, the state statutes regulate how youth sports are played. They do so by essentially determining that a certain category of players—those suspected of suffering a concussion—are ineligible to continue playing in the

286. It also contributes to advancing the sports law field because it adds to the growing body of law dedicated to sport.
288. Lowrey & Morain, supra note 213, at 292; see Brandwein, supra note 206, at 39–41.
game or practice in which the suspected concussion occurred. These players are also ineligible to return to play or practice until cleared by a suitable medical professional. This feature of the state statutes goes to the heart of the “field of play,” and determinations of who may take the field, and who may not, have traditionally been an issue reserved for coaches, administrators, and referees.

Perhaps most importantly, the wide reach of the legal and policy response to concussions in sports also is contributing toward a redefinition of traditional sports norms that will have an impact beyond the issue of concussions. Specifically, the legal and policy response to concussions is challenging the notion that there are certain “inherent” features of sports, such as the “play with pain” norm, that has been taken for granted as part of the game. Moreover, the legal and policy response to concussions is causing us to rethink the role of government in sports in ways we have not before.

We know that law can have an important impact on changing cultural norms. Scholars have explained that “[t]here can be no doubt that law, like action in general, has an expressive function” and that its expressive dimension goes beyond its coercive effects. Thus, the expressive theory of the law “focuses on what law says rather than the sanctions that law threatens.”

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291. WASH. REV. CODE § 28a.600.190(3) (2015); Harvey, supra note 209, at 86.
292. WASH. REV. CODE § 28a.600.190(4).
293. Brandwein, supra note 206, at 49 (stating that the removal from play mandate in concussion statutes “takes the decision of when a student should return to competition out of the hands of coaches, players, and parents”). The Court of Arbitration for Sport has also developed a law explaining the insulating of the “field of play” from further interference or review. See Richard McLaren, The CAS Ad Hoc Division at the Athens Olympic Games, 15 MARQ. SPORTS L. REV. 175, 191 (2004).
294. Brandwein, supra note 206, at 38.
295. Baugh et al., supra note 290, at 310.
is said to create public meanings and shared understandings between the government and the public. Law has the ability to communicate important value judgments and can serve to educate individuals about socially preferred or harmful behavior. Law then may cause individuals to change their behavior by “signaling the underlying attitudes of a community or society.” “Because people are motivated to gain approval and avoid disapproval, the information signaled by legislation and other law” can cause individuals to change their behavior to conform to popular norms. Court decisions also have an expressive effect because they too “often reflect public attitudes.” Accordingly, because individuals value approval, law can affect behavior by signaling what behavior will generate approval, which causes individuals “to update their prior beliefs about the approval pattern.” As a result, many scholars have explained that the law has the power to shape social norms and influence behavior.

The legal and policy response to concussions is causing people to rethink what were previously unchallenged assumptions about sports and the prevailing model for sports, specifically that features of sports, such as playing through pain and injury, are simply “part of the game.” It also is causing us to rethink the notion that the government has little role to play in regulating sports. Our current legal structure supports a model for sports that values

303. McAdams, supra note 297, at 341.
304. McAdams asserts that “[t]here are at least two reasons why approval motivates behavior. An individual may value approval intrinsically because it satisfies a preference for esteem or instrumentally because it helps to achieve other ends.” Id. at 343.
305. Id. at 342.
306. Id. at 365.
307. Id. at 371.
308. See Geisinger, supra note 297, at 37 (explaining that “scholars note that laws affect behavior not only by making the behavior more costly, but also by affecting social norms and, consequently, by changing an individual’s preferences for undertaking particular acts”); McAdams, supra note 297, at 389 (explaining that “[i]n a democratic society, legislation and other law can change what people believe about the approval patterns in their community or society; the law operates as a signal of popular opinion”); Sunstein, supra note 297, at 2021 (arguing that the expressive function of law shapes social norms).
309. Abrams, supra note 282, at 95 (explaining the ethic of playing through injuries rather than reporting suspected concussions).
310. Id. at 107.
winning and commercial appeal with little role for the state. An important feature of the win-at-all-costs model is glorifying athletes who play despite injury and keeping talented players in the game, despite the physical harm. In football, for instance, “sitting out during an injury is often viewed as weak and lacking the requisite toughness” and playing through pain and injury is “viewed as the action of a warrior who embodies the ethos of sport.” Commentators have explained that it is “a common mantra shared by many athletes that they should push themselves beyond their normal endurances,” which includes “playing with a variety of injuries.”

The President and members of Congress have recognized these norms as being particularly dangerous for children. For instance, at the White House’s Healthy Kids and Safe Sports Concussion Summit, President Obama stated that, with respect to head injuries, “[w]e have to change a culture that says you suck it up.” Congressman Hank Johnson discussed the “old mantra of perseverance” and “[w]alking off the pain” as having an enormous influence on children, who view it as “noble behavior of their football heroes.” Commentators have described the need for norm change regarding concussion management to create a new understanding among parents, coaches, sports administrators, and athletes themselves that a head injury is not simply “part of the game” but a serious injury that must be addressed. Concussion statutes that mandate education and awareness are a key part of this culture shift. Similarly, in congressional testimony on the crisis of youth sports concussions, Dr. Robert Graham stated that a “culture shift” was needed because the seriousness of sports concussions was not appreciated by “athletes, their

311. See Promoting the Well being and Academic Success of College Athletes: Opening Statement, U.S. SENATE COMMITTEE ON COM., SCI., & TRANSP. (Jul. 9, 2014), http://www.commerce.senate.gov/public/index.cfm/hearings?id=48f489fd-720f-44d7-8a68-53e9afe8f8139&Statement_id=B7CFF2CE-8C4A-4D60-9724-86E6700EC9B7 (statement of Sen. John D. Rockefeller IV, Chairman, S. Comm. on Commerce, Sci., & Transp.) (stating that in college athletes there are “strong incentives to win at any cost” and that the revenue generated by teams is put back into the programs “to perpetuate that cycle of winning”).
313. Hodge & Kadoo, supra note 220, at 160.
314. See Remarks by the President, supra note 257.
317. Brandwein, supra note 206, at 28, 42 (explaining the ways that educating athletes, parents, and coaches will go a long way toward changing the “macho culture” around sports).
Dr. Graham acknowledged the importance of concussion management statutes in the needed culture change. Moreover, some members of Congress see concussion management laws as being an important step in furthering culture change in youth sports.

