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Signed, Your Coach: Restricting Speech in Athletic Recruiting in *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*

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I. INTRODUCTION

In *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy* ("*Brentwood II*"),[1] the United States Supreme Court unanimously held that an athletic association may enforce its anti-undue-influence recruiting policy, restricting the speech of its voluntary member schools, to avoid undue influence on young student athletes during the recruitment process.[2] In reaching its holding, the Court extended two lines of First Amendment jurisprudence. First, the Court extended the application of *Ohralik v. Ohio State Bar Ass'n*[3] to a context other than attorney-client solicitation for the first time.[4] In doing so, the Court held that the possibility of undue influence in athletic recruiting was analogous to that in attorney-client solicitation and harmful enough to

1. 127 S. Ct. 2489 (2007).
2. *Id.* at 2496.
3. 436 U.S. 447 (1978).
4. *Brentwood II*, 127 S. Ct. at 2494-95.

justify speech restriction.[5] Second, the Court extended the application of the *Pickering v. Board of Education*[6] balancing test beyond the context of government employment, weighing the interests of Brentwood Academy ("Brentwood") against those of the Tennessee Secondary School Athletic Association ("TSSAA").[7] Ultimately, the Court held that the TSSAA's interest in enforcing its rules and restricting the speech of its voluntary members outweighed Brentwood's interest in recruiting speech.[8]

The decision in *Brentwood II* sets a precarious standard. The First Amendment doctrines used by the Court to support its holding were removed from their contexts and greatly extended. While the decision in *Brentwood II* is unanimous, the concurring Justices did not concur in the judgment because they supported the reasoning adopted by the majority. Rather, the concurring Justices in *Brentwood II* did so for the same reasons that they dissented in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n* ("*Brentwood I*"),[9] arguing that Brentwood was not entitled to First Amendment protection because TSSAA's actions were private and not state actions.[10] Further, the Court established a nebulous practical standard for recruiting that does little to clarify the boundary between appropriate recruiting measures and inappropriate ones.

II. FACTUAL BACKGROUND

The TSSAA is a not-for-profit corporation that provides standards, rules, and regulations for interscholastic athletics among its members. Membership is voluntary and includes approximately 290 public high schools and 55 private high schools in the state of Tennessee. Brentwood is one of the private school members.[11]

Since the 1950s, the TSSAA has maintained a policy that prohibits high schools from imposing "undue influence" on middle school student-athletes in the process of recruiting for high school athletics. In April 1997 the head football coach at Brentwood mailed letters to a number of eighth-grade football players who had signed letters of intent, which are contracts indicating their intent to attend and play football at

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5. *Id.*
6. 391 U.S. 563 (1968).
7. *Brentwood II*, 127 S. Ct. at 2494-95.
8. *Id.* at 2495-96.
9. 531 U.S. 288 (2001).
10. *Id.* at 305 (Thomas, J., dissenting).
11. Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 127 S. Ct. 2489, 2492 (2007).

Brentwood. The letters from the football coach, which were also sent to the parents of the student athletes, invited the student athletes to the school's spring football practice sessions.[12] The letters also informed the rising freshmen that equipment would be distributed at these practices and that "getting involved as soon as possible would definitely be to [their] advantage."[13] The letter was signed "Your Coach."[14] All of the recipients of the letter attended all or some of the spring practices.[15]

The TSSAA declared the letters violative of the TSSAA anti-undue-influence recruiting policy, which led to an investigation of recruiting practices at the school by a three-member panel known as the TSSAA Board of Control. During this investigation, Brentwood was given ample notice that it had violated the TSSAA anti-undue-influence recruiting policy. Regular correspondence and meetings between TSSAA and Brentwood regarding the investigation ensued. This correspondence included a hearing before the TSSAA Board of Control and a de novo review by the entire TSSAA board of directors. At these proceedings, the school was represented by counsel and given the chance to introduce evidence to both of the boards, but each time, the school elected not to present evidence. As a result of these hearings, the TSSAA Board of Control found that Brentwood violated TSSAA's policy prohibiting undue-influence in the recruiting of student-athletes and sanctioned Brentwood accordingly. The board placed Brentwood's athletic program on a four-year probation, prohibited the Brentwood boys' football and basketball teams from competing in playoff tournaments for two years, and fined the school $3,000.[16]

