PEPPERDINE UNIVERSITY

Journal of the National Association of Administrative Law Judiciary

Volume 28 | Issue 1 Article 7

3-15-2008

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Fair Play: The Tension Between an Athletic Association's Regulatory Power and Free Speech Rights of Member Schools – The Practical Implications of *Tennessee v. Brentwood*

By Aaron Echols*

I. INTRODUCTION

We always want to protect the interests of our youth and prevent them from being pressured or unduly influenced in making an important decision. But where does that desire conflict with a school's First Amendment right in trying to persuade students to attend their school?

The First Amendment explains, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] In addition, the Fourteenth Amendment also explains, "nor shall any State deprive any person of life, liberty, or property, without due process of law."[2]

Since the formation of the Constitution, our national government and judicial system have been laying out the boundaries for First Amendment protection and what exactly constitutes a violation of First Amendment rights. The same judicial system has attempted to define the protection afforded by the Fourteenth Amendment ever since its creation in the post Civil War era. While there has been wide protection of First Amendment freedom of speech rights,

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1. U.S. CONST. amend. I.
2. U.S. CONST. amend. XIV, § I.

speech is not afforded absolute protection.[3] In fact, the Supreme Court has held in numerous cases that an individual or entity's First Amendment rights to free speech was not *per se* violated simply because punishment was handed down for acts that included or were limited to speech.[4] For example, there are instances where courts have upheld punishments against individuals because the court felt the employer's and state's interest in regulating speech/behavior was greater than the individual's First Amendment rights to unrestrained speech.[5] In deciding whether an individual's rights have been infringed upon without the proper due process of law, the courts have evaluated the purposes behind speech restrictions and the process by which those restrictions were enforced.[6]

Courts have often found violations of due process in situations where punishments were assessed without hearings, investigations or other processes being utilized to allow individuals to have their interests represented.[7] Claims alleging violations of First and Fourteenth Amendment rights often occur in situations where

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3. *See* Davis v. Comm'r of Mass., 167 U.S. 43 (1897) ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.") *Id.* at 47.

4. *See* Patterson v. Colorado, 205 U.S. 454 (1907). In *Patterson*, defendant was punished for running certain articles and cartoons that questioned the Supreme Court of Colorado. *Id.* at 458-59. Defendant claimed the articles and cartoons were true and were protected under the First Amendment of the Constitution. *Id.* at 461. The Court, however, disagreed and held that "the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." *Id.* at 462 (quoting Frisby v. Schultz, 487 U.S. 474 (1988)). Appellants were strongly opposed to abortion and wanted to express themselves by picketing outside the residence of a doctor who performed abortions at two nearby clinics. *Id.* at 476. The Town Board decided to enact an ordinance that "prohibited all picketing in residential neighborhoods except for labor picketing." *Id.* Appellants challenged the ordinance saying that the ordinance violated their First Amendment rights. *Id.* at 477. The Court held that, "[t]he nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication and is content-neutral." *Id.* at 488.

5. *See* Connick v. Myers, 461 U.S. 138 (1983); *see also* Fox v. Washington, 236 U.S. 273 (1915).

6. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

7. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

administrative bodies have taken action against individuals under their supervision. In such cases, the decision turns on the nature of the speech that has been restricted by the administrative body, and whether the administrative body's interest in regulating the speech or behavior in question outweighs the individual's interest to speak or act as they choose.[8]

This case note will focus on the development of free speech rights and how those free speech rights co-exist with the rights of administrative bodies to regulate the speech and behavior of members. In particular, this case note will examine the tension between the free speech rights of member schools trying to advertise the benefits of attending their school and the regulatory interests of an athletic association seeking to ensure fair athletic competition and academic priority over athletics.

II. STATUTORY BACKGROUND

The rights to free speech and due process originated with the creation of the First and Fourteenth Amendments to the Constitution. The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[9] Over time, this Amendment has been construed to protect everything from expressing negative opinions about public officials to various forms of protesting.[10] This is not an absolute right however, and courts have found certain restrictions on speech to be appropriate.[11]

Not long after the enactment of 42 U.S.C. § 1983, actions were brought claiming the protection of Section 1983, but it was unclear exactly what powers and rights were intended to be conferred by 42 U.S.C. §1983.[12]

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8. *Connick*, 461 U.S. at 151-52.

9. U.S. CONST. amend. I.

10. *See* Davis v. Comm'r of Mass., 167 U.S. 43 (1897); Patterson v. Colorado, 205 U.S. 454 (1907); Stromberg v. California, 283 U.S. 362 (1931).

11. *See* Davis, 167 U.S. at 43; *Connick*, 461 U.S. 151-52.

12. 42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[13]

Monroe v. Pape was one of the early cases which considered the scope of Section 1983. In *Monroe,* the police officers broke into Monroe's home and made him and his wife stand naked in the living room as they went through the rest of the house.[14] Monroe alleged that the officers did not have any authority or a warrant to justify these actions and that they "acted 'under color of statutes, ordinances, regulations, customs and usages' of Illinois and of the City of Chicago."[15] Monroe attempted to bring his claim in federal court by establishing federal jurisdiction under Section 1983.[16]

> There can be no doubt at least since Ex parte Virginia, 100 U.S. 339, 346-347, 25 L.Ed. 676, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity,

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13. Mitchum v. Foster, 407 U.S. 225 (1972).
14. *Monroe*, 365 U.S. at 169.
15. *Id.*
16. *Id.*

> whether they act in accordance with their authority or misuse it. [citation omitted] The question with which we now deal is the narrower one of whether Congress, in enacting [42 U.S.C. § 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. [citations omitted] We conclude that it did so intend.[17]

The Court went on to explain that Section 1983 had three primary purposes.[18] First, it was said to "prohibit any invidious legislation by States against the rights or privileges of citizens of the United States."[19] Second, "it provided a remedy where state law was inadequate," particularly in terms of discrimination.[20] Third, the "aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[21]

In *Mitchum*, the lower court issued an injunction against a local bookstore to have it shut down because the bookstore was alleged to be a public nuisance.[22] After a series of relatively ineffective actions in the state court system, Mitchum filed a complaint in federal court "alleging that the actions of the state judicial and law enforcement officials were depriving him of rights protected by the First and Fourteenth Amendments."[23] The Court considered the issue of whether Section 1983 allowed federal courts to grant relief in state court proceedings.[24] The Court explained that Section 1983 was enacted for the "express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment.'"[25] The Court explained that Section 1983 put the federal government in the position of "guarantor of basic

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17. *Monroe,* 365 U.S. at 171-72.
18. *Id.* at 173.
19. *Id.* at 173-74.
20. *Id.* at 174.
21. *Id.*
22. *Mitchum*, 407 U.S. at 227 (quoting 17 Stat. 13, 42nd Cong., 1st Sess., Ch. 22 (1871)).
23. *Id.*
24. *Id.* at 229.
25. *Id.* at 238.

federal rights against state power."[26] "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."[27]

Under the incorporation doctrine, the Fourteenth Amendment protects certain fundamental rights from state action.[27] With the incorporation doctrine and the Supreme Court holdings explaining the scope of Section 1983, an individual's right to free speech under the First Amendment was granted further protection. The combination of the two clearly eliminated the absolute right of an administrative body, found to be a state actor, to regulate the speech of members and claim the protection of law and state sovereignty.

Many judicial decisions have attempted to shape the scope of free speech and define the line between an individual's rights and an administrative body's interest in regulating the speech and behavior of its member organizations.

III. CASE LAW BACKGROUND

Countless cases have dealt with the ability of the government as well as private entities to act as administrative bodies and appropriately regulate the speech and behavior of others.[28] These

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26. *Id.* at 239.

27. *Id.*

27. Palko v. Connecticut, 302 U.S. 319, 325 (1937) *rev'd on other grounds* (holding that for a right to be incorporated under the Due Process clause, the right must be one that is "so rooted in the traditions and conscience of our people as to be ranked as fundamental.").