Concussion litigation also has an important influence on sports norms. As with other areas of the law, tort law does not easily fit within the sports context, at least with respect to players. Co-participant liability generally is limited to cases of recklessness in order not to chill the physical nature of the games. Moreover, the doctrine of assumption of the risk is frequently employed to prevent an athlete from recovering for injuries sustained while engaging in conduct that courts consider an inherent part of the game. The concussion issue is challenging our traditionally held understandings of what is an inherent feature of our favorite professional and amateur sports and is, therefore, outside of the reach of law and public policy. The class action complaints brought by former professional and intercollegiate athletes are employing the legal system to redefine what has been considered an inherent feature of sports—playing while injured—as a tort and using the legal process to tell the stories of sports concussion harm. These narratives in the context of litigation and the media attention to them are changing norms, defining the problem by moving the issue from sport to tort, and translating previously accepted norms of the game into credible legal claims.
For instance, in the *NFL Players’ Concussion Injury Litigation*, the players alleged that the NFL promotes football by glorifying “the brutality and ferocity of” the game by “lauding and mythologizing the most brutal and ferocious players and collisions, and simultaneously propagating the fraudulent representation that ‘getting your bell rung,’ ‘being dinged,’ and putting big hits on others is a badge of courage and does not seriously threaten one’s health.”

The complaint also alleged that the NFL “propagated the false myth that collisions of all kinds... many of which lead to short-term and long-term neurological damage... are an acceptable, desired, and natural consequence of the game, and a measure of the courage and heroism of players involved at every level of the game.”

Similarly, in *Arrington v. NCAA*, the plaintiffs alleged that the NCAA failed to protect players from the risk and effects of concussions across multiple sports. The complaint alleged that the NCAA had assumed a duty to protect athletes given its stated mission to “protect and enhance the physical and educational well being of the student athlete” and that the NCAA ignored the concussion issue. Moreover, the complaint alleged that the NCAA kept all revenues generated by intercollegiate athletics and provided “no medical or financial support to collegiate student-athletes who sustained concussions while playing an NCAA sport.” The complaint went on to detail the particular concussion injuries sustained by the lead plaintiffs in the sports of football, soccer, and ice hockey.

In *Ripple v. Marble Falls Independent School District*, former high
school football player Blake Ripple alleged that he “suffered numerous concussions or sub-concussions while under the supervision” of the school’s football coach and that the coach and other staff continued to put Ripple into games and practices when they knew Ripple was “injured and was in a fragile condition,” causing long-term injury. The complaint details that Ripple, a one-time National Honor Society student, is unable to live independently or go to college.

Finally, and most recently, in Mehr v. Federation Internationale de Football Ass’n, several athletes brought a class action claim against FIFA—the international governing body for soccer—the United States Soccer Federation, and other soccer defendants alleging that these entities failed to have concussion management and return-to-play guidelines. The plaintiffs also alleged that the governing bodies for soccer failed to adopt rule changes “to account for proper concussion management.”

Specifically, the plaintiffs claimed that the governing bodies for soccer ignored substantial medical research and failed to adopt rules that addressed the risk of brain injury from repetitive heading by players younger than seventeen. The plaintiffs also alleged that FIFA’s rule limiting substitutions in soccer matches led to an increase in the number of concussions and exacerbates the risks of multiple concussions in a match.

In addition to challenging the notion that playing with a head injury is an inherent feature of some sports, one of the most important future effects of the legal response to concussions is that it can help erode the tendency to treat sports—the types of games, the way they are played, and the very purpose of sports—as somehow fundamental, essential, and not subject to change. This

Mar. 27, 2015).


336. Id. ¶ 3.


339. Id. ¶ 267.

340. Id. ¶ 375.

341. Id. ¶¶ 384–85.

342. D. STANLEY EITZEN, FAIR AND FOUL: BEYOND THE MYTHS AND PARADOXES OF SPORT 55 (5th ed. 2012) (explaining that “tradition” is the primary reason that teams and fans resist change of offensive team names and mascots); id. at 250–51 (noting most have a vested interest in the sports status quo, and, despite the problems in sport, “the vast majority of fans continue to support the sports establishment uncritically”); Brandwein, supra note 206, at 28, 43 (stating that “it is difficult to change the culture
thinking forms the backbone of the traditional “part of the game” response to concussions. The assumption is that something that is “part of the game” cannot be altered.\footnote{See Jeff Nussbaum, How to Bring Pro Football into the 21st Century, \textit{The Atlantic} (Jan. 29, 2015), http://www.theatlantic.com/entertainment/archive/2015/01/suggestions-for-safer-football/384890/ (“The injuries suffered by today’s NFL are injuries inflicted by set design: an unwillingness on the part of the league to honestly confront the challenges that its own rules, structures, and customs have put in place.”).}

