Brooklyn Law Review

Volume 74
Issue 3
SYMPOSIUM:
The Products Liability Restatement: Was it a Success?

Article 20

2009

An Opportunity for Reform: Tennessee Secondary School Athletic Association v. Brentwood Academy and NCAA Recruiting

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An Opportunity for Reform

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION V. BRENTWOOD ACADEMY AND NCAA RECRUITING

I. INTRODUCTION

In 2004, news broke that the Colorado University football program had used sex, drugs, and alcohol to lure recruits to the school.[1] An investigative panel reviewing the incidents issued a fifty-page report, in which it found that player-hosts "felt pressured to impress recruits and resorted to providing alcohol, drugs and sex, including visits to strip clubs and the hiring of strippers."[2] While the nation's colleges and universities and their coaches condemned Colorado's practices,[3] regrettably, the truth is that Colorado University was neither the first nor the last school to engage in such scandalous recruiting.[4] In fact, evidence suggests that the occurrence of these practices is increasing.[5]

Unfortunately, these improper recruiting practices are a product of the current state of intercollegiate athletics. According to colleges and

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[1] Steven K. Paulson, *Panel Probing Colorado Issues Blistering Report*, SEATTLE TIMES, May 19, 2004, at D14.

[2] *Id.* According to the report, there was no evidence that officials condoned the misconduct; however, it did suggest that they were "lazy, ineffective or simply ignored what was going on . . . ." *Id.*

[3] *See* Greg Wallace, *Winds of Change: College Recruiting Set to Get Major Overhaul*, BIRMINGHAM POST-HERALD, May 24, 2004, at 8 (discussing how the Colorado incident and another recruiting scandal at the University of Miami would lead to changes in NCAA recruiting rules and predicting that such changes would be welcomed by many coaches).

[4] *See, e.g.*, Brad Wolverton, *NCAA Says Athletics Infractions Cases Will Reach a Record High This Year*, CHRON. OF HIGHER ED., Sept. 19, 2007, *available at* http://chronicle.com/daily/2007/09/2007091904n.htm. The history of collegiate recruiting illustrates that no matter what occurs, college coaches have continued to engage in illegal and ethically questionable recruiting tactics. *See* Andy Staples, *A History of Recruiting; How Coaches Have Stayed a Step Ahead*, SI.COM, June 23, 2008, http://sportsillustrated.cnn.com/2008/writers/andy_staples/06/19/recruiting.main/index.html?eref=T.

[5] *See* Wolverton, *supra* note 4. According to Wolverton, the NCAA's enforcement staff was on pace to complete twenty major infraction cases in 2007, a third more than 2006, and twice the number it handled in 2002. *Id.* In addition, athletic departments reported about 3500 minor rules violations for 2006, about fifty percent more than in 2002. *Id.*; *see also* Daniel F. Mahoney et al., *Ethics in Intercollegiate Athletics: An Examination of NCAA Violations and Penalties—1952-1997*, *in* THE BUSINESS OF SPORTS 447, 449 (Scott R. Rosner & Kenneth L. Shropshire eds., 2004) (providing data that shows the number of men's programs penalized has risen from 7.1 per year in the 1950s to 18.5 in the 1990s).

Notably, David Price, the NCAA's vice president for enforcement, suggests that the rise in violations may be the result of the NCAA's commitment to speedier investigations and colleges' devotion to greater compliance with the rules. Wolverton, *supra* note 4. For more on NCAA enforcement, see *infra* Part III.C.3.

universities, the purpose of college athletics is to enhance the educational experience of the student.[6] To preserve this end, many of America's schools have joined the National Collegiate Athletic Association ("NCAA"), an independent body charged with governing intercollegiate athletics.[7] Consistent with the goals of its member institutions, the NCAA claims that college athletics is an avocation: a recreational activity meant to ensure that "the educational experience of the student-athlete is paramount."[8] Yet, despite this profession, college athletics has become much more than an avocation, as colleges and universities have become focused on achieving athletic prowess, even at the expense of academic excellence.[9]

Consumed by a need to achieve athletic success, many coaches resort to questionable recruiting tactics.[10] To prevent such measures, the NCAA has adopted an extensive set of rules governing the recruitment of student-athletes.[11] Nonetheless, despite the NCAA's efforts, coaches still continue to commit recruiting violations, and, perhaps even worse, engage in questionable conduct that is not proscribed by the recruiting rules.[12] This persistent usurpation of both NCAA and ethical standards indicates that NCAA recruiting rules need to be drastically changed.[13]

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[6] *See, e.g.*, UNIVERSITY OF CONNECTICUT DIVISION OF ATHLETICS, 2007-08 STUDENT-ATHLETE HANDBOOK 3 (2007), *available at* http://www.uconnhuskies.com/MainLinks/AboutUconn/0708%20SA%20Handbook%20revised.pdf.

[7] The NCAA is not the only governing body of college athletics—other prominent collegiate athletic associations include, for example, the National Association of Intercollegiate Athletics ("NAIA") and the National Junior College Athletic Association ("NJCAA")—but it is the largest and most prominent regulator of college athletics and thus will be the focus of this Note.

[8] NCAA, Our Mission, http://www.ncaa.org/wps/ncaa?ContentID=1352 (last visited Jan. 3, 2009).

[9] *See* discussion *infra* Parts III.B.3, III.C.3.

[10] *See* discussion *infra* Part III.B.3.

[11] *See, e.g.*, NCAA, 2008-09 NCAA DIVISION I MANUAL 77-125 (2008) [hereinafter NCAA DIVISION I MANUAL], *available at* http://www.ncaapublications.com/ProductsDetailView.aspx?sku=D109. The NCAA has manuals that set forth the rules governing all three divisions of intercollegiate athletics. *See* NCAA, Rules and Bylaws, http://www.ncaa.org/wps/ncaa?ContentID=19 (last visited Jan. 3, 2009).

[12] According to David Price, because of the recent rule changes and the emphasis on compliance, recruiting tactics have become "increasingly creative." Wolverton, *supra* note 4. Throughout history, coaches have been one step ahead of the NCAA. *See* Staples, *supra* note 4 (quoting Conference USA Commissioner Britton Banowsky as saying that "[e]very time [the NCAA] change[s] the rules, somebody comes up with something"). After the NCAA passes a rule, coaches will find some creative way to get around it, after which the NCAA will pass a new rule banning the conduct, and the cycle will repeat itself. *See id.* (providing a history of coaches skirting NCAA recruiting rules); Dana O'Neil, *Gray Scale: Recruiters Struggle with Perfectly Legal Yet Ethically Questionable*, ESPN.COM, Nov. 19, 2008, http://sports.espn.go.com/ncb/columns/story?id=3710807&lpos=spotlight&lid=tab4pos1 (discussing ways in which recruiting rules are now being circumvented, in violation of the intent of the rule, as well as flat-out broken).

A good example of this is shown by the fact that, after the NCAA banned sending text messages to recruits, coaches began using different practices to get around the ban. Andy Staples, *Beating the System: With Texting Outlawed, Coaches Turn to E-mail; Notes*, SI.COM, Jan, 14, 2008 http://sportsillustrated.cnn.com/2008/writers/andy_staples/01/14/recruiting.notebook/index.html. One method is to e-mail recruits—currently, the NCAA allows unlimited emailing—since, for recruits able to receive e-mail on their phones, an e-mail to them is essentially the same as a text

Fortunately, a recent decision by the Supreme Court in *Tennessee Secondary School Athletic Association v. Brentwood Academy* ("*Brentwood II*"),[14] can be the catalyst for such a change.[15] In *Brentwood II*, the Supreme Court upheld a high school athletic association's Anti-Recruiting Rule against a First Amendment challenge by one of its member schools.[16] The Rule effectively prevented recruiting by prohibiting a school from using undue influence on a student in order to retain his admission for athletic purposes.[17] In upholding the Rule, the Court applied its public employee speech doctrine because of Brentwood Academy's voluntary decision to join the Tennessee Secondary School Athletic Association ("TSSAA").[18]

This Note focuses on the *Brentwood II* decision and the potential implications it will have on NCAA recruiting. Specifically, it argues that the NCAA is entitled to the same broad authority to limit recruiting as the Supreme Court gave to the TSSAA. Ultimately, while an intercollegiate athletic association and high school athletic association are certainly different, given the reasoning of the Court in *Brentwood II* and other cases, this Note claims that the Court would, in the context of recruiting, treat the NCAA no differently than the TSSAA, and thus would permit the NCAA to effectively *ban* the athletic recruitment of high school student-athletes.

Part II begins by discussing the relevant background of the *Brentwood II* case. It then sets forth the development and parameters of the public employee speech doctrine, and how it was applied in *Brentwood II*. Part III then analyzes the implications *Brentwood II* could have on the NCAA. After briefly looking at the background of the NCAA, Part III examines whether the Court would be inclined to apply the public employee speech doctrine to collegiate recruiting. It then addresses what the likely result would be, under current public employee speech law, if the NCAA were to pass a recruiting ban similar to the

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message. *Id.* Another method coaches have used is to have one of his or her players text message a recruit. *Id.*

[13] The NCAA Rule Book only contributes to the current state of recruiting. The 439 page-long book, with forty-nine pages devoted to recruiting alone, not only makes it difficult for coaches to understand all the rules, but also leaves a lot of room for interpretation. *See* O'Neil, *supra* note 12; NCAA DIVISION I MANUAL, *supra* note 11, at 77-125.

[14] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489 (2007).

[15] *See* David G. Savage & Eric Sondheimer, *Justices Uphold High School Anti-Recruiting Rule*, L.A. TIMES, Jun. 22, 2007, at 13 (quoting Elsa Kircher Cole, general counsel for the NCAA, as saying "[t]his will have an impact on all athletic associations, at whatever level, to make and enforce rules like this one involving recruiting").

[16] *Brentwood II*, 127 S. Ct. at 2490-91.

[17] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 13 F. Supp. 2d 670, 673 (M.D. Tenn. 1998), *rev'd*, 180 F.3d 758 (6th Cir. 1999), *rev'd*, 531 U.S. 288 (2001), *on remand*, 262 F.3d 543 (6th Cir. 2001).

[18] *Brentwood II*, 127 S. Ct. at 2495-96.

TSSAA's.[19] Finally, Part IV briefly discusses why the NCAA should establish a recruiting ban and how such a ban could be implemented.

II. *BRENTWOOD II*

A. Facts

The TSSAA is a private, voluntary association of public, independent, and parochial secondary schools from the state of Tennessee.[20] Its purpose is "to stimulate and regulate the athletic relations of the secondary schools in Tennessee."[21] One of the TSSAA's members is Brentwood Academy, an independent college-preparatory school located in Brentwood, Tennessee.[22]

In order to prevent member schools from recruiting middle school student-athletes for their athletic programs, the TSSAA has promulgated an Anti-Recruiting Rule.[23] The Anti-Recruiting Rule, located in TSSAA Bylaws Section 21 reads:

> The use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule.[24]

The circumstances of the case arose in 1997, when Brentwood Academy's head football coach, Carlton Flatt, sent a letter to middle school students, inviting them to participate in spring football practice.[25] The letter explained that "getting involved as soon as possible would definitely be to your advantage," and was signed, "Your Coach."[26] Although the boys who received the letter had already agreed to attend Brentwood Academy in the fall, they had not yet enrolled in the school as defined by the TSSAA.[27] As a result, the TSSAA found that Coach

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[19] This Note suggests implementing an NCAA recruiting ban that is similar to the TSSAA's Anti-Recruiting Rule, which prevents coaches from asserting undue pressure on a student and his or her parents or guardians to retain the student's services for athletic purposes. *Brentwood*, 13 F. Supp. 2d at 673. This hypothetical "NCAA recruiting ban," referred to throughout this Note, would prevent a coach from influencing a student-athlete to attend his school for the purposes of athletics. It would not prevent unilateral activity by the student-athlete, such as sending video of themselves to coaches, in order to bolster his chance for admission. *See infra* Part IV.

[20] *Brentwood*, 13 F. Supp. 2d at 673.

[21] *Id.*

[22] *Id.*

[23] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 442 F.3d 410, 416 (6th Cir. 2006), *rev'd*, Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489 (2007).

[24] *Brentwood*, 13 F. Supp. 2d at 673.

[25] *Id.* at 676. Coach Flatt also called the students to tell them that "they should not participate in spring practice if it conflicted with activities at their respective middle schools." *Id.*

[26] *Id.*

[27] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489, 2492 (2007) (The TSSAA defines enrolled as having "attended 3 days of school.").

Flatt's letter violated its Anti-Recruiting Rule and imposed sanctions on Brentwood Academy.[28]

On December 12, 1997, Brentwood Academy filed an action against the TSSAA in the U.S. District Court, Middle District of Tennessee, to contest the penalties.[29] Brentwood brought suit under § 1983,[30] alleging that the Anti-Recruiting Rule violated its First Amendment right to freedom of speech.[31] After concluding that the TSSAA was a state actor subject to suit under § 1983, the district court agreed with Brentwood, holding that the TSSAA's Anti-Recruiting Rule violated the First Amendment.[32] The Sixth Circuit reversed, holding that the TSSAA was not a state actor and thus not subject to § 1983 liability.[33] On appeal, the Supreme Court reversed the circuit court on the threshold issue, concluding that the TSSAA was indeed a state actor, and remanded the case back to the Sixth Circuit for adjudication on the merits of Brentwood's claims.[34] After both the district court and court of appeals held that the Anti-Recruiting Rule violated Brentwood's free speech rights,[35] the Supreme Court granted certiorari to decide Brentwood's First Amendment claim.[36] In addressing the constitutionality of the Anti-Recruiting Rule, the Court applied a line of

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[28] *Brentwood*, 13 F. Supp. 2d at 676-77. The TSSAA also found that Brentwood coaches had violated the Anti-Recruiting Rule for: (1) admitting student-athletes to athletic contests free of charge, and (2) conducting impermissible off-season practice with Brentwood student-athletes. *Id.* However, for the purposes of Brentwood's First Amendment claim, the only violation at issue was the one regarding Coach Flatt's letter.