28. *See* City of San Diego v. Roe, 543 U.S. 77 (2004). A police officer was fired after he made videos of himself stripping and performing sexual acts and sold the videos on Ebay®. *Id.* at 78. Facts uncovered in an independent investigation and Roe actually selling a tape to an undercover officer caused a committee to decide Roe had violated several specific policies of the police department "including conduct unbecoming of an officer." *Id* at 79. Roe failed to follow orders to remove all the materials from the internet and was cited and fired. *Id.* at 78-79. Roe alleged the termination violated his First Amendment rights. *Id.* at 79. The Court held that a governmental employer could impose restrictions on employees that would be unconstitutional if applied to non-government employees. *Id.* at 80. The Court further held that Roe's speech was not a matter of public concern and was detrimental to the interests of the employer. *Id.* at 84. *See also* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995). Went For It, Inc., a lawyer

free speech issues have ranged from a teacher's ability to talk about issues in the school, to the dissemination of pornographic material, or a retailer's ability to advertise.[29] In *Pickering v. Board of Education of Township High School District 205*, a teacher criticized the financial responsibility of the school board and was subsequently fired.[30] The school board held a hearing, as required, and attempted to justify the action taken in firing the teacher by claiming many of the teacher's allegations about financial irresponsibility were false and harmful to the school board's reputation and ability to maintain a disciplined faculty.[31] In the hearing reviewed by the Illinois courts, the teacher alleged that the school board fired him for speaking out about how the school's financial handlings violated his First Amendment rights.[32] The Illinois courts dismissed the teacher's First Amendment claims on the grounds that teachers do not enjoy the right to make negative remarks about the operations of schools.[33] On review, the Supreme Court held that teachers were the members of the academic community most likely to have informed opinions, and therefore teachers must have the ability to speak freely about how

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referral service, filed suit seeking injunctive relief from a Florida statute that prohibited client solicitation by direct mailings for the first thirty days after an accident. *Id.* at 621. Went For It alleged that this statute violated their First and Fourteenth Amendment rights. *Id.* The Court upheld the statute stating that the state bar had a substantial interest in protecting citizens from overreaching by lawyers and that the statute was properly fashioned to meet those ends. *Id.* at 635. *See also* State v. Fowler, 83 A.2d 67 (R.I. 1951). Fowler was charged "with making a public address to a religious meeting" in a public park, in violation of a city ordinance. *Id.* at 67. Fowler alleged that the statute and his punishment violated his free speech and free assembly rights under the First and Fourteenth Amendments. *Id.* The court held that the ordinance was valid because the ordinance did not restrict the right to free speech but instead only sought to prevent activities that could lead to "annoyance and disorder," defeating the proper use of the park. *Id.* at 68.

29. *See, e.g.*, Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

30. *Pickering*, 391 U.S. at 566.

31. *Id.* at 567.

32. *Id.*

33. *Id.*

funds for the operation of the school are spent without fear of being fired.[34]

Outside of allowing employees to speak freely about employment conditions, cases have also dealt with a state's interest in regulating material made available to the state's citizens.[35] In *Paris Adult Theatre I v. Slaton*, a suit was filed to enjoin two theatres from

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34. *Pickering*, 391 U.S. at 563. The *Brentwood* Court uses the *Pickering* holding to illustrate the need for a balance between the employee's rights to comment on matters of public concern against the State's interest as an employer, to run an efficient workplace. Tennessee v. Brentwood, 127 S. Ct. 2489, 2495 (2007).

35. *See* Kaplan v. California, 413 U.S. 115 (1973). The owner of an adult book store was convicted for violating an obscenity statute. *Id.* at 116. An undercover police officer entered an adult book store and purchased a book that violated the obscenity statute. *Id.* The obscenity statute defined obscene material as material relating to nudity or sexuality that "goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." *Id.* at 116 n.2. The Court held that not all books were protected by the First Amendment, and obscene material was not protected by the First Amendment. *Id.* at 118-19. The Court held that the state could regulate obscene material without violating the book store owner's First Amendment rights. *Id.* at 118-19. *See also* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). Two establishments that wanted to provide all nude dancing, challenged a statute that prohibited complete nudity. *Id.* at 562-63. The statute required that dancers wear "pasties" and "G-strings" when dancing. *Id.* at 563. The owners of the establishment claimed that the statute violated freedom of expression rights under the First Amendment. *Id.* at 563-64. The Court held that the statute did not suppress free expression and that the state could enforce the statute because the state had an interest in protecting morals and public order. *Id.* at 569-70. *See also* Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999). Broadcasters challenged FCC regulations that prohibited stations from airing any advertisements about otherwise legal casinos in the area. *Id.* at 180. The regulations prohibited any advertising about the lottery or other games of chance and the broadcasters alleged that the regulations violated their First Amendment rights. *Id.* The Court held that the regulations did violate the First Amendment. *Id.* at 188-89. *See also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). Tobacco retailers and manufacturers challenged regulations on the advertising and sale of tobacco products. *Id.* at 532. The regulations prohibited any outdoor advertising within 1,000 feet of any public playground, elementary, or secondary school. *Id.* at 534-35. The Court held that the ban on outdoor advertising violated the manufacturers' and retailers' First Amendment rights because there was not a "reasonable fit between the means and the ends of the regulatory scheme." *Id.* at 561-62.

showing allegedly obscene movies.[36] The theatres were planning to show two movies that contained material the state of Georgia believed to be "hard core pornography" and the state attempted to prevent the movies from being shown by enforcing a state statute that made it illegal to show obscene materials.[37] The theatres challenged the injunction and the statute, alleging a violation of their First Amendment rights.[38] The Supreme Court held that the state had an interest in regulating obscene materials and that the state statute was acceptable, as long as the applicable statute met First Amendment standards.[39] In *Liquormart, Inc. v. Rhode Island*, two separate state regulations prohibited advertisement of liquor prices anywhere other than the place of sale.[40] The first regulation prohibited any form of advertising by liquor retailers other than "price tags or signs displayed with the merchandise within licensed premises and not visible from the street."[41] The second regulation prohibited any advertising through Rhode Island media which mentioned the prices of alcoholic beverages.[42] A licensed liquor retailer sought a declaratory judgment that the ban was a violation of the First Amendment.[43] The Court explained that a state has an interest in protecting its consumers by regulating advertising to ensure the dissemination of truthful information.[44] The Court also pointed out however that there must be a relationship between the ban and the necessary protection, and that in this case the absolute ban, on

36. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 49 (1973).

37. *Id.* at 51-52.

38. *Id.*

39. *Id.* at 57. *Brentwood* uses this case to illustrate the Tennessee Secondary School Athletic Association's (TSSAA) interest in preventing hard-sell tactics directed at middle school students that could lead to exploitation, distorted competition between teams, and give athletics priority over academics. *Brentwood*, 127 S. Ct. at 2495-96.

40. Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

41. *Id.* at 489.

42. *Id.*

43. *Id.* at 484.

44. *Id.* at 496.

otherwise accurate advertising of the price of liquor, violated the retailer's First Amendment rights.[45]

In addition to deciding the constitutionality of restrictions on commercial advertising and the actions of retailers, courts have also been faced with the constitutionality of restrictions placed on professionals engaged in more service-oriented industries.[46] In *Edenfield v. Fane*, a certified public accountant challenged a state wide ban on in-person solicitation.[47] The Court held this ban violated the certified public accountant's First Amendment rights in regards to his ability and desire to communicate truthful information to prospective clients.[48]

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45. *Id.* at 516. *Brentwood* uses *Liquormart* to illustrate the constitutional difference between "prohibiting appeals to the public at large [citations omitted] and rules prohibiting direct, personalized communication in a coercive setting." *Brentwood*, 127 S. Ct. at 2493.

46. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980). Central Hudson challenged a state ban that prevented electric companies from using any advertising that promoted the use of electricity. *Id.* at 558-59. Central challenged the ban, alleging that it violated Central's First Amendment rights. *Id.* at 559. The public service commission sought to justify the ban by stating it promoted the national plan to conserve energy. *Id.* at 559-60. The Court explained that restrictions on honest commercial speech can only go as far as the interest sought to be served. *Id.* at 565. The Court held the ban was too broad in prohibiting all advertising about electricity services, and must be struck down under the First Amendment. *Id.* at 570-71. *See also* Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91 (1990). An attorney was disciplined for holding himself out to be a specialist in a field that was not approved for advertising claiming specialization. *Id.* at 97. The attorney was listed as a certified trial specialist by the National Board of Trial Advocacy and the attorney referenced this specialization in his letterhead. *Id.* at 96. The disciplinary commission recommended that the attorney be censured for the violation and rejected his claim that the advertisement of his specialization was protected by the First Amendment. *Id.* at 97-98. The Court held that the attorney's reference to his specialization was truthful and explained that the Commission's concern about attorney's making misleading statements about specialization was not sufficient to outweigh the attorney's right to advertise his specialization truthfully under the First Amendment. *Id.* at 110-11.

47. Edenfield v. Fane, 507 U.S. 761 (1993).

48. *Id.* at 777. *Brentwood* uses this case to illustrate the intended narrow holding of *Ohralik*, explaining the Court has not been quick to invalidate state regulations on solicitation and commercial advertising without the risks associated with in-person solicitation. *Brentwood*, 127 S. Ct. at 2494.

In *Bates v. State Bar of Arizona*, two attorneys violated a rule prohibiting advertising and were sanctioned by the state bar.[49] The Supreme Court held the advertising was truthful and was protected by the First Amendment.[50] In *Zauder v. Disciplinary Counsel of Supreme Court of Ohio*, an attorney challenged his punishment for running two separate ads in local newspapers.[51] One ad offered to represent individuals facing charges of drunk driving and explained that there would be no charge if the individual was in fact convicted.[52] The attorney was informed that this advertisement looked like an offer to represent criminal defendants on a contingency-fee basis, which was a violation of the Ohio ethics rules.[53] The attorney withdrew the advertisement and did not take any employment opportunities that resulted from the ad.[54] The attorney then ran a second advertisement offering representation to women who had been harmed by a contraceptive device.[55] The complaint filed against the attorney alleged that this advertisement violated disciplinary rules that prohibited the use of illustrations in advertisements.[56] This disciplinary rule required an attorney's advertisements to be "dignified" and prohibited an attorney from taking employment after the attorney gave unsolicited advice to an individual when the advice consisted of telling the individual that he should pursue legal action.[57] The Court held that there was no justification for prohibiting advertisements aimed at people with a specific legal problem.[58] The Court further held that the interest in preventing in-person solicitation was not implicated by the newspaper advertisements and that the attorney must be allowed to

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49. Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

50. *Id.* at 383. *Brentwood* used *Bates* to explain the difference between regulations on conduct and regulations on speech.

51. Zauder v. Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985).

52. *Id.* at 629-30.

53. *Id.* at 630.

54. *Id.*

55. *Id.* at 630-31.

56. *Id.* at 631-33.

57. *Id.* at 631-33.

58. *Id.* at 655-56.

advertise using truthful information.[59] In *Connick v. Myers*, an assistant district attorney alleged she was fired for exercising her First Amendment right of free speech.[60] When she was confronted with the possibility of being transferred, which she opposed, she circulated a questionnaire throughout the office.[61] The questionnaire asked about the need for a grievance committee, office morale, and concern about the district attorney's transfer policy.[62] The Supreme Court held that her First Amendment rights were not violated when she was terminated, because the questionnaire did not address matters of public concern, placing it outside the scope of First Amendment protection.[63] The Court explained that her employer had a right to promote an efficient workplace by regulating the speech of their employees.[64]

Once an entity is determined to be a state actor, the standard for determining the constitutionality of action taken regulating speech of employees is much higher.[65] When an administrative body that is a state actor places restrictions on a member's constitutional rights based on a contractual or voluntary relationship, a balancing test is used to weigh the administrative body's interest against the member's interest. This balancing test is used to make sure that constitutionally protected rights are not being improperly denied.[66] In *Rust v. Sullivan*, a statute allowed money to be given, under Title X of the Public Health Service Act, to organizations providing family

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59. *Id.* at 656 (invalidating a restriction on truthful, nondeceptive legal advertising directed at people with specific legal problems).

60. Connick v. Myers, 461 U.S. 138, 138 (1983).

61. *Id.* at 140-41.

62. *Id.* at 141.

63. *Id.* at 154 (holding Myers' employer was not required under the First Amendment to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships").

64. *Id. Brentwood* uses *Connick* to parallel the government's interest in running an effective workplace, which outweighed the right to absolute free speech, with TSSAA's interest in running a fair athletic league by regulating the speech of its participants. *Brentwood*, 127 S. Ct. at 2495.

65. *See* Rumsfield v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47 (2006).

66. *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 719 (1996) ("the inquiry is whether the [political party] affiliation requirement is a reasonable one").

planning services with the conditions that the money given to the organization not be used for abortion-related speech.[67] The Court explained that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[68] The Court held the statute was constitutional because any restraints that were present on the plaintiff's speech were "a consequence of [the plaintiff's] decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."[69]

The *Brentwood* opinion relies primarily on the Supreme Court's decision in *Ohralik v. Ohio State Bar Association*.[70] There the Court held that "the State – or the Bar acting with state authorization – constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."[71] Ohralik was an attorney and a practicing member of the Ohio Bar.[72] While picking up his mail at the local post office, Ohralik heard that local resident Carol McClintock had recently been injured in a car accident.[73] Ohralik called McClintock's parents and "suggested that he might visit Carol in the hospital."[74] During the phone conversation, Carol's parents agreed that Ohralik could visit Carol in the hospital, but asked him to stop by their home before visiting the hospital.[75] Once Ohralik arrived at the home, the McClintocks explained the circumstances of Carol's auto accident.[76] The McClintocks explained that Carol's car was struck by the car of an uninsured motorist.[77] Carol's parents also told Ohralik that Carol's friend Wanda Lou was in the car with Carol at the time of the accident and

67. Rust v. Sullivan 500 U.S. 173, 177-78 (1991).
68. *Id.* at 193-94.
69. *Id.* at 199.
70. *Brentwood*, 127 S. Ct. at 2493.
71. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978).
72. *Id.* at 449.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*

that both Wanda Lou and Carol were injured.[78] Ohralik suggested that the McClintocks hire a lawyer but Carol's parents said they would leave that decision to Carol because she was eighteen years old and would be the beneficiary of any lawsuit.[79]

Ohralik left the McClintocks' home and proceeded to the hospital "where he found Carol lying in traction in her room."[80] He talked to her briefly and explained that he would represent her if she would sign an attorney-client agreement.[81] Carol said she would have to discuss the matter with her parents before she signed any agreement and asked Ohralik to tell her parents to come visit her.[82] Ohralik waited until all of Carol's other visitors had left and he took pictures of Carol in traction.[83] On his way back to the McClintock home, Orhalik stopped at the scene of the accident to take pictures.[84] Ohralik also stopped to buy a tape recorder.[85]

During his second visit at the McClintock home, Ohralik hid his newly acquired tape recorder under his raincoat and recorded the conversation.[86] Ohralik and the McClintocks discussed the McClintocks' insurance policy and the consequences of being struck by an uninsured motorist.[87] Ohralik explained that their insurance policy contained an uninsured motorist clause that would provide benefits of up to $12,500 for both Carol and Wanda Lou.[88] Carol's parents told Ohralik that Wanda Lou "swore up and down" that she did not want to sue but Carol had in fact called home and told them to tell Ohralik he could proceed with the matter.[89] Two days later, Ohralik visited Carol in the hospital for a second time, and had her

78. *Id.*
79. *Id.*
80. *Id.* at 450.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*

sign a contract stating he would receive one-third of her recovery from any lawsuit.[90]