Courts often recognize certain aspects of sport as “fundamental” parts of the game.\footnote{Avila v. Citrus Cnty. Coll. Dist., 131 P.3d 383, 394 (Cal. 2006) (“For better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball.”).} Such entrenched thinking about the fundamental nature of sports is seen in everything from casual commentary to case law and carries not just the power of tradition\footnote{EITZEN, supra note 342, at 121 (stating that “sport, as an institution, is conservative”).} but also gender norms because preserving the games as they are maintains their masculine qualities.\footnote{See Nussbaum, supra note 343 (“Even before the sweeping rule changes [to football] in 1906, there was concern in some quarters that any changes would alter the game to the point at which it became unrecognizable and, worse, unmasculine. The artist Frederic Remington summed up these concerns in a letter to the legendary Walter Camp: ‘Football, in my opinion, is best at its worst. I do not believe in all its namby-pamby talk, and I hope the game will not be emasculated and robbed of its heroic qualities.’”)} For instance, in the debate over concussions in football, particularly at the youth level, commentators have argued that the rules cannot be changed to eliminate or reduce tackling because it is an inherent part of the game.\footnote{See Dave Zirin, The NFL Can’t Make Football Safer, \textit{U.S. News} (Feb. 1, 2013, 2:34 PM), http://www.usnews.com/debate-club/should-football-be-fundamentally-changed-to-make-it-safer/the-nfl-cant-make-football-safer. Similarly, youth football programs have resisted making any changes to the game itself, despite medical evidence that hits to younger players pose increased dangers of concussions. See Steve Fainaru & Mark Fainaru-Wada, Questions About Heads up Tackling, \textit{ESPN} (Jan. 13, 2014), http://espn.go.com/espn/oil/story/_/id/10276129/popular-nfl-backed-heads-tackling-method-questioned-former-players. Instead, administrators (and the NFL) have implemented rule changes that simply limit the number of hits in practice. Anahad O’Connor, \textit{Trying to Reduce Head Injuries, Youth Football Limits Practices}, N.Y. TIMES (June 13, 2012), http://www.nytimes.com/2012/06/14/sports/pop-warner-football-limits-contact-in-practices.html?r=0 (quoting Jon Butler of Pop Warner Football, stating that rule changes regarding hits in practice could not go farther because young athletes needed to be prepared to take hits in games); Jon Solomon, \textit{USA Football Wants to Change Youth Football. Does Heads up Football Work?}, ALA. (Feb. 20, 2014, 1:30 PM), http://www.al.com/sports/index.ssf/2014/02/usa_football_wants_to_change_y.html (stating that there would be no changes to the game of youth football, but instead “education” about proper tackling technique as a means of keeping football “viable” in the future).} A bill in the New York state legislature proposing to ban tackle football for children younger than fourteen had “little support,” with critics stating that the need was not to change the game but to surrounding something like sports that is steeped in tradition”).

The unwavering belief in the power of tradition means that even when it is acknowledged that the current rules of the sport are perhaps a part of the problem, administrative bodies consider changes to be part of the solution. For instance, youth football programs\footnote{See Steve Fainaru & Mark Fainaru-Wada, Questions About Heads up Tackling, \textit{ESPN} (Jan. 13, 2014), http://espn.go.com/espn/oil/story/_/id/10276129/popular-nfl-backed-heads-tackling-method-questioned-former-players. Instead, administrators (and the NFL) have implemented rule changes that simply limit the number of hits in practice. Anahad O’Connor, \textit{Trying to Reduce Head Injuries, Youth Football Limits Practices}, N.Y. TIMES (June 13, 2012), http://www.nytimes.com/2012/06/14/sports/pop-warner-football-limits-contact-in-practices.html?r=0 (quoting Jon Butler of Pop Warner Football, stating that rule changes regarding hits in practice could not go farther because young athletes needed to be prepared to take hits in games); Jon Solomon, \textit{USA Football Wants to Change Youth Football. Does Heads up Football Work?}, ALA. (Feb. 20, 2014, 1:30 PM), http://www.al.com/sports/index.ssf/2014/02/usa_football_wants_to_change_y.html (stating that there would be no changes to the game of youth football, but instead “education” about proper tackling technique as a means of keeping football “viable” in the future).} have resisted making any changes to tackle football, as did the professional league. The NFL has taken a less confrontational posture, proposing to ban tackle football instead of the popular youth sport. For the moment, however, the part of the league to honestly confront the challenges that its own rules, structures, and customs have put in place.\footnote{See Steve Fainaru & Mark Fainaru-Wada, Questions About Heads up Tackling, \textit{ESPN} (Jan. 13, 2014), http://espn.go.com/espn/oil/story/_/id/10276129/popular-nfl-backed-heads-tackling-method-questioned-former-players. Instead, administrators (and the NFL) have implemented rule changes that simply limit the number of hits in practice. Anahad O’Connor, \textit{Trying to Reduce Head Injuries, Youth Football Limits Practices}, N.Y. TIMES (June 13, 2012), http://www.nytimes.com/2012/06/14/sports/pop-warner-football-limits-contact-in-practices.html?r=0 (quoting Jon Butler of Pop Warner Football, stating that rule changes regarding hits in practice could not go farther because young athletes needed to be prepared to take hits in games); Jon Solomon, \textit{USA Football Wants to Change Youth Football. Does Heads up Football Work?}, ALA. (Feb. 20, 2014, 1:30 PM), http://www.al.com/sports/index.ssf/2014/02/usa_football_wants_to_change_y.html (stating that there would be no changes to the game of youth football, but instead “education” about proper tackling technique as a means of keeping football “viable” in the future).}
improve coaching.\textsuperscript{348} Similarly, in response to a concussion lawsuit, the Illinois High School Association, which regulates high school sports in the state, asserted that “simply put, high school football should not be subject to being dismantled or reassembled.”\textsuperscript{349}

Finally, Dr. Robert Cantu has called for “fine-tuning” of many sports to limit concussions in children.\textsuperscript{350} Cantu noted, however, the strong resistance by parents and coaches to change the rules because “[they] are satisfied with the rules as they are.”\textsuperscript{351} Indeed, one of the critiques of the legal response to concussions goes to the heart of this entrenched thinking; state statutes emphasize management of a player once a concussion has occurred, taking the initial concussion as a given part of sports.\textsuperscript{352}

But the legal and policy response to concussions in sports serves to remind us that, of course, sports are at their core made-up games.\textsuperscript{353} They are social constructs injected with values that are reflected in society at large. Justice Scalia powerfully made this point in his dissent in \textit{PGA Tour v. Martin},\textsuperscript{354} a case involving a challenge to the PGA Tour’s refusal to permit golfer Casey Martin use of a cart during play to accommodate his disability.\textsuperscript{355} The Court held that the PGA Tour was required to accommodate Martin and allow him to use a cart because walking was not “fundamental” to the game.\textsuperscript{356} Justice Scalia stated that the rules of a particular sport are “entirely arbitrary,” so “it is quite impossible to say that any of a game’s arbitrary rules is ‘essential.’ . . .


