

**Concussion Safety In Youth Sports:  
Roles for State Legislation and the Local “Power of the Permit”**

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I. INTRODUCTION

“We want our kids participating in sports,” says President Obama.<sup>1</sup> “As parents, though, we want to keep them safe, and that means we have to have better information.”<sup>2</sup> The President spoke as he opened the first White House Healthy Kids and Safe Sports Concussions Summit on May 29, 2014. He pinpointed the need for “better research, better data, better safety equipment, [and] better protocols” to reduce the incidence of concussions in youth sports and to improve diagnosis and treatment of competitors who suffer them.<sup>3</sup>

The one-day Summit assembled more than 200 attendees, including professional sports league representatives, medical professionals, coaches, parents, and youth athletes.<sup>4</sup> The President used the “bully pulpit,” not only to help promote

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<sup>1</sup> *Remarks by the President at the Healthy Kids and Safe Sports Concussion Summit*, <http://www.whitehouse.gov/the-press-office/2014/05/29/remarks-president-healthy-kids-and-safe-sports-concussion-summit> (May 29, 2014); Juliet Eilperin, *First-Ever Summit on Sports Concussions Held at the White House*, WASH. POST, May 29, 2014.

<sup>2</sup> *Remarks by the President*, *supra* note 1.

<sup>3</sup> *Id.*; David Jackson, *Obama: We Need “Better Data” On Sports Concussions*, USA TODAY, May 29, 2014.

<sup>4</sup> Juliet Eilperin, *Obama To Host a White House Summit On Growing Concerns Over Sports Head Injuries*, WASH. POST, May 28, 2014.

public education about traumatic brain injuries, but also to announce financial pledges to help fund continued research and safety initiatives.<sup>5</sup>

The bully pulpit's influence reaches only so far, however, because neither the President nor Congress can directly regulate interscholastic sports programs (middle school and high school competition, for example), or private youth sports organizations (Little League baseball or Pop Warner football, for example).<sup>6</sup> Direct public regulation seeking to advance concussion safety must come from the states, whose initial legislative responses to growing public concern show promise. These official responses, however, leave much unaccomplished while parents join with coaches, league administrators, and other adults to make sports as safe as possible for the millions of children who play each year.

#### A. *The Police Power*

Since 2009, all fifty states and the District of Columbia have enacted statutes to improve prevention and treatment of concussions in youth sports.<sup>7</sup> In partisan times typically marked by red-state-blue-state divisions, such swift unison warrants public notice. The legislative flurry holds potential to help make life better for many

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<sup>5</sup> See, e.g., *Obama Says Concussions Need More Attention*, BOSTON HERALD, May 29, 2014.

<sup>6</sup> See, e.g., ROBERT GRAHAM ET AL., SPORTS-RELATED CONCUSSIONS IN YOUTH: IMPROVING THE SCIENCE, CHANGING THE CULTURE 45-46 (Inst. of Medicine & Nat'l Res. Council 2014) (discussing recent federal bills, not passed by Congress, to enact guidelines or provide funding).

<sup>7</sup> See Nat'l Conf. of State Legis., *Traumatic Brain Injury Legislation*, <http://www.ncsl.org/research/health/traumatic-brain-injury-legislation.aspx> (list and survey of statutes; Apr. 2014); 2014 Bill Tracking MS H.B. 4 (Miss. Jan. 30, 2014).

youth athletes, and the passage of time will determine the desirability of further legislative action. As families await this verdict based on experience, however, one protective amendment deserves immediate enactment.

As Part II of this article discusses, the new concussions statutes in many states regulate only interscholastic sports programs. The statutes do not reach private leagues, clubs and associations that use fields, gymnasiums, and other public property managed by local government.<sup>8</sup> Most private youth sports organizations fall into this category because they do not own and operate their own facilities.

In states whose concussions legislation currently reaches only school sports, achievement of the enactors' protective purposes depends on amendments extending regulation to these private organizations. Like the initial concussions legislation itself, the amendments would exercise the "police power," the states' acknowledged "broad authority to enact legislation for the public good"<sup>9</sup> by "protect[ing] the health and safety of its citizens,"<sup>10</sup> including "the health and safety of minors."<sup>11</sup>

By exempting private sports organizations that use public facilities, the legislatures in many states have left a bulk of youth athletes outside public regulation that, according to every state legislature, balances the needs of concussion victims with the capacities of organized sports programs to implement

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<sup>8</sup> *Id.*; Graham et al., *supra* note 6, at 269.