[29] *Id.* at 678. The dispute between Brentwood and the TSSAA has been quite lengthy. Since Brentwood Academy filed its action, the case has produced two decisions by the Supreme Court, three by the Sixth Circuit, and two by the Middle District of Tennessee. *Brentwood*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998), *rev'd*, 180 F.3d 758 (6th Cir. 1999), *rehearing en banc denied*, 190 F.3d 705 (6th Cir. 1999), *cert. granted*, 528 U.S. 1153 (2000), *rev'd*, 531 U.S. 288 (2001), *on remand*, 262 F.3d 543 (6th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002), *on remand*, 304 F. Supp. 2d 981 (M.D. Tenn. 2003), *rev'd in part, aff'd in part, and remanded*, 442 F.3d 410 (6th Cir. 2006), *rehearing en banc denied, cert. granted*, Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 127 S. Ct. 852 (2007), *rev'd and remanded*, 127 S. Ct. 2489 (2007).

[30] 42 U.S.C. § 1983 (2000). Section 1983 permits a cause of action against any person who, when acting under color of law, deprives another of any Constitutional Rights. *Id.* This, of course, includes the right to freedom of speech. *See* U.S. CONST. amend I.

[31] *Brentwood*, 13 F. Supp. 2d at 678. Brentwood also alleged (1) that the TSSAA violated its Fourteenth Amendment substantive and procedural due process rights, (2) that the TSSAA violated federal antitrust laws, (3) equitable estoppel, and (4) unfair, unreasonable, arbitrary, and oppressive action in violation of state law. *Id.* at 672.

[32] *Id.* at 694.

[33] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 180 F.3d 758, 766 (6th Cir. 1999), *rev'd*, 531 U.S. 288 (2001).

[34] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n (*Brentwood I*), 531 U.S. 288, 290-91, 305 (2001).

[35] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 304 F. Supp. 2d 981, 997 (M.D. Tenn. 2003), *aff'd in part, rev'd in part, and remanded*, 442 F.3d 410 (6th Cir. 2006), *rev'd and remanded*, Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 127 S. Ct. 2489 (2007); *Brentwood*, 442 F.3d at 430-31.

[36] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 852 (2007).

cases traditionally reserved for determining the free speech rights of public employees.[37]

B. Speech Rights in Public Employment

While the First Amendment protects the right to engage in free speech without government interference,[38] it is well settled that this right is not absolute.[39] Throughout its history, one area in which the Court has consistently allowed government interference with free speech rights has been public employment.[40] Before the 1950s, courts gave public employees no First Amendment protection, allowing public employers to restrict their employees' speech without repercussions.[41] During this time, most courts adopted the view of Oliver Wendell Holmes, who concluded in *McAuliffe v. Mayor of New Bedford*[42] that, because there was no constitutional right to public employment, there was no right to freedom of speech in public employment.[43]

By the mid-twentieth century, however, courts' refusal to recognize public employee speech rights began to erode. Beginning in the 1950s the Supreme Court began recognizing that some limited First Amendment protection extended to public employment.[44] Eventually, in 1968, the Court finally rejected the reasoning in *McAuliffe*, officially recognizing in *Pickering v. Board of Education* that public employees have certain free speech rights in the workplace.[45]

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[37] *Id.* at 2495. The line of cases that sets the standard for the restriction of speech in public employment begins with *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See* discussion *infra* Part II.B. Prior to the decision in *Brentwood II*, *Pickering* applied only to the speech rights of government employees and contractors, not to speech by an employee at a private school that is a member of a private athletic association. *Brentwood II*, 127 S. Ct. at 2499 (Thomas, J., concurring).

[38] U.S. CONST. amend I. Although the Constitution only protects the right of free speech from congressional interference, the Supreme Court has since held that the right to freedom of speech is a fundamental right protected against the states by the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925); Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 707 (1931).

[39] Chapinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.").

[40] *See* Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1464-67 (2007).

[41] Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (And Vice Versa)*, 35 GA. L. REV. 939, 945-46 (2001).

[42] 29 N.E. 517 (Mass. 1892).

[43] *Id.* at 518. Holmes' oft-cited opinion was that "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 517.

[44] *See* Lara Geer Farley, Comment, *A Matter of Public Concern: "Official Duties" of Employment Gag Public Employee Free Speech Rights*, 46 WASHBURN L.J. 603, 610 (2007) (citing Wieman v. Updegraff, 344 U.S. 183 (1952)). In *Wieman*, the Court found unconstitutional an Oklahoma statute that required all public employees to take a loyalty oath, holding that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman*, 344 U.S. at 186, 192.

[45] *See* Wells, *supra* note 41, at 946.

The decision in *Pickering* has remained the law regarding public employee speech rights for the past forty years without much alteration.[46] However, the Court has added two important threshold requirements. These requirements are set forth in *Connick v. Myers*[47] and *Garcetti v. Ceballos*.[48] Together, these three cases have established a three-pronged test that is used when determining the free speech rights of public employees.[49]

1. *Pickering v. Board of Education*

The landmark public employee speech case began when Marvin Pickering, a high school teacher in Will County, Illinois, wrote a letter to a local newspaper criticizing the local school board.[50] The letter attacked the school's handling of a bond proposal as well as the subsequent allocation of the financial resources it received from the proposal.[51] In response to this letter, the school board dismissed Pickering.[52] After his dismissal, Pickering challenged the board's decision, alleging that his speech was protected by the First and Fourteenth Amendments.[53] The Supreme Court ruled in favor of Pickering and, in the process, established a balancing test that delineated the contours of public employee free speech rights.[54]

In setting forth the standard for protecting public employee speech, the Court acknowledged the unique situation public employment presented. Specifically, it noted that although a public employee has no constitutional right to employment, once employed, a public employee may not be subject to arbitrary and unreasonable conditions of employment.[55] Thus, the problem before the Court was determining the extent of a public employee's free speech rights in the context of these conflicting tenets. As its solution, the Court adopted a balancing test that weighs the interests of a public employee, "as a citizen, in commenting upon matters of public concern against the interest of the State, as an employer, in promoting the efficiency of its public services . . . ."[56] Applying this test, the Court concluded that since Pickering's statements neither interfered with his duties nor disrupted the regular operation of

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[46] *See* Estlund, *supra* note 40, at 1466 (stating that *Pickering* "has been refined but has not varied much over the years").

[47] 461 U.S. 138 (1983).

[48] 126 S. Ct. 1951 (2006).

[49] Hereinafter, the *Pickering*-*Connick*-*Garcetti* decisions will be referred to as the *Pickering* doctrine.

[50] Pickering v. Bd. of Educ., 391 U.S. 563, 564-66 (1968).

[51] *Id.* at 565-66.

[52] *Id.* at 566.

[53] *Id.* at 564-65.

[54] *Id.* at 574-75

[55] *Id.* at 568.

[56] *Id.* This test will be referred to as the *Pickering* balancing test.

the schools, the school had no interest in limiting Pickering's speech.[57] Consequently, its dismissal of Pickering violated his First Amendment rights.[58]

2. *Connick v. Myers*

After the Court's decision in *Pickering*, the public employee speech doctrine remained mostly unchanged until the Court added a threshold requirement in 1983.[59] In *Connick v. Myers*, Sheila Myers, an Assistant District Attorney in New Orleans, was fired after she engaged in speech at her workplace.[60] Myers, who was upset that she was being transferred to another criminal court, prepared and distributed a questionnaire that was meant to solicit the views of fifteen assistant district attorneys on various issues, including "the office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[61] After one assistant district attorney reported that Myers was creating a "mini-insurrection" within the office, her supervisor, Harry Connick, fired her for her refusal to accept the transfer.[62]

Myers challenged her termination, alleging that it was a violation of her free speech rights as set forth in *Pickering*.[63] However, before addressing whether Myers' discharge was protected under the *Pickering* balancing test, the Court held that it must first determine whether Myers' questionnaire constituted "speech on a matter of public concern."[64] In so holding, the Court established a threshold requirement to the public employee speech doctrine.

The Court reasoned that this threshold requirement is necessary because an employer should be granted broad discretion to manage its employees when their speech does not relate to the concerns of the community.[65] According to the Court, "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the employer, except under the most unusual circumstances, is entitled to take action against the employee.[66] Whether speech "addresses a matter of public concern" is

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57 *Id.* at 572-73.
58 *Id.* at 574-75.
59 *See* Estlund, *supra* note 40, at 1466-67.
60 461 U.S. 138, 140-41 (1983).
61 *Id.*
62 *Id.* at 141.
63 *Id.*
64 *Id.* at 146.
65 *Id.*
66 *Id.* at 147.

determined by the "content, form, and context of a given statement, as revealed by the whole record."[67]

Looking at the content, form, and context of Myers' questionnaire, the Court concluded that only one of the questions survived this threshold test: whether assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates."[68] According to the Court, the questions pertaining to the office transfer policy, office morale, the need for a grievance committee, and the level of confidence in supervisors were "mere extensions" of Myers' personal grievance.[69] Ultimately, the Court found that these questions were aimed to give Myers ammunition against her superiors, and not to evaluate the performance of a public office.[70] Such questions convey nothing except that one employee is upset with the status quo.[71]

The Court did apply the *Pickering* balancing test to the one question that did address a matter of public concern—whether assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates."[72] Nonetheless, the Court found the speech was unprotected, and Myers' discharge was not prevented by the First Amendment, because it touched upon a matter of public concern in only the most limited sense and her supervisor could reasonably believe the speech would disrupt the workplace.[73]

3. *Garcetti v. Ceballos*

The *Connick* and *Pickering* decisions established a two-tiered test to public employee speech cases.[74] The Court first asks whether "the employee spoke as a citizen on a matter of public concern."[75] If the answer is yes, the Court then asks whether the employer had an "adequate justification for treating the employee differently from any other member of the general public."[76] In *Garcetti v. Ceballos*, the Court established a second threshold requirement for public employee speech cases.[77]

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[67] *Id.* at 147-48.

[68] *Id.* at 149 (quoting questionnaire created by New Orleans Assistant District Attorney) (internal quotation marks omitted).

[69] *Id.* at 148.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 149 (quoting questionnaire created by New Orleans Assistant District Attorney) (internal quotation marks omitted).

[73] *Id.* at 154.

[74] Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006).

[75] *Id.* (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

[76] *Id.* (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)). To answer this question, the Court used the *Pickering* balancing test.

[77] *See* Ralph D. Mawdsley & Allan Osborne, *The Supreme Court Provides New Direction for Employee Free Speech in* Garcetti v. Ceballos, 214 ED. LAW REP. 457, 459 ("[T]he Supreme Court has injected a new interpretive clarification as to when employee's speech is

Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney's Office.[78] In 2000, a defense attorney asked Ceballos to review an affidavit used in a search warrant.[79] Ceballos reviewed the affidavit and found many inaccuracies.[80] After communicating these inaccuracies to his supervisors, Ceballos claimed he was subjected to numerous retaliatory employment actions, for which he brought suit.[81]

In denying Ceballos' claim, the Court stressed that the "controlling factor" in the case was the fact that Ceballos' expression was made pursuant to his official duties as a calendar deputy and not as a citizen.[82] According to the Court, when public employees speak "pursuant to their official duties, [they] are not speaking as citizens for First Amendment purposes," and thus are not protected by the Constitution.[83] Because Ceballos was speaking pursuant to his official duties, the Court dismissed Ceballos' claim without determining whether his speech addressed a matter of public concern or satisfied the *Pickering* balancing test. Consequently, the Court established a third prong in the test for determining whether a public employee's speech is constitutionally protected.[84]

Despite the addition of the two threshold requirements, the public employee speech doctrine has not been changed substantially. Moreover, all indications showed that this doctrine was limited to protecting the speech of public employees or independent contractors.[85] Nevertheless, in *Brentwood II*, the Court extended the *Pickering* doctrine beyond public employment and independent contracting to determine whether a high school athletic association could limit the recruiting speech of its private member institutions.

C. The Decision in Brentwood II

The issue before the Court in *Brentwood II* was whether the TSSAA's Anti-Recruiting Rule, which essentially prohibits the athletic recruitment of middle school student-athletes, violated Brentwood Academy's free speech rights. In a unanimous decision, the Supreme

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protected as that of a citizen."); Farley, *supra* note 44, at 613-14 (stating that *Garcetti v. Ceballos* "add[ed] another test to its public employee speech analysis").

[78] *Garcetti*, 126 S. Ct. at 1955.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 1956.

[82] *Id.* at 1959-60. Neither party in the case disputed that Ceballos "wrote the memo pursuant to his . . . duties." *Id.* at 1961.

[83] *Id.* at 1960.

[84] *Id.* at 1959-62.

[85] *See* Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489, 2499 (2007) (Thomas, J., concurring).

Court reversed the Sixth Circuit, and held that the Anti-Recruiting Rule did not violate the First Amendment.[86]

Eight members of the Court agreed with Justice Stevens' application of the *Pickering* line of cases to uphold the Anti-Recruiting Rule.[87] Although there was little support for the extension of the *Pickering* doctrine to a situation involving a private school in a private athletic association,[88] the Court found that applying *Pickering* was appropriate here because Brentwood Academy voluntarily joined the TSSAA.[89] The Court found this situation similar to the public employment context, noting that the TSSAA's interest in enforcing its rules can sometimes warrant curtailing the speech of a member institution,[90] "[j]ust as the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights . . . ."[91]

Applying the three-part *Pickering* doctrine, the Court did not analyze the two threshold questions, choosing instead to assume that Coach Flatt was speaking as a citizen about a matter of public concern.[92] Rather, the Court focused solely on the third prong: the *Pickering* balancing test. Rephrasing the balancing test in terms of the facts of the case, the Court stated that the TSSAA's Anti-Recruiting Rule would be upheld only if it was "necessary to managing an efficient and effective state-sponsored high school athletic league."[93]

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[86] *Id.* at 2493 (majority opinion).

[87] *Id.* at 2495-96. It should be noted that, in addition to finding the Anti-Recruiting Rule constitutional under *Pickering*, Justice Stevens found an alternative justification for upholding the Anti-Recruiting Rule. *Id.* at 2495. In Part II.A of his opinion, Justice Stevens held the TSSAA's Anti-Recruiting Rule constitutional under *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978)—which held that direct solicitation by a lawyer that exerts undue pressure on clients could be prohibited—because recruiting, which exerts undue influence on a child, could prevent informed and reliable decision-making. *Id.* However, only three other Justices agreed with Stevens; a majority of Justices refused to extend *Ohralik* beyond the parameters of that case—i.e., the attorney-client relationship. *Id.* at 2498 (Kennedy, J., concurring). Because this additional part of Stevens' analysis was rejected by a majority of the Court, this Note will not address it.