\textsuperscript{349} \textit{IHSA Responds to Concussion Lawsuit}, supra note 109.


\textsuperscript{351} \textit{Id.}


\textsuperscript{353} \textit{EITZEN}, supra note 342, at 244 (stating that “[s]port is a social construction” created by people, and it can be changed by people as well).


\textsuperscript{355} \textit{Id.} at 664–70 (majority opinion).

\textsuperscript{356} \textit{Id.} at 663, 690.
The only support for any of them is tradition and . . . insistence by . . . the ruling body of the sport . . . . 357 Indeed, sports scholars have stated that sport is governed by a “wholly arbitrary, entirely contingent, and—to anyone unfamiliar with any given sport—frankly bizarre-seeming set of rules and regulations that themselves enable a sport to achieve its true goal: entertainment.” 358 Sport, then, is not pre-determined or unchangeable but, on the contrary, is “created by people interacting, using their skills and interests to make sport into something that meets their interests and needs.” 359 It is perhaps the realization, whether conscious or not, that our sports entertainment is at the expense of athletes’ health and well being that is driving the norm change around sports participation and head injuries.

In addition to eroding the view that there are essential, “inherent” features of sports, the legal response to concussions presents a high-profile challenge to the view that the government generally should not be involved in sports—or at least in how the games are played. 360 An important justification for the “hands off” approach government takes with sports is that the government should defer to those private regulators, such as the NCAA, USOC, or professional leagues, that are in the best position to preserve and administer the games that entertain us. 361 Thus, courts and legislatures are not thought to be in the best position to mediate the social construct that is sports. 362 The legal and policy response to concussions, however, has made clear that too much deference to sports

357. Id. at 700–01 (Scalia, J., dissenting).
360. See PGA Tour, 532 U.S. at 699 (Scalia, J., dissenting) (opining that the PGA Tour need only provide access to the game but does not have to change its rules to comply with the Americans with Disabilities Act).
361. See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 85, 88 (1984) (explaining how the NCAA has assumed the task of governing how games are played and who is eligible to play them); Josephine R. Potuto, NCAA as State Actor Controversy: Much Ado About Nothing, 23 MARQ. SPORTS L. REV. 1, 3–4 (2012) (discussing how “[t]he arguments for and against state actor status for the NCAA’s regulation of intercollegiate athletics focus less on a black letter rule enunciation of what should make a private actor subject to constitutional mandates and more on a seat-of-the-pants perception of circumstances, equities, and consequences”); see also Nat’l Collegiate Athletic Ass’n v. Miller, 10 F.3d 633, 638–40 (9th Cir. 1993) (“NCAA legislation consists of both substantive rules and a procedural enforcement program.”). But see Vikram David Amar, The NCAA as Regulator, Litigant, and State Actor, 52 B.C. L. REV. 415, 415 (2011).
362. See Potuto, supra note 361, at 39–44. Indeed, the Court has applauded the private regulator for its involvement in the construction and regulation of how each sport is played, showing broad deference to private entities in areas where the Court may consider itself a part of the audience rather than the referee. See Bd. of Regents, 468 U.S. at 120.
regulators can exact too high a cost on athletes. Notwithstanding the NFL’s agenda in lobbying for concussion statutes, the legal and policy response to concussions has included a high-profile framing of an issue in sports that government is in the best position to solve. As a result, a new understanding can emerge that government involvement in sports is not always an unwarranted intrusion but can be beneficial. Such an understanding will chip away at the “hands off” approach that shapes our public discourse around sports regulation.

IV. TOWARD A NEW CONCEPTUAL FRAMEWORK FOR REGULATING SPORTS

These two outcomes—eroding the calcified thinking that aspects of sport are essential and challenging the notion that the government has little role to play in sports—can create much-needed policy space for reconsidering the role of law in sports. To that end, a new framework for thinking about government regulation of sports could replace the “hands off” view that currently prevails with a more nuanced approach that conceptualizes the appropriateness, or not, of government regulation based on the context in which the sport is played, the values at stake in that context, and the government’s ability to enhance the public good through sports.

To begin, it is important to note that rethinking the role for the government in sports does not lead to the conclusion that more regulation and litigation over sports is better or should be pursued in all cases. Indeed, the “hands off” approach to sports regulation has substantial benefits. Government involvement in sport at its extreme brings to mind Soviet-era sportive nationalism, where Eastern Bloc governments invested heavily in sports as a means of cultivating international influence and prestige. Moreover, voluntary associations and governing bodies for sports in general do a fine job prescribing rules for competition, hosting sporting events, and enforcing rules of eligibility and play. Rethinking a role for the government in sports, therefore, does not necessarily lead to the conclusion that a new executive

364. See Kelley & Carchia, supra note 30 (quoting a study revealing that $5 billion was spent on childhood sports in 2009); supra notes 46–66 and accompanying text.
365. VINOYKUR, supra note 32, at 15.
366. See Bd. of Regents, 468 U.S. at 88–89.
branch agency or government sports “ministry” must be created.367 Instead, in rethinking the role of government in sports, it is important to consider ways in which law and the democratic process can be used to inject important values into sports programs that already enjoy substantial public funding and legal support.

Additionally, rethinking the role of government in sports goes beyond the issues with sports programs today. It is important because of the range of uses for sports in contributing to lifetime health and wellness.368 That is, we must consider a new way of thinking about sports—not just for those who have the “privilege” to participate but also for all of those who do not and what that means for society. Creating policy space to reconsider the government’s attitude toward involvement in sports is, therefore, important not just to ensure fairness to football players or athletes in “revenue generating” college sports. It is important so that, for instance, we can have another weapon in the fight against childhood obesity and so that all children—and not just the talented few—can enjoy the positive benefits that social science research amply demonstrates come with sports participation.369

The legal and policy response to concussions in sports points out the uneasy, and often harmful, fit of the government’s “hands off” approach as applied across multiple sports contexts.370 A lesson from the government’s response to concussions in sports is that law can be used to better account for the differences in sports contexts by calibrating a balance of important values that are not currently served by a one-size-fits-all approach. Accordingly,

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367. See Nathaniel Grow, Regulating Professional Sports Leagues, 72 WASH. & LEE L. REV. 573, 577 (2015). Though some commentators have persuasively made the case that a government agency is necessary in the professional sports context. Id.