In 1998 after the TSSAA enforcement proceedings, Brentwood brought suit in the United States District Court for the Middle District of Tennessee against the TSSAA under 42 U.S.C. § 1983,[17] challenging the athletic association's prohibition of undue-influence recruitment of middle school students for athletic programs. Brentwood alleged that the TSSAA's sanctions were state actions that violated the school's First Amendment[18] and Fourteenth Amendment[19] rights. The district court

12. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 293 (2001).
13. *Brentwood II*, 127 S. Ct. at 2492 (internal quotation marks omitted).
14. *Id.* (internal quotation marks omitted).
15. *Id.*
16. *Id.* at 2496-97.
17. 42 U.S.C. § 1983 (2000).
18. U.S. CONST. amend. I.
19. U.S. CONST. amend. XIV.

entered summary judgment for Brentwood on its First Amendment claim and enjoined the TSSAA from enforcing its anti-recruiting policy.[20]

On appeal, the TSSAA alleged the district court erred in holding that the TSSAA's actions constituted state actions.[21] The United States Court of Appeals for the Sixth Circuit reversed the decision of the district court, holding that the actions of the TSSAA did not constitute state actions but instead constituted private actions from which Brentwood was not protected by the First or Fourteenth Amendments.[22]

The United States Supreme Court granted certiorari and reversed the ruling of the Sixth Circuit, holding that the TSSAA was a state actor.[23] In so holding, the Court stated that the TSSAA met the entwinement exception to the state action doctrine.[24] The Court reasoned that state government was entwined in the operations of the TSSAA from the "bottom up" and the "top down," which rendered the nominally private entity a state actor.[25] The state government was entwined from the bottom up because 84% of the TSSAA's members were public schools in which athletics played a vital role in student education.[26] In addition, half of the TSSAA meetings were at public schools during regular school hours, and the financial support for the TSSAA came from the member schools.[27] Regarding top-down entwinement, the Court held that state employees were selected to serve as members of the TSSAA's Board of Control, and the TSSAA's ministerial employees were treated as state employees for state retirement benefits.[28] Having resolved the state action issue, the Court remanded the case for adjudication on the First and Fourteenth Amendment claims.[29]

On remand, the Sixth Circuit held that the TSSAA's policy did not facially violate Brentwood's First and Fourteenth Amendment rights, and the case was further remanded to the district court for trial on those claims.[30] The district court ruled for Brentwood again, finding the school's First and Fourteenth Amendment rights were violated by the TSSAA's enforcement of its recruiting policy. An appeal followed, and

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20. *Brentwood I*, 531 U.S. at 293.
21. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 180 F.3d 758, 761 (6th Cir. 1999).
22. *Brentwood II*, 127 S. Ct. at 2492-93.
23. *Brentwood I*, 531 U.S. at 302.
24. *Id.*
25. *Id.* at 300.
26. *Id.* at 298-99.
27. *Id.* at 299.
28. *Id.* at 300.
29. *Id.* at 305.
30. *Brentwood II*, 127 S. Ct. at 2492-93.

the Court of Appeals for the Sixth Circuit affirmed the decision of the district court, holding that Brentwood's free speech rights were violated.[31] Granting certiorari a second time, the Supreme Court unanimously reversed and remanded the case, holding that: (1) the TSSAA's enforcement of its anti-undue-influence recruiting policy did not violate Brentwood's First Amendment rights and (2) any procedural due process violation under the Fourteenth Amendment regarding the TSSAA proceedings was harmless beyond a reasonable doubt.[32]

III. LEGAL BACKGROUND

A. *The First Amendment, Fourteenth Amendment, and Incorporation*

The First Amendment[33] provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech."[34] Over the years, the Supreme Court has extended the First Amendment to apply to the Federal judicial and executive branches in addition to the United States Congress. However, the Court has extended the First Amendment's protection further. The Fourteenth Amendment[35] provides, in relevant part, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[36] Because freedom of speech is a privilege of citizenship of the United States, the Court has interpreted this clause of the Fourteenth Amendment to broaden the protection of the First Amendment and protect individuals from the speech restrictions of *state* actors in addition to federal actors.[37] This doctrine is known as incorporation and has been used by the Court to protect most of the individual liberties granted by the Bill of Rights from state action in addition to federal action.[38]