[88] *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 442 F.3d 410, 421-23 (6th Cir. 2006) (holding that the *Pickering* line of cases did not apply to the instant situation), *rev'd*, Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 127 S. Ct. 852 (2007); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 304 F. Supp. 2d 981 (M.D. Tenn. 2003) (no mention of *Pickering* line in decision), *aff'd in part, rev'd in part, and remanded*, 442 F.3d 410 (6th Cir. 2006), *rev'd and remanded*, Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 127 S. Ct. 2489 (2007).

[89] *Brentwood II*, 127 S. Ct. at 2495-96. Justice Kennedy's concurring opinion exemplifies the importance that Brentwood's voluntary participation in the TSSAA had in the Court's decision. According to Kennedy, absent Brentwood's consensual participation in the TSSAA, the speech by Coach Flatt would be entitled to First Amendment protection. *Id.* at 2498-99 (Kennedy, J., concurring).

[90] *Id.* at 2495 (majority opinion) (citing Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291 (2001); Grove City Coll. v. Bell, 465 U.S. 555, 575 (1984)).

[91] *Id.* (citing Connick v. Myers, 461 U.S. 138, 103 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

[92] *Id.*

[93] *Id.*

Analyzing the purpose of the Anti-Recruiting Rule, the Court found that it was indeed necessary for the TSSAA to operate efficiently and effectively.[94] The TSSAA established the Rule because athletic recruiting of middle school students could "lead to exploitation [of student-athletes], distort competition between high school teams, and foster an environment in which athletics are [sic] prized more highly than academics."[95] According to the Court, any one of these harms would inhibit a high school athletic association's ability to operate "efficiently and effectively."[96] Therefore, since the Anti-Recruiting Rule discouraged the conduct—recruiting—that might lead to these harms, the Court held that the Rule did not violate Brentwood's free speech rights.[97]

III. IMPLICATIONS FOR NCAA RECRUITING

In *Brentwood II*, the Court granted broad discretion to a high school athletic association to limit the recruitment of student-athletes.[98] However, given the reasoning of the decision, *Brentwood II* could potentially have a drastic effect on college recruiting. Although it governs college, and not high school, athletics, the NCAA is very similar to the TSSAA in its composition, purpose, and values.[99] Moreover, the difference between the NCAA and the TSSAA is minimal in terms of athletic recruiting. Thus, the likely effect of the Court's decision in

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[94] *Id.*

[95] *Id.* at 2495-96 (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60 (1973)).

[96] *Id.* at 2496 (quoting Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006)).

[97] *Id.*

[98] *Id.*

[99] *See* discussion *supra* Part II (TSSAA) and discussion *infra* Part III.A (NCAA). The glaring difference between the two is that the NCAA governs the athletics of colleges and universities throughout the country, as opposed to the athletics of high schools within a state. For the Supreme Court, this distinction has proved crucial in the context of state action. In *Brentwood I*, the Court held that the TSSAA was a state actor that was subject to suit under § 1983. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n (*Brentwood I*), 531 U.S. 288, 305 (2001). Contrarily, the Court has held that the NCAA is not a state actor, and thus cannot be sued under § 1983. NCAA v. Tarkanian, 488 U.S. 179, 199 (1988). Accordingly, the NCAA could restrict all speech, making the issue as to whether the *Pickering* doctrine applies moot.

However, since the decision in *Brentwood I*, some commentators have argued that under the Court's reasoning in *Brentwood I*, the NCAA may now be considered a state actor. *See, e.g.*, *Brentwood II*, 127 S. Ct. 2489, 2499 (2007) (Thomas, J., concurring) (stating that the application of the majority's entwinement test could easily change the result of *Tarkanian*); James Potter, Note, *The NCAA as State Actor:* Tarkanian*,* Brentwood*, and Due Process*, 155 U. PA. L. REV. 1269, 1303 (2007); Robin Petronella, Comment, *A Comment on the Supreme Court's Machiavellian Approach to Government Action and the Implications of its Recent Decision in* Brentwood Academy v. Tennessee Secondary School Athletic Association, 31 STETSON L. REV. 1057, 1082-83 (2002). Furthermore, even if the NCAA is not a state actor, its rules can be subjected to § 1983 liability if they are adopted by a college or university that is a state actor. *See* Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 540 (2006) (stating that NCAA rules become subject to the First Amendment when a public university adopts them as their own). Thus, an NCAA recruiting ban could easily come under the scope of the First Amendment and, as such, this Note will work under the assumption that an NCAA recruiting ban would be subject to § 1983 liability, knowing that, if the NCAA and its member institutions are not state actors, recruiting speech could still be restricted.

Brentwood II is that, like the TSSAA, the NCAA could, if it so desired, prohibit the recruitment of student-athletes.

A. Background of the NCAA

The NCAA is a private, voluntary organization that governs intercollegiate athletics among many of America's colleges and universities.[100] It is comprised of over 1,200 schools,[101] which appoint volunteer representatives who introduce and vote on bylaws and establish programs to govern, promote, and further the purposes and goals of intercollegiate athletics.[102]

The stated purpose of the NCAA is to "govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount."[103] Among the NCAA's core values are its commitment to:

> The collegiate model of athletics in which students participate as an avocation, balancing their academic, social and athletics experiences . . . . The highest levels of integrity and sportsmanship . . . . The supporting role that intercollegiate athletics plays in the higher education mission and in enhancing the sense of community and strengthening the identity of member institutions . . . .[104]

To abide by these core values, the NCAA has instituted regulations that govern its member institutions in areas such as amateurism, ethical conduct, eligibility, and recruiting.[105] The NCAA recruiting rules clearly reflect the stated core values. According to The Principle Governing Recruiting, "Recruiting regulations shall . . . shield [prospective student athletes] from undue pressures that may interfere with the scholastic or athletics interests of the prospective student-athletes or their educational institutions."[106]

The composition, purpose, and values of the NCAA are undoubtedly similar to the TSSAA, an organization that is also composed of voluntary member institutions and strives to create a level

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[100] NCAA, About the NCAA, http://www.ncaa.org/wps/ncaa?ContentID=2 (last visited Jan. 3, 2009).

[101] NCAA, Composition and Sport Sponsorship of the NCAA, http://www.ncaa.org/wps/ncaa?ContentID=811 (last visited Jan. 3, 2009).

[102] NCAA, Overview, http://www.ncaa.org/wps/ncaa?ContentID=435 (last visited Jan. 3, 2009).

[103] NCAA, Our Mission, *supra* note 8.

[104] *Id.*

[105] *See* NCAA DIVISION I MANUAL, *supra* note 11, at iii-v.

[106] *Id.* at art. 2.11. The Principle Governing Recruiting is part of the NCAA Constitution and is also applicable to both Division II and Division III member institutions. *See* NCAA, 2008-09 NCAA DIVISION II MANUAL art. 2.11 (2008), *available at* http://www.ncaapublications.com/ProductsDetailView.aspx?sku=D209; NCAA, 2008-09 NCAA DIVISION III MANUAL art. 2.11 (2008), *available at* http://www.ncaapublications.com/ProductsDetailView.aspx?sku=D309.

playing-field, protect student-athletes, and emphasize the primacy of education.[107] Of course, the difference between the NCAA and the TSSAA is the fact that one governs intercollegiate athletics and one high school athletics. To some, this single difference is a critical one.[108] Ultimately, however, it is unlikely that this difference is sufficient to circumscribe the Court's reasoning in *Brentwood II* from being applied to the NCAA.

B. High School vs. College: Why Brentwood II-Pickering *Jurisprudence Should Apply to NCAA Recruiting*

Unquestionably, there are some universally recognized differences between high school and college athletics.[109] Because of these differences, an argument can certainly be made that the recruiting practices of high schools and colleges should receive different constitutional protections. Indeed, there are situations in which courts have distinguished between colleges and high schools when affording First Amendment protection. For example, courts have limited the free speech rights of high school students much more than those of college students in certain circumstances.[110] The basis for this distinction is the idea that "high school students are less mature and the missions of the respective institutions are different."[111]

Because the Court has previously distinguished between high schools and colleges when delineating free speech rights and because it applied *Pickering* without much direction, it is arguable that the TSSAA's status as a high school athletic association was critical to the

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[107] *See infra* notes 128, 129 and accompanying text.

[108] *See* Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 13 F. Supp. 2d 670, 674-75 (M.D. Tenn. 1998) (TSSAA "Guidelines for Understanding the 'Recruiting Rule' and Understanding What Is 'Undue Influence'" state, "High school athletics is not the same as colleges recruiting high school athletes for college athletics. High school athletics exist[s] for an entirely different reason."), *rev'd*, 180 F.3d 758 (6th Cir. 1999), *rev'd*, 531 U.S. 288 (2001), *on remand*, 262 F.3d 543 (6th Cir. 2001).

[109] *See supra* note 108.

[110] *See, e.g.*, Bd. of Regents of Univ. of Wisconsin System v. Southworth, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring) ("[C]ases dealing with the right of teaching institutions to limit expressive freedom of students has been confined to high schools whose students and their schools' relation to them are different . . . from their counterparts in college education.") (internal citations omitted); *see also* Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915, 1948 (2002) (noting the "stark" distinction between the Court's recognition of college and high school free expression). *But see* Kerry Brain Melear, *The First Amendment and Freedom of Press on the Public University Campus: An Analysis of* Hosty v. Carter, 216 ED. LAW REP. 293 (2007) (noting that this distinction may begin to blur with the Seventh Circuit's decision in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1330 (2006)).

In addition, courts have also limited the rights of children to be exposed to harmful and inappropriate material. *See infra* notes 144-147 and accompanying text.

[111] *Hosty*, 412 F.3d at 740 (Evans, J., dissenting). Other courts have agreed that college students are more mature than high school students. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981); Tilton v. Richardson, 403 U.S. 672, 686 (1970); Axson-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004).

Supreme Court's decision in *Brentwood II*. Under this argument, because the TSSAA's status was critical to the application of *Pickering*, the Court could decide that its application is improper as to the NCAA, a college athletic association.

Yet, while such a distinction is possible, it is unlikely the Court would make it in the context of recruiting for three reasons. First, the language and reasoning of the *Brentwood II* decision do not suggest a different analysis would apply for college athletic associations. Second, the Court has never distinguished between high schools and colleges when applying *Pickering*. Third, the differences between high school and college students and the missions of the respective institutions, both of which warrant granting different constitutional protections in other arenas, are largely irrelevant with regard to athletic recruiting.

1. Language and Reasoning of *Brentwood II*

Despite the fact that *Brentwood II* was a territory in which *Pickering* had yet to be applied—i.e., speech by a *private school* that is a member of a *private athletic association*—the Supreme Court had no problem extending the public employee speech doctrine to the TSSAA's Anti-Recruiting Rule.[112] There was little explanation underlying the Court's decision to apply the *Pickering* doctrine to the instant circumstances. Rather, its application appeared to stem from the Court's determination to limit Brentwood Academy's speech rights because of its voluntary decision to join the TSSAA.[113] So determined, the Court decided that the *Pickering* line should apply because an "athletic league's interest in enforcing its rules" is similar to "the government's interest in running an effective workplace."[114]

The Court's failure to further explain exactly why it applied the *Pickering* doctrine in *Brentwood II* suggests that the doctrine's application was based solely on Brentwood Academy's voluntarily

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[112] This extension may seem logical since the TSSAA is a state actor and § 1983 liability depends on whether the party is a state actor, not whether it is a public entity. *See supra* note 99. However, extending *Pickering* here ignores the fact that an enterprise's public entity status is critical in the public employee speech context. *See* May v. Evansville-Vanderburgh Sch. Corp., 787 F.2d 1105, 1109 (7th Cir. 1986) ("[W]e acknowledge that cases such as *Pickering* and *Connick* give public employees greater rights of free speech than private employees have, but this is not just for the formalistic reason . . . that the First Amendment restricts only state action, and not private action. The behavior of public enterprises is a political question . . . and since the employees of public enterprises have insights and information about the conduct of the enterprise that the private citizen lacks, they have a distinctive contribution to make to political speech."). Arguably, the same contribution cannot be made by an employee of a private enterprise that is also a state actor.

[113] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489, 2496 (2007) (stating that "[h]igh school football is a game[, g]ames have rules," and "[i]t is only fair that Brentwood follow them") (internal quotations omitted); *see also id.* at 2498-99 (Kennedy, J., concurring) (stating that Justice Kennedy has "little difficulty" in finding that the recruiting rule does not violate the First Amendment based on Brentwood's "consensual membership" in the TSSAA).

[114] *Id.* at 2495 (majority opinion).

membership in the TSSAA. Because the NCAA is also an athletic league in which its members voluntarily participate, it seems logical to assume that the Court would apply the *Pickering* doctrine to the NCAA were an NCAA recruiting ban at issue.[115]

Moreover, nothing in the language of the opinion suggests that the application of the *Pickering* doctrine was limited only to a high school athletic association. Notably, when choosing to apply *Pickering*, Justice Stevens referred to athletic leagues in general, and not just high school athletic leagues.[116] This distinction is perhaps significant since, in other parts of his opinion, Justice Stevens specifically referenced a high school athletic league.[117] Based on Justice Stevens' usage of "athletic league" instead of "high school athletic league," in addition to his emphasis on Brentwood Academy's voluntary membership in the TSSAA, it seems as though an NCAA recruiting ban would be scrutinized under the *Pickering* doctrine.

2. Application of *Pickering* to High School and College Employees

Because the Court did not distinguish between high school and college athletic leagues in *Brentwood II*, it seems as though it would apply *Pickering* regardless of the differences between high schools and colleges. Moreover, the Supreme Court cases that have distinguished between high schools and colleges have dealt with the free speech rights of students, not teachers or employees.[118] These cases would not be applicable to a rule prohibiting recruitment by colleges and universities, since such a rule seeks to limit the speech of the member institutions and its employees, not the speech of students.

The Supreme Court has never distinguished between high school teachers and college professors for the purpose of regulating employee speech—indeed, the *Pickering* doctrine has been applied at both education levels.[119] Thus, the fact that the high school setting is markedly different from that of a college should not be of consequence in

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[115] The Court has previously held that voluntary participation permits speech restrictions even at the collegiate level. In *Grove City College v. Bell*, the Court held that, although Grove City College was a private entity, because it voluntarily participated in a federal financial assistance program, it was required to abide by Title IX as a condition of accepting the assistance. 465 U.S. 555, 575-76 (1984).