Ohralik obtained Wanda Lou's address from the McClintock family and proceeded to her house uninvited.[91] Ohralik once again hid the tape recorder under his coat and recorded most of his conversation with Wanda Lou.[92] During his conversation with Wanda Lou, Ohralik explained the terms of the McClintocks' insurance coverage and Wanda Lou's recovery options as a passenger in the car.[93] He offered to represent Wanda Lou in an action to recover the insurance benefits in exchange for the same one-third contingency fee agreement he had reached with Carol.[94] There was a dispute as to whether Ohralik recorded the full conversation in its entirety, but ultimately, Wanda Lou stated, "O.K." when presented with Ohralik's proposition of representation to recover the insurance proceeds.[95] The next day, Wanda Lou's mother attempted to invalidate her daughter's consent by explaining they did not want to sue anyone and would consult their own lawyer if they decided to sue.[96] Ohralik however, maintained that Wanda Lou had created a binding agreement.[97] Wanda Lou notified Ohralik a month later that she did not want to sue anyone and did not want to be represented by him.[98] She also asked Ohralik to notify the insurance company that he was not representing her so the insurance company would agree to release her check.[99]

Carol McClintock also eventually disposed of Ohralik as her attorney but still paid him one-third of her recovery after he sued her for breach of contract.[100] Later, Carol and Wanda Lou both filed complaints against Ohralik with the Grievance Committee of the Geauga County Bar Association and the Board decided Ohralik had

90. *Id.*
91. *Id.* at 451.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 451-52.
97. *Id.*
98. *Id.* at 452.
99. *Id.*
100. *Id.*

violated two portions of the Ohio Code of Professional Responsibility.[101] The Board also rejected Ohralik's claim that his actions were protected by the First and Fourteenth Amendments.[102] The Supreme Court of Ohio upheld the Board's decision and actually increased Ohralik's punishment to an indefinite suspension.[103]

The primary issue presented in *Ohralik* was whether the State or the bar can punish an attorney for soliciting clients in person for pecuniary gain.[104] The *Ohralik* Court held, "The State – or the Bar acting with state authorization – constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."[105] The *Ohralik* Court went on to explain that a lawyer soliciting business in person with a prospective client has long been seen as contrary to the ideal attorney-client relationship and an action that poses serious potential to harm the prospective client.[106] Furthermore, the Court stated that soliciting professional services in person is not the same as permissive truthful advertising, and is certainly different than the "forms of speech more traditionally within the concern of the First Amendment."[107] The Court supported this holding by stating that the "common sense" approach was still used when it came to distinguishing between speech surrounding a commercial transaction and speech in an arena "traditionally subject to government regulation."[108]

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101. *Id.*

102. *Id.* at 453.

103. *Id.*

104. *Id.* at 448-49.

105. *Id.* at 449 (explaining that the *Bates* Court "held that truthful advertising of 'routine' legal services is protected by the First and Fourteenth Amendments against blanket prohibition by a State. The Court expressly reserved the question of the permissible scope of regulation of 'in-person solicitation of clients – at the hospital room or the accident site, or in any other situation that breeds undue influence'").

106. *Id. See also Brentwood*, 127 S. Ct. at 2494; *Brentwood* highlighted *Ohralik's* use of *Bates* to illustrate the "evils" of in-person solicitation. *Brentwood* explained the pressure on individuals may actually prevent them from making the informed and reliable decisions sought in *Bates*. *Brentwood*, 127 S. Ct. at 2494.

107. *Ohralik*, 436 U.S. at 449.

108. *Id.* at 456; *see* Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (protecting speech that was purely commercial in nature but

The *Orhalik* Court further developed circumstances where speech could be regulated without offending an individual's First Amendment rights.[109] "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[110] The Court pointed out that, "[n]umerous examples could be cited of communications that are regulated without offending the First Amendment," and explained that it was essential to protect the consumer because "[t]he aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making."[111] The Court pointed out that in-person solicitation for legal services could "encourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' of legal services."[112] In fact, the Court believed that such solicitation may actually go against the interest, identified in *Bates*, of hoping to promote decisions that are reliable and well informed.[113]

The Court added to the analysis by explaining that the State has an interest in protecting consumers through regulating commercial activity, but also has a special interest in maintaining appropriate standards for licensed professionals.[114]

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pointing out that commercial speech was differentiable from other forms of speech).

109. *Ohralik*, 436 U.S. at 456.

110. *Id.* (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502). In *Giboney*, Empire Ice sought enforcement of a state regulation to prevent plaintiff/employees from picketing. *Id.* at 492-93. The Court upheld the state regulation, holding that it did not violate the employees' rights under the First Amendment. *Giboney*, 336 U.S. at 504.

111. *Ohralik*, 436 U.S. at 456-57.

112. *Id.* at 457-58.

113. *Id.* at 458; *see also* Zauder v. Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985). *Brentwood* refers to the *Zauder* case to illustrate the point that situations like the one faced in *Brentwood* and *Ohralik* "involved a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." *Brentwood*, 127 S. Ct. at 2494.

114. *Id.*

> Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation. In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny.[115]

The Court pointed out that even the appellant conceded the State had a "compelling interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching" and other types of troublesome behavior.[116] The Court reasoned that the guidelines prohibiting in-person solicitation were preventative measures and were meant to deter harm before it occurred.[117] In illustrating the possible negative consequences of face-to-face solicitation, the Court explained that these dangers have been apparent to the Federal Trade Commission and have been appropriately handled by the Federal Trade Commission.[118] The Court went on to state that people might place their trust in an unqualified lawyer simply because of the lawyer's power of persuasion if the circumstances were such that they would be likely to cause an individual to acquiesce to the lawyer and his advice, even though the individual was uninformed.[119]

The Court explained that if the appellant's view prevailed, in-person solicitation could rarely be regulated by the State, essentially circumventing the State's great interest in regulating lawyers in an "effective, objective, and self-enforcing manner."[120] For all of these reasons, the Court held that the Constitution, in particular an individual's First Amendment rights to free speech, was not violated

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115. *Ohralik*, 436 U.S. at 456-57.
116. *Id.* at 462.
117. *Id.* at 464.
118. *Id.* at 465.
119. *Id.*
120. *Id.* at 466-67.

by a State enforcing proactive measures to prevent the harm of its citizens.[121]

IV. FACTS

A. Procedural History

The *Brentwood* case at hand was actually preceded by another action between Brentwood and the Tennessee Secondary School Athletic Association (hereinafter "TSSAA") that also reached the Supreme Court.[122] The primary issue in the first *Brentwood* action (hereinafter "*Brentwood I*") was whether TSSAA was a state actor when they enforced a rule prohibiting member schools from recruiting middle school athletes.[123] The District Court found TSSAA to be a state actor but the Court of Appeals for the Sixth Circuit reversed, holding that TSSAA was not a state actor when enforcing rules against its member schools."[124]

The Supreme Court explained the standard for state action by stating that "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself."[125]

> [A] challenged activity may be state action when it results from the State's exercise of "coercive power," [citation omitted] when the State provides "significant encouragement, either overt or covert," [citation omitted] or when a private actor operates as a "willful participant in joint activity with the State or its agents" [citation omitted]. We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," [citation omitted] when it has been delegated a public function by the State,

121. *Id.* at 467.

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

123. *Brentwood Acad.*, 531 U.S. at 290.

124. *Id.* at 293-94.

125. *Id.* at 295 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345 (1974)).

> [citation omitted] when it is "entwined with governmental policies," or when government is "entwined in [its] management or control[.]"[126]

Contrary to the Sixth Circuit, the Supreme Court held that TSSAA was in fact a state actor.[127] The Court began the reasoning for their holding by stating, "[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it."[128] The Court pointed out that public school officials represented their respective institutions within TSSAA, and were acting within the scope of their duties through this representation.[129] The Court explained that TSSAA was a "mechanism to produce rules and regulate competition" that was "overwhelmingly composed of public school officials" to "adopt and enforce the rules that make the system work."[130] The Court reasoned that because the public schools essentially delegated these jobs to TSSAA, it was as if the schools were exercising their own authority to meet the goals and responsibilities of TSSAA.[131] The Court believed that TSSAA would not exist without the public school officials that represented their schools within TSSAA because those public officials did not "merely control but overwhelmingly perform[ed] all but the purely ministerial acts by which the Association exists and functions in practical terms."[132] The Court illustrated the extent of the entwinement by pointing out that "[o]nly the 16% minority of private school memberships prevents this entwinement from being total and their identities [being] totally indistinguishable."[133] The Court also stated that while most of TSSAA's money came from the admission charged for games,

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126. *Id.* at 296.
127. *Id.* at 294.
128. *Id.* at 298.
129. *Id.* at 299.
130. *Id.*
131. *Id.*
132. *Id.* at 299-300.
133. *Id.* at 300.