<sup>9</sup> *Bond v. United States*, --- S. Ct. ----, ---- (June 2, 2014).

<sup>10</sup> *Hill v. Colorado*, 530 U.S. 703, 715 (2000).

<sup>11</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 591 (2001) (Stevens, J., concurring in the judgment in part, and dissenting in part).

reasonable health and safety protocols. About 35 million children play organized sports in the United States each year, including about 60% who play in private programs outside of school.<sup>12</sup> Football alone enrolls about three million players in private youth organizations, but only about 1.1 million players on interscholastic teams.<sup>13</sup>

Dual regulation reportedly even encourages some youth athletes who have not yet recovered from a concussion to continue playing on their private travel teams even though statutes prohibit their schools from allowing them to resume interscholastic play, often on the very same fields, without medical clearance.<sup>14</sup> Continued travel play ignores the virtual medical consensus that concussed athletes “go through a period shortly after the injury during which they are especially vulnerable to catastrophic injury if subjected to another blow to the head. In the worst case, known as second-impact syndrome, it can be a fatal combination.”<sup>15</sup>

Exempting private youth sports organizations from statewide regulation holds no medical basis because a concussion is a concussion, regardless of whether a boy or girl sustains it in interscholastic play or in a private youth league. A growing body of medical evidence suggests that children are more susceptible to concussions

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<sup>12</sup> Minn. Amateur Sports Comm’n et al., *Youth Sports Statistics*, <http://statisticbrain.com/youth-sports-statistics/> (Sept. 10, 2013).

<sup>13</sup> Elizabeth Landau, *High Schools Tackle Football Concussions*, <http://www.cnn.com/2013/08/30/health/high-school-football-safety/index.html> (Sept. 2, 2013).

<sup>14</sup> Bill Pennington, *A New Way to Care for Young Brains*, N.Y. TIMES, May 6, 2013, at D1.

<sup>15</sup> *Id.*; see also Graham et al., *supra* note 6, at 43.

than adults, can suffer greater adverse effects than adults, and may need a longer recovery period.<sup>16</sup> Unrecognized or improperly treated pediatric concussions can leave their victims less able to learn in school,<sup>17</sup> perform functions of everyday life,<sup>18</sup> and perhaps enjoy adulthood free from chronic pain and cognitive dysfunction.<sup>19</sup> Without distinguishing between interscholastic competition and private youth league play, Canadian Paediatric Society president Dr. Richard Stanwick says, “The concern about concussion is that not only can you get concussed out of the game; you can get concussed out of life.”<sup>20</sup>

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<sup>16</sup> See, e.g., *Concussions and the Marketing of Sports Equipment: Hearing Before the Comm. on Commerce, Sci., and Transp.*, U.S. Senate, 112th Cong, 1st Sess. (Oct. 19, 2011), at 35 (“The youth or immature brain is more susceptible to concussive injuries than the mature adult brain. Children and young adults recover more slowly from a concussion. Youth athletes are also more at risk for concussion due to their disproportionately large head size compared to body size and the weakness of their neck musculature.”) (statement of Dr. Ann McKee, Prof. of Neurology and Pathology, Boston Univ. School of Medicine); see also, e.g., *id.* at 30 (“[T]he pediatric population . . . may be at even greater risk given the ongoing development of the pediatric brain.”) (statement of Dr. Jeffrey S. Kutcher, Univ. of Michigan associate professor of Neurology); ROBERT CANTU & MARK HYMAN, CONCUSSIONS AND OUR KIDS 29 (2012); Roy McGregor, *Bodychecking in Kids’ Leagues Takes a Hit In a Survey*, GLOBE & MAIL (Canada), Mar. 4, 2013, at S1 (quoting Dr. Charles Tator, “one of the world’s leading expert on concussion”; “[T]he scientific evidence is mounting that the young brain is more vulnerable to concussion than the older brain. The evidence is now pointing to the adolescent brain as being most vulnerable.”).

<sup>17</sup> Cantu & Hyman, *supra* note 16, at 72-74; Naomi J. Brown et al., *Effect of Cognitive Activity Level on Duration of Post-Concussion Symptoms*, 133 PEDIATRICS e299 (Jan. 2014); Mark E. Halstead et al., *Returning to Learning Following a Concussion*, 132 PEDIATRICS 948 (Oct. 2013).