[116] *Brentwood II*, 127 S. Ct. 2489, 2495 (2007) ("Just as the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights, so too can an athletic league's interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants.") (internal citations omitted).

[117] *Id.* at 2495-96.

[118] *See supra* note 110 and accompanying text.

[119] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 594-98 (1972) (junior college professor's speech); Pickering v. Bd. of Educ., 391 U.S. 563, 564-67 (1968) (high school teacher's speech).

determining whether to apply the *Pickering* doctrine to restrict the speech of coaches.

Nevertheless, some courts have indicated that college professors are entitled to more First Amendment protection in order to ensure "academic freedom,"[120] because universities are places of "free-wheeling inquiry" and not designed for the "selective conveyance of ideas" like high schools.[121] Yet, regardless of whether or not college professors are entitled to more protection than high school teachers, the reason behind granting further protection, a teacher's "right to choose classroom content and methodology,"[122] does not apply in the context of athletic recruitment. In communicating with student-athletes about possibly attending their institution and playing for their school's athletic team, college coaches are simply not choosing "classroom content and methodology."[123]

3. Differences Between High School and College Students and Institutions

Even if the Court were inclined to find the difference between the TSSAA and the NCAA important here,[124] *Pickering* should still apply. In certain areas, courts have distinguished between colleges and high schools in terms of determining free speech rights.[125] Generally, there have been two reasons for such a distinction: (1) the different missions of high schools and colleges and (2) the difference in maturity between high school and college students.[126] In the context of athletic recruiting, these distinctions are largely immaterial.

First, the claimed missions of the respective associations are not different in the context of athletics. Although some believe high school athletics serves an entirely different purpose then college athletics,[127] the respective missions of both the NCAA and the TSSAA indicate otherwise. For example, the purpose of the TSSAA is "to stimulate and

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[120] *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1962 (2006) (recognizing that there is an argument that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests" that are not fully protected by the public employee speech doctrine); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 912 (2006) (discussing that lower courts allow substantially more restrictions against primary and secondary school teachers than college and university professors).

[121] Kenneth Lasson, *Controversial Speakers on Campus: Liberties, Limitations, and Common-Sense Guidelines*, 12 ST. THOMAS L. REV. 39, 65 & n.127 (quoting Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting)) (internal quotation marks omitted).

[122] *See* Schauer, *supra* note 120, at 911.

[123] *Id.*

[124] The Court may, for example, find that the students have a right to access the information, putting at issue the students' First Amendment rights.

[125] *See* discussion *supra* Part III.B.

[126] *See supra* note 111 and accompanying text.

[127] *See supra* note 108 and accompanying text.

regulate the athletic relations of the secondary schools in Tennessee."[128] Similarly, the purpose of the NCAA is to "govern competition in a fair, safe, equitable, and sportsmanlike manner, and . . . integrate intercollegiate athletics into higher education . . . ."[129] In passing its recruiting rule, the TSSAA asserted three interests: "(1) to keep high school athletics in their proper place subordinate to academics[,] . . . (2) to protect student athletes from exploitation[, and (3) to] foster[] a level playing field between the various member schools."[130] Similarly, the NCAA claims to promote "[t]he supporting role that intercollegiate athletics plays in the higher education mission," and the "collegiate model of athletics in which students participate as an avocation . . . ."[131] Moreover, the NCAA's recruiting rules are set out "to shield [prospective student-athletes] from undue pressures,"[132] and "to protect and enhance the physical and educational well-being of student-athletes."[133]

Not only do the organizations' stated missions and policies indicate that the NCAA and the TSSAA have similar purposes, but at least one court has agreed that high school and college athletics serve similar purposes. According to the Tenth Circuit, there is "no more than a difference in degree" between high school and college athletic programs.[134] The court continued:

> The fundamental positions are the same, the goals are the same, the stakes are pretty much the same. The same relationship also exists between the primary academic functions of the schools in each category and the athletic programs. The differences in degree or magnitude do not lead to a different result. In each, the athletic program is very important, as are the many other diverse functions, programs, and activities not within the academic core.[135]

Thus, while in terms of academics, the respective missions of high schools and colleges may be different,[136] in terms of athletics, the missions of high schools and colleges are very similar: both seek to promote athletics as a part of the educational experience. Because of their similar missions, the Court need not distinguish between the TSSAA and the NCAA when determining the extent to which the NCAA can restrict its members' speech.

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[128] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 13 F. Supp. 2d 670, 673 (M.D. Tenn. 1998), *rev'd*, 180 F.3d 758 (6th Cir. 1999), *rev'd*, 531 U.S. 288 (2001), *on remand*, 262 F.3d 543 (6th Cir. 2001).

[129] NCAA, Our Mission, *supra* note 8.

[130] Brentwood Acad. v. Tenn. Secondary Scholastic Athletic Ass'n, 262 F.3d 543, 557 (6th Cir. 2001).

[131] NCAA, Our Mission, *supra* note 8.

[132] NCAA DIVISION I MANUAL, *supra* note 11, at art 2.11.

[133] *Id.* at art. 2.2.

[134] Colorado Seminary v. NCAA, 570 F.2d 320, 321 (10th Cir. 1978).

[135] *Id.*

[136] *See* Lasson, *supra* note 121, at 65 (Universities are places for "free-wheeling inquiry," while high schools are designed for the "selective conveyance of ideas.").

Second, a legal distinction between the maturity levels of high school and college student-athletes is inappropriate in the context of recruiting. Collegiate recruiting targets mostly high school students, not college students.[137] Thus, the target audience for college recruiting is not college students, but rather, high school students. Consequently, in terms of college athletic recruitment, the distinction between high school and college students is inapplicable. Rather, the appropriate distinction is between high school students and middle school students, who are the subjects of high school recruiting. Hence, the critical question is whether the Court would be inclined to distinguish between high school and college recruiting on the ground that high school students are more mature than middle school students.

Scholars generally agree that middle school children are less mature than high school children.[138] Interestingly though, it is not so clear whether courts have made this distinction.[139] Specifically concerning free speech rights, some courts have been willing to grant greater rights to students as they progress through elementary school, middle school, and high school.[140] However, in many instances the free speech rights of children—specifically what speech they have the right to be exposed to—have not been delineated along age-specific lines.[141] Rather, the government and most courts tend to lump all children[142] under the same rubric when determining the scope of their free speech rights.[143] If the Court were inclined to do the same, it is unlikely to think they would distinguish between high school and middle school children when considering whether to apply the *Pickering* doctrine to the NCAA.

Even if the Court were to distinguish between high school and middle school children, it does not necessarily follow that it would grant

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[137] *See* Division I Men's Basketball Academic Enhancement Working Group, Key Research Findings Presented (Aug. 10, 2007), http://www1.ncaa.org/membership/governance/division_I/management_council/2007/October/05_Add_B_BAEG.htm (reporting that thirteen percent of Division I student-athletes are transfer students).

[138] *See* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, HOW OLD IS OLD ENOUGH?: THE AGES OF RIGHTS AND RESPONSIBILITIES 28-29 (1989) (noting that twelfth graders have a greater capacity for decision-making than seventh and eighth graders); LAURA M. PURDY, IN THEIR BEST INTEREST? 53-54 (1992) (noting that a child's capacity to make rational decisions generally increases with age).

[139] For example, in most states the age of majority for contracts is eighteen and no distinction is made amongst children under eighteen. *See* 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 9:3 (4th ed. 1993).

[140] *See, e.g.*, Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1538 (7th Cir. 1996) (noting that no decisions of the Courts of Appeals apply *Tinker*-based speech rights to the elementary school setting, and that "[t]he 'marketplace of ideas,' an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the means of expression").

[141] *See* Amitai Etzioni, *On Protecting Children From Speech*, 79 CHI.-KENT L. REV. 3, 43-44 (2004).

[142] The definition of "children" is unclear, but it at least encompasses all minors under the age of seventeen. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 637 (1968).

[143] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684-86 (1986); *Ginsberg*, 390 U.S. at 637; *see also* Etzioni, *supra* note 141, at 43-44.

the NCAA less discretion to limit recruiting than the TSSAA. Notably, while the Court has held that high school students are entitled to free speech rights,[144] it has also shown a willingness to limit these rights in order to protect high school aged children from being exposed to unsuitable speech. Accordingly, it has upheld certain government efforts to limit the amount of speech high school aged children can be exposed to both on and off school grounds.[145] The basis for allowing such a restriction is that exposure to such material may be harmful or inappropriate for children,[146] who may not be fully capable of making a reasonable decision.[147]

The recruiting process similarly exposes high school aged children to sensitive materials, which are inappropriate for or harmful to them and negatively impact their decision-making.[148] Thus, it is likely the Court would seek to protect the recruits, increasing the likelihood that it would apply the *Pickering* doctrine when contemplating the constitutionality of an NCAA recruiting ban.

Recruiting has been greatly affected by the rising importance of college athletics. Although colleges claim that sports are meant to serve an educational purpose,[149] college athletics has come to serve more than just an educational purpose because athletic programs can produce a substantial amount of revenue for the NCAA, their conferences, and their schools.[150] In addition to direct revenue, schools may accrue additional

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[144] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 511 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

[145] In *Ginsberg*, the Court held that it is constitutionally permissible for a State to protect minors under seventeen from being exposed to potentially harmful materials—i.e., obscene sexual materials. 390 U.S. at 637. The basis of this holding was the State's constitutional power to regulate the well-being of children. *Id.* at 639; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (allowing a high school to prohibit its school newspaper from publishing what it deemed to be unsuitable material).

[146] In *Hazelwood School District v. Kuhlmeier*, the Court allowed a high school to limit its students' speech, in part, to ensure that "readers or listeners are not exposed to material that may be inappropriate for their level of maturity." 484 U.S. at 271. The Court continued to hold that a school "must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics." *Id.* at 272. In *Ginsberg*, the Court upheld the State law because it was rational for the State to conclude that exposure to sex material could be harmful to children under seventeen. 390 U.S. at 639-43.

[147] *See* Bellotti v. Baird, 443 U.S. 622, 635 (1979) (stating that the Court's rulings that the State could limit the freedom of children to make their own choices were based on "recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them").

[148] *See infra* notes 159-175 and accompanying text.

[149] *See, e.g.*, Univ. of Mich. Athletic Dep't, Mission Statement and Guiding Principles, http://www.mgoblue.com/clubs/article.aspx?id=74106 (last visited Jan. 5, 2009) ("The individuals who participate in our department at all levels can learn the benefits of teamwork, self-discipline, personal responsibility, the setting of high standards, and the joy of achievement.").

[150] The NCAA's total operating revenue for the 2007-2008 season was $614 million. NCAA, Revised Budget for Fiscal Year Ending August 31, 2008, http://www.ncaa.org/wps/wcm/connect/resources/file/ebca1c0e7492aa3/2007-08%20BUDGET%20(06-07%20Budget%20with%20moves).pdf?MOD=AJPERES (last visited Jan. 3, 2009) [hereinafter NCAA Revised Budget].

benefits because of college athletics, including increased tuition and fees, increased exposure, and alumni donations.[151] College athletics is also popular with the student body and public at large.[152] Because the amount of revenue a college earns, the additional benefits it receives, and its popularity depend highly on the athletic success of the institution,[153] coaches get paid good money[154] and are under intense pressure to have a successful program.[155]

While large, this figure includes only money earned from NCAA-television contracts, NCAA-conducted tournaments, and membership dues. *Id.* It does not include money earned from bowl games, conference tournaments, ticket sales, and conference television contracts. *See The NCAA and Conference Affiliation*, *in* THE BUSINESS OF SPORTS, *supra* note 5, at 459, 464-66 [hereinafter *Conference Affiliation*]. Depending on the conference, the revenue that comes from these sources can be quite substantial—in excess of $100 million. For example, the Southeastern Athletic Conference ("SEC") reported that its 2005-06 revenue was $116.1 million. SEC, 2005-2006 SEC Revenue Distribution, http://www.secsports.com/index.php?s=&url_channel_id=20&url_article_id=7426&change_well_id=2 (last visited Jan. 3, 2009) [hereinafter SEC Revenue Distribution]. The SEC is one of the "Big Six" conferences—the Atlantic Coast Conference ("ACC"), Big East, Big Ten, Big 12, Pac-10, and SEC—each of which accumulates similar annual revenues. *See Conference Affiliation*, *supra*, at 465-66.

Most of this money is distributed to the schools. NCAA Revised Budget, *supra* (Roughly $466 million of the NCAA's operating revenue was distributed to the schools.); SEC Revenue Distribution, *supra* (noting that all of the $116.1 million was distributed to the twelve SEC schools).

Notably, the statistics show that most athletic programs lose money. *See* ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 172 (1999). However, despite this fact, many schools still try hard to turn athletics into a revenue builder because of the potential for amassing substantial revenue. *See id.* at 164; Andy Staples, *In Big-Time Football Spending War, The Rich Get Richer*, SI.COM, Nov. 18, 2008, http://sportsillustrated.cnn.com/2008/writers/andy_staples/11/18/spending/index.html?eref=T1. Moreover, the deficits of athletic programs seem to be decreasing. *See* NCAA, 2002-03 REVENUES AND EXPENSES OF DIVISIONS I AND II INTERCOLLEGIATE ATHLETIC PROGRAMS REPORT 18 (2003), *available at* http://www.ncaapublications.com/Uploads/PDF/2002-03_d1_d2_rev_expd8af0a75-a361-4cf9-bfde-32afdc06f5ca.pdf (last visited, Jan.3, 2009).

[151] *See* Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy to College Basketball*, 12 MARQ. SPORTS L. REV. 595, 601 (2002); *see also* Staples, *supra* note 150 (noting that schools invest money in college football for "financial reasons, public relations reasons and community building reasons") (internal quotation marks omitted).

[152] *See* ZIMBALIST, *supra* note 150, at 196 (noting college sports' popularity and importance in our culture).