The Court has chosen not to extend the First Amendment further and has adopted the state action doctrine, establishing that the First Amendment's protection does *not* extend to the actions of other individuals or private entities.[39] However, there are some judicially created exceptions to this general rule in which the actions of private entities are considered to be state action. For example, the Court has

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31. *Id.*
32. *Id.* at 2495-96, 2497-98.
33. U.S. CONST. amend. I.
34. *Id.*
35. U.S. CONST. amend. XIV.
36. *Id.* § 1 (the Privileges or Immunities Clause).
37. Duncan v. Louisiana, 391 U.S. 145, 147 (1968).
38. *Id.* at 148.
39. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

held that a private entity should be treated as a state actor "when it is controlled by an 'agency of the State,' when it has been delegated a public function by the State, when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control.'"[40] When a nominally private entity's composition and workings are pervaded by public institutions and officials, it is appropriate to apply constitutional standards to that entity.[41] The Court recognized this concept in *Evans v. Newton*,[42] in which the Court held that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[43]

B. When Are Restrictions on Speech Acceptable?

While the Supreme Court has never directly addressed First Amendment free speech in the context of athletic recruiting, the Court does recognize two long-standing doctrines regarding permissible government speech restriction.[44] Each doctrine provides an example of when it is acceptable by First Amendment standards to restrict the speech of a private entity because society's interest in restricting the speech outweighs society's interest in protecting it.[45]

1. *Ohralik* and Undue Influence. In *Ohralik v. Ohio State Bar Ass'n*,[46] the Court held that a state agency may prohibit an attorney from engaging in face-to-face solicitation of clients due to the potential dangers such solicitation may precipitate.[47] Ohralik, a member of the Ohio Bar, learned of a car accident in which one of the victims was a casual acquaintance. Immediately afterward, Ohralik visited the victim in the hospital while the young lady was still in traction in her hospital bed. The two talked briefly about the car accident, and then Ohralik told the victim that he would represent her and asked her to sign a contract, which she did at a later date. On the same day, Ohralik solicited an eighteen-year-old female passenger injured in the same

40. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001) (brackets in original) (citations omitted).

41. *Id.* at 298.

42. 382 U.S. 296 (1966).

43. *Id.* at 299.

44. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

45. *Ohralik*, 436 U.S. at 447; *Pickering*, 391 U.S. at 563.

46. 436 U.S. 447 (1978).

47. *Id.* at 468.

accident, who verbally committed to retain him. Later, the victims filed a complaint with the local bar association regarding Ohralik's conduct, and the complaint was related to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.[48] The board had long held that "direct, in-person communication with the prospective client . . . [is] inconsistent with the [legal] profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client."[49] As a result, the board found that Ohralik had violated the Ohio Code of Professional Responsibility[50] and sanctioned him accordingly. The Ohio Supreme Court adopted the board's findings and enforced the sanctions, despite Ohralik's allegations that his First and Fourteenth Amendment rights were violated.[51] The United States Supreme Court granted certiorari and affirmed the Ohio Supreme Court's ruling.[52]

On Ohralik's claims of First and Fourteenth Amendment violations, the Court held that restricting such speech was of greater societal interest than preserving it, reasoning that "in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."[53] In so concluding, the Court considered the immediacy of the communication and the imminence of harm that could be caused by the communication.[54] The unanimous opinion, written by Justice Powell, identified several dangers that could result from in-person solicitation, including a one-sided presentation of the facts by the attorney, a hastily made decision by the potential client who has no time to reflect and compare, and the absence of an opportunity for a third party to intervene and offer alternatives.[55] The Court stressed that an attorney, trained in the art of persuasion, putting such pressures on a potential client "actually may disserve the individual and societal interest . . . in facilitating 'informed and reliable decisionmaking.'"[56] Because that societal interest of preventing undue influence was a compelling interest of the state, the state had the authority to restrict speech to protect that interest.[57]

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48. *Id.* at 450-54.
49. *Id.* at 454.
50. OHIO CODE OF PROF'L RESPONSIBILITY DR2-103(A), -104(A) (1970).
51. *Ohralik*, 436 U.S. at 453.
52. *Id.* at 468.
53. *Id.* at 457.
54. *Id.* at 457 n.13.
55. *Id.* at 457.
56. *Id.* at 458 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977)).
57. *Id.* at 462.