TSSAA was basically using the moneymaking capacity of the schools "as its own."[134] The Court further believed that "the State Board once freely acknowledged the Association's official character but now does it by winks and nods."[135] The Court held, "[e]ntwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it."[136]

The action was then remanded to determine whether there had been a violation of Brentwood's First Amendment rights when the school was punished for distributing a letter from their football coach to a group of middle school athletes.[137] The opinion of the Court however was met with some disagreement that would again be echoed when the action between Brentwood Academy and TSSAA made its second appearance before the Supreme Court.[138] Justice Thomas, Chief Justice Roberts, Justice Scalia, and Justice Kennedy felt the entwinement relied upon by the majority to declare TSSAA a state actor, was inadequate and had never been used before to determine that an association was a state actor.[139] The dissent argued that common sense would show TSSAA was not a state actor because they were a private organization that was founded to organize and sponsor tournaments and activities between member schools.[140] The dissent further explained that TSSAA was not a state actor because: membership in TSSAA was open to both public and private schools, TSSAA was not established by the state of Tennessee, and TSSAA was not funded by public school members but rather by the tournaments that TSSAA organized and hosted.[141]

The case was remanded to the Sixth Circuit, which remanded the case back to the district court, this time to rule on the First

134. *Id.* at 299.
135. *Id.* at 301.
136. *Id.* at 302.
137. *Id.* at 305.
138. *Id.* at 305-15 (Thomas, J. dissenting).
139. *Id.*
140. *Id.*
141. *Id.*

Amendment issue.[142] The District Court again ruled for Brentwood and the Court of Appeals for the Sixth Circuit affirmed the ruling, with the majority holding that the anti-recruiting rule was a "content based regulation of speech that [was] not narrowly tailored to serve its permissible purposes."[143] The Sixth Circuit also held that TSSAA violated Brentwood's due process rights when they "improperly considered *ex parte* evidence during its deliberations."[144]

B. Factual Background

The facts before the Supreme Court, in both this and the preceding action, originated from TSSAA sanctioning Brentwood for personal letters sent by the Brentwood head football coach to individual middle school athletes.[145] The principal opinion of this action focuses primarily on the First Amendment, the Fourteenth Amendment, and the *Ohralik* decision in reaching the conclusion that the actions of TSSAA did not violate Brentwood's constitutional rights.[146]

TSSAA is a non-profit organization established to "regulate interscholastic sports among its members."[147] Two hundred and ninety public schools and fifty-five private schools in Tennessee are members of TSSAA with Brentwood being one of the fifty-five private school members.[148] For over fifty years, "TSSAA has prohibited high schools from using 'undue influence' in recruiting middle school students for their athletic programs."[149] In April 1997, the head football coach at Brentwood Academy sent a personal letter to a particular group of eighth-grade boys inviting them to take part in Brentwood's spring practices.[150] In his letter, the coach told the boys that football equipment would be passed out at the practices and

142. *Brentwood*, 127 S. Ct. 2492-93.
143. *Id.*
144. *Id.* at 2493. (emphasis in original).
145. *Id.* at 2492.
146. *Id.* at 2494.
147. *Id.* at 2492.
148. *Id.*
149. *Id.*
150. *Id.*

that it would be to their advantage to get involved with Brentwood's football program as soon as possible.[151] The coach closed his letter to the boys by signing it "Your Coach."[152] Each of the boys who received one of these letters had filled out a contract saying they planned to go to school at Brentwood, but none of them were actually "enrolled" at Brentwood according to TSSAA standards.[153] Every one of the boys that received the coach's letter attended at least part of the spring practice sessions mentioned in the letter.[154]

TSSAA undertook an investigation, during which they held several hearings, and corresponded with Brentwood in various forms before any sanctions were handed down.[155] During the investigation, TSSAA delivered a memo and follow up questions to Brentwood's headmaster.[156] A hearing was held before TSSAA's executive director and an advisory panel made up of three members from the TSSAA Board of Control.[157] Throughout the investigation, TSSAA notified Brentwood of all the charges against it, and Brentwood was represented by counsel at each of the hearings.[158] None of the evidence offered by Brentwood was excluded from the investigation or hearings.[159]

One of the allegations investigated by TSSAA, in addition to the letter from Brentwood's football coach, involved claims that an Amateur Athletic Union (AAU) coach, Bart King, encouraged "talented middle school students – including a basketball star named Jacques Curry – to attend Brentwood."[160] TSSAA communicated these allegations to Brentwood and received a letter from their headmaster addressing the "allegation that King had told Curry that if he attended Brentwood, he 'would *probably* have a car when he was in the tenth grade.'"[161] Throughout the investigation, Brentwood

151. *Id.*
152. *Id.*
153. *Brentwood*, 127 S. Ct. at 2492.
154. *Id.*
155. *Id.* at 2496.
157. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*

continued to state King was not affiliated with the school and was not authorized to act on behalf of Brentwood.[162] However, in spite of these defenses, TSSAA's director and advisory panel ultimately declared Curry ineligible to play for Brentwood.[163] On Brentwood's final appeal to TSSAA, Brentwood offered "testimony from Curry and an affidavit from King denying the alleged recruiting violations."[164] After Curry testified, Brentwood explained that King was present at the hearing and could answer questions, but the board declined to call him as a witness.[165] The board then held an *ex parte* proceeding where they met with two TSSAA investigators, even though the investigators had not been cross-examined by Brentwood.[166] The investigators offered handwritten notes detailing their investigations, and Brentwood was never given access to these notes.[167]

"After reviewing the evidence, the board found that Brentwood had committed three specific violations of its rules, none of which appeared to involve either King or Curry," and the board reinstated Curry's eligibility to play for Brentwood.[168] The board placed Brentwood's athletic programs on probation for four years, banned the boys' basketball and football teams from tournaments and playoffs for two years, and fined Brentwood $3,000.[169] Brentwood alleged the punishment regarding the football coach's letter, under the non-recruiting rule, was a violation of their First Amendment rights.[170] Brentwood also alleged that their non-presence at the closed door meeting with the investigators violated their due process rights, under the Fourteenth Amendment, and negatively influenced the punishment handed out.[171]

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162. *Id.*
163. *Id.*
164. *Brentwood*, 127 S. Ct. at 2496.
165. *Id.* at 2497.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*

V. ANALYSIS AND CRITIQUE

A. Application of the Ohralik Case

Despite the fact that *Ohralik* factually involved an attorney being punished by a state bar for in-person solicitation of clients, the Court here felt the *Ohralik* reasoning and holding was still applicable to an athletic association regulating the behavior and speech of its member schools.[172] The Court felt *Ohralik* was applicable because the ban applied in *Ohralik* was more of a ban on conduct than a restriction on speech.[173] The Court explained that it has always been acceptable to make certain forms of conduct illegal, even if that conduct involved language, be it spoken, written, or printed.[174] The Court expanded on this point by further explaining that the First Amendment does not eliminate the State's power to "regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."[175] The Court supported this assertion by pointing out that the prohibition of in-person solicitation of clients by lawyers did not raise any substantial First Amendment issues.[176] The Court used *Ohralik* to show the "evils" that are present with in-person solicitation and the fact that those evils are very different from the harms presented by "conventional commercial speech."[177] The Court stated that in-person solicitation may actually be more harmful than helpful to the affected individual, because it could prevent the individual from making a truly informed and reliable decision.[178] The Court paralleled the circumstances and reasoning of *Ohralik* with the relationship between high school football coaches and the danger of illegally recruiting middle school students who are trying to decide where to attend high school.[179]

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172. *Brentwood*, 127 S. Ct. at 2493.

173. *Id.*

174. *Id.* at 2494.

175. *Id.* (citation omitted) (quoting Ohralik v. State Bar Ass'n, 436 U.S. 447, 456 (1978).)