[153] A large part of the NCAA revenue is distributed to Division-I conferences according to their past success in the NCAA men's basketball tournament. *See* Roger C. Noll, *The Business of College Sports and the High Cost of Winning*, *in* THE BUSINESS OF SPORTS, *supra* note 5, at 477, 482-85. Also, the money conferences receive for bowl games, television contracts, etc., depends highly on the success of their schools. *See* Keith Darcé, *Boost from Bowls*, SIGNONSANDIEGO.COM, Dec. 23, 2007, http://www.signonsandiego.com/news/business/20071223-9999-1b23bowls.html (reporting that the conferences whose schools played in the 2007 Poinsettia Bowl, a low-level bowl, received $750,000, the conferences whose schools played in the 2007 Holiday Bowl, considered a mid-level bowl, earned $2.5 million, and the conferences whose teams played in the BCS bowls, the most prestigious bowls, earned the most).

While many are skeptical that athletic success leads to increased alumni giving, *see* ZIMBALIST, *supra* note 150, at 167-69 (1999), there is evidence that athletic success can result in an increase in applications and an expansion in the student body. *See id.* at 169-71.

[154] *See* BRUCE FELDMAN, MEAT MARKET: INSIDE THE SMASH-MOUTH WORLD OF COLLEGE FOOTBALL RECRUITING 57 (2007) (citing a 2006 USA Today study which reported that 42 of 119 Division I-A college football coaches made over $1 million).

[155] *See* ZIMBALIST, *supra* note 150, at 203-04 (stating that coaches are expected to produce winners and if they do not they are fired); Bobby Bowden, *Tension, Pain, Satisfaction: Inside the Recruiting Game*, N.Y. TIMES, Feb. 14, 1988, § 5, at 7 (same).

Recruiting is vital to the success of the program. According to Bobby Bowden, the current coach of the Florida State University football team and the winningest coach in NCAA Division I-A football history,[156] "National championships can be won in February by those who sign the best prospects."[157] Even low-profile sports rely heavily on recruiting. According to the former Harvard women's swimming coach, Maura Costin Scalise, ninety-five percent of her success was due to recruiting.[158]

Because of the importance of recruiting premiere prospects, coaches take recruiting very seriously.[159] Many coaches are willing to use whatever means necessary to obtain recruits' services.[160] Examples of the measures taken by teams to lure recruits include exposing recruits to drugs, alcohol, and sex,[161] providing recruits with money and jobs,[162] altering grades and test scores,[163] harassing recruits,[164] and even misleading recruits.[165] In addition, coaches consistently attempt to capitalize on the emotions and fantasies of the young and impressionable recruits, many of whom dream of being a college and professional sports star.[166] By including recruits in such a corrupt process, coaches create an

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[156] Florida State University, Official Athletic Site of Florida State University: Bobby Bowden Profile, http://seminoles.cstv.com/sports/m-footbl/mtt/bowden_bobby01.html (last visited Jan. 24, 2008).

[157] Bowden, *supra* note 155, at 57.

[158] WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 43 (2003).

[159] For an insightful and in-depth account of the intensity of the recruiting process for big-time college football, see FELDMAN, *supra* note 154; *see also* Bowden, *supra* note 155, at 57 (stating that the recruiting team at Florida State included "one full-time secretary, 10 assistant coaches and five graduate assistants").

[160] *See* ZIMBALIST, *supra* note 150, at 204 ("The incentive is clear: do all you can to win. Whatever it takes."); Bowden, *supra* note 155, at 57 (discussing how the pressure to win leads some coaches to cheat); O'Neil, *supra* note 12 (discussing how coaches resort to ethically questionable tactics to lure recruits).

[161] *See supra* notes 1-2 and accompanying text; *see also* MURRAY SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY 248 (1990) (discussing how colleges have attractive women "date" recruits for their weekend visit).

[162] *See* JOHN F. ROONEY, JR., THE RECRUITING GAME 136-37 (1980) (noting that schools sometimes provide players with cars, apartments, money, and questionable or non-existent jobs).

[163] *See id.*

[164] *See Text-Messaging Ban to Be Implemented Aug. 1*, ESPN.COM, Apr. 26, 2007, http://sports.espn.go.com/ncaa/news/story?id=2850555 (reporting a story of one athlete "waking up and having 52 text messages").

[165] *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992). Ross was a promising high school basketball player recruited to play at Creighton University. *Id.* at 411. According to Ross, he was assured that he "would receive a meaningful education while at Creighton." *Id.* (internal quotations omitted). However, it was evident that Ross was not capable of receiving such an education. *See id.* at 412; *see infra* note 176 and accompanying text; *see also* ROONEY, *supra* note 162, at 136 (noting that coaches sometimes "promis[e] one package of financial aid and deliver[] another" to recruits).

[166] *See* SPERBER, *supra* note 161, at 249 (claiming that the recruiting process "offer[s] a fantasy world filled with free and almost unlimited pleasures"); Bowden, *supra* note 155 (stating that part of the recruiting process is "inflat[ing] the egos of 17-year-old athletes," only to deflate them later); Staples, *supra* note 4 (quoting the director of football recruiting at Oregon University as saying that "[w]e had to find a way to make [recruits] larger than life") (internal quotations omitted); *College Recruiting: Are Student Athletes Being Protected: Hearing Before the Subcomm. On*

environment that is harmful and inappropriate for high school aged children.[167] This is evidenced by the inability of recruits to make a well-reasoned decision amidst this environment.

While high school students may be more capable of making a reasonable decision than eighth graders, some scholars suggest that even twelfth graders' decision-making ability is hampered by their yet-uncontrolled emotions. According to Anna Freud,[168] the decision-making capabilities of adolescents are negatively impacted by their emotions and fantasies more so than adults, lessening the likelihood that an adolescent will make a well-reasoned decision.[169] Perhaps, by catering to the fantasies and emotions of student-athletes, the recruiting process inhibits the ability of recruits to make a reasonable decision as to where to attend college.[170] Specific evidence supports the idea that many prospective student-athletes make a less than well-reasoned decision when determining which college to attend. For example, recruits have chosen schools based solely on their dreams of playing professional sports,[171] fake books and magazine covers that played on these dreams,[172] their weariness with the recruiting process,[173] and even what number they can wear.[174] Moreover, when committing to a school, recruits sign letters of intent that are borderline unconscionable.[175]

Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 108th Cong. 20-25 (2004) (testimony of Don McPherson, Executive Director, Sports Leadership Institute, Adelphi University) [hereinafter McPherson Testimony]. According to Don McPherson, the Executive Director of the Sports Leadership Institute at Adelphi University, for many elite student-athletes, "higher education is not in their plans" and they have little interest in being in college. *Id.* at 24. Rather, college sports is a "stepping stone" to the next level of play: professional sports. *Id.*

[167] *See* SPERBER, *supra* note 161, at 248 ("Once on campus the recruit experiences forty-eight hours of high-pressure sales pitches and higher-pressure pleasures.").

[168] Freud was a leading researcher in the field of child psychiatry. *Cf.* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *supra* note 138, at 1.

[169] *Id.* at 31-35.

[170] Recruits, even those with non-professional aspirations, place a lot of emphasis on recruiting when determining which school to attend. JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES 312 (2001). According to one study, which polled student-athletes at some Division I-A, Ivy League, and Coed Liberal Arts Colleges, in 1989 73% of all male student-athletes said being recruited was a "very important" reason for choosing their college. *Id.* This number rose from 36% in 1976. *Id.* For women, the number was only 29%, but this was up from 4% in 1976. *Id.* at 334. The authors speculate that both of these numbers have likely since increased. *Id.* at 259-60.

[171] *See* McPherson Testimony, *supra* note 166. Unfortunately, the reality of the situation is that almost all—i.e., over ninety-five percent—of college athletes will not continue to play sports at a professional level. *See* NCAA, Estimated Probability of Competing in Athletics Beyond the Interscholastic High School Level, http://www.ncaa.org/research/prob_of_competing/ (last visited Jan. 4, 2009).

[172] *See* Staples, *supra* note 4 (noting that several recruits chose to attend the University of Oregon because of fake comic books, in which the recruits led the team to a national championship, and fake Sports Illustrated covers, in which a recruit was holding the Heisman Trophy).

[173] *See, e.g.*, BOWEN & LEVIN, *supra* note 158, at 49 (stating that some athletes commit to a school merely to end the recruiting process).

[174] *See* FELDMAN, *supra* note 154, at 304. Feldman recounted the press conference of Robert Elliott, a recruit who decided to attend Mississippi State University because

The fact that recruits engage in such suspect practices when deciding where to go to college indicates that the recruiting process may be inappropriate for many recruits, or, at worst, even harmful to them.[176] Since the Supreme Court has shown a predisposition to protect high school aged children from being exposed to inappropriate or harmful materials, it is reasonable to believe that the Court would not afford high school student-athletes greater access to recruiting speech than it gave to middle school student-athletes in *Brentwood II*.[177]

4. Summary

Although the NCAA and the TSSAA govern student-athletes of different ages, there are a variety of reasons why the Supreme Court would not distinguish between the two in the context of recruiting. Specifically, the language and reasoning of the *Brentwood II* decision and prior Supreme Court jurisprudence suggest such a difference is immaterial. Consequently, it seems that the same legal standards the Supreme Court used to evaluate the TSSAA's Anti-Recruiting Rule would govern an NCAA recruiting ban. Under these standards, the NCAA would have the authority to impose restrictions so long as those restrictions do not contravene the *Pickering* doctrine. Accordingly, an NCAA recruiting ban would only be upheld if it would survive scrutiny under the *Pickering* doctrine.

> Coach Croom told me I could come in and wear No. 2. It was really where I could go and feel comfortable and rock my No. 2. I've been wearing it since Pee Wee, and that's the only number I can rock. If I put something else on, it won't look right on me. I figure, you've got to look good to play good. I can't wear those double-digit numbers.

Id.

[175] *See* Seth Davis, *To Sign or Not to Sign*, SI.COM, Nov. 14, 2008, http://sportsillustrated.cnn.com/2007/writers/seth_davis/11/13/national.letter/index.html. Letters of Intent are forms signed by recruits which bind the recruits to a school. *Id.* They are voluntary, overly restrictive, non-negotiable, and very difficult to rescind. *Id.* While recruits get some benefit from them, according to Davis they are unfair and even "farcical." *Id.* According to Pete Rush, a lawyer quoted in the piece, they may be unconscionable. *Id.* Nonetheless, every year over "30,000 [student-]athletes sign national letters of intent" because, according to Davis, "that's what everybody does." *Id.*

[176] *See* Ross v. Creighton Univ., 957 F.2d 410, 412 (7th Cir. 1992). Ross enrolled at Creighton from 1978 to 1982 but did not receive nearly enough credits to graduate. *Id.* After he left Creighton, Ross enrolled "for a year of remedial education at the Westside Preparatory School[,] . . . attend[ing] classes with grade school children." *Id.* He later enrolled at Roosevelt University. *Id.* After dropping out of Roosevelt, Ross had a "'major depressive episode,' during which he barricaded himself in a Chicago motel room and threw furniture out the window" in an expression of anger against "Creighton employees who had wronged him." *Id.*

[177] Importantly, this Note is not suggesting that *Ginsberg* or *Hazelwood* would be the basis for limiting recruiting speech. Rather, it is suggesting that, because the Court has previously protected high school students from inappropriate and harmful speech, it would be less inclined to distinguish between high school and college recruiting when determining whether to apply the *Pickering* doctrine to a hypothetical NCAA recruiting ban.

C. *Why an NCAA Recruiting Ban Would Survive Scrutiny Under* Pickering

If the Court were inclined to subject an NCAA recruiting ban to the *Pickering* doctrine, the next inquiry would be whether such a ban would be constitutional under the three-pronged test. As indicated above, the first part of this test asks whether the employee is speaking as a private citizen.[178] If the employee is speaking as a private citizen, a court must then determine whether the employee is speaking on a matter of public concern.[179] Finally, if the employee meets these threshold requirements, a court must apply a balancing test to determine whether the employee's interests as a citizen in commenting upon matters of public concern outweigh the employer's interest in promoting the efficiency of its operation.[180] Put more succinctly, the three-pronged *Pickering* doctrine holds that, when employees are speaking as citizens about matters of public concern, their speech can be restricted only when necessary for their employers to operate efficiently and effectively.[181]

1. Employee Speaking as a Citizen

Although in *Brentwood II* the Court did not address this threshold issue, assuming instead that Coach Flatt was speaking as a citizen,[182] it is likely that a college coach's recruiting speech would not survive scrutiny under *Garcetti*.[183] In *Garcetti*, the Supreme Court concluded that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes . . . ."[184] Although it did state that a formal job description is not dispositive of an employee's official duties,[185] the Court did not provide a framework for defining the scope of an employee's official duties, leaving the task to the lower courts.[186] As a result, lower courts have relied on the rationale of *Garcetti*[187] as well as their own

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[178] *See* discussion *supra* Part II.B.3.

[179] *See* discussion *supra* Part II.B.2.

[180] *See* discussion *supra* Part II.B.1.

[181] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489, 2495 (2007).

[182] *Id.*

[183] Notably, in *Garcetti*, the Court declined to decide whether the threshold requirement would apply to speech involving "academic scholarship or classroom instruction." Garcetti v. Ceballos, 126 S. Ct. 1951, 1962 (2006). However, since recruiting involves neither "academic scholarship" nor "classroom instruction," there is no reason to think the Court would not extend *Garcetti* to an NCAA recruiting ban.

[184] *Id.* at 1960.

[185] *Id.* at 1961-62. The Court's fear was that an employer could overly restrict an employee's rights by creating broad job descriptions. *Id.*

[186] *Id.* at 1961.

[187] *See, e.g.*, Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007) ("*Garcetti* did not explicate what it meant to speak 'pursuant to' one's 'official duties' . . . . Thus, in order to determine whether Williams wrote these memoranda pursuant to his responsibilities as

definitions of "official duties" in determining whether speech could be restricted.[188] Under either analysis, recruiting speech does not pass this threshold test.

First, the rationale behind *Garcetti* indicates that recruiting speech is spoken pursuant to a college coach's official duties. In *Garcetti*, the Supreme Court stipulated that an employer can restrict speech that "owes its existence to a public employee's professional responsibilities."[189] Accordingly, it distinguished *Garcetti*, in which Richard Ceballos, because of his duties as a deputy district attorney, notified his superiors about misstatements made in affidavits, from *Pickering*, in which Pickering challenged a school's allocation of financial resources. The Court explained that Pickering's speech "had no official significance and bore similarities to letters submitted by numerous citizens every day."[190] Certainly, recruiting speech is much closer to Ceballos' speech than Pickering's. Unlike the speech in *Pickering*, recruiting speech is promulgated only as a requirement of the position and bears little resemblance to other citizens' communications. Clearly then, recruiting speech "owes its existence"[191] to a college coach's responsibility to recruit student-athletes.