368. Brustad et al., supra note 23, at 352 (stating that “there is good general support for the notion that participation in structured youth sport has beneficial effects on the physical activity behaviors, lifestyle practices, and psychological well being of youngsters”); Designing, supra note 39 (explaining the health benefits of sports participation and the childhood obesity epidemic).

369. FARREY, supra note 54, at 64–65; Brustad et al., supra note 23, at 352; Koller, supra note 185, at 413. Indeed, such benefits have been recognized for decades as being an important national priority. See S. REP. NO. 95-770, at 12 (1978) (“[T]he development of a successful amateur sports program in the United States is tantamount to the availability of Federal financial assistance at an early date. It must be recognized that broad-scale amateur sports opportunities for a maximum number of individuals at all ages and all levels of ability not only serve as a deterrent to many of our current social problems, but also make a substantial contribution to the development of the individual and to our society.”).

370. Amateur Sports Act, supra note 4, at 93 (statement of Thomas McMillen, Co-Chair, President’s Council on Physical Fitness and Sports) (“Some argue that the government should have no role in sports. I beg to differ. In fact, I’d venture to say that our government has created our upside down priorities that are skewed to elite athletes. For example, Congress has given Major League Baseball an exemption from anti-trust laws . . . [b]ut no one is a watch-dog for our kids.”).
rather than reflexively rejecting most forms of government involvement in
sports, government regulation of sports should be conceptualized as a
contextual continuum with varying levels of regulation depending on whether a
given issue is a matter of youth sports, school sports, or sports at the Olympic
or professional level. Such a continuum would place professional sports in the
position of enjoying the most deference because they function like other private
businesses. Youth sports occurring in schools would enjoy the least deference.
The result would be more law and democratic input into how publicly
supported sports programs are constructed and administered to promote the
public good.

The values underlying professional sports participation are consistent with
the mission of the professional sports context: an emphasis on winning,
commercial appeal, and discrimination in favor of the most talented athletes.
These values support the commercial interests of the professional sports
enterprise, and a professional sports team is not likely to be successful without
emphasizing them. Because professional sports are businesses, they should be
treated like other free-market enterprises. Moreover, to the extent special
circumstances make sports an imperfect fit for some legal doctrines, courts
have made common-sense adjustments, such as in the antitrust context where
some cooperation among members of a league is viewed as necessary to
generating the “product” of competitive sports.371 In addition, concerns over
player safety are best addressed through the robust unionization of professional
leagues372 and existing legal remedies for employees, such as workers’
compensation laws.373 However, due to the fact that government action gave
professional sports leagues powerful monopoly power that can injure
consumers, some have argued that more regulation is needed in discrete areas
such as stadium financing and franchise relocation.374 Otherwise, because of
their business nature and the legal protections available to athletes, there is no
urgency to rethinking the government’s regulatory approach toward

Players Ass’n, http://www.nflpa.com (last visited Jan. 13, 2016); Major League Soccer Players
Union, http://www.mlsplayers.org (last visited Jan. 13, 2016); MLB Players,
http://mlbplayers.mlb.com (last visited Jan. 13, 2016); Women’s Nat’l Basketball Players Ass’n,
373. Stephen Cormac Carlin & Christopher M. Fairman, Squeeze Play: Workers’ Compensation and
the Professional Athlete, 12 U. MIAMI ENT. & SPORTS L. REV. 95, 95–96 (1995); J. Brad Reich, When
“Getting Your Bell Rung” May Lead to “Ringing the Bell”: Potential Compensation for NFL Player
374. See Grow, supra note 367, at 646–47. See generally Rosentraub, supra note 26.
professional sports leagues.\textsuperscript{375} However, such justifications are not as readily translated to other sports settings. Indeed, as the context shifts from professional to Olympic, intercollegiate, interscholastic, and youth recreational sports, the deference to private sports regulators and commercial values are harder to justify. This can lead to tensions between the “professionalization” of sports outside of the professional context and a neglect of other important values that are at stake.\textsuperscript{376} For this reason, the deferential, “hands off” approach taken toward professional sports should not be reflexively applied in other sports settings, and the legal response to concussions suggests how.\textsuperscript{377}

Outside of the realm of professional sports, although sometimes overlapping, are Olympic and intercollegiate sports.\textsuperscript{378} Both of these contexts present circumstances best served by a middle ground approach to government regulation, where government regulation can and should be more nuanced than the general “hands off” philosophy applied to the private sector sports industry. In the Olympic and intercollegiate context, the “hands off” approach to regulation is most justified for matters such as determining athlete eligibility (in terms of compliance with sporting rules) and the actual rules of the game.\textsuperscript{379} The structure of such programs, however, can and should be open to greater public input.\textsuperscript{380}

\textsuperscript{375} At least one scholar has remarked that because of “the huge role that professional sports play in American life,” Congress keeps a “watchful eye” on professional sports. LOWE, supra note 33, at 132–33.

\textsuperscript{376} See Nw. Univ. v. NLRB, 362 N.L.R.B. No. 167, at 1 (2015) (discussing whether collegiate athletes should be considered employees but failing to reach a conclusion); Ben Strauss, In a First, Northwestern Players Seek Unionization, N.Y. TIMES (Jan. 28, 2014), http://www.nytimes.com/2014/01/29/sports/ncaafootball/northwestern-players-take-steps-to-form-a-union.html?_r=0.

\textsuperscript{377} See Andrew B. Carrabis, Head Hunters: The Rise of Neurological Concussions in American Football and Its Legal Implications, 2 HARV. J. SPORTS & ENT. L. 371, 385–86 (2011); see also supra Part II.A.

