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A GAME PLAN TO CONSERVE THE INTERSCHOLASTIC ATHLETIC ENVIRONMENT AFTER LEBRON JAMES

KEVIN P. BRAIG

Our sports are liturgies—but do not have dogmatic creeds. There is no long bill of doctrines all of us recite. We bring the hungers of our spirits, and many of them, not all, are filled—filled with a beauty, excellence, and grace few other institutions now afford. Our sports need to be reformed—Ecclesia semper reformanda. Let not too much be claimed for them. But what they do superbly needs our thanks, our watchfulness, our intellect, and our acerbic love.¹

I. INTRODUCTION

For decades, the community of high schools in the Ohio High School Athletic Association (OHSAA) has sought to regulate interscholastic athletics by prohibiting external influences upon students that are potentially inconsistent with the educational and community values of athletic participation. Traditionally, the recruiting of a student for athletic purposes has been the primary influence that the OHSAA membership has sought to combat. Today, an additional new threat has emerged as the powerful external influence of television is poised to extend its immense pressure to the interscholastic athletic environment.

The college football and basketball environments are historical examples of athletic environments where recruiting and television are co-dependent on one another. At the intercollegiate level, television, recruiting, and the competitive value of athletics (i.e., the economic pressure to win) form an “iron triangle” that has polluted the educational and community values of the intercollegiate athletic environment. Television demands a winning “intercollegiate athletic product,” which in turn demands effective recruiting, which in turn demands television exposure. The iron triangle has proven to be virtually indestructible and survived the National Collegiate Athletic Association (NCAA) membership’s 50 years of reform efforts.

Like NCAA schools caught in the grip of the "iron triangle," the OHSAA membership has almost no control over television or the external pressure to win, but the OHSAA's members can control recruiting. To exercise effective control of recruiting, both the member schools and the OHSAA must possess the will and ability to enforce the recruiting regulations agreed to by the membership. Today, however, the OHSAA membership appears incapable of enforcing its recruiting regulations under the OHSAA's current administrative structure, recruiting bylaws, and enforcement program. Thus, the intent of this article is to suggest a system of new checks and balances within the OHSAA that will empower the OHSAA membership to fairly, effectively, and efficiently enforce recruiting regulations and thereby conserve the educational and community values of the interscholastic athletic environment.

Today's threats to the educational and community values of the interscholastic athletic environment also threaten the future union of public schools and private schools within the OHSAA. It is axiomatic that associations, such as the OHSAA, "usually perish from impotence or from tyranny. In the former case, their power escapes from them; it is wrested from their grasp in the latter." In the absence of reform, a high school athletic association membership's power to enforce recruiting regulations and thereby effectively regulate interscholastic athletics will be wrested from the membership by the courts. Two examples already exist: LeBron James v. Ohio High School Athletic Ass'n and Brentwood Academy v. Tennessee Secondary School Athletic

2. See, e.g., GERRY FAUST & STEVE LOVE, THE GOLDEN DREAM 63 (1997) ("No coach can guarantee a winner. All he can do is recruit [like] his life depended on the outcome of the games—and, professionally, it does.").

3. Cf. OHIO CONST. art. VI, § 2 (requiring a "thorough and efficient system" of public education throughout Ohio).


5. See TOM MCMILLEN & PAUL COGGINS, OUT OF BOUNDS: HOW THE AMERICAN SPORTS ESTABLISHMENT IS BEING DRIVEN BY GREED AND HYPOCRITICITY—AND WHAT NEEDS TO BE DONE ABOUT IT 23 (1992). ("The greatest threat to sports is posed not by reformers but by those who expect too much [from] sports)—whether participants who treat athletics as their only shot at the brass ring, spectators who elevate sports to a religion, or nations that tout their athletic conquests as barometers of their health.").

6. These threats are not confined to Ohio. In all 47 states where public schools and private schools compete together in postseason tournaments, similar threats exist. While this article focuses on Ohio's regulation of interscholastic athletic recruiting, many of the issues raised herein also will have application in other states.

Once the OHSAA membership loses the power to regulate an individual member’s recruiting activity, the membership’s power to conserve the educational and community values of the interscholastic environment will escape its grasp. Once the OHSAA membership loses the power to conserve the educational and community values of the interscholastic athletic environment, the purpose for which the OHSAA members currently join together in the OHSAA will cease to exist. Finally, once the purpose for which Ohio high schools join the OHSAA ceases to exist, the current composition of the OHSAA will likely cease to exist, and new associations that better advance the high schools’ interests will emerge, but the overall quality and value of interscholastic athletics will be weakened.

II. THE OHSAA MEMBERSHIP BEARS THE SOCIO-ECONOMIC COSTS OF REGULATING RECRUITING TO CONSERVE THE EDUCATIONAL AND COMMUNITY VALUES OF THE INTERSCHOLASTIC ATHLETIC ENVIRONMENT.

The “recruiting game” has been called “sport’s most miserable affliction.” However, before a fair, effective, and efficient system of new checks and balances for regulating recruiting can be proposed, one must understand the threats that recruiting and television present, the nature of the interscholastic environment, and the current deficiencies in the OHSAA’s administrative structure, recruiting bylaws, and enforcement program.


9. See OHIO HIGH SCH. ATHLETIC ASS’N, 2001-2002 HANDBOOK OF THE OHIO HIGH SCHOOL ATHLETIC ASSOCIATION FOR MEMBER SCHOOLS - GRADES 7 TO 12, CONST. art. 2-1-1, at 24 (hereinafter OHSAA HANDBOOK). (“The purpose of this non-profit organization shall be to regulate, supervise and administer interscholastic [athletic] competition among its member schools to the end that the interscholastic athletic program be an integral factor in the total educational program of the schools.”)

10. The epidemic of conference jumping that was sparked by Miami-Florida’s defection from the Big East to the Atlantic Coast Conference is illustrative. See William C. Rhoden, Switching Conferences for Prestige and Profit, N.Y. TIMES, Nov. 5, 2003, at D1 (noting that “dog-eat-dog mentality—from presidents on down” has weakened all of college football: “The A.C.C. wounds the Big East; the Big East in turn raids Conference USA teams; and Conference USA raids the Western Athletic [Conference] and Mid-American Conferences.”)


12. MCMILLEN & COGGINS, supra note 5, at 63.
A. A Clear and Present Danger Is Currently Threatening the Educational and Community Values of the Interscholastic Athletic Environment.

As a threshold issue, there can be no denying that today the OHSAA membership charged with conserving the interscholastic athletic environment must confront many of the same crises that the intercollegiate athletic environment has struggled to navigate since the late 1940s. Moreover, as the result of the Supreme Court’s ruling in *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, the OHSAA membership must navigate these crises while footing the bill to allege improper inter-community recruiting against a member (one of the major causes of the crises) and coping with the potential new external influence of increased televising of interscholastic athletics.

On December 12, 2002, television brought a superstar interscholastic basketball-phenomenon, LeBron James, and his Ohio private parochial high school, Akron St. Vincent/St. Mary, to the national stage and cast him as the leading man and his teammates and their opponents as supporting actors in a successful national television broadcast. The game generated a 1.97 rating, which at the time was ESPN2’s third-highest rating for an amateur basketball game ever. With the success of the James telecast, observers of interscholastic athletics saw their warnings of more than a decade ago come to fruition:

High school athletics have become the latest entrée on the American sports menu, served up to help satisfy the voracious appetite of the fan. As a result, scholastic athletes are on the verge of becoming as important to the billion-dollar sports industry as their college brothers and sisters - and just as vulnerable to big-time exploitation.

In comparison to the James telecast, in 2002, ESPN’s Thursday and Saturday prime-time college football telecasts drew a 2.2 rating, and ESPN’s Saturday afternoon college football telecasts scored a 1.9 rating. Furthermore, the United States Congress General Accounting Office has found that the cost of programming sports on television has increased significantly over the last three years. In contrast, the cost of programming high school sports on tele-

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vision appears to be nominal.¹⁷

James arrived on the national scene on the crest of the next major technological wave in television—high definition digital television. The Federal Communications Commission has mandated that all television stations be capable of broadcasting HDTV by 2006. HDTV permits a broadcaster to “multi-cast” (i.e., broadcast four or more standard broadcast streams simultaneously) and brings to television the interactive capabilities of the Internet. As a result of the development of this technology and the escalating costs associated with current sports programming, it appears HDTV broadcasters will have an increased need for inexpensive sports programming to fill their multi-casts.¹⁸ Thus, it appears that HDTV has a great potential to create a future demand for additional celebrity interscholastic students (like James) and teams (like football power Concord (CA) De La Salle, which possessed an 144-game winning streak when television came to call in the fall of 2003).¹⁹ Such developments

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¹⁷. Compare Ron Kroichick, De La Salle’s Win Streak On the Line On National TV, SAN FRANCISCO CHRON, Oct. 23, 2003, at A1 (noting promoter of nationally televised high school football game on ESPN2 between visiting Shreveport (LA) Evangel Christian and host Concord (CA) De La Salle covered Evangel Christian’s traveling expenses and paid De La Salle “a modest appearance fee (about $7,000)”), with David Shook, Notre Dame Scores for NBC, BUS. WK. ONLINE (Nov. 11, 2002), at http://www.businessweek.com/bwdaily/dnflash/nov2002/nf2002118_9409.htm (last visited Feb. 9, 2004) (noting NBC and Notre Dame are “in the second season of a five-year deal that obligates NBC to pay the school $45 million or about $1.5 million per game”), at http://uk.biz.yahoo.com/021108/244/de8k2.html (on file with author). See also Christopher Lawlor, Super 25 rankings; High School Football, USA TODAY, Oct. 28, 2003, at C11 (“[Last] Friday’s [De La Salle-Evangel Christian] game on ESPN2 drew a 0.56 rating, which translates to about 482,000 households. By comparison, the Friday college football coverage averages 0.98 and 837,000 households.”).


It used to be that nothing was bigger than the local high school football game between Homecoming rivals. Now, like Troy falling to a gimmick after a decade-long siege, that innocent era officially ended a week ago Friday night, with the first nationally televised high school football game. The contest, between De La Salle of Concord, Calif., and Evangel Christian Academy of Shreveport, La., was the final victory of professionalization, commercialization and most of all, nationalization over a game that has always been proudly, passionately home-grown.... [G]iven the... commercial success of the De La Salle-Evangel game—it was sponsored by Juicy Fruit chewing gum, a TV crew of dozens provided all the production values of a college game, and it was the first transcontinental matchup of regional powerhouse—the foundation has been laid for a national playoff system along the lines of college football’s Bowl Championship Series. The media are salivating at the prospect. Indeed, a new all-football network, TFN, will be showing four high school games later this season.

Id.


“The real value [James] has created is... the glamour and excitement.... He’s opened [the] door for future high school players. They [might] not have his skill or charisma, but a precedent has been set. Maybe ESPN will televise a high school game of the week or a national championship game.”

Id. (quoting Adidas executive sports director Sonny Vaccaro).
in the televising of interscholastic athletics undoubtedly would generate an up-
surge in recruiting as high schools scramble to attract the next potential inter-
scholastic celebrity superstar or manufacture the next interscholastic athletic
dynasty.\(^{20}\)

Anecdotal analysis of sports on television should give defenders of the
educational and community values of the interscholastic athletic environment
cause for concern. With the assistance of the courts, advancements in televi-
sion technology have a long history of contributing to wrenching, tectonic
shifts that permanently degrade the community spirit, intra-associational
equality, and educational values of athletic environments. In 1922, the United
States Supreme Court ruled that major league baseball was exempt from fed-
eral antitrust law on the basis that baseball games were local, community af-

1. 1922. See, e.g., Tim Warsinskey, The Heirs to the Throne, CLEV. PLAIN DEALER, Mar. 27, 2003, at
7 ("'With LeBron James being this mega-superstar high school kid, it's taken high school basketball
to a whole different dimension. So you have everyone trying to find the next LeBron,' Kevin Boyle,
coach at nationally ranked St. Patrick High in Elizabeth, N.J., recently told ESPN.com.").

(1922).

3. 1922. See Rooney Jr., supra note 11, at 183.
educational values in college football. In the 1970s, the NCAA membership combined new football recruiting regulations with pre-existing limits on the number of television appearances that a school could make to produce an unprecedented era of competitive equity in college football. During the seven-year period from 1980 through 1986, six different schools won the college football national championship. For five of those schools—Georgia, Clemson, Penn State, Miami-Florida ("Miami"), and Brigham Young—the championship was the school’s first in football. The NCAA’s poster-boy program during this era was Penn State, the only team to claim two championships during the period. Under legendary coach Joe Paterno, Penn State had long been one of the NCAA’s brightest stars in preventing the competitive value of intercollegiate athletics from swallowing whole the educational value of intercollegiate athletics.

However, in 1984, the Supreme Court ruled that the NCAA’s regulation of the televising of college football violated federal antitrust laws. As a result of the Supreme Court’s decision, the NCAA could no longer limit the number of times an NCAA member could appear on television. There is evidence that competitive equity and educational values suffered as a result of the deregulation of the televising of college football. In the 16 years since 1987 when the effects of de-regulation began to accrue, a national football championship was the first in school history for only two schools (Colorado and Florida State).


Television money . . . moved colleges and universities into the entertainment business in a much bigger way. Many of the most vocal and partisan fans were not students or parents or alumni, but people who valued winning more than they did the universities’ underlying purposes. The thrill of victory, sports as spectacle, sports for gambling - these were their lodestones.

Id.

24. See, e.g., Bill Finley, Paterno in Trouble in Happy Valley, N.Y. TIMES, Nov. 5, 2003, at D1. After 16 years as an assistant at Penn State, Paterno was promoted to the head job in 1966. Since then, the Nittany Lions have won two national championships. Five of his teams have finished undefeated and untied. Twenty times, Penn State has ended seasons ranked in the Top 10. Under Paterno, it has finished with a losing record only four times . . . Paterno has run a spotless program that is an example of how to do things right in college football. Year in and year out, he seems to produce well-rounded individuals who take academics seriously, graduate and leave Penn State knowing that life is about more than football.

Id.; Bob Smizik, Pitt Falls Short Academically, PITTSBURGH POST-GAZETTE, Sept. 26, 2003, at B1. Recently released statistics by the NCAA covering graduation rates of football players make Pitt look bad, very bad. Of players who entered Pitt in 1996-97, only 16 percent graduated, which is one of the lowest rates in the country. Of players who entered from 1993-96, only 35 percent graduated. By contrast, Penn State shone. Of players who entered in 1996-97, 80 percent graduated. In the previous four years, 76 percent graduated.

Id.