Second, recruiting also falls under the "official duties" of a college coach, as defined by lower courts. Lower courts have commonly defined "official duties" as activities performed by an employee that are required as part of his or her job.[192] Recruiting speech is certainly a required part of a college coach's job. Most, if not all, college coaches' official job descriptions include recruiting prospective student-athletes.[193] This requirement is not hollow; given the importance of recruiting, it is unquestionable that recruiting is a required part of the job.[194]

Athletic Director, we must also look to the facts and rationale underlying *Garcetti*."); Jackson v. Jimino, 506 F. Supp. 2d 105, 109-11 (N.D.N.Y. 2007) (rejecting the notion that *Garcetti* created a bright-line rule, choosing instead to apply a fact-based inquiry when determining whether an employee speaks as a citizen).

188 *See infra* note 192 and accompanying text.

189 *Garcetti*, 126 S. Ct. at 1960.

190 *Id.*

191 *Id.*

192 *See, e.g.*, *Williams*, 480 F.3d at 693 (holding that job-required speech is unprotected because it falls within a public employee's official duties); Pittman v. Cuyahoga Valley Career Ctr., 451 F. Supp. 2d 905, 929 (N.D. Ohio 2006) (same).

193 *See, e.g.*, Bates College, Job Opening: Head College Squash Coach, http://www.squashtalk.com/jobs/2007/jobs07-30.html (last visited Jan. 5, 2009) (listing recruiting contacts and communication as "essential job functions"); College of the Holy Cross, Assistant Coach Men's Baseball, http://holycross.interviewexchange.com/jobofferdetails.jsp;jsessionid=0026F49A867D037E77804FB0E2968659?JOBID=7415 (last visited Jan. 5, 2009) (describing job responsibilities as "assist[ing] with all areas of the program including, but not limited to, coaching and recruiting").

194 *See supra* notes 157-159 and accompanying text. As further evidence of the importance of recruiting, see SHULMAN & BOWEN, *supra* note 170, at 259, in which the authors discuss just how prevalent recruiting is. According to Shulman and Bowen, almost twenty years ago, about ninety percent of the men who played basketball, football, and hockey, and two-thirds of men playing other sports, reported that they were recruited. *Id.* Moreover, the authors reported that when

Since recruiting is an "official duty" of a college coach and recruiting speech "owes its existence" to this duty, a challenge to an NCAA recruiting ban would not survive scrutiny under *Garcetti*.[195] Failure to satisfy this threshold requirement would end the inquiry immediately and result in the upholding of an NCAA recruiting ban as a valid restriction of its members' speech.

2. Speech as a Matter of Public Concern

Even if a court does conclude that a coach recruiting prospective student-athletes speaks as a private citizen, that speech must address a matter of public concern in order to survive the second threshold inquiry.[196] As the Supreme Court stated in *Connick v. Myers*, whether an employee speaks on a matter of public concern is determined by the "content, form, and context" of the speech.[197] In *Myers*, the Court concluded that Myers' questionnaire to fellow assistant district attorneys did not constitute a matter of public concern because it was a "mere extension[]" of a personal grievance with the employer.[198]

Since *Connick*, the contours of the public concern test have not been distinctly defined;[199] however, subsequent cases have provided some guidance. For example, in *Rankin v. McPherson*,[200] the Court held that private remarks made to a co-worker expressing support for an assassination attempt on the President constituted a matter of public concern.[201] Through its holding, the Court emphasized that speech need not be made public, and can be either inappropriate or controversial, to

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asked about the odds someone could appear on campus and make a team without the coach knowing them, an admissions dean answered "essentially zero." *Id.* at 39.

Notably, two years later, Bowen and Levin reported numbers which indicated that the number of recruited athletes may be a little lower than the original numbers. BOWEN & LEVIN, *supra* note 158, at 419. Importantly though, Bowen and Levin applied a more demanding definition of "recruited athletes" that surely did not include all recruits. *Compare id*. at 69 (recruited athletes are athletes "who were on a coach's list at the time admissions decisions were being made"), *with* SHULMAN & BOWEN, *supra* note 170, at 38 (recruited athletes were determined by student-athlete surveys).

[195] Although the applicable relationship here might be the NCAA-member institution arrangement, an argument that the Court would look at the member institution's official duties is misguided given the Court's language in *Brentwood II*. By assuming that Coach Flatt was speaking as a citizen on a matter of public concern, and not Brentwood Academy, the Court seemed to indicate that the duties of the *coach* were at issue in a *Garcetti* inquiry, not the school. Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489, 2495 (2007).

[196] *See* discussion *supra* Part II.B.2.

[197] 461 U.S. 138, 147-48 (1983).

[198] *Id.* at 148.

[199] City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam) ("Although the boundaries of the public concern test are not well defined, *Connick* provides some guidance.").

[200] 483 U.S. 378 (1987).

[201] *Id.* at 386-87. While engaged in a private conversation about an assassination attempt on the President, McPherson told a co-worker "if they go for him again, I hope they get him." *Id.* at 381. The comment was overheard by another employee and reported to the employer, who fired McPherson. *Id.* at 381-82.

constitute a matter of public concern.[202] In *City of San Diego v. Roe*, the Court held that a police officer's sexually explicit videos did not constitute a matter of public concern.[203] In its holding, the Court attempted to clarify the definition of what constitutes public concern, stating that "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[204]

Despite this guidance, lower federal courts have found the public concern test to be imprecise.[205] As a result, courts have taken different approaches in determining what constitutes a matter of public concern. Some courts have focused on whether the speech was made as an employee or as a private citizen.[206] Other courts have focused on whether the content of the speech was of private interest or of concern to the community as a whole.[207] This disagreement over how to define "a matter of public concern" only demonstrates that the public concern test is a fact-based inquiry, the outcome of which depends on the content, form, and context of the particular speech.[208]

The content, form, and context of recruiting speech indicate that it would not constitute speech on a matter of public concern. Recruiting speech entails one-on-one communications between coaches and players that focus on student-athletes' ambitions to attend and compete at the respective institution.[209] This type of speech concerns an individual

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[202] *Id.* at 386-87.

[203] *Roe*, 543 U.S. at 79, 84.

[204] *Id.* at 83-84.

[205] *See, e.g.*, Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 798 (5th Cir. 1989).

[206] *See* Sparr v. Ward, 306 F.3d 589, 594 (8th Cir. 2002); Gillum v. City of Kerrville, 3 F.3d 117, 120-21 (5th Cir. 1993); *see also* Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1181 (2007). Of course, with the Court's decision in *Garcetti*, it would seem that this issue would be addressed prior to asking whether the speech touches on a matter of public concern.

[207] *See* Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1051-52 (6th Cir. 2001); *see also* Walter E. Kuhn, Note, *First Amendment Protection of Teacher Instructional Speech*, 55 DUKE L.J. 995, 1005 (2006).

[208] *See* Campbell v. Galloway, 483 F.3d 258, 271 (4th Cir. 2007) ("Our fact-specific resolution of individual cases has done little to sharpen the line between cases where the complaints about discrimination are matters of public concern and those where such complaints are not matters of public concern."); Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 75 (1988) (suggesting that lower courts have been inconsistent in determining what constitutes speech on a matter of public concern because of the "almost unbridled discretion given [to] the courts under *Connick*"); Rhodes, *supra* note 206, at 1184 (calling public concern standards "fact-dependent and not always predictable").

[209] For an example of the kind of issues the recruits and coaches discuss, see FELDMAN, *supra* note 154, at 154-75 (detailing the efforts of The University of Mississippi coaches to get a recruit to meet minimum eligibility requirements, which focused solely on the young man's eligibility, and, of course, football—two interests entirely personal to the recruit).

Of course, some speech that could be considered recruiting speech would not be so personal in nature—i.e., billboards or brochures advertising the school and its athletic program. While such speech could presumably be considered as addressing a matter of public concern, it is not at issue here since a NCAA rule similar to the TSSAA's rule would not prohibit such speech. Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489, 2495 (2007).

student's personal interest in playing athletics at a particular institution. It cannot be said to concern community-wide interests, such as discrimination or governance, since it is not the "subject of legitimate news interest" or "of general interest and of value and concern to the public."[210]

Moreover, the *intent* of the speech is not to address a matter of public concern, which, according to at least one Circuit Court of Appeals, is important in discerning whether the employee was addressing a matter of public concern.[211] Rather, the goal of recruiting speech is to attract prospective student-athletes to the school's athletic program.[212] Thus, even if some discussion took place that was of a general interest to the public, it would still not necessarily constitute speech on a matter of public concern.[213] Combining this with the fact that coaches recruit as part of their professional duties,[214] it is evident that speech intended to recruit a student-athlete to a college or university does not address a matter of public concern.[215]

3. *Pickering* Balancing Test

If a court were to determine that a college coach recruiting a student-athlete is an employee speaking as a citizen on a matter of public concern—or if it assumes as much, as did the *Brentwood II* Court—the final determination would be whether the NCAA's interest in efficiency

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[210] City of San Diego v. Roe, 543 U.S. 77, 83-84 (2004) (per curiam). An example of private remarks that implicate the general interest of the public is displayed in *Rankin v. McPherson*, 483 U.S. 378 (1987). In *Rankin*, an employee made private remarks to another employee about her views on the attempted assassination of the President. *Id.* at 381-82. The Court held these remarks to be a matter of public concern, given the fact that they were delivered on the heels of "heightened public attention" on presidential assassinations. *Id.* at 386. Discussions over a recruit's ability to compete at a college or university does not similarly pique the interest of the public.

[211] Salehpoor v. Shahinpoor, 358 F.3d 782, 787 (10th Cir. 2004) ("The court will also consider the motive of the speaker to learn if the speech was calculated to redress personal grievances or to address a broader public purpose." (citing Workman v. Jordan, 32 F.3d 475, 482-83 (10th Cir. 1994))).

[212] *See supra* note 209.

[213] In *Connick*, the Court stated, "[Speech] not otherwise of public concern does not attain the status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." Connick v. Myers, 461 U.S. 138, 148 n.8 (1983). Following this reasoning, even if the subject matter of recruiting speech could, in some circumstances, be considered addressing a matter of general interest to the public, because the intent of the speech is to address personal, and not public, concerns, it does not necessarily attain public concern status.

[214] *See* discussion *supra* Part III.C.1.

[215] For an example of what courts have found to be matters of public concern, see Johnson v. Ganim, 342 F.3d 105, 112-14 (2d Cir. 2003) (letter criticizing mayor's administration was a matter of public concern); Victor v. McElveen, 150 F.3d 451, 456 (5th Cir. 1998) (protest against racial discrimination was a matter of public concern). For an example of the what courts have not found to be matters of public concern, see Alexander v. Eeds, 392 F.3d 138, 145-46 (5th Cir. 2004) (complaints about police department's promotion process were not a matter of public concern); *Salehpoor*, 358 F.3d at 788 (complaint of theft of student's research was not a matter of public concern).

and effectiveness outweigh the school's free speech rights.[216] The Court's most recent articulation of the *Pickering* balancing test—in *Brentwood II*—is that when an employee speaks as a citizen about matters of public concern, an employer can only impose those restrictions that are necessary for it to operate efficiently and effectively.[217] Like the threshold inquiries, in applying the *Pickering* balancing test, the Court requires a fact-based, case-by-case assessment of both the employer's interest in operating efficiently and effectively and the employee's interest in free speech.[218]

The *Brentwood II* decision provides some valuable guidance for evaluating an NCAA recruiting ban. According to the *Brentwood II* Court, there are a number of harms that could prevent a high school sports association from operating efficiently and effectively.[219] These harms include exploitation of students, lack of competition, and an athletic-centric environment.[220] Because the TSSAA's Anti-Recruiting Rule discourages these harms, the Court held that the Rule is necessary for the association's efficient and effective operation and thus a valid speech restriction.[221] Thus, it follows that if (1) recruiting high school student-athletes leads to similar harms; (2) these harms detract from the NCAA's ability to operate efficiently and effectively; and (3) an NCAA recruiting ban discourages these harms, then it would be upheld under the *Pickering* balancing test.

While the Supreme Court did not rely on empirical evidence to support its conclusion that recruiting middle school students could lead to exploitation, distortion of competition, and creation of a culture that values athletics over academics,[222] specific evidence shows that collegiate recruiting harbors these evils. First, the recruitment of student-athletes has lead to their exploitation. As discussed above, the NCAA, its conferences, and its schools receive substantial revenue as a result of college athletics.[223] Despite this fact, none of the revenue is distributed directly to the players themselves.[224] Rather, for their athletic

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[216] *See* discussion *supra* Part II.B.1.

[217] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489, 2495 (2007).

[218] *See* Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 677 (1996) ("*Pickering* requires a fact-sensitive and deferential weighing of the government's legitimate interests."); Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968) ("Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.").

[219] *Brentwood II*, 127 S. Ct. 2489, 2496 (2007).

[220] *Id.* at 2495-96.

[221] *Id.* at 2496.

[222] *Id.* at 2495-96.

[223] *See supra* note 150.

[224] *See* NCAA DIVISION I MANUAL, *supra* note 11, at art. 12.1.2 (establishing that an individual is ineligible for participation in intercollegiate athletics if he or she accepts payment for playing).

participation, the majority of student-athletes are compensated with a free college education and any other benefits that exist from playing an intercollegiate sport.[225] Whether or not this consideration is sufficient, the basis of this exchange is undermined by recruiting.[226]

Because of the emphasis placed on winning in college athletics, the importance of acquiring physically gifted student-athletes cannot be understated.[227] To acquire these top athletes, many coaches recruit student-athletes based solely on their physical skills, paying little attention to their academic qualifications, so long as they meet the minimum NCAA requirements.[228] As a result, many of these physically gifted athletes are not academically qualified to attend the institution,[229] but are able to attend because college admissions offices lower their academic standards in order to ensure the student-athletes' admission.[230]

This is problematic because it will be harder for these unqualified student-athletes to receive a meaningful education.[231] Coming into school, the recruits are at a disadvantage because they are academically unqualified to attend the school. Moreover, while attending school they have to devote much of their time to athletics, instead of focusing on academics.[232] Because of the combination of these two factors, it is arguable that many, or at least some, student-athletes are not receiving the requisite college education.[233] By depriving many recruits

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[225] *See* James J. Duderstadt, *Intercollegiate Athletics and the American University: A University President's Perspective*, *in* THE BUSINESS OF SPORTS, *supra* note 5, at 560-61.