The Court's rationale included two major considerations: (1) the injurious effects of in-person client solicitation on the legal profession and (2) the injurious effects, potential or actual, that such solicitation could have on a potential client.[58] In the second part of its rationale, the Court articulated that a lay client may be unsophisticated and distressed and may have placed a great amount of trust in the lawyer in response to the vulnerability of, and the pressures placed upon, the client.[59] In contrast to in-person solicitation, when a potential client reads an advertisement or information in writing, the client has time to reflect and can "'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'"[60]

Ohralik has become the standard for attorney-client solicitation. However, due to the unique features of in-person solicitation by lawyers, the Court had not extended the 1978 holding beyond the attorney-client relationship until *Brentwood II*.[61]

2. *Pickering* and Balancing of Interests The Court also has allowed the restriction of government employee speech by the government as employer in limited situations.[62] In *Pickering v. Board of Education*,[63] which was later refined by *Connick v. Myers*[64] and a multitude of other cases, the Court established a four-prong test for determining when the government as employer may restrict the speech of its employees.[65]

In *Pickering* an Illinois high school teacher, Pickering, was dismissed by the local board of education. The board dismissed Pickering for sending a letter to a local newspaper criticizing the way the board and its superintendent handled proposals for increased taxes that would raise revenue for schools. Pickering challenged his dismissal, arguing his letter was free speech protected by the First and Fourteenth Amendments.[66] However, after a full hearing, the board determined his letter was "detrimental to the efficient operation and administration of the schools of the district" and upheld his dismissal.[67] Pickering

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58. *Id.* at 460-66.
59. *Id.* at 465.
60. *Id.* at 466 n.25 (brackets in original) (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).
61. 127 S. Ct. 2489, 2498 (2007).
62. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
63. 391 U.S. 563 (1968).
64. 461 U.S. 138 (1983).
65. *See id.*
66. *Pickering*, 391 U.S. at 564.
67. *Id.* (internal quotation marks omitted).

filed suit in the Circuit Court of Will County, Illinois, which affirmed the board's dismissal, stating that the interests of the school system in efficient education of students outweighed Pickering's First Amendment interest in the speech at issue. On appeal, the Illinois Supreme Court affirmed the circuit court's ruling, and Pickering appealed to the United States Supreme Court for adjudication on his First and Fourteenth Amendment challenges.[68]

In a unanimous opinion, written by Justice Marshall, the Court held that Pickering's speech was not detrimental to the efficient education of students.[69] Therefore, Pickering's First Amendment interest in speaking on issues of public importance outweighed the board's interest in efficiency, and his dismissal violated his First and Fourteenth Amendment rights.[70] In arriving at its holding, the Court identified factors for courts to use when assessing whether an employee's speech disrupts the efficient performance of government.[71] These factors indicate whether the government employee's speech interests have overcome the government employer's interest in efficiency and, in turn, reveal whether the employee's dismissal was lawful or in violation of the employee's free speech rights.[72]

A court using the four-prong *Pickering–Connick* test must first consider the threshold inquiry of whether the employee's speech touched on matters of public concern.[73] Government employee speech touches on matters of public concern when the employee is speaking as a private citizen, not as an employee pursuant to official duties, and when the speech addresses issues of political, social, or other matters of interest to the public.[74] When speech touches on matters of public concern, it is deemed protected speech for First Amendment purposes.[75] Second, if the employee speech satisfies that threshold, a court must consider whether the government's interest in efficient performance of public services outweighs the employee's First Amendment interest in the speech at issue.[76] In balancing the two interests, a court must determine whether the speech impaired the government's ability to perform its duties, which includes an evaluation of any impairment of workplace harmony or discipline, impairment of working relationships, and