Three schools (Miami, Nebraska, and Florida State) won multiple national championships. Moreover, the poster-boy program of this era, Miami (3.5 championships) was characterized in an article in *Sports Illustrated* calling for the abolishment of the program as “being worse in more ways over a longer period of time than any other intercollegiate athletic program in memory.” Of course, Miami did not drop its football program. Though, in 1995, the NCAA hit the school with sanctions for fraud, an athletic department staff member perpetrated on the federal Pell Grant program. After the 2001 and 2002 college football seasons, Miami played in the national championship game and cashed its share of the more than $25 million payout resulting from its appearances.

However, a high school will feel the increased pressure to recruit in a

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26. In his dissent from the Supreme Court’s decision that invalidated the NCAA’s limitations on its members’ rights to appear on television, Justice Byron White (who was an All-American football player and star basketball player during his collegiate days at the University of Colorado) proved prophetic when he stated: “Even with shared television revenues, unlimited appearances by a few schools would inevitably give them an insuperable advantage over all others and in the end defeat any efforts to maintain a system of athletic competition among amateurs who measure up to college scholastic requirements.” *Id.* at 128 (White, J., dissenting).

27. Alexander Wolff, *Broken Beyond Repair*, *SPORTS ILL.*, June 12, 1995, at 20. In this article, SI writer Alexander Wolff catalogued the sins of the Hurricanes’ football program in the form of an open letter to then-Miami President Edward T. (Tad) Foote II:

> For all its victories, Miami football has been worse in more ways over a longer period of time than any other intercollegiate athletic program in memory. Scan the list of abuses that beset college sports, and your football team can claim, going back to 1980, at least one entry in virtually every category: improper benefits; recruiting violations; boosters run amok; academic cheating; use of steroids and recreational drugs; suppressed or ignored positive tests for drugs; player run-ins with other students as well as with campus and off-campus police; the discharge of weapons and the degradation of women in the football dorm; credit-card fraud and telephone credit-card fraud.

*Id.*

During the past decade your school enrolled and suited up at least one player who scored a 200 on his verbal SAT—the number you get for spelling your name correctly. An on-campus disturbance, involving some 40 members of the football team, required 14 squad cars and a police dog to quell. Fifty-seven players were implicated in a financial-aid scandal that the feds call “perhaps the largest centralized fraud upon the federal Pell Grant program ever committed.” And among numerous cases of improper payments to players from agents was one in which the nondelivery of a promised installment lead a Hurricane player to barge into an agent’s office and put a gun to his head.

*Id.*


manner that will be harmful to the educational and community values of the interscholastic athletic environment only if the OHSAA membership follows the NCAA's lead and permits external sources of influence to usurp the membership's authority to define the character of the "interscholastic athletic product" that OHSAA member schools form out of their student "resources." The OHSAA membership can conserve the educational and community values of the interscholastic athletic environment by mutually agreeing to clearly define how the individual OHSAA member school may manufacture (via recruiting) its "interscholastic athletic product." Thus, the time is now for the OHSAA membership to play an active role in reforming the OHSAA to achieve the conservation of the educational and community values of the environment.

Thirteenth century jurist Henry de Bracton once said: "An ounce of prevention is worth a pound of cure." The last 50 years of NCAA efforts to clean up the intercollegiate athletic environment prove the adage and demonstrate that it may be impossible to clean up an amateur athletic environment polluted by television after the environment has been polluted. In the early 1990s, the Knight Commission met repeatedly over a period of five years and produced three reports that "helped channel the head of steam building up behind college sports reform in the 1990s." Yet, when the Knight Commission reconvened in 2001, it sadly reported:

[I]t is clear that good intentions and reform measures of recent years have not been enough. After digesting the extensive testimony offered for some six months, the Commission is forced to reiterate its earlier conclusion that "at their worst, big-time college athletics appear to have lost their bearings." Athletics continue to "threaten to overwhelm the universities in whose name they were established."

Indeed, we must report that the threat has grown rather than diminished. More sweeping measures are imperative to halt the erosion of traditional educational values in college sports. The evidence strongly suggests that it is not enough simply to add new rules to the NCAA's copious rulebook or ask presidents to carry the burden alone. Higher education must draw together all its strengths and assets to reassert the primacy of the educational mission of the academy. The message that all parts of the higher education community must proclaim is emphatic:

Together, we created today's disgraceful environment. Only by acting

30. Henry de Bracton's, De Legibus (1240).
together can we clean it up.\textsuperscript{32}

Likewise, secondary education must draw together its strength, primarily its community-based nature, to maintain the primacy of the educational mission of interscholastic athletics. The OHSAA membership simply cannot permit recruiting and television to create a similar "disgraceful environment" at the interscholastic level. The OHSAA membership's reform of the OHSAA should represent a desirable and legitimate effort to prevent the interscholastic athletic environment from becoming "intercollegiatized" by the degradation of the environment's educational and community values. It is still not too late for the OHSAA membership to save these values that have for so-long thrived in the interscholastic athletic environment.

\textbf{B. A Healthy Interscholastic Athletic Environment Is Community-Based.}

An interscholastic team "is not only \textit{assembled} in one place; it also \textit{represents} a place."\textsuperscript{33} As a result, few things bring a community together like interscholastic athletics. For example, one who experiences a high school football game on a Friday night is immediately struck by the depth of community involvement in the athletic event. From the players and the coaches on the field to the members of the band to the parents selling food, drinks, programs, and raffle tickets, the entire athletic environment resonates: "This is our community united and at its best!"\textsuperscript{34}

Like any other environment, such as a river, the OHSAA interscholastic athletic "environment" is a "complex of... factors... that act upon an organism or an ecological community and ultimately determine its form and survival."\textsuperscript{35} The "organisms" that inhabit the interscholastic athletic environment are the students. As in all environments, the interscholastic athletic environment contains "big fish" (i.e., students of above-average or elite athletic abil-

\begin{itemize}
  \item \textsuperscript{32} \textit{Id.} at 11.
  \item \textsuperscript{33} \textit{See NOVAK, supra} note 1, at 151.
  \item \textsuperscript{34} \textit{See, e.g.,} David C. Patterson, \textit{Joy in Mudville: A Sense of Community, Columbus Bar Briefs} (Spring 2003), available at http://www.cbalaw.org/Publications/briefs/Index.asp?issue=35&id=231 (on file with author).
  \item \textsuperscript{35} \textit{WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY} 416 (1991).
\end{itemize}
ity) and "small fish" (i.e., students of average or below-average athletic ability). According to NCAA statistics, more than 94 percent of all students compete in their final event at the interscholastic level. In other words, the interscholastic athletic environment is comprised of far more "small fish" than "big fish." The "ecological communities" that inhabit the interscholastic athletic environment are the "schools" of students that collect in the public schools and the private schools within the OHSAA. The geographic districting of students is the primary factor determining the form of the public school communities within the OHSAA. Religious philosophy or academic philosophy is the primary factor determining the form of the private school communities within the OHSAA.

Parents and coaches are the primary sources of influence on the interscholastic athletic environment. The United States Constitution gives parents the right to choose how to educate their children. As a corollary to this right, for better or worse, parents have a right to make the choice between educational options based on the type of "athletic education" that a high school offers. Since parents are not members of the OHSAA, the OHSAA membership has almost no power to limit a parent from shopping for the high school that is the best "athletic fit" for his or her child. The OHSAA membership's power-


37. As used herein, unless otherwise noted, the term "private school" refers to private parochial schools that have a religious affiliation and other private schools that do not have a religious affiliation.


39. Brentwood Academy II, supra note 8, at 22;

The TSSAA does not have a substantial government interest in preventing or discouraging students from moving from one school to another for academic or educational purposes, in whole or in part, in order to foster competitive equity in athletic contests. The substantial governmental interest in informed school choice trumps any governmental interest in controlling which schools or teams win athletic contests. Academics are more important than athletics.

Id.; compare with Mike Fields, Mayo New King of Another Hill, LEXINGTON HERALD-LEADER, Apr. 25, 2003, at C1 (quoting step-father of talented eighth-grade basketball player as stating the reason for step-son's transfer from private Kentucky school to public school in Cincinnati was prospect "was [not] getting the right basketball education"). Cf. William Bainbridge, Transient Students are Education Dilemma, COLUMBUS DISPATCH (May 24, 2003), available at http://www.schoolmatch.com/articles/cdmay03.htm (citing study published in the Journal of the American Medical Association that examined multiple sociodemographic characteristics of students and concluded that "the bottom line is that increased mobility of Americans hurts student achievement").

40. See, e.g., Massillon City Sch. Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, No. 7247, 1987 WL 19827, at 6 (Ohio App. Nov. 5, 1987) (hereinafter Massillon) ("The OHSAA can only regulate the activities of its member schools and their agents. It does not have the power to punish private individuals as Massillon would suggest. The OHSAA must work within its own limita-
lessness to stop parents from subordinating the educational and community values of interscholastic athletics to the competitive value of interscholastic athletics is a major obstacle to conserving the interscholastic athletic environment. However, the OHSAA membership does have the power to regulate how a member high school’s coach reacts to the shopping of a talented student and a coach’s independent actions that potentially impact the educational and community values of the environment.

Coaches are the other primary source of influence on the students that inhabit the interscholastic athletic environment. The Knight Commission recognized that “[c]oaches are closest to the athletes and have the most influence on the quality of their collegiate experiences.” 41 High school coaches play the same role on the interscholastic level. While school supporters also have the potential to influence the environment, the most respected college coaches and administrators in history have recognized that an athletic program’s coach generally has some responsibility to control the influence of such “outsiders.” For instance, legendary former University of Alabama coach Paul “Bear” Bryant once said, “When the cheating starts, . . . look to the head coach. He’s the chairman of the board.” 42 Former University of Missouri athletic director and football coach Don Faurot, a member of the College Football Hall of Fame, echoed coach Bryant’s remarks when he observed that “most of the evils of college athletics are brought about by the coaches themselves. The alumni are merely tools in the coaches’ hands and never recruit a boy that . . . coaches do not want.” 43

In making these statements, Bryant and Faurot were not condemning their colleagues. Rather, they were acknowledging that generally a coach has some power and responsibility to monitor and control the influence that his or her community attempts to exert on the intercollegiate athletic environment. Similarly, a high school coach generally has some power and responsibility to control his or her school’s influence on the athletic environment. The coach “sets the tone.” 44 This article is premised on a favorable “coach’s bias” that presumes the majority of high school coaches are willing and able to play an active role in conserving the educational and community values of the interscholas-

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41. KNIGHT COMMISSION 2001 REPORT, supra note 14, at 25.
42. Id.
43. See Herman Hickman, The College Football Crisis: To Bring Football Back To Its Rightful Place, Part I, SPORTS ILL., Aug. 6, 1956, at 60 (hereinafter “Hickman, Part I”).
44. Cf. DENNY DRESSMAN, GERRY FAUST: NOTRE DAME’S MAN IN MOTION 42 (1981) (“A successful football team sets the tone for the whole year.”) (quoting former Cincinnati Archbishop Moeller High School principal); DON YAEGER, UNDUE PROCESS: THE NCAA’S INJUStICE FOR ALL 7 (1991) (“It [is] axiomatic in sports that teams take on the personality of their coaches.”).
A GAME PLAN TO CONSERVE...  

This article also recognizes that a high school coach alone cannot conserve the environment. Finally, this article recognizes that a coach's role in conserving the educational and community values of the environment must be balanced with a coach's legitimate interest in pursuing the competitive value of the environment in the form of assembling a winning team. The value of winning cannot be discarded nor underestimated, and this article makes no attempt to do so. Rather, this article reflects a view of winning similar to that espoused by former Yale University president and Major League Baseball Commissioner A. Bartlett Giamatti, who stated:

Why do I bring up won-lost records in assessing the health of varsity athletics? Because I want there to be no doubt about what I believe. I think winning is important. Winning has a joy and discrete purity to it that cannot be replaced by anything else. Winning is important to any man's or woman's sense of satisfaction and well-being. Winning is not everything but it is something powerful, indeed beautiful, in itself, something as necessary to the strong spirit as striving is necessary to a healthy character.

It must be difficult to be a high school coach in the modern interscholastic athletic environment. At the interscholastic level, a high school coach has dual, competing interests in the interscholastic athletic environment. As an

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It can be argued, if you have an old coach's bias like mine, that the aims and beliefs of the coaches are at least as important as the views of the [university] presidents. Where a college president views the picture from a broad perspective, a coach sees the problems from the ranks of the players, from the fighting line. I have known intimately most of the coaches who answered our questionnaire either as opposing players, opposing coaches, former teammates or through covering their practices and games. No more dedicated group can be found in any profession even though their opinions of what is best for the game may differ widely.


In 1984, during an era when funding for higher education from all sources was tightening and many institutions were faced with the specter [sic] of decreasing enrollments, numerous [college] presidents found themselves under intense pressure leveled from opposing camps. On the one hand, the presidents have been subjected to significant pressure from alumni and boosters, from influential members of their boards of trustees and from state legislators, who in large measure control the budgets of public institutions, to produce winning athletic programs. On the other hand, the presidents have been accosted on occasion by irate faculty and other groups demanding that the institutions recognize their academic mission by de-emphasizing major, 'winning' athletic programs which had become all too commercial in appearance and function. Caught in the vice between these and similar pressure groups, and no doubt desiring to ensure
educator, a high school coach has an interest in conserving the interscholastic athletic environment by encouraging and nurturing participation in interscholastic athletics of any student within his or her community with a desire to participate regardless of the student’s level of athletic ability. But a coach also has a legitimate, competitive interest in fairly utilizing the interscholastic athletic environment. As a competitor, a coach has an interest in fairly assembling, developing, retaining, and utilizing the athletically-gifted students that inhabit the interscholastic athletic environment in order to put together a competitive “product” in the form of a winning team. Consistent with the OHSAA membership’s mandate that the educational value of interscholastic athletics is the primary value of interscholastic athletics, many (undoubtedly most) high school coaches view their role as educators as primary and their role as competitors as secondary.\(^4\) However, some coaches (particularly when under pressure from overly demanding parents, alumni, boosters, and other outside influences) may be hard-pressed to resist transposing the OHSAA membership’s mandatory hierarchy of priorities. These coaches’ actions, if not their rhetorical words, reflect a philosophy that “for coaches ‘winning is the only thing.’”\(^49\)

The OHSAA’s role in the interscholastic athletic environment is similar to the role of a state environmental protection agency. The OHSAA’s role is to prevent the degradation of the educational and community values of the interscholastic athletic environment while simultaneously permitting competing OHSAA member schools and their coaches to fairly assemble and develop competitive interscholastic athletic teams that pursue the achievement of athletic excellence that is reflective of a school’s pursuit of total educational excellence.\(^5\) Thus, the OHSAA fulfills its role when it discourages coaches and school supporters from engaging in the type of recruiting that “pollutes” the interscholastic athletic environment.