[226] *See id.* at 561 (claiming that "recruiting college athletes based entirely on physical skills rather than academic promise undermines [the] premise [of this exchange]").

[227] *See supra* notes 157-159 and accompanying text.

[228] FELDMAN, *supra* note 154, at 157-75; *see also infra* note 242.

[229] *See* Jim Naughton, *Athletes Lack Grades and Test Scores of Other Students*, THE CHRON. OF HIGHER EDUC., Jul. 25, 1997, at A43.

[230] Bowen and Levin provide a detailed analysis of the admissions advantage for recruited athletes. BOWEN & LEVIN, *supra* note 158, at 69-79. Specifically, the statistics they provide show that a high percentage of academically unqualified athletes get admitted to the country's most prestigious universities. *Id.* at 74-75; *see also* Lynch, *supra* note 151, at 602 (discussing how athletes that fail to meet school's admissions requirements can still be admitted through special admission processes, often with "no questions asked").

[231] *See* William C. Dowling, *To Cleanse Colleges of Sports Corruption, End Recruiting Based on Physical Skills*, THE CHRON. OF HIGHER EDUC., Jul. 9, 1999, at B9.

[232] *See* SPERBER, *supra* note 161, at 303 (reporting that many teams require fifty hours of participation a week).

[233] While graduation rates are roughly the same for athletes and non-athletes, *see* NCAA, Overall Division I Graduation Rates, http://web1.ncaa.org/app_data/instAggr2007/1_0.pdf (last visited Jan. 3, 2009), that does not necessarily mean they are receiving a quality education. *See, e.g.*, BOWEN & LEVIN, *supra* note 158, at 129-34, 146-49 (providing statistics that show recruited athletes generally perform worse than the remaining student body); SPERBER, *supra* note 161, at 301 (stating that many athletes, including those in low-profile Division I sports, "receive degrees but no education"); ZIMBALIST, *supra* note 150, at 39-41 (arguing that even student-athletes that graduate sometimes receive "totally hollow degrees") (internal quotation marks omitted); Dowling, *supra* note 231, at B9 (claiming that big-time college athletes cannot succeed in school); Pete Thamel, *Top Grades and No Class Time for Auburn Players*, N.Y. TIMES, Jul. 14, 2006, at A1 (discussing how football players at Auburn University took classes that did not require attendance and received substantially higher grades for them).

of a meaningful college education, colleges undermine the basic exchange with student-athletes and exploit them for athletic success.[234]

Second, the recruitment of student-athletes has led to a distortion of competition between colleges. Although a new team or two may contend each year, for the most part, every year the same teams compete for an NCAA championship.[235] This trend is neither limited to the high profile sports of men's basketball and football,[236] nor to Division I.[237] This lack of competition is a direct result of recruiting. Given coaches' claims as to the importance of recruiting to a program's success,[238] it should be no surprise that success on the recruiting trail has led to success on the playing field.[239] Therefore, since recruiting is integral in

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[234] WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 299 (1995) (claiming "that the college admissions office and faculty exploit the athlete by taking on board a poorly prepared student and providing to him or her course work of minimum quality so the athlete can meet minimum eligibility standards").

[235] For example, from 2002-2007, several teams have appeared in the top ten of the final Associated Press (AP) college football poll multiple times, including the University of Southern California six times, the Ohio State University five times, and Louisiana State University, Georgia University, Oklahoma University, and the University of Texas four times. ESPN College Football, 2008 NCAA Football Rankings—Final, http://sports.espn.go.com/ncf/rankings?seasonYear=2007&pollId=1 (last visited Mar. 3, 2009); ESPN College Football, 2008 NCAA Football Rankings—Final, http://sports.espn.go.com/ncf/rankings?seasonYear=2006&pollId=1 (last visited Mar. 3, 2009); ESPN College Football, 2008 NCAA Football Rankings—Final, http://sports.espn.go.com/ncf/rankings?seasonYear=2005&pollId=1 (last visited Mar. 3, 2009); ESPN College Football, 2008 NCAA Football Rankings—Final, http://sports.espn.go.com/ncf/rankings?seasonYear=2004&pollId=1 (last visited Mar. 3, 2009); ESPN College Football, 2008 NCAA Football Rankings—Final, http://sports.espn.go.com/ncf/rankings?seasonYear=2003&pollId=1 (last visited Mar. 3, 2009); ESPN College Football, 2008 NCAA Football Rankings—Final, http://sports.espn.go.com/ncf/rankings?seasonYear=2002&pollId=1 (last visited Mar. 3, 2009). Perhaps more indicative of the lack of competition is that only three teams of the sixty spots in the final top ten for the past six years were from schools outside the "Big Six" conferences. *Id.*

[236] In fact, the lack of competition may be more prevalent in low-profile sports. *See, e.g.*, NCAA, Division I Women's Volleyball Champions, http://www.ncaa.com/history/w-volleyball-d1.html (last visited Jan. 3, 2009) (Only ten different schools have won a national championship in Division I women's volleyball in twenty-seven years.); NCAA, Division I Indoor Track & Field—Team Champions, http://www.ncaa.com/history/indoortrack-d1.html (last visited Jan. 3, 2009) (Arkansas University has been the men's Division I national indoor track and field champion nineteen times in the past twenty-five years.).

[237] *See, e.g.*, D3football.com, D3football.com Top 25, http://www.d3football.com/top25/2007/week-0 (last visited Feb. 9, 2009); D3football.com, D3football.com Top 25, http://www.d3football.com/top25/2006/week-0 (last visited Feb. 9, 2009); D3football.com, D3football.com Top 25, http://www.d3football.com/top25/2005/week-0 (last visited Feb. 9, 2009); D3football.com, D3football.com Top 25, http://www.d3football.com/top25/2004/week-0 (last visited Feb. 9, 2009); D3football.com, D3football.com Top 25, http://www.d3football.com/top25/2003/week-0 (last visited Feb. 9, 2009). From 2003-2007, several teams appeared in the D3football.com preseason top ten multiple times including Mount Union, St. John's and Mary Hardin-Baylor five times, and Linfield four times. *Id.*

[238] *See supra* notes 156-158 and accompanying text.

[239] Many of the teams that consistently place in the top ten of the final AP college football poll have also been recognized as having a top ten recruiting class by college football pundits. *See* Rivals.com, Football Recruiting: Team Rankings, http://rivals100.rivals.com/TeamRank.asp? (last visited Jan. 24, 2008). From 2002-2008, several teams placed among the top ten in terms of strength of recruiting class multiple times according to Rivals.com, including Georgia University seven times, and Oklahoma University, Louisiana State University, and University of Southern California five times. Rivals.com, Football Recruiting: Team Rankings, http://rivals100.rivals.com/TeamRank.asp?

establishing success on the playing field, it follows that it is a, if not the, driving force behind the current lack of competition in college athletics.

Third, the recruitment of student-athletes fosters an environment in which athletics is valued more than academics. Because of the heightened importance of college athletics to institutions, the fact that education is the primary reason for attending college is sometimes lost.[240] Thus, instead of an environment which attempts to integrate athletics and academics, a different environment emerges which often forces the student-athlete to choose between athletic and academic success.[241] Recruitment of student-athletes encourages such an environment, since recruiting focuses on the physical skills of a student-athlete, often at the expense of academic qualifications.[242] By allowing this type of recruiting and by encouraging it through the admission of academically unqualified student-athletes, colleges are contributing to a culture that values athletic excellence at the expense of academic success, the third harm mentioned by the *Brentwood II* Court.

Like the effect of these harms on the TSSAA, each one of these harms impacts the NCAA's ability to operate efficiently and effectively.

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postype=0&sort=0&year=2008 (last visited Mar. 19, 2009); Rivals.com, Football Recruiting: Team Rankings, http://rivals100.rivals.com/TeamRank.asp? postype=0&sort=0&year=2007 (last visited Mar. 19, 2009); Rivals.com, Football Recruiting: Team Rankings, http://rivals100.rivals.com/TeamRank.asp? postype=0&sort=0&year=2006 (last visited Mar. 19, 2009); Rivals.com, Football Recruiting: Team Rankings, http://rivals100.rivals.com/TeamRank.asp? postype=0&sort=0&year=2005 (last visited Mar. 19, 2009); Rivals.com, Football Recruiting: Team Rankings, http://rivals100.rivals.com/TeamRank.asp? postype=0&sort=0&year=2004 (last visited Mar. 19, 2009); Rivals.com, Football Recruiting: Team Rankings, http://rivals100.rivals.com/TeamRank.asp? postype=0&sort=0&year=2003 (last visited Mar. 19, 2009); Rivals.com, Football Recruiting: Team Rankings, http://rivals100.rivals.com/TeamRank.asp? postype=0&sort=0&year=2002 (last visited Mar. 19, 2009). This correlates highly with the AP top ten. *See supra* note 235.

[240] This fact gets lost on both the players and coaches. *See* Dowling, *supra* note 231, at B9 (discussing a scandal at the University of Minnesota, in which a tutor revealed that she had completed 400 assignments for men's basketball players from 1993 to 1998); Mark Schlabach, *Younger Harrick Blamed for Fraud*, ATLANTA J.-CONST., May 21, 2003, at C1 (reporting an investigation that revealed that the assistant men's basketball coach at the University of Georgia, Jim Harrick, Jr., lied about his teaching credentials to get a physical education position at the school, misled the university as to how the class would be taught, and gave an "A" to three players who failed to attend class, do class work, and take the final exam); Andy Staples, *Economics of Recruiting*, SI.COM, Feb. 6, 2009, http://sportsillustrated.cnn.com/2008/writers/andy_staples/01/23/recruiting.economics/1.html (reporting on a study which found that, for top college football recruits, graduation rates had no measurable effect on their choice of school).

This fact also gets lost on schools. *See* Lynch, *supra* note 151, at 602-06, 608. Lynch's article provides a detailed analysis of the relationship between college athletics—specifically basketball—and academics. In arguing that many elite college programs may have lost sight of "educational primacy," *id.* at 605, Lynch highlights instances where the desire for athletic success impedes on the academic missions of universities. *Id.* at 602-06, 608. Some of the examples relevant to this Note include: coaches steering athletes to less demanding majors or courses to ensure they will meet NCAA eligibility requirements, athletes spending forty to sixty hours a week on their sports, and regular season games and postseason tournaments infringing on class attendance. *Id.*

[241] *See* Lynch, *supra* note 151, at 604. The unfortunate truth is that often the choice has to be athletics, because, if athletes refuse to meet their coaches' demanding requirements, they will lose their athletic scholarships. SPERBER, *supra* note 161, at 303.

[242] According to Bowen and Levin, recruitment of athletes in the high-profile sports "has become so aggressive that not even lip service is paid to educational values." BOWEN & LEVIN, *supra* note 158, at 44.

The Supreme Court has provided some guidance for determining whether a restriction is necessary for an employer to operate efficiently and effectively. According to the Court, relevant considerations in this test include whether the employee speech "impairs discipline by supervisors or harmony among co-workers, has a detrimental impact on . . . working relationships, . . . or interferes with the regular operation of the enterprise."[243] Because the instant situation is not the traditional employer-employee relationship, the only applicable inquiry seems to be whether the harms of recruiting speech interfere with the regular operation of the NCAA.

Indeed, recruiting harms have impeded the regular operation of the NCAA and, consequently, detracted from its ability to operate efficiently and effectively. Among the NCAA's stated purposes are: protecting the well-being of student-athletes, ensuring fair and equitable competition, and respecting the supporting role that athletics plays to education.[244] Part of the NCAA's regular operation includes enacting measures to ensure these purposes are upheld.[245] Nonetheless, recruiting has lead directly to exploitation of student-athletes, unequal competition, and diminishment of the educational predominance, each of which strikes at the core of the NCAA's purposes. In undermining the NCAA's values, recruiting interferes with its regular operation and detracts from its ability to operate efficiently and effectively.[246]

The negative impact of recruiting on the NCAA's efficient and effective operation can be seen in the failures of the NCAA's current enforcement system. To uphold its rules, the NCAA has an enforcement division that investigates and punishes rules violations.[247] However, the high number of recruiting and other violations[248] has significantly negated the enforcement division's ability to quash this conduct. Because

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[243] Rankin v. McPherson, 483 U.S. 378, 388 (1987); *see also* Love-Lane v. Martin, 355 F.3d 766, 778 (4th Cir. 2004); Khauns v. Sch. Dist. 110, 123 F.3d 1010, 1014-15 (7th Cir. 1997).

[244] *See supra* notes 129, 131-133 and accompanying text.

[245] NCAA, Services, http://www.ncaa.org/wps/ncaa?ContentID=1355 (last visited Jan. 3, 2009) (stating that part of its job is to enact regulations to deal with athletic problems).

[246] *Cf.* Hinshaw v. Smith, 436 F.3d 997, 1007-08 (8th Cir. 2006) (holding that speech which miscommunicated the employer's interpretation of a recently-passed law undermined the board's efforts and was thus unprotected under *Pickering*); Pappas v. Giuliani, 290 F.3d 143, 149 (2d Cir. 2002) (holding that a police officer's speech, reinforcing perception that police department is racially biased, undermined the efforts of the police department and thus impaired its ability to operate efficiently).

[247] NCAA, NCAA Enforcement/Infractions, http://www.ncaa.org/wps/ncaa?ContentID=34874 (last visited Jan. 3, 2009).

[248] For the number of rules violations in recent years, see Wolverton, *supra* note 4. Notably, those numbers include only detected violations; a substantial amount of violations go undetected. *See infra* notes 253-254 and accompanying text.