\textsuperscript{378} Note that there is overlap between these contexts, in that the same athlete may participate as both an intercollegiate or professional athlete and an Olympic athlete. See, e.g., Sandy Thatcher, NCAA Athletes in Olympic Sports Should Be Able to Keep Earnings; Rules Need Changing, SWIMMING WORLD, http://www.swimmingworldmagazine.com/news/ncaa-athletes-olympic-sports-able-keep-earnings-rules-need-changing/ (last visited Jan. 13, 2016).


With respect to the Olympic Movement, a more nuanced approach is necessary because developing and supporting Olympic talent involves a pyramid structure of sports with the widest base being grassroots participation opportunities to bring a large number of children into sports.\(^{381}\) From there, and over time, Olympic talent will emerge and be nurtured at the highest peak through elite sports training.\(^{383}\) At the elite level, rules of competition and eligibility are derived from international sporting organizations, and domestic courts and legislatures rightly stay out of such matters.\(^{384}\) Moreover, discrimination among athletes at the elite level on the basis of talent is central to the mission of the Olympic Games.\(^{385}\) For these athletes, the Olympic Movement’s ability to provide them a voice in governance and provide due process in resolving disputes, without government intervention, is well documented.\(^{386}\) Through the Court of Arbitration for Sport, athletes and sports governing bodies have access to specialized arbitration procedures and a private legal regime that has created “a uniform body of *lex sportiva* that is predictable and evenly applied worldwide.”\(^{387}\)

As such, the hands off, deferential approach is more warranted at the level of supporting and selecting elite talent for international competition, and the Amateur Sports Act and court decisions reflecting this approach are well justified.

However, an effective Olympic program relies on grassroots sports opportunities to help develop those who will become the nation’s elite

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381. Paul Downward et al., *Sports Economics: Theory, Evidence and Policy* 53 (2009) (“There are distinctions in the US, where professional sports and amateur sports have developed more independently, but they are, of course, still inextricably linked . . . [because they both] feed talent vertically into professional sports” and the Olympic Games, “the largest sporting event.”).


383. Indeed, this grassroots to elite model was initially envisioned as being the mission of the United States Olympic Committee. Farrey, *supra* note 54, at 184–85. The original Amateur Sports Act stated that the USOC’s purpose was to establish national goals for, and encourage participation in, amateur athletics. 36 U.S.C. § 220503 (2012).


386. *Id.*

387. *Id.* at 269, 306.
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Indeed, as initially conceived, the American Olympic Movement and the USOC were intended to develop grassroots opportunities and support broad-based recreational athletics for the general population. However, as currently operated, the USOC focuses almost exclusively on using its resources to develop athletes with the best chance of winning Olympic medals. The government has deferred to the USOC, and its sponsors, to determine that the USOC’s focus will be on medal winning and its commercial rewards. The USOC, therefore, does not primarily allocate its resources at the base of the American Olympic pyramid, but it aims the bulk of its funding to the athletes at the peak. It is over this policy choice that the federal government, which created the modern USOC and gave it the exclusive right to market the Olympic trademarks, has a role to play. For instance, Congress could require the USOC to invest more in community sports programs as a condition of retaining the exclusive use of the Olympic trademark and tax-exempt status. Congress could also set targets for underserved populations, such as children in urban environments and lower socio-economic status who are less likely to be involved in sports. Congress could also grant the USOC funding to develop a

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388. S. REP. NO. 95-770, at 12–13 (1978) (stating that an adequately funded grassroots amateur sports program is critical to the United States’ Olympic success).
389. FARREY, supra note 54, at 184 (citing to statements of Senators Ted Stevens and Richard Stone who intended that the USOC, through the Amateur Sports Act, would foster greater grassroots athletics opportunities); see Amateur Sports Act, supra note 4, at 2 (statement of Sen. Ted Stevens, Member, S. Comm. on Commerce, Sci., and Transp.) (noting that a purpose of the hearing was to determine whether the USOC was meeting their responsibility under the Amateur Sports Act to promote grassroots amateur athletic opportunities).
390. FARREY, supra note 54, at 188–90. The USOC’s mission is to “support U.S. Olympic and Paralympic athletes in achieving sustained competitive excellence while demonstrating the values of the Olympic Movement, thereby inspiring all Americans” and to “provid[e] financial support and jointly work[,] to develop customized, creative and impactful athlete-support and coaching education programs.” About the USOC, TEAM USA, http://www.teamusa.org/about-the-usoc (last visited Dec. 16, 2015); see Amateur Sports Act, supra note 4, at 76 (statement of Ed Burke, Chair, Community Based Multisport Organizations/Armed Forces Council of the USOC and Junior Olympic Committee of the USOC) (stating that the USOC’s budget and spending had shifted away from grassroots opportunities and development programs “in favor of sport for the elite athletes who best have the chance” to represent the United States in the Olympic Games”).
391. FARREY, supra note 54, at 188–89 (“[T]he broadcast and corporate partners were telling the USOC leadership that they, like the The Boss, wanted winners now.”).
392. Such proposals have been made in the past. Amateur Sports Act, supra note 4, at 89 (statement of Thomas McMillen, Co-Chair, President’s Council on Physical Fitness and Sports) (stating that Congress should consider requiring the USOC to earmark revenues from the licensing of the Olympic trademarks to expand grass roots sports opportunities); see id. at 104 (statement of Jeff Darman, Governmental Legislative Affairs Liaison, Road Runners Club of America) (urging Congress to support additional funding for grassroots sports programs through the USOC and the resources generated through the licensing of the Olympic trademarks).
more comprehensive grassroots youth sports system to increase recreational opportunities. Or Congress could move past the concept of the USOC having primary responsibility for amateur sports in the United States and simply acknowledge the USOC as the body responsible for elite, Olympic athletics. Congress could then create a second organization, with suitable funding, to develop and promote youth grassroots athletics.\textsuperscript{393} Thus, while the "hands off" approach to sports is justified at the elite levels, where the United States’ Olympic program has to play by international rules when entering its elite athletes in international competition, the way in which the United States provides opportunities for children and youth to participate in sports is an increasingly important domestic issue.\textsuperscript{394} Such an issue, in the shadow of a childhood obesity epidemic, does not warrant a "hands off" approach, and it need not be left to the discretion of the private USOC and the market forces that necessarily shape its mission.