<sup>18</sup> Frederick P. Rivara et al., *Disability 3, 12, and 24 Months After Traumatic Brain Injury Among Children and Adolescents*, 128 PEDIATRICS 1129, 1135 (Oct. 2011).

<sup>19</sup> Paul McCrory et al., *Can We Manage Sport Related Concussion in Children the Same as in Adults?*, 38 BRIT. J. SPORTS MED. 516, 517 (2004); WILLIAM PAUL MEEHAN III, KIDS, SPORTS, AND CONCUSSION: A GUIDE FOR COACHES AND PARENTS 11-28 (2011); U.S. Gov’t Accountability Office, *Concussion in High School Sports*, GAO-10-569T (May 20, 2010) (referencing statement of Linda T. Kohn, Director, Health Care).

<sup>20</sup> McGregor, *supra* note 16, at at S1 (quoting Dr. Stanwick).

Thanks to the highest rates of youth sports concussions, football tends to attract the lion's share of public attention.<sup>21</sup> President Obama is right, however, that "concussions are not just a football issue."<sup>22</sup> In the states where the statutory exemption for private sports organizations exists, the exemption cuts a wide swath because "concussion is a risk in almost any sport,"<sup>23</sup> and "a common problem for children and adolescents."<sup>24</sup> The American Academy of Pediatrics finds that "[a]mong the more commonly played high school sports, football and ice hockey have the highest incidence of concussion, followed by soccer, wrestling, basketball, field hockey, baseball, softball, and volleyball."<sup>25</sup>

The statutory exemption for private sports organizations compromises the health and safety of both boys and girls. The concussion rate in girls' soccer is almost as high as in boys' football, and girls have higher rates of reported concussions than boys in similar sports and may experience more difficulty than

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<sup>21</sup> David Buzas et al., *Concussions from 9 Organized Youth Sports: Results From NEISS Hospitals Over an 11-Year Frame, 2001-2012*, ORTHOPAEDIC J. SPORTS MEDICINE (online 2014).

<sup>22</sup> Remarks of the President, *supra* note 1.

<sup>23</sup> Meehan, *supra* note 19, at xi, 37; *see also, e.g.*, Michael W. Kirkwood et al., *Pediatric Sports-Related Concussion: A Review of Clinical Management of an Oft-Neglected Population*, 117 PEDIATRICS 1359, 1360 (2006) ("Almost all athletic endeavors pose some risk of concussive injury.").

<sup>24</sup> William P. Meehan & Richard G. Bachur, *Sports-Related Concussion*, 123 PEDIATRICS 114, 119 (2001); *see also, e.g.*, Cantu & Hyman, *supra* note 16, at 3 ("Concussions happen to all types of athletes – young and old, boys and girls, and in every conceivable sport.").

<sup>25</sup> Kirkwood et al., *supra* note 22, at 1360; *see also* Meehan, *supra* note 19, at 29-37 (discussing concussions in various sports); *The Impact of Concussions on High School Athletes: Hearing Before the H. Educ. and Labor Comm.*, May 20, 2010 (statement of Dr. Gerard Gioia, director of neurophysiology, Children's Nat'l Med. Center, Washington, D.C.) (children can suffer concussions in any sport that has high risk of direct contact, including wrestling, cheerleading and gymnastics); GAY CULVERHOUSE, *THROWAWAY PLAYERS: THE CONCUSSION CRISIS FROM PEE WEE FOOTBALL TO THE NFL* 77-78 (2012) (discussing concussions in sports other than football).

boys in recovering from concussions.<sup>26</sup> In 2013, the American Academy of Neurology found that in high school basketball, girls suffer concussions at rates more than five times those of boys.<sup>27</sup>

The nationwide numbers remain uncomfortably high. Two researchers estimate that concussions represent nearly 9% of all high school athletic injuries.<sup>28</sup> Americans of all ages suffer about 300,000 reported sports-related concussions each year, and most of the injured are interscholastic and youth league players.<sup>29</sup> The reports are almost certainly underestimates,<sup>30</sup> however, not only because many families may not recognize concussion symptoms,<sup>31</sup> but also because a “culture of resistance”<sup>32</sup> leads many youth athletes to hide their head injuries from their parents and coaches to avoid letting down the team,<sup>33</sup> or to avoid removal from the