Significantly, out of all areas of NCAA rules violations—i.e., academic, recruiting, eligibility, unethical conduct, illegal participation—half occur from recruiting. SPERBER, *supra* note 161, at 245.

of the NCAA's small enforcement division,[249] it relies heavily on the college or university to investigate itself in many cases.[250] This tactic is obviously suspect given an institution's desire to act in its own self-interest. Consequently, the NCAA has increased its efforts to limit infractions.[251] However, this strategy has produced mixed results. While there is speculation that these efforts have curtailed NCAA violations,[252] the fact remains that many violations still go undetected.[253] For example, the NCAA staff, which receives seven or eight tips a day concerning possible rules violations, still pursues only one of every fifteen leads.[254]

Because the NCAA has to rely so heavily on the individual institutions to report violations, it has encouraged schools to cooperate with its enforcement division in exchange for a reduction in penalties.[255] As a result, the penalties the NCAA has implemented to enforce violations have been relatively weak.[256] The most common penalties for major violations of NCAA rules are the loss of scholarships, a limitation on the number of recruiting visits, and probation.[257] These penalties have little effect on the coaches and schools that receive them.[258]

Thus, the NCAA's enforcement efforts have created a system in which (1) an overwhelming majority of violations go undetected and (2)

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[249] *See* Lynch, *supra* note 151, at 612 ("[T]he small size of the NCAA's enforcement staff impairs its ability to detect violations of those rules."). While the NCAA has increased its enforcement efforts, *see* Wolverton, *supra* note 4 ("The NCAA has doubled its investigative staff in recent years and cut its average inquiry time in half, to about 10 months."), the NCAA still contributes only .99% of its budget to enforcement. NCAA Revised Budget, *supra* note 150.

[250] *See* ZIMBALIST, *supra* note 150, at 174.

[251] *See supra* note 249.

[252] *See* Wolverton, *supra* note 4.

[253] *See id.*; ZIMBALIST, *supra* note 150, at 174 ("[T]he NCAA does not have the resources to investigate even 1 percent of the major infractions."); Dan Wetzel, *NCAA Naps During Golden Age of Cheating*, RIVALS.COM, Sept. 24, 2008, http://rivals.yahoo.com/ncaa/football/news;_ylt=Al9c AynbXuRDOAXO_GKxqyw5nYcB?slug=dw-ncaacheating092308&prov=yhoo&type=lgns (noting that recently the NCAA has not pursued violations of its rules with much fervor, leading to a golden age of cheating in college athletics).

[254] Wolverton, *supra* note 4. A good reason for this may be the fact that the enforcement division has only twenty investigators to investigate almost 17,000 teams. NCAA, SUMMARY OF NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES DATA RELATED TO THE DECLINE IN THE SPONSORSHIP OF OLYMPIC SPORTS 12 (2004), *available at* http://www.ncaa.org/wps/wcm/connect/resources/file/ebee0945173e990/olympic_sports_supplement.pdf?MOD=AJPERES&attachment=true.

[255] SPERBER, *supra* note 161, at 317.

[256] *See* ZIMBALIST, *supra* note 150, at 177-78 ("If a violation is detected . . . the penalty ultimately imposed is *de minimis* and getting smaller."). For a recent example, see the weak penalties imposed by the NCAA against Indiana University and its head coach, Kelvin Sampson, for committing various recruiting violations. *See* Andy Katz, *Sampson Receives NCAA's Harshest Penalty*, ESPN.COM, http://sports.espn.go.com/ncb/news/story?id=3725832 (last visited May 18, 2009). Most indicative of how weak the penalties are is that all the coaches on the then-Indiana University staff are currently coaching at the professional or collegiate level. *Id.*

[257] *See* Lynch, *supra* note 151, at 612; Katz, *supra* note 256.

[258] For coaches, see ZIMBALIST *supra* note 150, at 177 (describing how, despite engaging in numerous recruiting violations from 1995-96, UCLA Coach Jim Harrick received no penalty from the NCAA and was coaching at a different school a year after the violations were uncovered). For schools, see Mahoney, Fink & Pastore, *supra* note 5, at 452 (citing statistics which show that NCAA penalties did not significantly impact team records); ZIMBALIST, *supra* note 150, at 179 (claiming that during the 1980s and 1990s "it paid to cheat"). For both, see Katz, *supra* note 256.

those that are detected result in rather minimal penalties. For an association committed to detecting and punishing violations in order to prevent unwanted conduct, undoubtedly this system is inefficient and ineffective. By fostering such a system, recruiting is directly responsible for the ineffective and inefficient operation of the NCAA.

Fortunately, an NCAA recruiting ban discourages the recruiting harms that cause this inefficiency. In *Brentwood II*, the Court accepted, without inquiry, that the TSSAA's Anti-Recruiting Rule discouraged the harms of recruiting.[259] Logically, it does not seem as though inquiry is necessary since a rule that bans recruiting is naturally going to discourage the harms that result from it.[260] Moreover, a recruiting ban would serve much better than the current framework, which is a complicated and extensive set of rules that contain loopholes that allow for easy evasion of the NCAA's recruiting restrictions.[261] An all-out ban would not allow any room for interpretation, preventing coaches from engaging in legal but ethically questionable conduct.

Ultimately, recruiting and the harms that result from it prevent the NCAA from the efficient and effective implementation of its purposes. To discourage these hindrances and increase the likelihood of an efficient and effective NCAA, a recruiting ban, and not merely stronger recruiting rules, is necessary. Consequently, a recruiting ban would survive the *Pickering* balancing test, the final prong of the *Pickering* doctrine.

IV. WHAT'S NEXT?: PASSING A RECRUITING BAN

While the NCAA may have the ability, legally, to pass a recruiting ban, whether the NCAA would be willing to impose such a ban is an entirely different question. Indeed, the NCAA *should* pass a recruiting ban. Recruiting student-athletes has undermined not only the purpose of the NCAA, but also of college sports in general. Colleges and universities' primary purpose is educating its students.[262] Sports are supposed to play a supporting role to academics and supplement the institution's mission.[263] Thus, while athletics certainly serves a purpose in the educational mission of an institution, its position is firmly inferior to

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[259] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489, 2496 (2007).

[260] Of course, an argument could be that a recruiting ban will have no effect because even if the NCAA passed a recruiting ban, exploitation, unequal competition, and the primacy of athletics would still continue. However, merely because such conduct might continue to occur does not mean that a recruiting ban does not *discourage* it.

[261] *See* O'Neil, *supra* note 12.

[262] According to the University of Connecticut's Athletic Department, "[i]ntellectual growth and academic progress is the primary purpose for [the student-athlete] being [in college]." UNIVERSITY OF CONNECTICUT DIVISION OF ATHLETICS, *supra* note 6.

[263] *Id.*

education. For all the reasons discussed in Part III, recruiting crosses this line, and therefore should be banned.

Moreover, the disadvantages of a recruiting ban are minimal. Banning recruiting does not have a harmful impact on prospective student-athletes.[264] A recruiting ban need not affect generally qualified and physically gifted student-athletes who wish to use their athletic abilities to gain admission.[265] Coaches would still know who to support in this process since a recruiting ban would not restrict unilateral action by the student, such as sending video of themselves to coaches.[266] The student would still be able to access the necessary information in order to make an informed decision about the institution he or she wishes to attend.[267] Finally, it would not harmfully impact the student-athlete's ability to play an intercollegiate sport.[268]

The only real negative impact of a recruiting rule is on the schools that will be unable to attract highly touted high school athletes through recruiting. However, if schools were committed to their mission of educational primacy, this would not be a negative at all. Athletic success, while desired, is not critical to achieving the educational goals of athletics.[269]

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[264] It may have an impact on those high schoolers with professional aspirations who want to be at the best program to succeed athletically; however, college is an educational institution, not a professional minor league.

[265] Colleges have special admissions procedures in which they give beneficial treatment to student-athletes who may not otherwise be admitted but whose athletic abilities will enrich the student body. Deirdre Carmody, *Colleges Bend Admissions for More than Athletes*, N.Y. TIMES, Jan. 25, 1989, at B6. This treatment also accrues to musicians, artists, and others who would benefit the student body. *Id.* While these applicants may be not be the best qualified, they are nonetheless still qualified to attend the institution according to the institution's, and not NCAA minimum, standards. *See id.* So long as this procedure is used to admit under-qualified, but not unqualified, student-athletes, there is little problem with it. Of course, this process would have to be regulated to ensure that it is not abused. *See* Elliott Almond, *Athletes Go to the Front of Admission Line*, L.A. TIMES, May 3, 1991, at C1 (discussing how the special admissions process is used to get admission of unqualified athletes).

[266] *See supra* note 19.

[267] A recruiting ban in no way prevents a school from generally advertising their athletic programs. Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (*Brentwood II*), 127 S. Ct. 2489, 2495 (2007). Moreover, given the popularity of college athletics and the easy access to information via the Internet, it is likely that a prospective student-athlete would be able to gain substantial information about a school's athletic program without having to talk to the coach. Importantly, with the elimination of recruiting, the emphasis of this decision would hopefully be on academics rather than on athletics since, without communicating with the coach, a student-athlete would not be certain whether he or she could participate in athletics at the school.

[268] Certainly, without recruiting there is a chance that schools will admit too many athletes, such that some will not be able to make a team. However, this does not mean a student-athlete will never play sports. Schools have intramural sports, *see, e.g.*, Univ. of Mich., Intramural Sports Homepage, http://www.recsports.umich.edu/intramurals/ (last visited, Jan. 3, 2009), and students are permitted to transfer. *See* NCAA DIVISION I MANUAL, *supra* note 11, at art. 14.5. In fact, without recruiting, the opportunity to play intercollegiate sports may increase because the stigma of the "walk-on" will be eliminated. *See* SHULMAN & BOWEN, *supra* note 170, at 39 (odds of making a team without knowing coach are "essentially zero").

[269] *See* Univ. of Mich. Athletic Dep't, Mission Statement, *supra* note 149. In fact, less focus on athletic success could improve a school's academic programs. While athletic success can bring substantial revenue to a university, most universities, even those with successful athletic

Unfortunately, many schools are not committed to educational primacy because college athletics is such a lucrative business.[270] As discussed earlier in this Note, schools receive a great deal of money from their athletic programs,[271] the amount of which is integrally tied to their athletic success.[272] By jeopardizing the ability to obtain premiere prospects, a recruiting ban has the potential to cripple an athletic program's success, and, consequently, cut the amount of revenue a school receives.[273] With the possibility of losing a substantial amount of revenue, the schools comprising the NCAA would likely not support a recruiting ban.[274]

Moreover, the NCAA, as an entity separate and distinct from the member schools, would have little incentive to support such a ban. College athletics has likewise generated a substantial amount of operating revenue for the NCAA.[275] Unfortunately, the NCAA's financial success has come while undermining its own principles.[276] Therefore, while supporting a recruiting ban would help the NCAA uphold its values, it would also undermine the importance of athletics and potentially uproot the financial base of the NCAA. As the NCAA's record has shown, if such a choice presented itself the NCAA would likely opt for maintaining the status quo.[277]

Thus, while the NCAA seems to have the legal endorsement to pass a recruiting ban, it is unlikely that the NCAA would be willing to pass one. As a result, it may be necessary for reform to come from a higher power. Since its formation in 1905,[278] the NCAA has largely governed itself; Congress has usually refused to take part in any reform efforts.[279] However, in extreme circumstances, the government has

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programs, lose money from their athletic programs. *See supra* note 150; *see also* MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 219-22 (2000). To remedy this, every year, schools use their additional financial resources to "zero out" the athletic department's books. SPERBER, *supra*, at 221. As a result, "[m]oney that could go to academic programs, student scholarships and loans, and many other educational purposes annually disappears down the athletic department financial hole." *Id.*

[270] *See* Lynch, *supra* note 151, at 605-07 (discussing how schools have allowed their educational missions to be infringed upon in order to maximize revenue from athletics).

[271] *See supra* notes 150-151 and accompanying text.

[272] *See supra* note 153.

[273] *See supra* notes 157-158 and accompanying text.

[274] *See* Lynch, *supra* note 151, at 605-08. This is critical because the persons that introduce and vote on rules are volunteers from the NCAA's member institutions. NCAA, Overview, *supra* note 102.

[275] The NCAA's current operating revenue is $614 million. *See supra* note 150.

[276] *See* Wetzel, *supra* note 253 (arguing that the NCAA has forfeited extensive enforcement in order to protect its big-time programs and television money).

[277] *Id.*

[278] *See* NCAA, The History of the NCAA, http://www.ncaa.org/wps/ncaa?ContentID=1354 (last visited Mar. 17, 2009).

[279] ZIMBALIST, *supra* note 150, at 195-96; Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12-21 (2000).

stepped in, pressuring the NCAA to make changes.[280] For example, in 1978, the United States House of Representatives' Subcommittee on Oversight and Investigation held hearings to investigate the NCAA's enforcement processes amidst public criticism that the processes were unfair.[281] Subsequently, the NCAA altered its rules to better address the concerns discussed in these hearings.[282]

According to some commentators, the current trend of the NCAA towards the commercialism of college sports is a call for government intervention.[283] Moreover, Congress itself has recognized a need to protect student-athletes from harmful collegiate recruiting. After the Colorado University recruiting scandal in 2004, Congress held a hearing on whether student-athletes were being protected in the recruiting process.[284] Hopefully, the NCAA's current subjugation of academic values and exploitation of student-athletes through the recruiting process will inspire further government action, giving the NCAA the necessary motivation to pass a recruiting ban.[285]

V. CONCLUSION

The purpose of colleges and universities is to educate. College athletics is supposed to play a supporting role in this purpose by fostering leadership, physical fitness, and athletic excellence in an effort to enhance the educational experience.[286] Unfortunately, for a variety of reasons, many have forgotten the professed athletic-academic relationship. Nowhere is this loss more evident than in recruiting. Driven by the desire for academic success, recruiting has become a corrupt process that exposes high school student-athletes to inappropriate situations, exploits the student-athletes, and sacrifices academic success for athletic excellence.

Fortunately, *Brentwood II* provides the NCAA with an opportunity to reestablish the proper role of college athletics. In finding that a high school athletic association can limit the speech of its member institutions and their coaches, the Court provides a template for a college

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[280] Smith, *supra* note 279, at 16.

[281] *Id.*

[282] *Id.*

[283] *Id.* at 22 ("If the NCAA and those who lead at the institutional and conference levels are unable to maintain academic values in the face of economics and related pressures, the government may be less than a proverbial step away.").

[284] *College Recruiting: Are Student Athletes Being Protected: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. (2004).

[285] Notably though, given the importance of college athletics in popular culture, commentators speculate that such a drastic reform may not be realistic. *See* ZIMBALIST, *supra* note 150, at 196.

[286] *Id.*; NCAA DIVISION I MANUAL, *supra* note 11, at art. 1.2.

athletic association to do the same. Hopefully the NCAA, whether pressured or not, will act on this endorsement and ban athletic recruiting.

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