68. *Id.* at 565.
69. *Id.* at 574.
70. *Id.* at 574-75.
71. *Id.* at 569-73.
72. *Id.*
73. *Connick*, 461 U.S. at 147-48.
74. *Id.*
75. *Id.*
76. *Pickering*, 391 U.S. at 568.

impairment of the speaker's ability to perform his or her own duties effectively.[77] In addition, a court must assess any disruption resulting from the manner, time, place, and context of the speech.[78] A potential disruption is all that is required for the government's interests to outweigh the employee's interests and, thus, for speech restriction to be lawful.[79] Third, a court must consider whether the government employee's speech played a substantial role in the termination.[80] Finally, if after considering the first three prongs, the court determines the employee's speech was protected speech, then the burden of proof shifts to the government to prove the government employee would have been fired regardless of the speech.[81]

If any one of the four prongs of the *Pickering–Connick* analysis is resolved in favor of the government employer, then a court need not proceed to the next prong in the sequence, and that court must hold that the government was justified in its restriction of employee speech.[82] However, if all prongs of the analysis are resolved in favor of the government employee, then the speech restriction is held to be a First Amendment violation.[83]

D. Procedural Due Process Analysis

The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."[84] Due process is divided into two varieties: procedural due process and substantive due process.[85] Procedural due process dictates that when a state or federal government deprives a person of life, liberty, or property, it must follow appropriate procedures.[86] Substantive due process refers to protecting those substantive rights to life, liberty, and property.[87] In assessing procedural due process, the Supreme Court considers: (1) whether there has been a deprivation, (2) whether the deprivation is of life, liberty, or property, and (3) whether proper procedures were followed, considering the private interest affected by the government action, the risk of erroneous deprivation of rights, and the

77. *Id.* at 570-73.
78. *Id.*
79. *See* Rankin v. McPherson, 483 U.S. 378, 388 (1987).
80. *Connick*, 461 U.S. at 151-55.
81. *See Rankin*, 483 U.S. at 388.
82. *See id.*
83. *See id.*
84. U.S. CONST. amend. XIV, § 1.
85. 16B AM. JUR. 2D *Constitutional Law* § 901 (1998 & Supp. 2007).
86. *Id.*
87. *Id.*

government's interest in the deprivation.[88] However, when a due process violation is harmless beyond a reasonable doubt, recovery is not available to a claimant.[89]

IV. COURT'S RATIONALE

The Court in *Brentwood II*[90] identified two issues posed by the case: (1) whether the TSSAA's enforcement of its anti-undue-influence recruiting policy violated Brentwood's First and Fourteenth Amendment rights and (2) whether the TSSAA proceedings violated Brentwood's procedural due process rights.[91] Correspondingly, the Court's analysis was divided into two sections mirroring the two issues, but the Court's opinion was dominated by analysis of the first issue.

A. *Undue Influence Existed*

First, the Court identified a difference between communication with the public at large and communication that is direct, personalized, and in a "coercive setting."[92] To illustrate that point, Justice Stevens, writing for the majority, cited *Ohralik v. Ohio State Bar Ass'n*,[93] which held that an attorney's in-person solicitation of a vulnerable client was not protected by the First Amendment as commercial speech.[94] In *Brentwood II*, the Court held that the same evils that distinguished in-person solicitation of a client by an attorney from commercial speech existed when a high school football coach wrote a letter to a rising ninth grader.[95] Justice Stevens specifically noted two aspects of the recruiting letters that were particularly liable to cause undue pressure.[96] Those aspects were: (1) the letter being signed, "Your Coach," and (2) the fact that the statement "getting involved as soon as possible would definitely be to your advantage" may suggest to the young student athlete that involvement may not be optional and failure to do so may be detrimental to the student athlete's athletic career.[97] Because of the ability of those statements to exert pressure on the student athletes and

88. *See* Matthews v. Eldridge, 424 U.S. 319 (1976).
89. *See* 16B AM. JR. 2D *Constitutional Law* § 906 (1998 & Supp. 2007).
90. 127 S. Ct. 2489 (2007).
91. *Id.* at 2492.
92. *Id.* at 2493.
93. 436 U.S. 447 (1978).
94. *Id.* at 468.
95. *Brentwood II*, 127 S. Ct. at 2494-95.
96. *Id.* at 2495.
97. *Id.* at 2495 & n.1 (internal quotation marks omitted).