Intercollegiate sports present a similar gray area in which some deference to sports regulators and the private NCAA and athletic conferences is appropriate. However, the intersection of intercollegiate sports programs with educational institutions that enjoy tax-exempt status and federal financial support\textsuperscript{395} warrant a greater role for the government. To meaningfully navigate this gray area, thought must be given to the way in which intercollegiate sports programs are structured. The dominant model currently employed by colleges and universities values winning and commercial success and, by extension, emphasizes elite athletic talent.\textsuperscript{396} This model flourishes in intercollegiate athletics because of the enormous deference given to the NCAA and educational institutions to structure their programs with little government interference. Commercial values, more so than educational values, predominate.\textsuperscript{397}

Eroding the thinking that any aspect of sports is essential or that any sports

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\item \textsuperscript{393} See id. at 105 (statement of Jeff Darman, Governmental Legislative Affairs Liaison, Road Runners Club of America) (stating that the government should "try dramatic new approaches" to stimulating grassroots sports participation); see also id. at 89 (statement of Thomas McMillen, Co-Chair, President’s Council on Physical Fitness and Sports) (stating that countries such as Great Britain and Germany have sports ministries which focus on sports participation opportunities for all citizens).
\item \textsuperscript{394} See, e.g., Youth Physical Activity: The Role of Schools, CENTERS FOR DISEASE CONTROL PREVENTION (Aug. 2009), http://www.cdc.gov/healthyyouth/physicalactivity/toolkit/factsheet_pa_guidelines_schools.pdf.
\item \textsuperscript{395} See National Collegiate Athletics Accountability Act, H.R. 2731, 114th Cong. (2015).
\item \textsuperscript{396} JOHN V. LOMBARDI ET AL., THE LOMBARDI PROGRAM ON MEASURING UNIVERSITY PERFORMANCE, THE SPORTS IMPERATIVE IN AMERICA’S RESEARCH UNIVERSITIES 9 (2003).
\item \textsuperscript{397} Id.
\end{itemize}
model is a natural, “inherent” feature of athletics creates space to consider ways in which the so-called “collegiate model” may be restructured to better serve students. Federal law, therefore, can play a role in setting baseline requirements, beyond gender equity, for all college and university athletic programs that receive federal financial assistance. Some scholars have suggested that Congress should create a regulatory agency to manage college athletics. Additionally, state legislatures can consider setting more particular sports agendas for their institutions. For instance, rather than leave an institution’s selection of sports and levels of competitions to athletic directors, state legislatures could set guidelines on what sports an institution emphasizes, or not, and how many students would be served. Moreover, state legislatures could set specific requirements on how much of a university’s funds (and student fees) may be allocated to the athletic department budget.

Therefore, in both the Olympic and intercollegiate contexts, beyond the details of how the games are played and who is eligible are larger policy questions related to the use of sports programs in the national interest and in the educational setting that legislatures are suited to answer. In this regard, the case for deference to sports regulators is weaker, and the government has a legitimate claim to regulation because of the context.

Finally, on the furthest end of the continuum from professional sports are youth sports. Youth sports participation opportunities are provided primarily through the private sector and (mostly secondary) schools. Certainly, private sector youth sports programs justifiably enjoy some freedom from government regulation. Parents can serve to protect their child’s interests and make

398. Although the need for reform of intercollegiate athletics is much-discussed, some authors have suggested that “political considerations” and “substantial vested interests of policymakers and sports fans” get in the way, as does the “entrenched symbiotic relationship between the professional leagues” and colleges and universities. William B. Gould IV, Glenn M. Wong & Eric Weitz, Full Court Press: Northwestern University, A New Challenge to the NCAA, 35 LOY. L.A. ENT. L. REV. 1, 65 (2014).


400. See, e.g., Alex Moyer, Note, Throwing out the Playbook: Replacing the NCAA’s Anticompetitive Amateurism Regime with the Olympic Model, 83 GEO. WASH. L. REV. 761, 822 (2015) (providing proof that legislators can regulate university budgetary requirements: “One piece of legislation, which passed seventy-nine-to-one, was a proposal that ‘redefines an athletic scholarship so that it can cover not only the traditional tuition, room, board, books and fees, but also the incidental costs of attending college’”).

401. See Koller, supra note 380, at 411–12, 414–15. See generally Moyer, supra note 400, at 823 (arguing that “Congress [is] the last, and best, hope to replace the amateurism regime”).

402. See Koller, supra note 18, at 449; see also Improving Sports Safety, supra note 5.

403. See Davis, supra note 18, at 234 (“Traditionally, private law was viewed as providing the principal legal mechanism for regulating the sports industries.”); Harvey et al., supra note 11, at 87.
informed choices about programs that best suit their child’s needs and the family’s budget. However, the legal response to concussions points to an area where government can productively regulate private sector youth sports to promote health and safety. While parents may often be in the best position to manage their child’s development as an athlete, much has been written about the tendency of many parents to encourage children’s unhealthy engagement with sports and the incidence of overuse injuries and harms of overtraining. Moreover, although the legal and policy response to concussions has not been grounded on narratives of overzealous parents, an important feature of the response is educating parents and changing norms within families that playing through injury is not safe or appropriate for children. Thus, future regulation of private sector youth sports can focus on similar areas of children’s health and well being.

This is not to say, however, that all youth sports programming should be left to the private sector. Scholars have explained that the values, goals, and types of participation opportunities structuring youth sports programs are determined by adults, and such programs tend to have “a strong orientation toward competitive outcomes and the exclusion of those who are less talented.” Private sector youth sports programs therefore manifest “an orientation toward competitive results rather than physical activity promotion or personal growth.” Given the focus of private youth sports programs (and the fact that the USOC has largely abandoned any effort at providing grassroots youth sports opportunities with tacit approval from Congress), there is a compelling argument in favor of the federal and state governments directing more regulatory attention toward youth sports by mandating and funding broad-based youth sports programs that can fill the gap left by the private sector.