Inter-community recruiting is the type of recruiting that “pollutes” the educational and community values of the interscholastic athletic environment.

\(^{48}\) Tom Groeschen, ‘Obsession’ with Athletics Seen, CINCINNATI ENQUIRER, Feb. 5, 2002, at A7 (quoting local high school football coach as stating “we’re supposed to be teachers first and then coaches”).

\(^{49}\) NOVAK, supra note 1, at 91.

\(^{50}\) Cf. DeRolph v. State, 677 N.E.2d 733, 772 (Ohio 1997) (“The tenor of the discussion, . . . by those advocating the entire education section [of the Ohio Constitution] as it was finally adopted, leaves no doubt that excellence was the goal, rather than mediocrity”).
Inter-community recruiting potentially occurs every time a coach or supporter of a high school has contact with a student enrolled at another high school or at another high school's community "feeder" middle schools. In general, by encouraging student mobility between school districts, inter-community recruiting may inhibit a student's academic achievement. Indeed, education experts, physicians, and statisticians have gathered data suggesting where academic achievement is the goal, "[t]here would appear to be no higher priority than finding ways to help families... understand that moving students from place to place hinders their educational progress."

Evidence that recruiting undermines academic performance has been reported at the intercollegiate Division III and Ivy League levels, which (like the interscholastic athletic level) purport to emphasize the educational value of athletics over competitive and economic values. In Reclaiming the Game: College Sports and Educational Values, authors William Bowen and Sarah Levin tracked almost 28,000 students who entered 33 selective Division III and Ivy League colleges and universities in 1995. Based on their data, Bowen and Levin concluded that:

Recruited athletes earn far lower grades than what might be expected on the basis of their incoming academic credentials and demographic characteristics. This striking "underperformance" phenomenon appears to be related directly to the criteria used in recruiting and admitting these athletes—and not to time commitments, differences in race or socioeconomic status, field of study, or the intensity of the athletic experience. Recruited athletes underperform even in seasons or in years when they are not participating in athletics.

This evidence suggests that inter-community recruiting can pollute the educational value of the interscholastic athletic environment by sending the message to students that the external, competitive value of athletics in the form of glory and profit is more valuable to the student than the student’s internal academic and social development. This evidence suggests that inter-community recruiting can pollute students by sending the message that developing one’s athletic assets (which for all but a tiny percentage of students are wasting assets) for consumption by others is more valuable to the student than developing one’s academic and social assets (which for all students are appreciating assets) for one’s own personal growth and benefit.

51. See Bainbridge, supra note 39.
52. See id.
53. BOWEN & LEVIN, supra note 46, at 328.
The athletic environment does not have to send these messages to its student inhabitants. Indeed, it is beyond dispute that even today the athletic environment does send positive messages through those coaches who have recognized that the greatest value of athletics is the intrinsic value that athletics can provide to the student. For instance, Frosty Westering, the head football coach of Pacific Lutheran University, is one of only 10 football coaches in NCAA history to win more than 300 games. Westering’s teams also have won three National Association of Intercollegiate Athletics (“NAIA”) national championships and the 1999 NCAA Division III national title. In his book, *Make the Big Time Where You Are*, Westering concisely summarized the intrinsic educational value of athletic participation:

> The sports arena can teach us a lot about ourselves—courage, confidence, discipline, and perseverance, as well as loyalty, teamwork and sportsmanship. These qualities give us that will to succeed—that ability to do whatever it takes to get the job done, regardless of the odds. These are all key qualities in any successful life. Learning these qualities, like anything else, is directly related to the dynamics of leadership.55

While inter-community recruiting holds the potential to undermine those values identified by educators such as coach Westering, inter-community recruiting holds an even greater potential to stifle the growth of a spirit of community between the OHSAA’s members. Ideally, the community nature and spirit that characterizes the interscholastic athletic environment should resemble the community spirit that characterizes the vast majority of athletic teams that achieve competitive excellence. In his book, *The Joy of Sports*, theologian Michael Novak eloquently captured this essential community nature of

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55. *FROSTY WESTERING, MAKE THE BIG TIME WHERE YOU ARE* 91-92 (2d 2001). See also NOVAK, supra note 1, at 235-36.

Perhaps what one learns best in sports are habits of discipline and poise under fire. Having faced often the prospect of ... defeat, one tends not to panic when things go badly. Having experienced the deep, groaning desire to quit under pressure, to yield, to admit that one cannot bear the pain or the intensity of the struggle any longer, one knows that there are always hidden resources yet to be called on. These are the qualities of heart most esteemed in the experience of sport, and most easily transferred into other spheres of life. For they regard, not so much the field of play external to oneself, as one’s knowledge of oneself under pressure.
successful athletic teams:

When a collection of individuals first jells as a team, truly begins to react as a five-headed or eleven-headed unit rather than as an aggregate of five or eleven individuals, you can almost hear the click: a new kind of reality comes into existence at a new level of human development. A basketball team, for example, can click into and out of this reality many times during the same game; and each player, as well as the coach and the fans, can detect the difference. "We were at the top of our profession," [former New York Knick] Dave DeBusschere wrote in his *The Open Man: A Championship Diary*: "We had shown that, without the best individuals, we could be the best team. We were a unit, a beautiful, cohesive unit. . . ." Yet there were nights that 1970-1971 season—once for example, when the Knicks played the Bucks in Milwaukee—when the Knicks fell back into playing individual basketball, each one doing his thing, using the other players but not really playing with them, not one with them. Play would begin to [get] ragged. Brilliant individual efforts would flash out, but the magic of unity was gone. The spell the team could weave on its opponents and the beauty of . . . playing as one, as if with a single swift intelligence, a single generous heart, a single reflexive system in five sets of arms, legs, leaps, cuts, and shots, were dissipated. The human race itself is not merely an aggregate of individuals; thus, images of human unity excite some hidden longing in the heart, some long-forgotten memory of expectation. For those who have participated on a team that has known the click of communality, the experience is unforgettable, like that of having attained, for a while at least, a higher level of existence: existence as it ought to be.

There is, I think, nothing mystical or anti-individual in this high form of community. It is not a community that diminishes each individual, or demands the submersion of the individual. [It is] quite the contrary. Each feels himself to be acting at his very best, better than his individual best; and not submerged but uplifted, beyond the limits of the single self. It is true that the fellow who tends to shoot a lot, or perhaps . . . be a prima donna, has to find a different mode of action; and the change may be painful, its proper vein difficult to locate. Some tensions, sulking, disappointments, battles, and frustrations may be necessary. But the new mode, once discovered, does not feel like subjection; it feels like liberation. One's defenses no longer need to be held high; one can give and receive easily, ebb and flow with the
rhythms of the team; and one finds new capacities, new energies.\textsuperscript{56}

However, when a student changes from one community to another as a result of inter-community recruiting, the community spirit within the OHSAA is threatened as the coach and others in the community that lost the student understandably will be hard-pressed to avoid resenting the community that gained the student. Such pollution of the community spirit within the OHSAA threatens the economic interest of the OHSAA membership. The OHSAA membership’s economic interest is based on an “interscholastic athletic product” similar to the “intercollegiate athletic product” marketed by the NCAA. The United States Supreme Court has described that “intercollegiate athletic product” in the context of intercollegiate football:

What the NCAA and its member institutions market . . . is competition itself—contests between competing institutions. . . . Moreover, [what] the NCAA seeks to market [is] a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like.\textsuperscript{57}

As the NCAA seeks to market its brand of athletics, the OHSAA seeks to market a particular brand of athletics—interscholastic athletics. The identification of this product with a community tradition differentiates interscholastic athletics from and makes it more popular than other sports to which it might otherwise be comparable, such as American Amateur Union (“AAU”) basketball and American Legion baseball. Thus, in order to preserve the economic value of the “interscholastic athletic product,” the composition of the competing teams must be determined by the same geographical, religious, or academic factors that determine the form of a particular high school community as a whole.

The OHSAA’s current administrative structure, recruiting bylaw, and enforcement program appear incapable of preserving the economic value of this interscholastic athletic product. Under the OHSAA’s current regulatory scheme, a high school that allegedly recruits a prospective student from outside the school’s community incurs few of the socio-economic costs to the OHSAA membership to allege an infraction of the association’s recruiting bylaw. Rather, the OHSAA membership bears most of the socio-economic costs

\textsuperscript{56} NOVAK, supra note 1, at 143-44.

\textsuperscript{57} Bd. of Regents, 468 U.S. at 101-02.
of the allegations against an individual OHSAA member. In other words, an individual member’s alleged recruiting “pollutes” the interscholastic athletic environment because the high school accused of engaging in the recruiting activity externalizes the costs of the allegations.

The economic reasons for the existence of pollution—whether it is pollution of a river in the form of toxic chemicals or the pollution of the interscholastic athletic environment in the form of toxic inter-community recruiting—have been described as follows:

The economic reason why society may not strike the right balance between economic output and the quality of the environment is that the costs of many kinds of pollution are borne not by the polluters, but by somebody else. As a result these “external” costs will not, in general, be taken fully into account by firms, individuals, or other bodies [that] cause pollution. The other side of the coin is that those who spend money on reducing pollution may not always be the people who gain from the resulting improvement [of] the environment. This applies both to “tangible” pollution, such as the poisoning of fish in polluted waters, and to “intangible” pollution, such as unpleasant smells or ugly landscapes.58

The economic reason why an OHSAA member school may not strike the right balance between the competitive and economic value of interscholastic athletics and the educational and community value of interscholastic athletics is that the socio-economic costs of inter-community recruiting are borne, not by the school accused of such recruiting, but by the other members of the OHSAA. As a result, high schools that engage in inter-community recruiting produce better athletic teams than they would if they were obliged to bear their fair share of the socio-economic costs generated by their alleged inter-community recruiting. Consequently, the OHSAA membership has much to gain from reform that returns a share of the costs of alleged inter-community recruiting to the accused schools and equips the OHSAA with the tools necessary to efficiently manage the OHSAA membership’s share of those costs.

C. Under the OHSAA’s Current Regulatory System, the OHSAA Membership Bears the Socio-Economic Costs of the Polarization Between Public and Private Schools Resulting From A Private School’s Alleged Recruiting Activity.

In the interscholastic athletic environment, the polarization of the

OHSAA's public school members and the OHSAA's private school members that may result from inter-community recruiting is the converse of a community spirit between the members. Thus, such polarization is the social cost that accrues when the OHSAA makes an allegation of improper recruiting against a particular member school. The social polarization between public schools and private schools that results from perceptions of private school recruiting has been well-documented. In 2002, the Dallas Morning News conducted a survey of the 47 states where public schools and private schools compete within the same athletic association and found one “common thread” within all the states: “[P]ublic schools express concerns that private schools enjoy unfair advantages.”

Most often, those perceived advantages are perceived as the ability and will of private schools to engage in inter-community recruiting:

- “Teams that have boundaries and can’t recruit shouldn’t be in a league with others [who can].”
- “There’s a theory kicking around that one of the OHSAA’s divisions be allotted strictly for private schools. . . . Private schools are not forced by geography to stick with the proverbial hand they’re dealt. . . . Their reach can exceed the district boundaries of public schools.”

On the other hand, private schools have expressed concerns that high school athletic associations such as the OHSAA are unjustifiably hostile toward private schools because the associations are controlled by overwhelming public school majorities. In the landmark case of Brentwood Academy v. Tennessee Secondary School Athletic Association, a federal district court found such hostility to exist between public schools and private schools in Tennessee:


60. Rachel Cohen, Almost A League of Their Own: Texas is One of 3 States That Separate Public, Private School Sports, DALLAS MORNING NEWS, Feb. 26, 2002, at 1A.


The testimony of Hulon Watson, Superintendent of Rutherford County Schools and former Riverdale High School Principal, exemplified the hostility between public schools and private schools regarding athletics. Watson testified that [Tennessee Secondary School Athletic Association Executive Director] Ronnie Carter was aware of the general hostility and suspicion toward private schools regarding athletics, which eventually resulted in a split into two divisions for certain TSSAA playoffs.63

The Brentwood Academy v. Tennessee Secondary School Athletic Ass’n case vividly demonstrates how, under the OHSAA’s current regulation of interscholastic athletic recruiting, an accused private school can externalize the socio-economic costs of recruiting allegations to the OHSAA membership. In Brentwood Academy, the TSSAA imposed sanctions upon Brentwood Academy, a private school that allegedly engaged in athletic recruiting in violation of the association’s recruiting bylaw. After Brentwood Academy filed a lawsuit to challenge the TSSAA’s sanctions, the United States Supreme Court and the Sixth Circuit Court of Appeals held that high school athletic associations such as the TSSAA and OHSAA are “state actors” required to prove that sanctions they impose upon a private school for improper recruiting are narrowly tailored to further legitimate interests in regulating recruiting.64 Subsequently, following a ten-day trial, the federal district court concluded that the TSSAA failed to meet its burden of proof and therefore violated Brentwood Academy’s constitutional rights to due process and freedom of speech under the Fourteenth Amendment to the United States Constitution. As a remedy, the district court voided the TSSAA’s sanctions.65

63. See Brentwood Academy II, supra note 8, at 16.


65. Brentwood Academy II, supra note 8, at 48-49. The trial court in Brentwood Academy clearly failed to appreciate the community-based nature of the interscholastic athletic environment. Compare Brentwood Academy II, supra note 8, at 22 n. 7 (“Board of Control member Morris Rogers ... testified... that a purpose of the Recruiting Rule was to protect schools and coaches from other schools taking their students. This is not a legitimate governmental interest in this case.”) with CHRISTOPHER BUTLER, ACROSS MANY FIELDS: A SEASON OF OHIO HIGH SCHOOL FOOTBALL 97-98 (2002);

On a late November night..., the [Van Wert] Cougars posted a... win over the previously unbeaten [Portsmouth] Trojans. Just like that, this near-.500 team had found itself in the state finals.... On the day of that game, most of the town packed up and headed east on U.S. Route 30 toward Fawcett Stadium in Canton, Ohio.... And for awhile everyone forgot that Van Wert was a small farming town near the Indiana border saddled with many typical anxieties—school, employment, finances, time, health, weather, and politics. They left it all behind that day to watch their (their) young men do battle in the name of Van Wert.