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

B. Principal Opinion: Justice Stevens

The Court began its analysis by explaining the scope and application of the First Amendment as it pertained to Brentwood and TSSAA in the case at hand.[180] The Court stated that the First Amendment protected Brentwood's right to provide the general public with truthful information, which included Brentwood's right to use information about the school's excellence in sports in an attempt to persuade prospective students to attend Brentwood.[181] The Court, however, acknowledged that Brentwood's right to publish information to prospective students was not absolute, and was in fact limited because of their membership in TSSAA.[182]

The Court then applied the *Ohralik* holding and reasoning to the circumstances at hand and defined the scope of *Ohralik*'s application.[183] The Court explained that the narrow holding of *Ohralik* applies only to "conduct that is 'inherently conducive to overreaching and other forms of misconduct.'"[184] The Court felt "[t]he dangers of undue influence and overreaching" caused by a lawyer's in-person solicitation are also caused by "a high school coach contact[ing] an eighth grader."[186] The Court reasoned that "[d]irect solicitation 'may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.'"[185] The Court stated that this pressure was also likely to be present when a letter was sent from a high school coach to an eighth grade athlete, inviting him to be part of a high school sports team, because a letter of that nature was a relatively weighty occurrence for an eighth grader.[188] The Court elaborated by discussing that such a letter is unfortunately often accompanied by a suggestion that failure to participate in the suggested activity will in one way or another actually harm the young athlete's chances to

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180. *Brentwood*, 127 S. Ct. at 2493.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 2494. (quoting Edenfield v. Fane, 507 U.S. 761, 774 (1993).
186. *Id.* at 2494-95.
185. *Id.* at 2494.
188. *Id.*

participate in high school sports, further decreasing their odds of playing college or professional sports.[186] The Court quoted the coach's statement in the letters to the boys, "I do feel that getting involved as soon as possible would definitely be to your advantage" to show the power and potential influence of the suggestion.[187] In fact, when the Brentwood football coach was asked about the effect his letter might have on middle school students, the coach admitted that in some situations a middle school student would not believe his participation in the practices was optional.[188] The Court felt that such a strong effect on "youthful hopes and fears, could well exert the kind of undue pressure that 'disserve[s] the individual and societal interest...in facilitating informed and reliable decision making.'"[189]

Based on this comparison and application of *Ohralik*, the Court framed the primary issue at hand as "whether the enforcement of a rule prohibiting high school coaches recruiting middle school athletes violates the First Amendment."[190] The Court held that, under the First Amendment, Brentwood has the "right to publish truthful information about the school and its athletic programs" in an effort to convince future students and their families that to enroll at Brentwood because of the school's athletic excellence.[191] The Court pointed out that Brentwood chose to join TSSAA, an organization that was a state-actor, and that TSSAA had the "obligation to prevent the exploitation of children, to ensure that high school athletics remain secondary to academics, and to promote fair competition among its members."[192] The Court disagreed with Brentwood's claim that TSSAA's interests were inadequate and that the rule was too broad to justify TSSAA's violation of Brentwood's constitutional rights.[193] The Court instead believed that TSSAA's interests in protecting students and promoting fair competition, with an academics first approach, were important and adequate enough to

186. *Id.*
187. *Brentwood*, 127 S. Ct. at 2495.
188. *Id.* at 2494 n.1.
189. *Id.* at 2494 (quoting *Ohralik*, 436 U.S. at 458).
190. *Id.* at 2492.
191. *Id.* at 2493.
192. *Id.*
193. *Id.*

justify TSSAA's anti-recruiting rule.[194] The Court also held the anti-recruiting rule, under which Brentwood was sanctioned, was an appropriate means to meet those interests.[195] The Court began to explain the holding in favor of TSSAA by stating that "[t]he anti-recruiting rule strikes nowhere near the heart of the First Amendment."[196] The Court pointed out that TSSAA prevented Brentwood from "recruiting individual middle school students," but did not limit Brentwood's right to publish truthful information about Brentwood's academics or athletics.[197] The Court explained that there was a constitutional difference between "rules prohibiting appeals to the public at large . . . and rules prohibiting direct, personalized communication in a coercive setting."[198] The Court reasoned that because TSSAA member schools were still allowed to "send brochures, post billboards, and otherwise advertise their athletic programs," the regulation against individual recruiting "poses no significant First Amendment concerns."[199]

The Court stated that at times, the government's interest in running the workplace outweighs the employees' speech rights.[200] The Court believed that similarly, there are circumstances under which an athletic association's interest in "enforcing its rules sometimes warrant[s] curtailing the speech of its voluntary participants."[201] The Court illustrated that it was obviously essential for TSSAA to be able to place the necessary conditions on the speech of TSSAA member schools to manage "an efficient and effective state-sponsored high school athletic league."[202] The Court stated that

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194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* (citation omitted).

198. *Id.*

199. *Id.* at 2495.

200. *Id.*; *see* Connick v. Meyers, 461 U.S. 138, 151-52 (1985).

201. *Brentwood*, 127 S. Ct. at 2495 (citing Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563, 568 (1968). In *Pickering*, the Court held there was the need for a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.).

202. *Brentwood*, 127 S. Ct. at 2495.

no scientific research was necessary to show that using "hard-sell tactics" with middle school kids "could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics."[203] The Court believed that TSSAA's anti-recruiting rule sought to eliminate the very behavior that would harm a high school athletic league's "ability to operate 'efficiently and effectively'."[204] The Court held it was only fair that Brentwood be required to abide by the same rules as all the other schools, to ensure that TSSAA could run a competitive and efficient athletic association.[208]

The Court also explained that even if the TSSAA's *ex parte* hearing was deemed unconstitutional, the violation of Brentwood's due process rights under the Fourteenth Amendment was not serious enough to affect the outcome of the trial.[205] The Court reasoned that in fact, Brentwood was not able to identify in any way that participation in the *ex parte* would have allowed them to develop a "more effective strategy."[206] The Court reasoned that because Brentwood was unable to identify anything in the investigators' notes that Brentwood did not already know, there was no credence to Brentwood's argument that they would have been able to raise a better argument or achieve less serious sanctions if they had been allowed to participate in the *ex parte* hearing.[207]

As a result, the Court held that there was no support for the allegation that TSSAA had violated Brentwood's constitutional rights under either the First Amendment or the Fourteenth Amendment.[208]

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203. *Id.* at 2495-96.
204. *Id.* at 2496.
208. *Id.*
205. *Id.* at 2497.
206. *Id.* at 2498.
207. *Id.*
208. *Id.*

C. Concurring in Part and Concurring in the Judgment: Justice Kennedy Writing, and Joined by the Chief Justice, Justice Scalia, and Justice Alito

Justice Kennedy, Chief Justice Roberts, Justice Scalia, and Justice Alito agreed that there was no difficulty in concluding that the challenged anti-recruiting rule did not violate any of Brentwood's First Amendment rights, but the Justices felt it was "both unnecessary and ill advised to rely upon *Ohralik* in the matter."[209] Justice Kennedy supported this assertion by pointing out that, "*Ohralik*, as the principal opinion notes, involved communications between attorney and client, or, more to the point, the in-person solicitation by an attorney of an accident victim as a potential client."[210] Justice Kennedy stood by this argument in spite of the fact that the *Ohralik* holding was later extended to prohibit "solicitation of accident victims through direct mail."[211] Justice Kennedy believed the Supreme Court had not yet extended "the *Ohralik* rule beyond the attorney-client relationship" and that it was therefore improper to extend the holding in *Ohralik* outside of the attorney-client relationship in this case, by applying the same standard to an athletic association regulating the speech of its member schools.[212]

Justice Kennedy illustrated this by pointing out that the Court's holding in *Edenfield* clearly explained that the *Ohralik* rule did not extend to communications between an accountant and possible clients.[213] Justice Kennedy further stated that applying *Ohralik* outside of the attorney-client relationship was improper because nothing in previous holdings had removed all forms of personal solicitation from First Amendment protection.[214] And he further noted that '*Ohralik's* holding was narrow and depended upon certain unique features of in-person solicitation by lawyers that were present in the circumstances of that case."[215] Because none of these