Thus, Congress and state governments could go a long way toward closing the gaps left by the private sector youth sports system by rethinking the

405. See Lowrey & Morain, supra note 213, at 290, 294.
406. Scholars have explained that most youth sports opportunities in the United States are through “organized youth sport involvement” instead of “self-organized physical play” and that organized youth sports are “adult-structured competitive sport opportunities” with adults “determining the philosophy, goals, and structure of the sport experience” as well as other decisions such as “who will have access to participation and who will be excluded.” Brustad et al., supra note 23, at 351–53.
407. Id.
408. Id. at 353.
deference given to school sports programs. In stark contrast to professional and elite Olympic sports, youth sports in schools should receive the least insulation from government involvement. Education-based sports programs are touted as an extension of the educational process and, therefore, should not be grounded in the same commercial, elite sport norms and values. As such, government should consider ways in which such programs could be used in the public interest. For instance, social science research clearly demonstrates that sports are beneficial to children’s health and well being and that family income is the most significant factor in predicting whether children will participate. Thus, one of the most important means of increasing sports opportunities is through fully funded programs in schools in which all children participate. Federal and state government could achieve full participation by requiring schools to provide an intramural, instead of varsity, sports program.

Similarly, government could use schools as laboratories to experiment with new sports options. The legal and policy response to concussions in sports is successfully challenging the thinking that playing traditional sports, in traditional ways, is the only legitimate sports experience. By requiring a fuller range of sports options or incentivizing experimentation with new sports, both the federal and state governments can be leaders in increasing sports participation and creating sports opportunities that provide less risk of harm to participants and appeal to a variety of athletic abilities. Thus, government can use sports in schools as a way to expand the definition of sport and reshape the view of who is an athlete, so that the benefits of sports participation can be more widely shared.

409. Designing, supra note 39.
410. Id. This is especially critical because our nation’s youth sports structure “is configured in a manner designed to identify and promote the next generation of athlete-entertainers,” and “talented children” are the focus of our youth sports culture. Farrey, supra note 54, at 74.
411. Schools have been, and are still used, as laboratories to test a number of new ideas. Thus, testing new sports options is just one more experiment that could be performed in schools. Cf. Wendy Parker, Connecting the Dots: Grutter, School Desegregation, and Federalism, 45 WM. & MARY L. REV. 1691, 1753 (2004) (observing that schools were used to test different approaches to desegregation); Amy P. Meek, Note, School Discipline “As Part of the Teaching Process”: Alternative and Compensatory Education Required by the State’s Interest in Keeping Children in School, 28 YALE L. & POL’Y REV. 155, 160–61 (2009) (noting that schools experimented with different disciplinary actions to improve student behavior, academic outcomes, and school safety).
412. Designing, supra note 39, at 3 (explaining that new sport options are needed to reach a wider population of children).
413. See id. at 7 (“It’s not just about providing access to existing experiences. It’s about understanding what are the new experiences we need to create. It’s about broadening the definition and offering more things.”).
Rather than seeking to regulate current sport offerings as constructed by sports regulators, governments can seek to use sports in the public interest to provide greater health and wellness benefits that translate across gender and socio-economic lines and include students with intellectual and physical disabilities.\textsuperscript{414} Indeed, Senator McCain’s comments stated that one of the few legitimate bases for government intervention in sports—fighting performance-enhancing drug use—was justified as necessary to protect children’s health.\textsuperscript{415} While doping in sports may potentially affect thousands of children,\textsuperscript{416} childhood obesity profoundly affects the health of millions.\textsuperscript{417}

The legal and policy response to concussions has helped erode the norms that have served to insulate sports and entrench our understandings that certain features of sports are inherent and not subject to change. In so doing, government involvement in sports is being legitimized in ways it has not been before. This legitimacy creates policy space to consider ways the government can play a role in enhancing sports experiences and expanding sports opportunities in the future.\textsuperscript{418} The federal and state governments, therefore, should contemplate legal changes that do not simply support our current model for sports or mitigate the effects of sports as designed and administered by others. Instead, future sports law initiatives should be developed by considering ways that the government and the democratic process can be used to provide greater and more meaningful sports participation opportunities to a wider population of children.

\textsuperscript{414} Id. at 1 (stating that just three out of every ten kids plays sports on a regular basis and “the shut out and pushed out, as well as those who opt out, are the norm, denied an experience that has the potential to deliver an array of social, health and other benefits”; “barriers to [sports] participation are greatest among vulnerable populations, children whose family or personal circumstances—economic, physical or otherwise—limit their access to the youth sport system as currently structured”).

\textsuperscript{415} See The Dan Patrick Show, supra note 1.


\textsuperscript{417} Nearly 18\% of children aged six to eleven and nearly 21\% of children aged twelve to nineteen are classified as obese, and as of 2012, the CDC states that more than one-third of children and adolescents are overweight or obese. \textit{Childhood Obesity Facts}, CENTERS FOR DISEASE CONTROL PREVENTION, http://www.cdc.gov/healthyyouth/obesity/facts.htm (last visited Dec. 16, 2015).

V. CONCLUSION

Law traditionally has been used in service of the goals of private actors in sports. The legal and policy response to concussions can be viewed as a narrow legal reform that is, at best, aspirational and, at worst, using law to shore up the game of football and protect the NFL’s long-term business interests. However, while some aspects of the legal and policy response to concussions may be dismissed as an industry-driven reform, it nevertheless is stimulating important normative changes that can provide a useful pathway for future government regulation of sports. First, the legal and policy response to concussions is causing Americans to rethink the traditional deference given to sports administrators and regulators, particularly with respect to youth and amateur sports. It also challenges the thinking that traditional aspects of sport are essential, inherent features of games. In this way, the legal and policy response to concussions can create important policy space to consider the ways in which sport can be used in the future to serve important public goals and reflect a wider range of public values.