Id. and Novak, supra note 1, at 118;
As a result of the district court’s decision, the TSSAA became potentially liable for approximately $2 million in legal fees and costs that were expended by Brentwood Academy to fight the TSSAA membership’s allegations of improper recruiting and resulting sanctions.66 This figure represents the economic cost to the TSSAA membership to allege (through its representatives—the TSSAA Executive Director and Board of Control) that Brentwood Academy committed a recruiting infraction. The cost to the TSSAA membership to allege the infraction is equivalent to the cost incurred by Brentwood Academy to defend itself against the TSSAA’s sanctions by vindicating its constitutional rights in federal court. Prior to the federal district court’s ruling in favor of Brentwood Academy, the TSSAA reportedly indicated that the TSSAA would have to assess a fee against its member schools to cover at least a portion of Brentwood Academy’s legal expenses.67 Thus, as the case currently stands, the TSSAA’s membership (including hundreds of innocent members who had nothing to do with the dispute), and not Brentwood Academy, is likely to bear the economic cost of the polarizing damage to the community spirit within the TSSAA that resulted from Brentwood Academy’s alleged improper recruiting. In Ohio, a similar case and result could cost each and every innocent high school in Ohio as much as 18 to 22 percent of its entire football budget.68

66. See Rob Johnson, TSSAA Appeals Ruling On Recruiting: Case Returns to Cincinnati, THE TENNESSEAN, Feb. 13, 2003, at 4B. Brentwood Academy’s cause of action to vindicate its constitutional rights arose under section 1983 of the United States Code which also provides that “[i]n any action or proceeding to enforce a provision of sections . . . 1983, . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.” 42 U.S.C. § 1988 (2000).


68. For example, Mogadore High School, a public high school in northeast Ohio that has won three state championships in Ohio’s smallest division reportedly operates its football program on a budget of between $11,000 and $13,000. See Tom Reed, Schools Rewarded for Playoff Success, AKRON BEACON J., (May 10, 2002), available at http://www.ohio.com/mld/beaconjournal/sports/high_school/3235657.htm. During the 2002-2003 school year, the OHSAA was comprised of 824 member high schools. See OHIO HIGH SCHOOL ATHLETIC ASSOCIATION, MEMBER SCHOOL DIRECTORY, at http://www.ohsaa.org/members.asp (last modified Nov. 12, 2003) (hereinafter MEMBER SCHOOL DIRECTORY). If Brentwood Academy’s reported legal expenses were divided among the high school members of the OHSAA, each member would be responsible for approximately $2,430. In other words, Mogadore would be forced to spend between 18 and 22 percent of its football budget to reimburse the legal expenses of a fellow member school rather than on its own interscholastic athletic program. Under these circumstances, the OHSAA’s potential liability to a private school that successfully defends itself against OHSAA sanctions by vindicating a constitu-
Prior to the Supreme Court's decision in *Brentwood Academy*, the members of the high school athletic associations in Tennessee and Ohio did not bear the economic cost of recruiting allegations. The association was not required to justify its sanctions in any manner. Rather, in order to avoid an association's sanctions, the accused school had the burden to prove that the association's sanctions were corrupted by "mistake, fraud, collusion, or arbitrariness." Even if the accused school succeeded in meeting its burden, the accused school was not entitled to recover the legal costs the school incurred to defend itself against the sanctions. Under these circumstances, the accused school shouldered the economic cost of vindicating itself. However, after *Brentwood Academy*, a vindicated private school will be able to shift the cost of its alleged recruiting activity to the other members of the association. As a result of this increased economic risk to the other members of the association, the OHSAA's ability to engage in effective regulation of a private school's recruiting activity surely will be chilled.

Unlike a private school, a public school accused of improper recruiting by the OHSAA membership technically remains responsible for the cost of recruiting allegations even after *Brentwood Academy*. In almost all cases, any school that successfully defends itself in court against OHSAA sanctions only will be able to recover its legal fees if the school is also vindicating a constitutional right such as the right to free speech or the right to due process. These rights are secured against abridgement by a state actor, such as the OHSAA, by the Fourteenth Amendment. However, public schools are political subdivisions of the state and courts have held that an Ohio public school district "is not entitled to rely upon the protections of the Fourteenth Amendment." Thus, a public school district does not appear capable of vindicating a constitutional right and thus does not appear capable of recovering its legal fees. However, since the OHSAA membership must bear the cost of its recruiting allegations against private schools, the necessity to avoid public school discontent that inevitably would result from more severe treatment of public schools will limit the OHSAA's ability to impose meaningful sanctions upon public

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69. *Judges*, 181 N.E.2d at 266.
71. See, e.g., *Avon Lake City Sch. Dist. v. Limbach*, 518 N.E.2d 1190, 1193 (Ohio 1988). See also *South Macomb Disposal Auth. v. Twp. of Washington*, 790 F.2d 500, 505 (6th Cir. 1986) (holding "the Fourteenth Amendment does not prescribe guidelines and impose restrictions upon one political subdivision vis-à-vis another political subdivision. The relationship between the entities is a matter of state concern; the Fourteenth Amendment protections and limitations do not apply").
schools that engage in inter-community recruiting. The OHSAA membership will have to regulate a public school’s recruiting as if the innocent members of the OHSAA, not the public school accused of recruiting, bear the socio-economic costs of the alleged recruiting activity. As a result, the OHSAA’s ability and will to engage in effective regulation of a public school’s recruiting activity also will be chilled.

D. A Comparison of the OHSAA’s Enforcement Before and After Brentwood Academy Indicates That the Present OHSAA Regulatory System Is Incapable of Conserving the Educational and Community Values of the Interscholastic Athletic Environment.

Three reported cases involving OHSAA enforcement of its recruiting by-law resulting from improper football recruiting pre-dated the Brentwood Academy case. All of these cases involved a public school community alleging that another public school improperly recruited its students. Since the Supreme Court’s decision in Brentwood Academy, one reported case involving OHSAA enforcement of its recruiting bylaw resulting from improper football recruiting has occurred. That case involved three public school communities’ allegations that a private school recruited students from their public school communities. In addition, the OHSAA attempted to enforce its bylaw defining amateurism against nationally acclaimed prep basketball star LeBron James. While the James case involved an eligibility issue rather than a recruiting issue, the case appears to demonstrate that the OHSAA was reluctant to take a strong enforcement position against James’ private high school, Akron

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Discontent by member institutions with their treatment by the NCAA is potentially damaging in many respects. It fosters lack of respect for the rules and the staff that enforces them, it can lead to reform initiatives that are not well thought out, and it can . . . lead to litigation and lobbying for governmental intervention where members come to feel that they need protection from their own Association.

Id.

73. An additional incident of improper football recruiting occurred at Massillon Washington High School in 2003 after the Brentwood Academy decision was handed down. However, since this case essentially involved a case of self-enforcement by the high school, the case is not treated in detail in this article. See Todd Porter, Massillon Returns Integrity, Ownership to Brown’s House, CANTON REPOSITORY, (July 16, 2003), available at http://www.cantonrep.com/archive/index.php?Category=17&ID=110506&r=0.

Fellow school districts in the county should take note of the blueprint Massillon has set. They handled these allegations thoroughly, thoughtfully and fully in the eyes of the public. They have not tried to sweep anything under the artificial turf at Paul Brown Tiger Stadium. OHSAA Commissioner Clair Muscaro called Massillon’s own investigation and cooperation exemplary.

Id.
St. Vincent/St. Mary.

In the first pre-Brentwood Academy case, in 1961, a public high school in southeast Ohio alleged that a public high school in northeast Ohio, Canton McKinley Senior High School, successfully recruited two of its players to transfer to Canton McKinley to play football. According to the Ohio Supreme Court, the OHSAA Commissioner “caused a thorough investigation of the charge to be made, including the securing of affidavits and statements of every person connected with the charge.”74 Following this investigation, the Commissioner found that the family of the two players had moved to Canton immediately before the 1961 football season in violation of the OHSAA’s rule prohibiting improper recruiting. As a sanction, the OHSAA suspended Canton McKinley “from playing interscholastic football during the school year of 1962-63 and the two boys were declared ineligible for interscholastic athletics at Canton McKinley High School.”75 Canton McKinley appealed the sanction and “the entire matter was fully reviewed and every opportunity given for the expression of opinion or to add additional information.”76 The OHSAA then affirmed the sanction.77

Subsequently, Canton McKinley sought relief from the one-year “death penalty” in the Ohio courts. The Ohio Supreme Court recognized that the OHSAA’s sanction “was harsh and most severe,” but the Court held that the OHSAA had nearly unlimited discretion to punish its member schools for recruiting infractions by stating:

The Ohio High School Athletic Association is an unincorporated association, and the decisions of the tribunals of such association with respect to its internal affairs will, in the absence of mistake, fraud, collusion or arbitrariness, be accepted by the courts as conclusive.78

The other two football recruiting cases pre-dating the Brentwood Academy decision involved the storied football program at Massillon Washington High School (“Massillon”), the program where legendary Cleveland Browns’ and Cincinnati Bengals’ coach Paul Brown began his career. In the first incident, in 1986, two of Massillon’s fellow-Stark County schools alleged that Massillon was “actively recruiting athletes from their schools.” The OHSAA held a hearing that lasted more than three hours, and nine witnesses were presented and cross-examined under oath. During the hearing, Massillon admit-

74. Judges, 181 N.E. 2d at 263.
75. Id.
76. Id.
77. Id.
78. Id. at 261-262.
ted that it had engaged in impermissible recruiting activities and the following
evidence was presented:

The Commissioner heard testimony that several athletes were invited
to the [Massillon] football banquet, that they were given a private tour
of the weight room by one of the football coaches, and that they were
telephoned several times by at least one booster club member encour-
aging them to transfer to [Massillon], and that the father of one of the
boys was informed that if he were to move his son to Massillon, they
would help him [in the] move.79

After the hearing, despite Massillon's request for leniency, the Commis-

sioner issued an opinion finding Massillon guilty of recruiting in violation of
the OHSAA bylaw and, as a result, Massillon was publicly reprimanded, sus-
pended from the 1986 and 1987 OHSAA postseason playoffs (in the event it
qualified), and placed on probation until 1990. After an unsuccessful appeal,
the Ohio courts upheld the OHSAA’s sanctions against Massillon’s challenges
that the OHSAA’s decision was based on mistake, collusion or fraud and was
unconstitutional.80

In 1999, Massillon was back before the OHSAA when neighboring Perry
High School accused the school of recruiting its star running back, Jessie
Scott, to transfer to Massillon to play football. The Commissioner conducted
a thirteen-hour, transcribed hearing on the matter at which witnesses were sub-
ject to cross-examination. Following the hearing, the Commissioner issued a
decision that Massillon had violated the recruiting bylaw. As a sanction for
Massillon’s conduct, the Commissioner declared Scott ineligible to participate
in OHSAA sponsored sports at Massillon, placed the school’s football pro-
gram on probation for a period of three years, and required the school to forfeit
any gate receipts that the school might receive as a result of qualifying for the
OHSAA state football playoffs for a period of three years. While the school
accepted the penalties, Scott appealed the ruling to the Ohio courts, which en-
joined the OHSAA sanction against Scott.81 The court of appeals stated:

While OHSAA Bylaw 4-9-2 contains the term "influence," no defini-
tion of such term is contained in the Bylaws. What constitutes “influ-
ence” under the Bylaws is based upon Commissioner Muscaro’s dis-
cretion and judgment. Commissioner Clair [sic] Muscaro, during the
hearing before the trial court, agreed that the purpose of the OHSAA
hearing “was to determine whether those third party’s actions actually

80. Id. at *4.
caused [the plaintiff-appellee] Jessie [Scott] to transfer" and that it was "important to have causation. . . ." The Commissioner further agreed that if he determined that plaintiff-appellee Jessie Scott’s decision to transfer was a voluntary family decision rather than a decision caused by illegal influence, he would not have found a violation. Therefore, we must focus our analysis on whether the trial court abused its discretion when it concluded, that the Commissioner’s decision, finding plaintiff-appellee Jessie Scott had transferred because of influence, was arbitrary or mistaken. The trial court found that the Commissioner’s decision was arbitrary or mistaken because it was not supported by reliable, probative and substantial evidence. . . . Upon review of the record of the hearing before the OHSAA and the quality of the evidence available at that hearing dealing with Jessie Scott’s reasons for transferring to Massillon Washington High School, we find the trial court did not abuse its discretion in concluding the Commissioner’s decision was arbitrary and mistaken.82

After the Supreme Court’s decision in Brentwood Academy, three suburban public high schools in Cincinnati, Ohio, accused neighbor and perennial football power Archbishop Moeller High School of recruiting prospective students enrolled in their middle schools. The public high schools alleged that Moeller used a postage-paid brochure to solicit information about the prospects such as the name of the prospect’s current team and current coach, and whether the prospect would be interested in obtaining information about the availability of financial aid to attend Moeller. The public schools also alleged that Moeller’s head football coach, Bob Crable, arranged to meet with prospects at a neighborhood Catholic Church. In a letter to the OHSAA, the public school administrators stated that they viewed Moeller’s actions as "a very serious matter" and as a "clear violation of [the] OHSAA bylaws."83 Moeller’s head football coach reportedly conceded that, from the perspective of an "outsider trying to interpret the rules" and the perspective of the complaining public school districts, the brochure looked like a football-recruiting brochure and reportedly conceded that he arranged to meet with the prospects at the church to recruit for Moeller football.84 Nevertheless, Moeller denied that the actions constituted infractions of the OHSAA recruiting bylaw, which stated "[a]ny attempt to recruit a prospective student for athletic purposes shall be strictly

82. Id at *5.
83. Michael D. Clark, Rivals Say Moeller High School Violated Both the Letter and Spirit of Football Recruiting Rules, CINCINNATI ENQUIRER, Jan. 11, 2002, at 1A.
84. Id.
prohibited." After a closed hearing in January of 2002, the OHSAA found that Moeller had violated the OHSAA's bylaw prohibiting improper recruiting. As sanctions for the infractions, the OHSAA Commissioner placed Moeller on probation for the remainder of the 2001-2002 school year, the 2002-03 school year, and the 2003-04 school year, fined the school $1000, and issued a public censure. In issuing the sanctions, the commissioner stated that "'[a]lthough the penalties may appear too harsh or too lax, depending on one's viewpoint, I consider my ruling fair.'" In comparison to the three

85. OHSAA Handbook, supra note 9, Bylaw 4-9-1, at 40-41. At this time, the OHSAA recruiting bylaw provided, in its entirety, as follows:

Section 9. Recruiting

4-9-1 A student is considered a prospective athlete after enrolling in the seventh grade, or the grade corresponding to the seventh grade for a student from a foreign country. Any attempt to recruit a prospective student-athlete for athletic purposes shall be strictly prohibited.