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<sup>26</sup> Cantu & Hyman, *supra* note 16, at 111-13 (reporting findings of Dawn Comstock, Nationwide Children’s Hosp., Ohio State Univ.); Mark E. Halstead & Kevin D. Walter, *Clinical Report—Sport-Related Concussion in Children and Adolescents*, 126 PEDIATRICS 597, 599 (2010); Chris G. Koutures & Andrew J. M. Gregory, *Injuries in Youth Soccer*, 125 PEDIATRICS 410, 412 (2010); Randall W. Dick, *Is There a Gender Difference in Concussion Incidence and Outcomes?*, 43 BRIT. J. SPORTS MED. i46, i49 (2009); Anahad O’Connor, *Concussions May Be More Severe in Girls and Young Athletes, Study Says*, N.Y. TIMES, May 11, 2012, at 12.

<sup>27</sup> James Barragan, *Seeing Red*, L.A. TIMES, Feb. 23, 2014, at C1.

<sup>28</sup> Halstead & Walter, *supra* note 25, at 597, 599.

<sup>29</sup> *Id.* at 598-99.

<sup>30</sup> Graham et al., *supra* note 6, at 2; Buzas et al., *supra* note 19 (estimating that as many as 50% of sports concussions go unreported).

<sup>31</sup> See, e.g., Halstead & Walter, *supra* note 25, at 597, 605-06; Jack Kelly, *What Dangers Await the Young Athlete?*, PITTSBURGH POST-GAZETTE, June 4, 2012, at C1; Graham et al., *supra* note 6, at 260-63.

<sup>32</sup> Graham et al., *supra* note 6, at 7, 27, 43, 101; see also e.g., Cantu & Hyman, *supra* note 16, at 1 (quoting Dawn Comstock, Nationwide Children’s Hosp., Ohio State Univ.; “We still have this culture where it’s hard to convince people that a concussion is a very serious brain injury.”).

<sup>33</sup> Graham et al., *supra* note 6, at 19, 289-90.



roster or the starting lineup.<sup>34</sup> At the White House Summit, President Obama hit the target when he called for changing “a culture that says you suck it up,” and encourages children to remain in the lineup regardless of the cost in present distress and potential future disability.<sup>35</sup>

A legislature “may take one step at a time, addressing itself to the phase of the problem which seems most acute,” before deciding whether to proceed further.<sup>36</sup> The time is ripe for state lawmakers to take the “next step” in youth sports concussions protection by universally extending regulation to private youth sports organizations that use public facilities, as most do.

#### *B. The Power of the Permit*

In states whose statewide concussions legislation currently reaches only interscholastic sports, local authorities such as the city council, the parks and recreation department, and the public school district should not wait for statewide legislative amendment. Instead these local authorities should apply the existing statewide mandates to private youth sports organizations as a condition for permission to use local fields and other public facilities. By taking the initiative

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<sup>34</sup> See, e.g., CHRISTOPHER NOWINSKI, HEAD GAMES: FOOTBALL’S CONCUSSION CRISIS FROM THE NFL TO YOUTH LEAGUES 129-34 (2007); Concussions and the Marketing of Sports Equipment, *supra* note 16, at 24 (“[T]he mentality to return to play as quickly as possible is very prevalent in the world of athletics. There is a lot of pressure on athletes to just deal with their injuries, or they will be in jeopardy of losing their starting position or playing time. This cultures an environment in which it is really easy to lie about your symptoms, especially when it comes to concussions.”) (statement of Alexis Ball, former women’s collegiate soccer player).

<sup>35</sup> Remarks by the President, *supra* note 1.

<sup>36</sup> *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

pursuant to delegated police power,<sup>37</sup> local agencies would exercise the so-called “power of the permit,” which (as Part III discusses) authorizes local authorities to set reasonable terms and conditions under which private persons may use public facilities, including public athletic venues.<sup>38</sup> “The power of the permit is a valuable, but underused, way to provide playing conditions that are as safe as possible.”<sup>39</sup>

## II. STATEWIDE YOUTH SPORTS CONCUSSIONS STATUTES

In our federal system, states frequently act as “laboratories”<sup>40</sup> by individually confronting a common problem with similar but not identical legislation. Any state assessing its own performance and weighing future legislative amendments can learn from other states’ experiences, enacting perceived strengths and avoiding perceived weaknesses. By addressing the concussions crisis<sup>41</sup> with statutory language whose particulars vary from jurisdiction to jurisdiction, the fifty states

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<sup>37</sup> *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 439 (2002); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (the city’s “efforts to protect public health and safety are clearly within the city’s police powers”).