"short circuit" informed decision-making, the Court held the letters from the Brentwood coach were not protected by the First Amendment.[98]

B. Efficiency of TSSAA Operations Outweighed Brentwood's Interest in Free Speech

Second, the Court concluded that Brentwood chose to be a member of the TSSAA, and just as a government office may restrict speech to preserve efficient and effective performance of public duties, so too may a voluntary athletic association restrict speech when, like the TSSAA, that athletic association has been deemed a state actor.[99] The Court assumed, without deciding, that Brentwood's speech touched on matters of public concern and then applied the *Pickering–Connick* balancing test.[100] Because the recruiting letters from Brentwood's football coach "could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics," the Court reasoned that common sense dictated that those negative effects impaired the TSSAA's ability to operate effectively and carry out its mission.[101] Therefore, the Court held that the TSSAA's interest in preventing undue-influence recruiting outweighed Brentwood's interest in the speech at issue, rendering the restriction of the speech legitimate.[102]

C. Any Due Process Violation Was Harmless Beyond a Reasonable Doubt

In a laconic third section of the opinion, the Court held that if Brentwood's procedural due process rights had been violated, which the Court suggested was unlikely, the violation was harmless beyond a reasonable doubt.[103] The Court noted that the TSSAA's sanctioning of Brentwood "was preceded by an investigation, several meetings, exchanges of correspondence [including faxes, memoranda, and letters], an adverse written determination from TSSAA's executive director, a hearing before . . . TSSAA's Board of Control, and finally a *de novo* review by the entire TSSAA Board of Directors."[104] In addition, the Court noted that during each hearing, Brentwood was represented by

98. *Id.* at 2494-95.
99. *Id.* at 2495.
100. *Id.* at 2495.
101. *Id.* at 2496.
102. *Id.*
103. *Id.* at 2497.
104. *Id.* at 2496.

counsel and had the opportunity to present evidence but did not do so.[105] Brentwood argued that it was not allowed to cross-examine or review the notes of the investigators during the hearings and that it was prejudiced as a result.[106] However, the Court held that Brentwood's assertion that it would have taken a different, more effective approach had it not been so prejudiced was unsupported, and the Court noted that Brentwood never suggested how it was prejudiced or how its approach would have been different.[107] As a result, the Court concluded that even if Brentwood's shaky assertion of prejudice was true, it still would be harmless beyond a reasonable doubt because Brentwood never identified any actual harm.[108]

D. The Concurring Opinions

The first concurring opinion was written by Justice Kennedy, who concurred in part and concurred in the judgment and was joined by Chief Justice Roberts, Justice Scalia, and Justice Alito.[109] Here, Justice Kennedy took issue with the application of *Ohralik* to the facts of *Brentwood II* (Justice Thomas joined this part of Justice Kennedy's opinion as well).[110] Justice Kennedy stated that *Ohralik* had never been extended beyond the attorney-client relationship and, due to the particular features of attorney-client solicitation, should not have been extended to other forms of personal solicitation.[111] In addition, Justice Kennedy argued that the majority's application of *Ohralik* made immaterial whether TSSAA membership was voluntary or mandatory, suggesting that when a school volunteered to be a member of an athletic association, it was volunteering to abide by all the rules thereof, no matter what those rules were.[112] Justice Kennedy aptly noted that the actual majority of the Court (five Justices) agreed with the inapplicability of *Ohralik*.[113]

In Justice Thomas's concurring opinion, he primarily focused on the second prong of the majority's analysis, the application of the *Pickering–Connick* balancing test.[114] Justice Thomas stated that *Pickering v.*

105. *Id.*
106. *Id.* at 2497-98.
107. *Id.* at 2498.
108. *Id.*
109. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).
110. *Id.*
111. *Id.*
112. *Id.* at 2498-99.
113. *Id.* at 2499.
114. *Id.* (Thomas, J., concurring in the judgment).