4-9-2 For purposes of this Bylaw Section 9, the term "recruit" shall mean the use of influence by any person connected [with] or not connected with the school to secure the transfer of a prospective student-athlete.

EXCEPTION: Mass marketing of a school directed to a general population of students does not constitute prohibited recruiting.

4-9-3 Prior to enrollment, a student may visit a public or non-public school in contemplation of transfer, as long as that contemplated transfer is consistent with the Board of Education or similar governing [body] policy formally adopted by that school district and arrangements for the visit are made through the principal and/or school administrator designated by the Board of Education or similar governing board.

4-9-4 Any violation of the recruiting prohibitions as set forth in this Bylaw shall cause the recruited student... to be ineligible upon transfer. Furthermore, the school to which the recruited student... transfers or the school the recruiting attempts were intended to benefit shall be subject to sanctions including, but not limited to suspension of membership in the OHSAA.

OHSAA HANDBOOK, supra note 9, Bylaw 4-9, at 40-41.


87. Id. At the time of the incident, the OHSAA bylaws provided with respect to sanctions, in pertinent part, as follows:

Bylaw 12 - Penalties

12-1-1 Penalties for violation of the OHSAA Constitution, Bylaws and Regulations shall be imposed by the Commissioner in accordance with the OHSAA Constitution, Bylaws or Regulations. The Commissioner's decision may be appealed to the Board of Control, whose decision shall be final.

12-1-2 Penalties include: suspension, forfeiture of games, forfeiture of championship rights, probation, public censure, denial of participation or fines not to exceed $1000 per occurrence, or such other penalties as the Commissioner may deem appropriate. ...

12-1-5 The type and duration of all penalties shall be determined in accordance with the nature of the offense.

OHSAA HANDBOOK, supra note 9, Bylaw 12 at 47.

cases that pre-dated Brentwood Academy, Moeller’s sanctions were relatively light.\textsuperscript{89} In all of the prior cases, the OHSAA either prohibited the violator from competing in regular season or postseason athletic contests or prohibited the targeted player from competing on behalf of the violator. The OHSAA imposed neither of these sanctions upon Moeller.

Though technically not a recruiting case, the outcome in the high-profile eligibility case involving Akron St. Vincent/St. Mary basketball star LeBron James conclusively demonstrated that the present OHSAA regulatory system is incapable of conserving the educational and community values of the interscholastic environment.\textsuperscript{90} On its surface, the James case involved the issue of whether James improperly “capitalized” on his athletic fame when he received as a gift two “throw-back” jerseys valued at over $800 during the 2003 basketball season. Indeed, the OHSAA ruled James ineligible on the basis that the event violated the OHSAA’s bylaw defining amateurism.\textsuperscript{91} But the dispute over James’ amateur status can also be viewed as a proxy test of the OHSAA membership’s will and power to enforce its bylaws to prevent a member school from subordinating the educational and community values of the interscholastic athletic environment to the competitive and economic values that the environment also potentially holds for an individual OHSAA member.

Both before and after James was declared ineligible and filed a lawsuit against the OHSAA and Akron St. Vincent/St. Mary to regain his eligibility, the actions of those affiliated with James and the inaction of school officials arguably demonstrated a belief that interests in exploiting the interscholastic

\textsuperscript{89} Id. ("The Ohio High School Athletic Association came down on Moeller High School Monday afternoon. Just how hard is up to interpretation. . . . Considering that the OHSAA could have, among other things, banned the school from postseason play, what Moeller received was a stern warning.").

\textsuperscript{90} Recruiting and eligibility are essentially the two sides of the same coin. Like recruiting cases, alleged violations of eligibility bylaws involve issues of participation in interscholastic athletics. Thus, the OHSAA’s handling of eligibility issues are relevant to the consideration of recruiting issues.

\textsuperscript{91} See Susan Vinella, OHSAA Looks at LeBron Again, CLEVE. PLAIN DEALER, Jan. 31, 2003, at D1; Susan Vinella, Lebron Loses His Eligibility; Basketball Star No Longer An Amateur After Accepting Gift of Two Jerseys, CLEVE. PLAIN DEALER, Feb. 1, 2003, at A1. The OHSAA bylaw regarding a student’s amateur status provided, in pertinent part:

4-10-1 A student who represents a school in an interscholastic sport shall be an amateur in that sport. An amateur athlete is one who engages in athletic competition solely for the physical, mental, social, and pleasure benefits derived therefrom. An athlete forfeits amateur status in a sport by . . . (e) [c]apitalizing on athletic fame by receiving money or gifts of monetary value (scholarships to institutions of higher learning are specifically exempted).

4-10-4 A high school student who loses amateur status may apply to the Association for reinstatement in the interscholastic program after [waiting a] period of one year.

See OHSAA HANDBOOK, supra note 9, Bylaw 4-10, at 41.
environment for its competitive and economic values were the only interests of consequence and that these interests should dictate the resolution of the case.\textsuperscript{92} In their complaint, James’ legal team alleged that James had been ruled ineligible “without reasonable investigation, notice or an opportunity to be heard” because the OHSAA was “frustrat[ed] that . . . [Akron] St. Vincent-St. Mary [was] capitalizing on LeBron James’ fame.”\textsuperscript{93} The James legal team alleged that “[Akron] Saint Vincent-Saint Mary [took] unusual measures to capitalize on the fame of Lebron James, from receiving fees for tournament participation around the country and playing in a larger arena, to raising ticket prices [and] contracting with a cable network.”\textsuperscript{94} The James legal team also made a thinly-veiled allegation that school officials failed to cooperate in the OHSAA Commissioner’s investigation by expressly alleging that school officials failed to inform James of the Commissioner’s request to interview James as part of the investigation.\textsuperscript{95} Notwithstanding the casting of the school as a defendant in the case, the James legal team expressly argued that those at the school that they alleged to be capitalizing on James’ celebrity were empowered by the OHSAA’s bylaws to “be the sole judge” as to whether James was eligible to participate in basketball.\textsuperscript{96} Finally, the James legal team expressly contended that James’ “celebrity [was] a valuable commodity” and that, as a result of being declared ineligible, James suffered irreparable harm in the form of the loss of James’ ability to pursue a state championship with his teammates and national recognition for the Saint Vincent-St. Mary basketball program.\textsuperscript{97} How-


\textsuperscript{93} Id. at 5-6, ¶ 25.

\textsuperscript{94} Id. at 5. See also Plaintiff LeBron James’ Brief in Support of TRO and Motion for Preliminary Injunction at 15, James v. OHSSAA, No. 2003-02-0746, at 10 (C. P. Summit County, Ohio Feb. 4, 2002) (“LeBron James is probably the most celebrated high school athlete in the United States of America. His games have garnered national interest, unprecedented for a high school athlete. His school has capitalized on his fame by moving games to larger arenas, contracting with cable television for Pay Per View viewing, contracting with ESPN for national coverage and raising ticket prices.”). Cf. id. at 11 (“The intent of the word capitalize is to engage in a business proposition intended to enrich.”), with WEBSTER’S DICTIONARY, supra note 35 (defining “exploitation” as “an unjust or improper use of another person for one’s own profit or advantage”).

\textsuperscript{95} Plaintiff LeBron James’ Brief in Support of TRO and Motion for Preliminary Injunction, James, No. 2003-02-0746, at 2.

\textsuperscript{96} Plaintiff LeBron James’ Brief in Support of TRO and Motion for Preliminary Injunction, James, No. 2003-02-0746, at 3 (C.P. Summit Cty. Feb. 4, 2002) (on file with author).

\textsuperscript{97} Id. at 2, 8. Cf. also Plaintiff’s Verified Complaint for Injunctive and Other Equitable Relief ¶ 13, James v. Ohio High School Athletic Ass’n, No. 2003-02-0746 (C.P. Summit Cty. Feb. 4, 2003) (“James suffered . . . irreparable harm in being unable to assist his team in competing for a state championship and a national title.”), with Blue v. Univ. Interscholastic League, 503 F. Supp. 1030, 1034 (N.D. Tex. 1980) (“The interests of John Byrd and Phil Blue as representative[s] of the
ever, in their moving papers, the James legal team did not expressly allege that the school’s basketball program provided any intrinsic educational value to James or that the OHSAA’s ruling deprived James of any educational value associated with athletic participation.

In contrast, some of the greatest educators in this nation’s history recognized almost half a century ago that “the athletic program exists for the welfare of the student, for the contribution it can make to his healthy educational experience, not for the glorification of the individual or the prestige or profit of the [school]. . . . No individual should be exploited for the sake of athletic success.”98 Furthermore, OHSAA bylaws required Akron St. Vincent/St. Mary to “fully cooperate with the Commissioner . . . in all matters which are the subject of any investigation.”99 The OHSAA bylaws also provided that “[t]he principal of the school shall be held ultimately responsible in all matters pertaining to interscholastic athletics involving the school.”100 Yet, notwithstanding the school’s obligations under the OHSAA’s bylaws and James’ allegations against the school, an Akron St. Vincent/St. Mary representative reportedly stated that James “deserve[d] [the school’s] wholehearted support.”101

Subsequently, the court granted a temporary restraining order that reinstated James’ eligibility.102 The court’s order opened the door for James to lead Akron St. Vincent/St. Mary to the Division II state basketball championship. Thereafter, the trial court revisited the issue of James’ eligibility and paradoxically dismissed James’ challenge to the OHSAA’s ineligibility ruling on the basis that James had no right to bring a claim without first exhausting his administrative remedies before the OHSAA.103 But in doing so, the court paradoxically usurped the OHSAA’s enforcement authority by prohibiting the OHSAA from stripping the school of its state championship or imposing any further penalties permitted by OHSAA bylaws.104

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98. ROONEY JR., supra note 11, at 173-75 (quoting the Statement of the Ivy League Presidents).
99. OHSAA HANDBOOK, supra note 9, at 35 (Bylaw 3-6-1).
100. Id. at 34 (Bylaw 3-1-1).
104. Id. The OHSAA bylaws provide the OHSAA with a range of penalties that it can impose against a school under the circumstances in the case:

If a lawsuit is commenced against the OHSAA seeking to enjoin the OHSAA from enforcing any or all
After the court rendered this decision, the OHSAA Commissioner appeared to publicly accuse the school of improperly exploiting James and his teammates at the expense of the community value of the interscholastic athletic environment. Nevertheless, the OHSAA did not appeal the decision. Notwithstanding that the OHSAA’s restraint likely was prudent, the OHSAA’s inaction could be interpreted as the forced-surrender of the OHSAA membership’s legitimate interest in maintaining the primacy of the educational and community values of the interscholastic athletic environment.

In summary, the outcomes in the Moeller recruiting incident and the LeBron James case suggest that the OHSAA’s administrative structure, recruiting bylaw, and enforcement program are no longer capable of effectively and efficiently regulating the interscholastic athletic environment or conserving the educational and community values of the environment. The OHSAA’s enforcement function is not a pleasant function, but, as the LeBron James case vividly demonstrated, the OHSAA enforcement function is most critical to conserving the educational and community values of the interscholastic athletic environment. Thus, every member of the OHSAA has a clear self-interest in reforming the OHSAA so that the OHSAA can effectively and efficiently enforce the OHSAA membership’s bylaws.

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of its Constitution, bylaws, sports regulations, decisions of the OHSAA, and an order from a Court of proper jurisdiction is subsequently either voluntarily vacated, or stayed, or reversed or otherwise determined by the Courts that the equitable relief sought is not or was not justified, the Commissioner may impose any one or more of the following in the interest of restitution and fairness to the other member school’s athletes:

(a) Require that individual or team records and performance achieved during such participation be vacated or stricken.
(b) Require that team victories be forfeited to opponent.
(c) Require that team or individual awards earned during such participation be returned to the association.
(d) Require the return of any financial receipts realized from tournament participation.
(e) Impose a monetary penalty commensurate with the expense to the OHSAA for the litigation.

OHSAA HANDBOOK, supra note 9, at 47 (Bylaw 12-1-4).


106. Press Release, OHSAA, OHSAA Commissioner Clair Mascaro’s Comments on Judge James R. Williams’ Ruling on the LeBron James Case (April 9, 2003) (stating “the OHSAA has always interpreted Bylaw 12-1-4 (Penalties) as applicable only in those cases brought by member schools and not in litigation brought by individual student-athletes and/or their parents.”).
III. REFORMING THE OHSAA’S REGULATORY SYSTEM IS IN THE SELF-INTEREST OF BOTH PUBLIC SCHOOL MEMBERS AND PRIVATE SCHOOL MEMBERS OF THE OHSAA.

In the post-Brentwood Academy era, the OHSAA must consistently and effectively enforce the membership’s bylaws if the OHSAA membership is to conserve the educational and community values of the interscholastic athletic environment.107 As the TSSAA recognized in its letter to its membership after the federal district court struck down its sanctions against Brentwood Academy:

The District Court’s decision undermines the ability of high schools to prevent the recruiting ills and abuses that have permeated college sports. . . . Perhaps more importantly, the District Court’s decision undermines the ability of educators to agree on the rules they will follow for their competition in educational athletics. Instead, the Court’s decision will put federal judges, not educators, in the position of deciding what is best for school sports.108

The TSSAA was correct that as a result of Brentwood Academy the courts have wrested much of the power over interscholastic athletics from high school athletic associations like the OHSAA. But the courts were able to do so only because the deficiencies in the administrative structures, recruiting bylaws, and enforcement programs of the associations permitted the courts to do so. If the membership of the OHSAA can organize and summon the will to reform its association, the OHSAA membership can reclaim the power to regulate interscholastic athletics from the courts. Abraham Lincoln once said, “Will springs from the two elements of moral sense and self-interest.”109 As the next part of this article will demonstrate, reform of the OHSAA’s regulatory culture is clearly in the self-interest of all of the OHSAA’s members.

1. Reform of the OHSAA’s Regulatory Deficiencies Is In the Self-interest of Both Public School Members and Private School Members of the OHSAA.

A public school member of the OHSAA has a financial interest in maintaining an effective association. Schools who qualify for the state playoffs

107. Cf. Young, supra note 72, at 825-26 (“While the enforcement program represents only a small component of the NCAA’s operations, it is critical to the preservation of integrity in college sports.”).