<sup>38</sup> EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 28.45, at 169 (3d ed. 2009 rev.) (“Municipal authorities, acting in the interests of the public health, safety, morals, or general welfare have wide discretion to permit, or to refuse to permit, particular uses of” public property within their management); 2 ANTIEAU ON LOCAL GOV’T LAW §27.02, at 27-6 (2d ed. by Sandra M. Stevenson 2008) (“Local enactments requiring licenses, permits and certificates are expressions of the local government’s police power and will be valid and constitutional if they are reasonable and have a reasonable relationship to the public health, safety, or the general welfare.”); Charles J. Russo, *REUTTER’S THE LAW OF PUBLIC EDUCATION* 367-70 (8th ed. 2012) (“uses of school property”).

<sup>39</sup> Tom Farrey, ESPN.com, *A Permit For Youth Football Safety?* (Feb. 9, 2014) (quoting Prof. Douglas E. Abrams).

<sup>40</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

<sup>41</sup> Lyle J. Micheli, *Foreword*, in Meehan, *supra* note 19, at xi (“true health crisis”).

and the District of Columbia have each exercised the police power to establish a laboratory conducive to experimentation and response.

Most of the statewide concussions statutes enact three core mandates.<sup>42</sup> First, leagues and teams must provide parents, coaches, administrators, and players with pre-season information and education about the dangers of concussions, how to recognize their symptoms, and how to help promote healthy recovery.<sup>43</sup> Second, coaches must immediately remove from a practice session or game a player who is suspected to have suffered a concussion.<sup>44</sup> Third, the player may not return to action until a physician or other licensed medical professional clears the player and affirms that return is medically appropriate.<sup>45</sup>

The three core mandates create protocols that show considerable promise with good faith local implementation. Many state concussions statutes blunt this promise, however, by narrowly regulating only interscholastic sports, and not private youth sports organizations.<sup>46</sup> Oklahoma, for example, requires “[e]ach school district board of education [to] work in cooperation with the Oklahoma Secondary School Activities Association.”<sup>47</sup>

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<sup>42</sup> Graham et al., *supra* note 6, at 266; Nat’l Conf. of State Legis., *supra* note 7.

<sup>43</sup> See, e.g., 2011 Alaska Sess. L., ch. 12; 2011 Ind. Acts, P.L. 144; 2011 Kan. Sess. L., ch. 45.

<sup>44</sup> See, e.g., 2011 Colo., Sess. Laws, Chap. 67, 2011 SB 40; La. Acts 2011, 314, 2011 SB 189; 2011 Md. Laws, Chap. 549 (2011 HB 858).

<sup>45</sup> See, e.g., 2010 Conn. Acts, P.A. 10-62 (Reg. Sess.), 2010 SB 456; 2011 Md. Laws, Chap. 549, 2011 HB 858); 2011 Minn. Laws, Chap. 90, 2011 SB 612.

<sup>46</sup> See Nat’l Conf. of State Legis., *supra* note 7.

<sup>47</sup> 2010 Okla. Sess. Laws, Chap. 264 (2010 SB 1700).

The Arkansas concussions statute is typical of ones that maximize pediatric protection by regulating both interscholastic play and private youth sports organizations. The state Department of Health must “develop concussion protocols substantially similar to those developed and implemented by the Arkansas Activities Association [which regulates interscholastic sports] to protect all youth athletes engaged in youth athletic activities” in the state.<sup>48</sup> “[Y]outh athletic activity’ means an organized athletic activity in which the participants, a majority of whom are under nineteen (19) years of age, are engaged in an athletic game or competition against another team, club, or entity, or in practice or preparation for an organized athletic game or competition against another team, club, or entity.”<sup>49</sup>

In states whose concussions statutes currently regulate only interscholastic play, the legislature should exercise its police power to extend protection to the millions of boys and girls who play in private sports organizations that use public facilities pursuant to permission granted by local government authorities such as the city council, the parks and recreation department, or the public school district.

### III. THE POWER OF THE PERMIT

In the absence of statewide extension, local government authorities should limit use of public facilities to private youth sports organizations that agree to adhere to the three core mandates prescribed in existing statewide legislation. Derived from delegation of the state’s police power, this power of the permit authorizes local governments to set reasonable terms and conditions under which

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<sup>48</sup> 2013 Ark. Acts, Act 1435 (2013 SB 1158).