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209. *Id.* at 2498
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*; *Edenfield*, 507 U.S. at 774.
214. *Brentwood*, 127 S. Ct. at 2498.
215. *Id.*

circumstances were present in the relationship between Brentwood and TSSAA, Justice Kennedy and the other concurring Justices believed it was improper to extend *Ohralik* to apply to the case at hand.[216]

Justice Kennedy reasoned that relying on *Ohralik* meant "the principal opinion, at a minimum, is open to the implication that the speech at issue is subject to state regulation whether or not the school has entered a voluntary contract with a state-sponsored association in order to promote a code of conduct affecting solicitation."[217] Because of this, Justice Kennedy, Chief Justice Roberts, Justice Scalia, and Justice Alito believed that while the proper result was achieved by protecting TSSAA's interest to promote a fair and efficient athletic association, the principal opinion's means of achieving that end caused substantial problems with the basic interpretation of the First Amendment.[218]

> To allow free-standing state regulation of speech by coaches and other representatives of nonmember schools would be a dramatic expansion of *Ohralik* to a whole new field of endeavor. Yet by relying on *Ohralik* the principal opinion undermines the argument that, in the absence of Brentwood Academy's consensual membership in the Tennessee Secondary School Athletic Association, the speech by the head coach would be entitled to First Amendment protection.[219]

D. Concurring in the Judgment: Justice Thomas

In concurring in the judgment, Justice Thomas argued that it was improper for the Court to rely on *Pickering* to support the finding that TSSAA's anti-recruiting rule did not violate Brentwood's First Amendment rights.[220] Justice Thomas stated that until the principal

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216. *Id.*
217. *Id.* at 2498-99.
218. *Id.* at 2499.
219. *Id.*
220. *Id.*

opinion in this case, the holding in *Pickering* applied only to the speech of government employees and contractors.[221] Justice Thomas believed the *Brentwood* Court removed *Pickering* from its original place and holding by applying it to the speech of a private school when a private association was enforcing a rule of the private association.[222] Justice Thomas pointed out that the Court was required to make this stretch application of *Pickering* only because they chose to recognize TSSAA as a state actor in *Brentwood I*.[223] "Because *Brentwood I* departed so dramatically from our earlier state-action cases, it is unsurprising that no First Amendment framework readily applies to this case. Rather than going through the bizarre exercise of extending obviously inapplicable First Amendment doctrine to these circumstances, I would simply overrule *Brentwood I*."[224]

While Justice Thomas believed the principal opinion was incorrect in relying on *Pickering*, he believed it was even more inappropriate to rely on *Ohralik* in these circumstances.[225] Justice Thomas explained that for the reasons expressed in the opinion concurring in the judgment, the holding in *Ohralik* was intended to be a narrow holding that does not apply to *Brentwood*'s facts.[226]

VI. IMPACT AND SIGNIFICANCE

A. Social Impact

One of the largest implications of the *Brentwood* case is the expansion of *Ohralik* as mentioned in the concurring opinion.[227] As explained, *Ohralik* had previously only been applied to the circumstances surrounding a potential attorney-client relationship.[228] The analysis in *Ohralik* seems to be primarily concerned with the

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221. *Id.*
222. *Id.*
223. *Id.*; *see Brentwood Acad.*, 531 U.S. at 315 (Thomas, J. dissenting).
224. *Brentwood*, 127 S. Ct. at 2499.
225. *Id.*
226. *Id.*
227. *Id.* at 2498.
228. *Id.* (Kennedy, J., concurring); *see Edenfield*, 507 U.S. at 774.

dangers presented by the nuances and importance of the attorney-client relationship.[229] The nature of the attorney-client relationship is unique because of the attorney's specialized knowledge, persuasive skills, and ability to bind their client to an array of actions and decisions. Because of these characteristics, the Court in *Ohralik* afforded special protection to the client and enacted a relatively high standard concerning the permissible contact between an attorney and a potential client.[230] The analysis by the *Ohralik* Court indicates that special concern should be given to how an attorney goes about soliciting clients and in turn, how much the client is able to appropriately weigh her options and make an informed decision.[231] While most would not argue with the appropriateness of this standard to provide protection for the client in the context of the attorney-client relationship, the same cannot be said when that high standard of contact and speech is implicated to other relationships and industries. In *Brentwood*, the Court explicitly paralleled the relationship between an attorney and a prospective client, with the relationship between a high school football coach and a prospective student athlete.[232] The Court felt this was an accurate analogy because they believed there was a similar potential for undue influence and pressure between a football coach and a student athlete.[233] The Court even explained the need to make sure that academics were given precedent over athletics.[234] All of these are admirable and legitimate concerns, but the Court did not give an adequate explanation of the parameters of the holding or the appropriate times when the *Ohralik* analysis actually should be applied.

Not all relationships and circumstances are similar to the attorney-client relationship and therefore should not be examined under the *Ohralik* standard. However, the Court's application in *Brentwood* arguably opens the door to that very type of application of *Ohralik*. *Ohralik* had previously only been applied to ban in-person

229. *Brentwood*, 127 S. Ct. at 2498 (Kennedy, J. concurring).
230. *Ohralik*, 436 U.S. at 461; *see also Edendfield*, 507 U.S. at 761.
231. *Ohralik*, 436 U.S. at 461-62.
232. *Brentwood*, 127 S. Ct. 2494-95.
233. *Id.* at 2495.
234. *Id.* at 2495-96.

solicitation by attorneys, but the Court's application of *Ohralik* in *Brentwood* implies that the holding of *Ohralik* can be applied to any situation where there is the opportunity for undue influence. More specifically, this application leaves open the possibility of *Ohralik* being used in any relationship between an administrative body and a member organization.

Some would argue that this standard and application banning in-person solicitation would be appropriate in any situation where most individuals would not possess the requisite knowledge to make an informed decision. Advocates of this application would especially support this reasoning when the individual faces the possibility of being pressured or influenced to the point that she would make a relatively important decision without being able to consider all the alternatives and possibilities. At first glance, this appears to be a fantastic idea. Of course, we want to protect people from being pressured to make important and binding decisions when they lack adequate knowledge or time to make an informed decision. In fact, it makes even more sense that we want to prevent adults from playing on the youthful hopes and dreams of students, preventing the students from making an informed decision that truly is in the student's best interest. However, once we move out of the ideological world into the practical world and seek to actually apply this standard, we find that we may have caused more problems than benefit, and generated more confusion than clear precedent.

Where can the line be drawn for application? Many administrative bodies already regulate the advertising, language and communication used by sales people of member organizations. Would this application of *Ohralik* remove all persuasive speech and in-person solicitation from First Amendment protection? In cases such as *Edenfield*, the Court was careful to point out that *Ohralik* did not remove all personal solicitation from First Amendment protections, but in *Brentwood*, the Court seems to go against that precedent.[235] The *Brentwood* Court's use of *Ohralik* appears to place the speech of all recruiters and salespeople in question. Under the analysis in *Brentwood* the pitches of recruiters and salespeople would be subject to state regulation as there is almost always the *opportunity* for undue influence with in-person solicitation. The

235. *Edenfield*, 507 U.S. at 761; *Brentwood*, 127 S. Ct. at 2498-99.

Brentwood application appears to do away with previous clear boundaries for *Ohralik* and instead, open the doors to limitless application.[236] Outside of the attorney-client relationship, it would be virtually impossible to draw a distinct line delineating just what were proper times for in-person solicitation versus improper circumstances for personal solicitation because those circumstances involved the propensity for overreaching and undue influence. The *Brentwood* Court's use of *Ohralik* essentially opens the dreaded floodgates of litigation and may cause the Supreme Court to fight through numerous cases and overrule precedent to set forth the appropriate circumstances where *Ohralik* should in fact be applied.