108. See Johnson, supra note 66.

share in the financial bounty generated by the state tournaments and the OHSAA has indicated a willingness in recent years to make the financial rewards reasonably meaningful.\textsuperscript{110} A public school member also has an interest in reforming the way the OHSAA regulates recruiting so as to ensure fair competition between member schools. The irony of the OHSAA’s regulatory history is that while the public schools have been dominating the private schools on the administrative policy-making field, the private schools have been dominating the public schools on the athletic field. For example, since 1972, the 25 largest public schools in Ohio have combined to win a total of 66 state championships while the 5 largest private parochial schools have combined to win a total of 91 state championships.\textsuperscript{111} Since 1972, private parochial schools have won more than 61 percent of the big school state football titles (19 of 31 championships). Overall, private schools have won nearly 49 percent of the state football championships (72 of 148 championships) despite the fact that such schools make up only about 14 percent of the OHSAA membership.

Of course, there is no fixed number of championships that public school members of the OHSAA should win nor is there a fixed number that private schools should win. Indeed, educators have long-recognized that, due to legitimate intra-community differences, it is not possible to achieve complete on-field competitive equity through recruiting regulations.\textsuperscript{112} Thus, the OHSAA recruiting regulations should focus on creating a process that promotes fairness by discouraging OHSAA members from pursuing the advantage that inter-community recruiting provides.\textsuperscript{113}

\textsuperscript{110} See, e.g., Reed, supra note 68 (reporting that Mogadore High School, which reportedly operates its football program on a budget of between $11,000 and $13,000, would receive a payment from the OHSAA of $7,000 as state finalist share of tournament proceeds).


\textsuperscript{112} YAEGER, supra note 44, at 95 (“It is one of the basic premises of life that you can’t legislate equality. . . . You can legislate fairness, but not equality.”) (quoting Thomas J. Niland, Jr., LeMoyne College Athletic Director).

\textsuperscript{113} It is not hard to see how the OHSAA’s current recruiting regulations give an advantage to those schools that engage in inter-community recruiting. Under the OHSAA’s current regulatory scheme, what one coach interprets as impermissible recruiting another coach may interpret to be perfectly permissible behavior. For instance, one coach may interpret the regulations to mean that any prospective student with an overlapping connection to his school (such as an overlapping religious faith) may be permissibly recruited. See, e.g., DRESSMAN, supra note 44, at 89;

Only 6 of Moeller’s 14 parishes sponsored grade school football teams, and two parishes did not have their own grade schools. Athletes in parishes without football teams participated in other youth football programs, and those without parish grade schools attended public elementary schools. [Moeller football coach] Gerry [Faust] went after Catholic boys in those situations with vigor, encouraging them to attend Moeller for the dual benefits of Moeller football and a Catholic education. Without fail, every time he
At a minimum, if the OHSAA's current structure, recruiting bylaw and enforcement program collectively is intended to represent an effort to provide for "fair competition," the above data clearly supports that a reform effort can be justified. It does not appear possible that the OHSAA's public schools could fare any worse under a new regulatory system. Thus, public school coaches and players who compete on the field with private schools have nothing to lose by experimenting with a new regulatory scheme.

Like the OHSAA's public school members, the OHSAA's private school members also have a financial interest and other interests in an OHSAA that can effectively regulate recruiting. To preserve these interests, a private school in Ohio, particularly one with a tradition as an athletic powerhouse, probably cannot afford to win a "Brentwood Academy-type" case. Twice in a little more than a decade, public school members of the OHSAA have sponsored referendums that if successful would have separated public schools and private schools for the purpose of postseason competition. It would seem only logical that a "Brentwood Academy victory" would motivate some public school members to launch a new campaign for separation.

Second, private schools that might think that they could eliminate their approached a Catholic boy outside the framework of parish football or eighth grade orientation, someone interpreted it as cheating.

Id. Another coach may interpret the regulations to mean that while he cannot initiate a first contact with a prospective student, he can attend any middle school game and station himself in a conspicuous place so that it is easy for a prospective student to initiate contact. Still another coach may interpret the bylaw to mean that it is improper to even attend middle school games because he might be contacted by a prospect. As one can plainly see, the OHSAA's regulation of recruiting actually encourages recruiting because those who interpret the bylaw's facial prohibition on recruiting most narrowly stand to gain a great competitive advantage over those who interpret the bylaw's prohibition most broadly.

Furthermore, as courts have recognized, simply separating public high schools and private high schools in competition is not likely to remove a high school's incentive to engage in inter-community recruiting. See, e.g., Jesuit Coll. Preparatory Sch. v. Judy, 231 F. Supp. 2d 520, 534 (N.D. Tex. Jan. 22, 2002) (recognizing that the all-public high school University Interscholastic League's exclusion of private schools from the UIL "is perhaps not the best way of accomplishing the UIL's objective of reducing or eliminating [inter-community recruiting and] unfair competition."). Indeed, it seems logical that breaking the only binding associational tie between public high schools and private high schools would inevitably increase inter-community recruiting as neither side would possess any rational self-interest in refraining from attempting to raid the other side for its elite athletes.

114. Of course, if in the future a private school brings an action against the OHSAA as a means of defending itself against allegations of recruiting infractions, there will be no guarantee that the school will prevail. As in football, when the ball is kicked off in court, anything can happen. However, as the Brentwood Academy case demonstrated, the school could be sure that it will put at risk financial resources which otherwise could be used to benefit its athletic programs. See Rob Johnson, Brentwood Academy Wins Court Battle, THE TENNESSEAN, Jan. 14, 2003, at 1A. (quoting Brentwood Academy headmaster Curt Masters as stating that "[c]ertainly, if we invested the resources that have been involved on both sides here, a lot of good things could have been done with that").
headaches from what they perceive to be unjustified public school grousing and do better financially by forming a separate association and going it alone would be wise to soberly consider the obstacles to pursuing such a strategy. At least in football, private schools often have difficulty filling their schedules with regular-season games. Separation into an all-private school athletic association certainly could not be expected to improve the scheduling situation. Demographics powerfully suggest that any private school that would risk leaving the OHSAA also would risk finding itself being forced to play games within Ohio further and further from its home and more and more often against out-of-state opposition and thereby would suffer in the long run.115

Finally, private schools that do not recruit students from outside their religious or philosophical communities will avoid the “recruiting stigma” that currently attaches to all private schools as the result of the activity of a few private schools. For instance, former Cincinnati Elder athletic director Reverend Edward Rudemiller once said: “I [have] never approached athletics for athletics sake. It should be a tool, an instrument in the educational process. The question . . . is one of balance. . . . Our league works on the good will of its members. Sometimes one member has to give in for the good of the league.”116

It is likely that many if not most private schools as well as public schools take a similar approach to interscholastic athletics. By reforming the OHSAA membership’s recruiting regulations, these schools would avoid “guilt by association” with those schools that actually engage in inter-community recruiting.

2. The OHSAA Membership’s Power to Regulate In Furtherance of Its Legitimate Interests is Derived From the OHSAA’s Administrative Structure, Recruiting Bylaws, and Enforcement Program.

In order to effectively further its interests, the OHSAA membership must vest the OHSAA itself with strong and legitimate sources of power. The NCAA’s historical sources of power to regulate intercollegiate athletics demonstrate that the OHSAA membership’s ability to effectively regulate interscholastic athletic recruiting is derived from the power contained in the OHSAA’s administrative structure, recruiting bylaw, and enforcement program. In 1951, Walter Byers became the executive director of the NCAA and

115. See, e.g., Valencia v. Blue Hen Conference, 476 F. Supp. 809, 823 (D. Del. 1979) (recognizing that a public school conference did not have to admit a private parochial school to the conference simply because, without such admission, the private parochial school was having difficulty filling its football schedule with local games).

116. DRESSMAN, supra note 44, at 93.
for 36 years "Walter Byers was the NCAA." University of Miami (Florida) sports law professor Lonny Rose, who has both studied and battled with the NCAA's enforcement program, has described how the NCAA under Byers derived power from the association's structure:

Despite the representations of Walter Byers that the membership made the rules and he really had no power, there is a tremendous amount of power in the staff. There is no question that schools or conferences propose legislation but that legislation is edited by the staff, and then there are interpretations, which are made by the staff. The staff doesn't have to pass a rule if it is empowered to interpret the current rules any way they want to. . . . As with every bureaucracy, there may be policy guidelines established by the electorate, but the implementation of the policy is done by the staff and that is a very powerful duty. The power can only land in the hands of the staff. There is a very small group of people that hold it all. Walter Byers was no dummy. He knew he had the power because of the NCAA structure. He just never talked about it.117

The NCAA's enforcement program was just as important as the NCAA's administrative structure to the association's power to regulate the intercollegiate environment:

[Walter] Byers built his dynasty, friends and coworkers said, on three pillars: football on television, the basketball tournament and enforcement. While the greatest success financially was the basketball tournament, the greatest means of gathering power was with enforcement, his colleagues said.

"In 1955, Walter had this idea, and the NCAA agreed, that the president of each member institution would sign a statement saying that his institution would abide by NCAA rules and regulations," said [Arthur] Bergstrom [who was hired by Byers in 1956 as the NCAA's director of enforcement]. "That was in '55. The enforcement program was really strengthened when it became necessary for each president to sign that statement saying that his institution was in compliance. At the time I'm talking about, nobody said much about the NCAA. About the only thing they ever knew much about was at the end of the basketball season there was that little ol' NCAA basketball tournament. Otherwise, you hardly ever heard of it. Then when the NCAA began to take action against the violators, then the ears did perk up and people began to pay attention. I think it was the most important

factor in stepping up the stature of the association.”

“Walter built the power of the NCAA on enforcement,” said former PAC-10 Commissioner Wiles Hallock, another of Byers’s one-time employees. “Before the NCAA was involved in an enforcement program, it didn’t have any power. It was a scheduling organization. They conducted a few championships. But as far as . . . power was concerned, it wasn’t there until Walter started working enforcement.”

When he started, he started big. Byers’s first case was the point-shaving scandal at the University of Kentucky. He personally investigated the case that eventually led to the NCAA’s first sanction—a one-year ban on Wildcat basketball.

“That’s where the NCAA made its mark,” Wayne Duke [then-Commissioner of the Big Ten Conference] said. “With Walter Byers principally behind the effort, they suspended the University of Kentucky basketball team for a full year. I think the Kentucky action just indelibly stamped on the public that the NCAA meant business. It was the first thing out of the box, so to speak, and it gave the NCAA clout.”

As at the intercollegiate level, the OHSAA membership’s ability to effectively regulate interscholastic athletic recruiting is derived from the power contained in the OHSAA’s administrative structure, recruiting bylaw, and enforcement program. However, the NCAA’s balance of power within these sources is inappropriate for the OHSAA as the NCAA is not a “state actor” and the OHSAA, like the TSSAA, bears that status. Thus, the OHSAA membership needs to strike a new balance of power between the OHSAA’s administrative structure and its recruiting bylaw and enforcement program.

3. The OHSAA Membership Can Effectively Regulate Recruiting Only By Re-Balancing the OHSAA’s Power To Effectively Manage the Socio-Economic Costs of Recruiting Allegations.

The OHSAA membership can further its self-interest in effectively and efficiently managing the socio-economic costs of alleged recruiting infractions only by re-balancing power between the OHSAA’s structure and the

118. Id. at 13.

119. See Zajd v. Big Walnut Local Sch. Dist. Bd. of Educ., No. C2-01-CV-880, slip op. at 7 (S.D. Ohio Sept., 2001) (recognizing while the OHSAA’s state actor status has yet to be conclusively resolved, “given some of the responsibilities that [the] OHSAA discharges (e.g. regulating interscholastic athletics in the State’s public school system) there does appear to be at least significant entwinement” which would support a finding that the OHSAA is a state actor) (on file with author).
OHSAA's recruiting bylaw and enforcement program. By re-balancing the OHSAA's power between these sources of power, the membership also may be able to eliminate its "state actor" status and shift the vast majority of the socio-economic costs of recruiting allegations back to the accused school.

The OHSAA membership can most efficiently manage the socio-economic costs associated with recruiting allegations under an administrative framework that permits the OHSAA to budget those costs up front. The OHSAA's audited financial statements for the years 2000 and 2001 indicate that the OHSAA generated more than $15 million per year in revenue, primarily from the gate receipts of its post-season tournaments. The OHSAA had a combined positive cash flow of more than $1 million for those years. Thus, while reform will have some up-front cost, the OHSAA clearly has the financial capacity to absorb and manage the costs.

Moreover, the OHSAA typically conducts about three investigations and less than one enforcement action per year relating to recruiting allegations. It is extremely unlikely that more investigations and enforcement actions would be generated by regulatory reform. Brentwood Academy incurred more than $500,000 in legal expenses just to bring its action and summarily prevail for the first time at the trial court level. By identifying the legal professional best-qualified to fill the investigative function in recruiting cases through a competitive bidding process, the OHSAA membership likely could implement regulatory reform that would budget perhaps as little as one-tenth that figure to handle the OHSAA's typical annual enforcement burden. Thus, by implementing regulatory reform, the OHSAA membership could obtain 10 years of effective recruiting regulation for the same price that it could pay to ineffectively regulate recruiting in a single "Brentwood Academy-type" case.

In addition, by re-balancing the OHSAA's power, the OHSAA membership can reduce the OHSAA's "entwinement" with public institutions and public officials and stand a great chance to eliminate the OHSAA's "state actor" status under Brentwood Academy. As one commentator has already observed:

Given the very slim majority that found state action in Brentwood, the way that the decision rides against a strong contrary tide, and the

121. Id.
122. See Michael D. Clark, Moeller Object of Recruiting Inquiry, CINCINNATI ENQUIRER, Jan. 8, 2002, at A1 (reporting that OHSAA estimated that it conducts "about three on-site investigations of possible rules violations per year").
prospect of a substantial change in the composition of the Court under the current conservative administration, it is worth pondering *Brentwood Academy*'s scope and durability even with regard to high school athletic associations.\textsuperscript{123}

The Supreme Court's reasoning in *Brentwood Academy* that a state high school athletic association such as the OHSAA is a "state actor" is based on an intuitive, \textit{ad hoc} doctrine grounded on a "vague notion of entwinement."\textsuperscript{124} The Court's decision is conspicuously not based on prior conceptions of the state action doctrine and creates a balancing test that allows for "the possibility that even if the facts point to state action, countervailing considerations might nevertheless lead the Court not to find state action in the particular case."\textsuperscript{125} Factually, the public school members of the OHSAA are not involved in the OHSAA by virtue of any legislative mandate from the State of Ohio nor do the individual members represent the state or set state policy.\textsuperscript{126} If the OHSAA membership reduces the "entwinement" of the OHSAA Board of Control with its public school members and provides its private school members with a fair, proportional share of the policy-making power in the adoption, interpretation, and enforcement of its bylaws, then in any future lawsuit the OHSAA membership's interest in maintaining an effective OHSAA should justify a court holding that the OHSAA is not a state actor under *Brentwood Academy*. As a result, a school that seeks to defend itself against OHSAA sanctions will not have a cause of action to vindicate a constitutional right and the OHSAA membership will return the vast majority of the economic cost of recruiting allegations to the accused school.