<sup>49</sup> *Id.*

private applicants may use public property (including public athletic facilities) that charters, statutes or ordinances commit to public management.<sup>50</sup>

The power of the permit means that when a private youth sports organization applies to use a field, gymnasium or other public facility for the first time, the local public decision maker may condition grant or denial on adherence to concussions protocols and other specified safety measures.<sup>51</sup> The decision maker may then determine future renewal or non-renewal based on the applicant's prior performance, as the Vineland, New Jersey City Council recently seemed poised to do after it reviewed the local midget football league's record concerning concussions safety, which the council found inadequate.<sup>52</sup>

#### A. *Legal Authority*

On May 10, 2014, the Vineland, New Jersey *Daily Journal* ran a story under the headline, "Midget Football May Be Banned."<sup>53</sup> The Vineland City Council said that the Vineland Midget Football League, which enrolls players between five and fourteen, reported only two of at least eight players who suffered concussions the prior season. The private league also allegedly issued some older players helmets

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<sup>50</sup> See *supra* note 40 and accompanying text.

<sup>51</sup> See, e.g., Douglas E. Abrams, *Achieving Equal Opportunity in Youth Sports: Roles For the "Power of the Permit" and the "Child Impact Statement,"* in LEARNING CULTURE THROUGH SPORTS: PERSPECTIVES ON SOCIETY AND ORGANIZED SPORTS 32, 34-36 (Sandra Spickard Prettyman & Brian Lampman eds., 2d ed. 2011) (arguing that local government agencies may use the power of the permit to assure equal opportunity for all children who wish to play in the community's travel teams and house league programs).

<sup>52</sup> *Id.*

<sup>53</sup> Joseph P. Smith, *Midget Football May Be Banned*, DAILY JOURNAL (Vineland, N.J.), May 10, 2014, at A1.

that were designed and recommended for younger, smaller and lighter players.<sup>54</sup> The city council threatened to close the fields to the midget football league because, according to the council's vice president, "nobody followed any protocols" about concussions the prior season.<sup>55</sup>

Because the Vineland Midget Football League does not own its own fields, it uses public fields pursuant to renewable agreements with the city council. The *Daily Journal* reported that under New Jersey law, a player who suffers a possible concussion may not return to action in practices or games without written medical clearance.<sup>56</sup> At a city council meeting, the council's vice president said that unless the league commits itself to greater adherence to safety protocols, "we can suspend the league by telling them they can't use the fields."<sup>57</sup> The vice president was right.

#### A. *The Breadth of Constitutional Authority*

In its management of athletic fields and other public property, a local decision maker such as the Vineland City Council may not condition grant of a permit or license on a private applicant's agreement to forfeit a constitutional right.<sup>58</sup> Where a locality's police power to grant or deny permits to use public facilities is otherwise established, however, federal or state constitutional challenges to extension of statewide concussions regulations would be unavailing.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See, e.g.,* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2596-97 (2013).

The point was made in *USA Baseball v. City of New York*, which upheld a 2007 New York City Council ordinance that exercised the power of the permit to prohibit the use of metal bats in competitive high school baseball games sponsored by public or private schools in the City.<sup>59</sup> After receiving about 3,500 pages of testimony, statements, reports and other documents from supporters and opponents of the proposed ordinance, the city council found that “the use of non-wood bats poses an unacceptable risk of injury to children, particularly those who play competitive high school baseball.”<sup>60</sup>

In *USA Baseball*, the federal district court granted summary judgment for the City in a suit brought by a group of plaintiffs that included high school coaches and parents, metal bat manufacturers, and others.<sup>61</sup> The court rejected the plaintiffs’ claims that the ordinance (1) violated the equal protection and due process clauses of the federal and New York State constitutions, and (2) exceeded the City’s police powers.

The equal protection and due process claims failed because the plaintiffs did not, and indeed could not, allege infringement of any fundamental right or suspect classification that would have triggered strict scrutiny.<sup>62</sup> In the absence of such allegations, the court found that “a rational basis exists for legislatively

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<sup>59</sup> 509 F. Supp.2d 285 (S.D.N.Y. 2007).

<sup>60</sup> *Id.* at 289.

<sup>61</sup> *USA Baseball*, 509 F. Supp.2d at 288.