Board of Education[115] was taken out of its usual context of government employment when it was applied to a nonemployment context involving a private school and a private athletic association.[116] Instead of the "bizarre exercise of extending obviously inapplicable First Amendment doctrine to these circumstances," Justice Thomas suggested that the Court simply should have overruled *Brentwood I* and held that the TSSAA was not a state actor, which would render a holding on First Amendment violations unnecessary.[117] Finally, Justice Thomas agreed, without elaborating, with Justice Kennedy's opinion that *Ohralik* was not applicable to this case, and its application by the majority was "outright wrong."[118]

V. IMPLICATIONS

It is no surprise that the Justices who wrote or joined concurring opinions in *Brentwood II*, with the addition of Justice Alito, were the same Justices who dissented in *Brentwood I*. In *Brentwood I*, those Justices contended that the actions of the TSSAA should not have been considered state actions and therefore would not fall under the purview of the First Amendment.[119] Six years later, in *Brentwood II*, the same Justices still agreed the First Amendment did not protect Brentwood.[120] However, those Justices did not so assert because they agreed with the majority's reasoning in *Brentwood II*.[121]

Five Justices out of nine in *Brentwood II* believed the *Ohralik* and *Pickering–Connick* standards did not apply to Brentwood and the TSSAA, and yet these Justices concurred in the judgment because they still did not believe the TSSAA's actions were state actions.[122] Indeed, Justice Thomas's dissent correctly stated that the majority's application of *Ohralik* to Brentwood and the TSSAA was "outright wrong."[123] For example, the recruiting letter at issue was a written, not an in-person communication, giving the student athletes a chance to reflect.[124] In addition, the letter was sent to the student athletes and their parents, giving their parents a chance to intervene.[125] Oddly, though, this was

115. 391 U.S. 563 (1968).
116. *Brentwood II*, 127 S. Ct. at 2499 (Thomas, J., concurring in the judgment).
117. *Id.*
118. *Id.*
119. 531 U.S. 288, 305-15 (2001).
120. 127 S. Ct. 2489, 2499 (2007) (Thomas, J., concurring in the judgment).
121. *Id.*
122. *Id.* at 2498 (Kennedy, J., concurring in part and concurring in the judgment).
123. *Id.* at 2499 (Thomas, J., concurring in the judgment).
124. *See id.* at 2492 (majority opinion).
125. *See Brentwood I*, 531 U.S. at 293.

never mentioned in *Brentwood II* but only mentioned in *Brentwood I*.[126] With the majority opinion being supported by authority that has been stretched and massaged to the point of inapplicability and with the actual majority of the members of the Court opposing the application of that authority, the reasoning in *Brentwood II* teeters precariously and likely will not withstand future challenges.

Second, the standard for acceptable recruiting practices established by the opinion in *Brentwood II* is too vague to be followed in practice. The Court's opinion raises more questions about the boundaries of recruiting than it answers. The application of *Ohralik* would have been more appropriate if the purpose of the recruiting letter was to solicit the student athletes' signatures on contractual letters of intent. In this case, however, the student athletes had already signed those letters, contractually indicating their intent to attend and play football at Brentwood.[127] So at the point when the student athletes received the letters, the Brentwood coach *was* their coach. In addition, as the Court pointed out, the student athletes may not have interpreted the invitation to get involved as optional, but perhaps that involvement was not, in fact, optional if they wished to be a part of the football program.[128] But if not at that point in the recruiting process, when may a coach invite rising freshmen to get involved? When may a coach warmly close a letter by signing, "Your Coach?" What type of correspondence should a coach have with recruits and their parents? These questions remain unanswered. Given the importance of athletics in the United States and the recent national spotlight on illegal and unethical practices in athletics, the Court will likely return to the reasoning in *Brentwood II* to help answer those questions.

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126. *See id.*
127. *Brentwood II*, 127 S. Ct. at 2492.
128. *See id.*

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