IV. THE BASIC DEFICIENCIES IN THE OHSAA'S CURRENT ADMINISTRATIVE STRUCTURE, RECRUITING BYLAW, AND ENFORCEMENT PROGRAM.

Currently, the OHSAA membership's regulatory scheme places too much power in its administrative structure and, in the aftermath of *Brentwood Academy*, not enough power in the recruiting bylaw and enforcement program. In order to reclaim power over the regulation of the interscholastic athletic environment from the courts, the OHSAA membership must reform these defi-


\textsuperscript{124} \textit{Id.} at 391-92.

\textsuperscript{125} \textit{Id.} at 392.

\textsuperscript{126} Accord \textit{Id.} at 391. Only 14 state high school athletic associations operate under the authority of their state legislatures. \textit{Id.} at 394.
A GAME PLAN TO CONSERVE...

ciencies.

A. Structural Deficiency: Public School "Tyranny of the Majority"

The biggest structural deficiency in the OHSAA membership's regulation of interscholastic athletic recruiting is the gross disparity of administrative policy-making power between the association's public school members and its private school members. Within the OHSAA, the public school members hold all but a scintilla of the power.

1. The Danger of the "Tyranny of the Majority."

In the first half of the nineteenth century, a political observer marveled at the United States citizenry's propensity to join together in voluntary associations for the purpose of "pursuing in common the object of their common desires." That observer, Alexis de Tocqueville, also postulated that:

Among the laws that rule human societies there is one which seems to be more precise and clear than all the others. If men are to remain civilized or to become so, the art of associating together must grow and improve in the same ratio in which the equality of conditions is increased.

According to de Tocqueville, "[f]eelings and opinions are recruited, the heart is enlarged, and the human mind is developed only by the reciprocal influence of men upon one another." As de Tocqueville observed more than a century and a half ago, an administrative structure that does not permit "reciprocal influence" or foster the "art of associating together" is burdened with danger for the majority and with a tendency to drive the minority from the association:

Unlimited power is in itself a bad and dangerous thing. Human beings


128. Id. at 110.

129. Id. at 108-09
are not competent to exercise it with discretion. . . . There is no power on earth so worthy of honor in itself or clothed with rights so sacred that I would admit its uncontrolled and all-predominant authority. When I see that the right and the means of absolute command are conferred on any power whatever, be it called a people or a king, an aristocracy or a democracy, a monarchy or a republic, I say there is a germ of tyranny, and I seek to live elsewhere, under other laws.  

It must be difficult to be the OHSAA Commissioner or a member of the OHSAA Board of Control. These OHSAA officials are "not out to zap schools or get schools." Indeed, it would be hard to contend that these officials do not sincerely have the best interest of the students at heart and desperately wish to conserve the educational and community values of the interscholastic environment for the benefit of those students. However, in the absence of the constitutional protection provided under the Brentwood Academy case, there is no "sure barrier" against the OHSAA’s public school majority targeting a private school. Under the current OHSAA administrative structure, the public school majority has virtually unlimited power at the administrative policy-making level. As de Toqueville observed, such unlimited power is inherently dangerous and encourages the private school minority to seek protection in other forums, specifically the federal and state courts.

2. The Current OHSAA Electoral System Deprives Private Schools from Competing for Seats On the Board of Control.

During the 2002-2003 school year the OHSAA was comprised of 824 member high schools. Approximately, 14.2 percent (117 schools) of the OHSAA was comprised of private schools whose communities are defined by religious or academic philosophies rather than geography. However, the OHSAA’s administrative structure is based solely on geography and the number of students enrolled at a particular member high school.

130. DE TOCQUEVILLE, VOLUME I, supra note 4, at 260.

131. Cf. Rob Johnson, TSSAA Anti-recruiting Effort Told, THE TENNESSEAN, Jan. 1, 2003, at B1 (quoting TSSAA Executive Director Ronnie Carter as stating, "We are not out to zap schools or get schools.").


I do not say there is frequent use of tyranny in America at the present day; but I maintain that there is no sure barrier against it, and that the causes which mitigate the government there are to be found in the circumstances and manners of the country more than its laws.

Id.

133. See MEMBER SCHOOL DIRECTORY, supra note 68. In addition to member high schools, more than 800 schools are members of the OHSAA’s seventh- and eighth-grade division. OHSAA HANDBOOK, supra note 9.
Under its bylaws, the OHSAA divides Ohio into six geographic districts: Central, East, Northeast, Northwest, Southeast, and Southwest. The number of schools in each district varies from a low of 55 schools in the East District to a high of 248 schools in the Northeast District. The OHSAA divides the schools within each district into three classes based on enrollment: Class "AAA," Class "AA," and Class "A."

Within the OHSAA, "[t]he Board of Control directs the Commissioner and establishes policy for the efficient operation of the Association" and has the legislative power to "make regulations to promote the purpose of the Association." The voting members of the Board of Control consist of one representative from each district's athletic board and an at-large representative of all seventh and eighth-grade member schools. Each of the three classifications must be represented by two members on the Board of Control. The members of the Board of Control are elected by a vote of the school principals in the district to be represented. The six-member district athletic boards are charged with "assist[ing] the Board of Control and the Commissioner in promoting the purposes of the Association, in organizing and conducting interscholastic athletic tournaments, and other duties as directed by them." Each representative serves a six-year term and terms are staggered. Each of the three classifications of schools must be represented by two members on each district athletic board. The members of each district athletic board are elected by a vote of the principals of member high schools of their classification within their district.

Balanced classification representation on the Board of Control is assured by a rotating schedule which dictates that in a given year, a particular geographic district must be represented by a member from a certain classification.

134. OHSAA HANDBOOK, supra note 9, at 27 (art. 5-8-1).
135. MEMBER SCHOOL DIRECTORY, supra note 68.
136. OHSAA HANDBOOK, supra note 9, at 33 (Bylaw 2-1-1, 2-1-2).
137. OHSAA HANDBOOK, supra note 9, at 25 (art. 5-1-1, 5-7-1). It is the duty of the Commissioner to "decide all questions and interpretations of the Constitution, Bylaws, and Regulations" and to "impose and enforce penalties" for the violations thereof. Id. at 27 (art. 6-1-2).
138. Id. at 25 (art. 5-2-1).
139. Id. at 25 (art. 5-3-1).
140. Id. at 26 (art. 5-5-1).
141. Id. at 30 (art. 7-7-1).
142. OHSAA HANDBOOK, supra note 9, at 28 (art. 7-1-1).
143. Id.
144. Id. at 29 (art. 7-4-2). For example, all principals of Class "AAA" high schools in the Southeast District vote for two Class "AAA" representatives on the Southeast District Athletic Board. All principals of Class "AA" high schools vote for two Class "AA" representatives, and all principals of Class "A" high schools vote for two Class "A" representatives.
For example, during the 2002-2003 school year, the OHSAA constitution required that Class "AAA" representatives come from the Southeast and Southwest Districts, Class "AA" representatives come from the Central and East Districts, and Class "A" representatives from the Northeast and Northwest Districts.\footnote{Id. at 25 (art. 5-3-1).}

It is indisputable that as a direct result of this election system, all but a scintilla of the policy-making authority of the OHSAA is controlled in perpetuity by its public school members and private school members are fenced out of the policy-making function. During the 2001-2002 and 2002-2003 school years, every voting member of the Board of Control was an administrator in a public school system.\footnote{OHSAA HANDBOOK, supra note9, at 5-8.} In addition, only two of the thirty-six members of the six district athletic boards came from a private school system.\footnote{Id. at 13.} In the Southwest District, where private schools comprised more than one-sixth of all the schools in the district, all six members of the district athletic board were affiliated with public schools.\footnote{See id. at 25 (art. 5-3-1).}

Moreover, because the OHSAA electoral process does not distinguish between public schools and private schools and because approximately 63 percent of the latter schools are located in the Northeast District and the Southwest District, the OHSAA electoral process effectively reserves seats on the Board of Control to representatives affiliated with public schools.\footnote{See id. See also MEMBER SCHOOL DIRECTORY, supra note 68.} Simultaneously, the process deprives private schools from competing for seats on the Board of Control. For example, since no Class "AAA" private schools exist in the Southeast District and the OHSAA 2002-2003 rotating Board of Control schedule mandates that the Board of Control representative of the Southeast District come from a Class "AAA" school, the OHSAA electoral process reserves a seat on the Board of Control to a representative affiliated with a public school.\footnote{See id. at 25 (art. 5-3-1).} Likewise, since the schedule mandates that the Board of Control representative of the East District come from a Class "AA" school and no private Class "AA" schools are located in the East District, the schedule reserves a second seat on the Board of Control to a representative affiliated with a public school. Since the only private schools in the Southeast District and the East District are "Class A" schools and the OHSAA rotating Board of Control schedule never provides for those districts to be simultaneously represented by

\begin{itemize}
  \item[145.] Id.
  \item[146.] Id. at 25 (art. 5-3-1).
  \item[147.] OHSAA HANDBOOK, supra note9, at 5-8.
  \item[148.] Id. at 13.
  \item[149.] Id.
  \item[150.] See id. at 25 (art. 5-3-1).
  \item[151.] See id. See also MEMBER SCHOOL DIRECTORY, supra note 68.
\end{itemize}
persons from Class "A" schools, the process reserves in perpetuity at least one seat on the Board of Control to a representative affiliated with a public school.\footnote{152}

From time-to-time, the OHSAA electoral process virtually guarantees the public school members a voting majority on the Board of Control. For example, during the 2003-2004 school year, the rotating schedule requires that the Southeast District and Central District representatives come from Class "AAA" schools and the Northwest District and East District representatives come from a Class "AA" schools.\footnote{153} In all of these districts combined, there is only one private school (a Class "AAA" school in the Central District) that could potentially supply a representative. Thus, prior to the casting of a single ballot, one could be nearly 100 percent certain that public school members of the OHSAA would hold a controlling majority on the Board of Control during the 2003-2004 school year.

3. The OHSAA Electoral Process Violates the Principle of "One-Person, One-Vote" Required By the Equal Protection Clause.

It is one of the most basic tenets of our republic that the state may not value one person's vote over that of another.\footnote{154} As a result, local government apportionment (including a local board of education apportionment) is subject to the "one-person, one vote" rule.\footnote{155} As the United States Supreme Court has observed, "[t]he personal right to vote is a value in itself, and a citizen is . . . shortchanged if he may vote for only one representative and the voters in another district half the size also elect one representative."\footnote{156}

The OHSAA process for electing members of the Board of Control clearly violates the "one-person, one-vote" rule by disproportionately favoring members in the OHSAA's smallest districts, the East and Southeast Districts (where only 5.5 percent of the private schools are located), over members of its largest districts, the Northeast and Southwest Districts (where more than 60

\begin{footnotes}
\footnote{152} OHSAA HANDBOOK, supra note 9, at 25.
\footnote{153} See id.
\footnote{154} Bush v. Gore, 531 U.S. 98, 105 (2000) ("It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'") (quoting Reynolds v. Sims, 377 U.S. 533, 555, (1964)).
\footnote{156} Bd. of Estimate, 489 U.S. at 698.
\end{footnotes}
percent of the private schools are located). Disproportionality is calculated by comparing the actual ratios of schools to representatives to an ideal ratio, i.e., that which would exist if each school had equal voting weight. The ideal ratio for the OHSAA Board of Control elections would be 117 schools for every one representative. However, the actual ratio of schools-to-representatives in the districts are as follows:

- East District: 55 schools to 1 representative
- Southeast District: 71 schools to 1 representative
- Central District: 103 schools to 1 representative
- Northwest District: 166 schools to 1 representative
- Southwest District: 181 schools to 1 representative
- Northeast District: 248 schools to 1 representative

Based on these ratios, the maximum percentage of deviation inherent in the OHSAA process for electing members of the Board of Control is 165 percent and the average percentage of deviation is 52 percent. Such a high deviation from the "one-person, one-vote" rule clearly violates the Equal Protection Clause. As the U.S. Supreme Court has observed:

To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character be-

157. See id. at 692-693.
159. The ideal ratio is calculated by dividing the total number of high schools in the OHSAA (824 schools) by the number of seats on the Board of Control (7). See Cunningham, 751 F. Supp. at 894.
160. See MEMBER SCHOOL DIRECTORY, supra note 68.
161. The maximum percentage deviation for each district is calculated by subtracting the actual ratio of schools-to-representatives from the ideal ratio and then dividing the difference by the ideal ratio. The maximum percentage deviation for the OHSAA Board of Control electoral process is determined by adding the absolute values of the percentage deviations of the most over-represented district and the most underrepresented district. See Cunningham, 751 F. Supp. at 894-95. In this case, the most over-represented district (East District) has a percentage deviation of 53 percent and the most underrepresented district (Northeast District) has a percentage deviation of negative 112 percent. The average percentage deviation is calculated by adding the absolute value of the percentage of deviation for each district and dividing by six (the number of district seats on the Board of Control).
162. See, e.g., Bd. of Estimate, 489 U.S. at 702 ("We note that no case of ours has indicated that a deviation of some 78% could ever be justified.").
comes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen’s vote cannot be made to depend on where he lives.163

The violation of the “one-person, one-vote rule” in the OHSAA’s electoral process is not the only deficiency present in the electoral process. As the Supreme Court has observed:

There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.164

One such factor is that identifiable political groups not be “fenced out of the political process and their voting strength invidiously minimized.”165 Unfortunately, the OHSAA electoral process also runs afoul of this factor. To a great extent, the OHSAA districts with the lowest school-to-representative ratios (i.e., the most “over-represented” districts) also have the highest public school-to-private school ratios, which are as follows:

Southeast District: 97% public schools (69 public schools to 2 private schools)

East District: 91% public schools (50 public schools to 5 private schools)

Northwest District: 89% public schools (166 public schools to 19 private schools)

Northeast District: 84% public schools (248 public schools to 40 private schools)

Central District: 82% public schools (103 public schools to 19 private schools)

Southwest District: 82% public schools (181 public schools to 32 private schools)166

165. See id. at 754.
166. MEMBER SCHOOL DIRECTORY, supra note 68.
B. Deficiencies In The OHSAA's Recruiting Bylaw And Enforcement Program.