<sup>62</sup> *Id.* at 293-94.

determining that metal and composite bats could . . . result in an increased risk of injury to infielders from hard-struck balls.”<sup>63</sup>

The plaintiffs’ police power allegation fared no better. “Protecting persons of high school age from baseball injuries plainly falls within the City’s police power to protect its residents’ health and safety.”<sup>64</sup>

A federal or state equal protection or due process challenge to local application of statewide concussions protocols would similarly fail for want of a fundamental right or suspect classification. The Supreme Court has said that the rational basis test upholds legislative or executive action, grounded in public health and safety, “if any state of facts reasonably may be conceived to justify it.”<sup>65</sup> For reasons expressed throughout this essay and by national experts at this Symposium and in the medical literature, a rational basis would easily support findings that the trio of existing statewide concussions mandates – education, removal from the lineup, and medical clearance – would promote youth athletes’ health and safety.<sup>66</sup>

### *B. Cost*

In early 2014, a New York City Council member introduced the Youth Football Safety Act, which would require that high school football and private youth league games played on city fields have a physician in attendance. The act would

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<sup>63</sup> *Id.* at 294.

<sup>64</sup> *Id.* at 298.

<sup>65</sup> *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

<sup>66</sup> *Id.* at 292.



also require that a certified athletic trainer attend every full-contact practice.<sup>67</sup> A commitment to regular attendance would be a condition for securing a parks department permit to use the fields.<sup>68</sup>

If the City Council finds rational health and safety concerns after hearings and passes the act, *USA Baseball* would likely dispose of any challenge grounded in equal protection, due process or the police power. In the exercise of its police power that the district court previously upheld, the City Council would need to show only a “conceivable rational relationship” with “the legitimate purpose of public safety.”<sup>69</sup>

The Youth Football Safety Act’s critics told the media, however, that interscholastic sports programs and private leagues could not afford to provide the required blanket medical coverage that the proposed act would mandate.<sup>70</sup> Local authorities need not grapple with similar fiscal concerns before exercising the power of the permit to extend the three existing statewide concussions mandates – education, removal from the lineup, and medical clearance -- to private youth sports organizations that seek to use public facilities. In their present form, the three concussions mandates are unlikely to impose significant fiscal constraints.

For eleven years (1990-2001), I served as president of a private youth hockey association that played in an ice rink operated by the city parks and recreation

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<sup>67</sup> Farrey, *supra* note 38.

<sup>68</sup> *Stephen Levin to Introduce Youth Football Safety Act*, BROOKLYN DAILY EAGLE, Jan. 29, 2014.

<sup>69</sup> *USA Baseball*, *supra*, 509 F. Supp.2d at 295 n.3.

<sup>70</sup> Graham et al., *supra* note 6, at 99-100.

department. Before the opening of preseason practice each year, the association and the city signed an agreement that set forth the terms and conditions of use. The states' three concussions mandates were still years away, but none would have taxed the youth hockey association's resources.

With minimal additional costs if any, the first mandate – education -- could easily have been incorporated into instruction, videos, and printed materials that the association already provided parents and coaches at preseason meetings. The second mandate -- removal from the lineup – summons a commonsense, cost-free response from prudent coaches and parents, even ones who would have to err on the side of removal in the absence of medical training.<sup>71</sup> The third mandate – medical clearance – would typically impose costs on a player's parents to schedule post-concussion medical treatment and examination, but these costs are no different than the costs imposed on parents of a concussed interscholastic player.

#### IV. CONCLUSION

Thanks to the sheer quantity and quality of research and commentary generated by prominent medical professionals, Americans are much more sensitive today about the perils of pediatric sports-related traumatic brain injuries than they were even a few years ago. Sports concussions have appeared prominently on the

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<sup>71</sup> See, e.g., Tracey Covassin et al., *Educating Coaches About Concussion in Sports: Evaluation of the CDC's "Heads Up: Concussion in Youth Sports" Initiative*, 82 J. SCHOOL HEALTH 233, 233 (May 2012) (“[A]t younger competitive levels, there is often limited medical coverage, which often places increased responsibility on coaches for addressing any medical issues that may arise.”).

national radar screen only in the past fifteen years or so.<sup>72</sup> Indeed, a comprehensive, well-researched 552-page history of professional football and the National Football League, published in 2004, makes no mention whatever of concussions.<sup>73</sup>