One of the hottest topics in the arena of high school sports is the issue of illegal recruiting. Many times, a student's ability to attend a particular public school is determined by the student's physical address within the school's district. However, a student may be able to attend a particular high school outside of the district he lives in based on the student's race and the racial distribution of the school the student is hoping to attend. Despite strong restrictions on a student's ability to live anywhere and attend any high school, allegations of illegal recruiting are still prevalent when new student athletes arrive and athletic programs succeed. The idea of illegal recruiting is even more rampant within the world of private schools because it was previously believed to be much more difficult to regulate the conduct of private schools. To promote organization and much more efficient competition, private schools have joined athletic associations, allowing the schools to participate in state-wide tournaments and playoffs. If schools choose to join a private association, there are no constitutional issues as to the association's ability to regulate behavior and speech of member organizations under an agreement between the association and member schools. These agreements would allow athletic associations to essentially put endless rules in place to restrict the rights of member schools to recruit student athletes. However, the most interesting twist on the future implications of *Brentwood* occur as a result of TSSAA being declared a state actor.

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236. *Brentwood*, 127 S. Ct. at 2498-99 (Kennedy, J., concurring).

B. Legal Impact

Declaring TSSAA to be a state actor raises constitutional issues for athletic associations across the country, blurring the lines of permissible and impermissible regulations of speech and behavior. Though TSSAA works with public schools and receives some funding from those public schools, the bulk of TSSAA's income results from the tournaments and events that TSSAA organizes and hosts.[237] In addition, TSSAA was established as and intended to be a private organization.[238] However, the Court felt TSSAA acted in place of the State Board of Education at times and was entwined with public operations to the point that they were a state actor.[239] This decision makes it unclear just where the boundary lies of state actor vs. private actor for an association or administrative body. As a result, it will be unclear for administrative bodies, especially athletic organizations, when they qualify as a state actor and just what they can do to regulate the behavior of members. This uncertainty is likely to cause excessive litigation and give the Court the unfortunate burden of redefining the scope of *Ohralik*, when an administrative body is a state actor, and the appropriate standards of First Amendment and Fourteenth Amendment protection for member organizations.

In particular, the use of *Ohralik* and *Pickering* in *Brentwood* raise issues of application for athletic associations and member schools as well other similarly situated administrative bodies and their members. The holding in *Brentwood* indicates that the speech and conduct of all schools in athletic associations would be subject to state regulation, regardless of whether the association or the school itself is a private organization.[240] Justice Kennedy made this point in the concurring opinion by stating, "By doing so, the principal opinion, at a minimum, is open to the implication that the speech at issue is subject to state regulation whether or not the school has entered a voluntary contract with a state-sponsored association in

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237. *Brentwood Acad.*, 531 U.S. at 306.

238. *Id.*

239. *Id.* at 304.

240. *Brentwood,* 127 S.Ct. at 2498-99 (Kennedy, J., concurring).

order to promote a code of conduct affecting solicitation."[241] In *Brentwood*, TSSAA and Brentwood are both private organizations, however, TSSAA is declared to be a state actor.[242] *Brentwood* also holds that the regulation of member schools, both public and private, are considered to be within the scope of TSSAA's state powers.[243] Declaring TSSAA to be a state actor could cause confusion about times when an athletic association is a state actor. The classification of an athletic association as a state actor or a private organization seriously affects the scope of action the association can take in regulating member schools. Giving TSSAA's interests predominance over the free speech rights of member schools, even private schools, could have additional far reaching implications for athletic organizations and member schools as well as similar administrative bodies across the country.

At some point, the judicial system is going to be forced to further delineate what exactly causes an athletic association such as TSSAA to be a state actor when an organization like the NCAA has continually been seen as a private organization. In *NCAA v. Tarkanian*, the Court held that the NCAA was a private entity and not a state actor despite the fact that they supervise and coordinate the athletic efforts of virtually every major public university in the United States.[244] There the Court pointed to the fact that the NCAA was a national entity, thereby somehow making them less entwined with the public schools than high school associations who oversee all the public schools in a given state.[245] In later cases, courts supported their holding that high school athletic associations were different from the NCAA and were state actors by reasoning that the schools overseen by these associations all exist within one state.[246]

In *Indiana High School Association v. Avant*, a student attempted to transfer from a private high school to a public high school and

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241. *Id.*

242. *Id.*

243. *Id.* at 2498.

244. NCAA v. Tarkanian, 488 U.S. 178, 193-98 (1988).

245. *Id.* at 193.

246. *See* Ind. High Sch. Ass'n, Inc. v. Avant, 650 N.E.2d 1164 (Ind. Ct. App. 1995) *rev'd on other grounds*; Tiffany v. Ariz. Interscholastic Ass'n, Inc., 726 P.2d 231 (Ariz. Ct. App. 1986).

ended up losing a year of eligibility.[247] The student challenged the association's ruling and the court was forced to decide whether the action taken by the Indiana High School Association qualified as state action.[248] The court held that the Indiana High School Association was a state actor and attempted to explain the difference between the Indiana High School Association as a state actor, and the NCAA as a private entity.[249] "Thus, an important distinction between the NCAA and the IHSAA is that the NCAA represents schools at a national level while the members of the IHSAA are all secondary schools in Indiana."[250] Additionally, in *Tiffany v. Arizona Interscholastic Association, Inc.*, a student attempted to challenge a rule that prevented all nineteen year old students from participating in high school athletics.[251] The Executive Board denied his request for a waiver of the age rule, even though he only turned nineteen because he had been held back by his elementary school in kindergarten and first grade.[252] The court held that there was no question that the athletic association was a state actor, acting under the color of law under 42 U.S.C. § 1983.[253]

However, now with many of the top high school teams playing against teams from other states with each schools' athletic associations overseeing the game and receiving money from admission charges, it is not unforeseeable that soon an athletic association could contain teams from different states. At this point, something would be forced to give. Either the NCAA would then have to be seen as a state actor or athletic associations would have to be granted status as private entities. In either case, only more confusion will ensue as a long line of precedent for either the NCAA or high school athletic associations the other will have to be overturned.

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247. *Ind. High Sch. Ass'n,* 650 N.E. 2d at 1165-66.
248. *Id.* at 1166-67.
249. *Id.* at 1169-70.
250. *Id.* at 1170.
251. *Tiffany,* 726 P.2d at 232.
252. *Id.* at 232-33.
253. *Id.* at 233.

VII. CONCLUSION

The accomplishments of *Brentwood* are two-sided. On one hand, important steps were taken to ensure a level playing field among the athletic programs of high schools and encourage high schools to give academics the appropriate priority ahead of athletics. *Brentwood* struck an important chord to make sure schools are treated equally and have an equal opportunity for success in athletic programs. More importantly, the Court in *Brentwood* took steps to make sure that the interests of young students are protected from undue influence or excessive persuasion. *Brentwood* also further developed the scope of free speech rights under the First Amendment by illustrating another instance where the rights of an administrative body preempted the free speech rights of a member. *Brentwood* was an important precedent to set forth an appropriate standard for the behavior of coaches and member schools and the ability of TSSAA and other state athletic associations to act to guarantee fairness and uniform behavior among member schools.

On the other hand, *Brentwood* also expanded on previous Supreme Court holdings and may have erroneously extended the intended scope and holdings of those previous cases, causing more uncertainty and harm than benefit. The use of *Ohralik* to support the Court's holding creates the possibility of lower courts applying *Ohralik* in inappropriate circumstances and expanding the holding beyond the arguably intended narrow scope of the attorney-client relationship. Not all relationships and circumstances need equal treatment when it comes to the restriction of fundamental constitutional rights, but the holding in *Brentwood* goes a long way towards this dangerous occurrence. *Brentwood* removes the free speech rights of an organization and does not clearly state the basis for doing so. While the holding may be just and correct, the manner in which the Court categorized TSSAA as a state actor and deemed TSSAA's interests sufficient to override the free speech rights of Brentwood, seemed to indicate that Brentwood's speech and conduct would be subject to regulation even if they were not members of TSSAA. A ruling of this magnitude sets a dangerous precedent that could lead to several organizations being subjected to improper regulation.

Only time and future litigation will tell whether the holding in *Brentwood* will have more of the desired effect of equality and fair

play, or the negative effect of improper expansion and disregard of precedent. In either case, the possible implications are serious.