Thanks to greater public awareness of traumatic brain injury in sports, times have changed for the better. One of this Symposium's national experts aptly calls concussions "the predominant youth sports safety issue of the 21st century."<sup>74</sup> As children continue to enroll in competitive sports central to American culture, the President and other national leaders can help invigorate concussions safety efforts by parents, national youth sports governing bodies, coaches, league administrators, and referees and other game officials.<sup>75</sup>

State legislation and the local power of the permit both recognize that sports inevitably brings risk of injury at any age and any level of play, and that many sports depend on controlled violence within the rules. But these exercises of public authority also recognize that the nation's tolerance level for concussions and other mild traumatic brain injury should be much lower in youth sports than in professional sports because children are not miniature adults.

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<sup>72</sup> See, e.g., Cantu & Hyman, *supra* note, 16, at 13 ("If you played competitive sports as a child, you know that concussions were thought to be not that serious.").

<sup>73</sup> MICHAEL MACCAMBRIDGE, *AMERICA'S GAME: THE EPIC STORY OF HOW PRO FOOTBALL CAPTURED A NATION* (2004).

<sup>74</sup> Brooke de Lench, *Praise For MomsTEAM Is Nice, But The Fight To Make Youth Sports Safer Isn't Over*, <http://www.momsteam.com/blog/brooke-de-lench/praise-momsteam-nice-but-fight-make-youth-sports-safer-not-yet-over#ixzz22VEOtIR9> (May 23, 2012).

<sup>75</sup> Douglas E. Abrams, *Confronting the Youth Sports Concussions Crisis: A Central Role for Responsible Local Enforcement of Playing Rules*, 2 MISS. SPORTS L. REV. 75, 88-89 (2013); Douglas E. Abrams, *Player Safety in Youth Sports: Sportsmanship and Respect as an Injury-Prevention Strategy*, 39 SETON HALL J. OF SPORTS AND ENT. LAW 1 (2012).

The pros are multi-millionaire adults who, if they receive full and fair information,<sup>76</sup> presumably can make their own risk-taking decisions in the billion-dollar businesses that employ them.<sup>77</sup> The law’s conception of personal autonomy generally grants competent adults considerable right to make decisions about their own health care and safety in the absence of potential or actual harm to others.<sup>78</sup>

Youth leaguers are children and adolescents who play games as part of their upbringing. Only a minuscule few will ever reach the professional ranks, but all deserve futures as free as possible from the chronic effects of early athletic injuries.<sup>79</sup> With the knowledge and perspectives that concussions researchers have already provided, says neurosurgeon and CNN chief medical correspondent Sanjay Gupta, “we owe it to our . . . kids . . . to make them as safe as we know how to do, and we can do a lot better than we have been doing.”<sup>80</sup>

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<sup>76</sup> See, e.g., Sam Farmer, *Players, Local Firm Sue [National Football] League Over Painkillers*, BALTIMORE SUN, May 21, 2014, at 3D (reporting on class action lawsuit by former NFL players who allege that the league “has supported a drug culture that has provided dangerous painkillers and anti-inflammatories for free to players for years with no warnings as to their side effects”); Childs Walker, *Goodell: Settlement is Great for All*, BALTIMORE SUN, Sept. 5, 2013, at 4D (reporting on tentative \$765 million settlement of suit brought by retired players who “accused the NFL of suppressing information on head trauma and allowing them to compete without knowing the long-term risks”).

<sup>77</sup> Remarks by the President, *supra* note 1 (discussing “grown men who choose to accept some risk to play” football); Abrams, *Confronting the Youth Sports Concussions Crisis*, *supra* note 74, at 88-89.

<sup>78</sup> See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (“Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”).

<sup>79</sup> Abrams, *supra* note 74, at 89.

<sup>80</sup> *Tackling the Dangers of Concussions*, DAILY NEWS OF L.A., Jan. 26, 2012, at L1 (quoting Dr. Gupta).

“Sports is . . . fundamental to who we are as Americans and our culture,” President Obama told the White House Summit. “We’re competitive. We’re driven. And sports teach us about teamwork and hard work and what it takes to succeed not just on the field but in life.”<sup>81</sup> “[S]ports are vital to this country,” but the nation needs to assure that children “are able to participate as safely as possible.”<sup>82</sup>

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<sup>81</sup> Remarks by the President, *supra* note 1.

<sup>82</sup> *Id.*