In the absence of reform, the OHSAA membership will learn what the NCAA membership learned in the 1970s and 1980s: "when you combine bad and unenforceable rules with bad and unfair enforcement, you're guaranteed bad results."167

The OHSAA's recruiting bylaw expressly states that "[a]ny attempt to recruit a student for athletic purposes shall be strictly prohibited."168 Like approximately 40 other states,169 the OHSAA defines "recruiting" by focusing on the reactions of prospective students rather than on the actions of those engaged in the recruiting activity: "For purposes of this Bylaw Section 9, the term 'recruit' shall mean the use of influence by any person connected or not connected with the school to secure the transfer of a prospective student."170

The OHSAA's bylaw does not compel the creation of any objective evidence that would indicate when a source of influence, such as a coach or other school supporter, exerts improper influence upon a prospective student. Indeed, the OHSAA's bylaw does not contain any definition of "influence."171 In the first instance, what constitutes improper "influence" is based solely on the discretion and judgment of the OHSAA's Commissioner and subsequently on the discretion and judgment of the Board of Control.172 Such persons do not have any training or experience in complex constitutional law principles such as due process and freedom of speech that will arise in virtually every case of alleged recruiting. In addition, the Commissioner and Assistant Commissioners who are authorized to investigate recruiting allegations also do not bring this important training and experience to the OHSAA's investigative role.

The United States Supreme Court has identified an unconstitutionally vague law as a law that "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, 167. YAEGER, supra at 44, at 127.

168. OHSAA HANDBOOK, supra note 9, at 40 (Bylaw 4-9-1).

169. See David Dulabon, First (Amendment) & Goal: High School Recruiting and the State Actor Theory, 2 VAND. J. ENT. L. & PRAC. 219, 232 (2000) ("While the language of the [recruiting] bylaws is tailored to fit the TSSAA's particular needs, approximately 40 states have established similar recruiting rules to deal specifically with the overreaching associated with illicit recruiting.").

170. OHSAA Handbook, supra note 9, at 40 (Bylaw 4-9-2).


172. Id. See also OHSAA HANDBOOK, supra note 9, at 47 (Bylaw 12-1-1. "Penalties for violation of the OHSAA Constitution, Bylaws and Regulations shall be imposed by the Commissioner in accordance with the OHSAA Constitution, Bylaws, [and] Regulations. The Commissioner's decision may be appealed to the Board of Control, whose decision shall be final.").
with the attendant dangers of arbitrary and discriminatory application."\(^\text{173}\) The OHSAA "anti-influence" recruiting bylaw and the OHSAA's exclusive reliance on legally untrained and inexperienced investigators and decision-makers fits this description perfectly. As a predictable result of this flawed regulatory scheme, the courts have criticized the OHSAA for the "lack of uniformity in [the] enforcement of its own rules" and have not hesitated to set aside the OHSAA's attempts to enforce its bylaws.\(^\text{174}\) As a result of the Supreme Court's decision in *Brentwood Academy* that shifted the socio-economic costs of recruiting allegations from the accused school to the OHSAA membership, the vagueness in the OHSAA recruiting bylaw that will arise whenever the OHSAA attempts to apply the bylaw has essentially eroded any potential effectiveness that arguably ever existed in the bylaw.

V. HOW THE OHSAA MEMBERSHIP CAN REFORM THE OHSAA AND ITS REGULATORY SYSTEM TO MANAGE THE SOCIO-ECONOMIC COSTS OF ALLEGED RECRUITING AND TO CONSERVE THE INTERSCHOLASTIC ATHLETIC ENVIRONMENT'S EDUCATIONAL AND COMMUNITY VALUES.

For more than 50 years, the NCAA has been confronted with similar challenges to providing effective regulation of the intercollegiate athletic environment. The NCAA membership's history of reform efforts is instructive for the OHSAA membership.

A. The OHSAA Membership Can Learn From The Lessons Of The NCAA Membership's History Of Reform Efforts.

"The NCAA itself is the result of a reform movement," current NCAA President Myles Brand said in April of 2003.\(^\text{175}\) The NCAA arose out of an administrative crisis—the death of Harold "Blue" Moore of Union College as the result of an injury suffered in an intercollegiate football game with New York University in 1905. Thereafter, on December 4, 1905, President Theodore Roosevelt brought two Harvard representatives to the White House to underscore his interest in the reform of the excessively violent aspects of college football. However, the Intercollegiate Football Rules Committee—


formed in 1894 by Harvard, Princeton, Pennsylvania, and Yale—met three days later and snubbed President Roosevelt, reneging on its promise to clean up the violent game. Subsequently, NYU Chancellor Henry McCracken expressed outrage over "the lack of commitment by the large schools to cleaning up college football" and organized a meeting that was attended by representatives of 62 colleges. The meeting resulted in the creation of the Intercollegiate Athletic Association of the United States ("IAAUS"): 

No one knew it then, but that group had formed what seven years later would become the National Collegiate Athletic Association, today the most powerful sports governing body in the nation. On January 12, 1906, the rules committee of the new association met with the Intercollegiate Football Rules Committee and together the two groups drafted new rules for the next fall's season. The forward pass was adopted, loose balls could no longer be kicked, hurdling—the act of literally flinging a small back over the line of scrimmage—was eliminated, a one-yard neutral zone between the offensive and defensive lines was established, the length of the game was cut from 70 to 60 minutes, first-down yardage was increased from 5 to 10 yards, in the hope that more teams would spread the field and run wide rather than diving haphazardly into the line, and, most importantly, the committee required that at least 6 of the 11 offensive players be on the line of scrimmage, ending dangerous "mass momentum plays."

In one afternoon's work, the group rewrote the rules so substantially that, in 1906, the game was, according to observers, both safer and more exciting. "I must say that football has been greatly improved this year," admitted Harvard's President [Charles] Eliot after the season ended. "It has less injuries and is much more openly played."

The success all but guaranteed the future role of the IAAUS—and later the NCAA—as the rule-making authority for college football.176

The NCAA was so successful in reforming college football that by the late 1940s, its member schools had begun to engage in regional and even national recruiting of prospective students to strengthen their football teams. In the late-1940s and early 1950s, some of the most powerful college football’s most powerful people spoke out against the erosion of the community-based nature of intercollegiate athletics:

In 1948, University of Missouri athletic director and head football coach Don Faurot complained bitterly about the recruitment of Mis-

176. YAEGER, supra note 44, at 5-6.
souri high-schoolers. He asked the NCAA to stop out-of-state schools—Arkansas, Kentucky, Tulane, Mississippi State, Alabama, and Kansas among them—from offering aid to "his" Missouri boys. Citing expense-paid trips to out-of-state campuses (perfectly legal today) and player tryouts as examples of unethical practices, he threatened to bolt the NCAA so that Missouri could meet the competition.

Partially in response to the Missouri allegations, Coach Paul "Bear" Bryant of the University of Kentucky decided in 1951 to phase out the recruitment of nonstate athletes. Out-of-state football scholarships would be limited to five and would ultimately be eliminated altogether. The growing desire to restrain national recruiting was evident in a 1956 *Sports Illustrated* survey of college administrators and football coaches. One of the nine "survival" recommendations designed to head off the college football crisis addressed the problem: "A fixed percentage of athletic scholarships—we suggest 75%—should be reserved only for boys in the conference territory of the college or university and its environ."177

However, the numerous pleas went unheeded. In 1952, the NCAA established new national standards that legalized and formalized scholarships on the basis of athletic ability and permitted any institution to recruit and subsidize students from any area of the country.178 Only the visionary leaders of the Ivy League declined to follow the crowd and recognized that the NCAA's new path was incompatible with maintaining athletics in a position subordinate to the total educational program.179 The Ivy League's choice to take the path less-traveled with respect to the role of intercollegiate athletics as part of the total educational program and the educational value that the choice offers today to the OHSAA membership was eloquently put into perspective in a quote from writer George Plimpton in *The Recruiting Game: Toward A New System Of Intercollegiate Sports*:

The storied rivalries that started during the 1870s; . . . the towering names (Heffelfinger, Kelley, and Booth of Yale, Brickley and Mahan of Harvard, Warner of Cornell, Poe of Princeton, Oberlander of Dartmouth, Luckman and Montgomery of Columbia. . . ); the eyepopping legends (Coach Percy Haughton was supposed to have throttled a bull dog to death to pep up his Harvard team before the 1908 Yale game); the huge, frenzied crowds of the '20s; the great marching songs; those

178. *Id.* at 22.
179. *Id.* at 173-75.
literary heroes Dink Stover and Frank Merriwell of Yale; a whole flapper generation that identified with Eastern football; the coonskin coat and the flask and all the attendant rituals and ceremonials of those New England autumn afternoons. Now all of this brilliant history and panoply was being shunted toward an obscure and shameful end, with the quality of the football withering to such a degree that surely the teams, in the vast empty places of their past glory, would play surreal contests as informal and ignored as pickup games in the corner of a municipal park.

But now, because nothing like that happened, many observers believe that the Ivy League’s adoption of a more balanced concept of football may be as important to the progress of the game, and perhaps of its future elsewhere, as what the colleges provided at its genesis. 180

Historically, the media has characterized the Ivy League’s decision as one that “de-emphasized” athletics, but such a characterization is patently inaccurate and misleading. Rather, the Ivy League leaders simply refused to de-emphasize the educational and community values of the intercollegiate athletic environment in comparison to its competitive and economic values. In response to Sports Illustrated’s 1956 survey of college presidents, administrators, and football coaches, Princeton University President Harold Dodds explained:

I have emphasized my belief in football and athletics in general as a “positive adjunct” to liberal education. I say this because experience shows that activities supplementing the educational process are essential to the development of the man who can take responsibility and acquit himself with honor on any stage of life; one who can and will work with and lead others. These are definite qualities that we strive to cultivate in our Princeton product, whether he is concerned with debating or music or playing guard or fullback.

Football is deeply rooted in our traditions and, in fact, has been in our educational blood stream ever since Rutgers and Princeton launched the sport on an intercollegiate basis in 1869. My predecessors and I


Sponsoring conference championships in 33 men’s and women’s sports, and averaging more than 35 varsity teams at each school, the Ivy League provides intercollegiate athletic opportunities for more men and women than any other conference in the country. All eight Ivy schools are among the “top 20” of NCAA Division I schools in numbers of sports offered for both men and women.

Id.
have found that participation and leadership in athletics have their own educational values for both participant and spectator undergraduates. I might add that football not only offers desirable competition, development and recreation for players but also provides a healthy focus for collegiate loyalties and public support. Incidentally, I myself hardly ever miss a game.

The “present state of intercollegiate football” will be bettered just as soon as all educators sense the importance of eliminating what might be called “duality in administration” or “double talk”—meaning one set of standards for education and another for the conduct of intercollegiate athletics.181

Predictably, those NCAA members that failed to eliminate this “double standard” clashed with the NCAA. In the mid-1970s, the NCAA’s members raised complaints of perceived NCAA abuses in the context of these enforcement clashes.182 As in Brentwood Academy, a member’s dissatisfaction with its own association landed everyone before the Supreme Court in National Collegiate Athletic Ass’n v. Tarkanian for a determination of whether or not the NCAA constituted a “state actor.”183 However, unlike the TSSAA in Brentwood Academy, the NCAA prevailed in Tarkanian and the Supreme Court held that the NCAA was not a “state actor.”184

In response to the Court’s decision, individual NCAA members moved to reform how they managed allegations of recruiting violations and other NCAA rules. “In the nearly 40 years of NCAA enforcement [that proceeded Tar- kanian], no one can remember a school that appeared before the infractions committee that was not found guilty of at least one rules violation.”185 Based on that data, the individual NCAA member prudently came to understand that, as a result of its loss in Tarkanian, once the NCAA alleged that a school had committed an infraction, the game was over. The individual member understood that once the allegation was made, the school could be 100 percent cer-

182. See Smith, supra note 47, at 993-94.
184. Id. at 182.
185. YAEGER, supra note 44, at 242.
tain that the NCAA would find it guilty of an infraction. In response, the individual member began to establish "compliance" programs in an effort to prevent the NCAA from ever alleging an infraction. In other words, the individual NCAA member took steps to efficiently manage the costs of allegations of rules infractions that the Supreme Court allocated in Tarkanian to the accused school, not the innocent NCAA membership.

The NCAA membership's compliance reform efforts gradually began to show results. Between 1997 and 2001, "only eight NCAA Division I-A football [programs were found] guilty of major violations of NCAA rules—the fewest in any five-year period since the NCAA started punishing schools in 1954."\(^{186}\) Generally, since the NCAA membership began employing compliance personnel, the average number of major infractions cases involving Division IA football and Division I basketball programs has decreased:

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In the cases where an association's compliance mechanisms broke down, however, the consequences were grave for the association. For example, the Southwest Conference ("SWC") membership's inability to comply with NCAA rules severely damaged the SWC membership's community spirit and contributed mightily to the demise of the once-proud league:

Grant Teaff remembers the meetings.

It was the late 1980s, and the Southwest Conference was dying from within, eaten away by its own cheating members.

In the span of 10 years, the National Collegiate Athletic Association had charged six Southwest Conference schools with a total of nine major violations for misconduct in their football programs. But the conference remained one, and the annual conference coaches' meetings proceeded as scheduled each year.

"We would sit around and glare at one another," said Teaff, head football coach at Baylor University from 1972 to '92. "We knew who the cheaters were. And they knew you knew, too. It wasn't a lot of fun and fellowship, let me tell you."


187. Id.
In 1996, the Southwest Conference died, a victim of its own vices and diminished talent level.188

The NCAA membership’s history of reform efforts offers several lessons to the OHSAA membership. The NCAA membership has demonstrated that an overemphasis on the competitive value of athletics is detrimental to the educational and community values of athletics. In addition, the demise of the Southwest Conference demonstrates that an association that fails to manage the socio-economic costs of alleged rules infractions is doomed.

Most importantly, the individual NCAA member has demonstrated the benefits that accrue from efficiently managing the socio-economic costs of alleged recruiting and other rules infractions. Because Brentwood Academy is the “flip-side” to Tarkanian on the “state action coin,” the OHSAA membership (the loser on the state action issue in Brentwood Academy) will benefit from reforming the OHSAA’s regulatory system just as the individual NCAA member (the loser on the state action issue in Tarkanian) benefitted from reforming its athletic department’s regulatory system. The OHSAA membership should follow the lead of the NCAA individual member and reform the OHSAA regulatory system in an effort to prevent an accused school from ever successfully alleging a violation of its constitutional rights. In other words, the OHSAA membership should take steps to efficiently manage the costs of alleging recruiting infractions that the Supreme Court allocated in Brentwood Academy to the OHSAA membership, not the accused OHSAA member school.

Finally, the NCAA membership has demonstrated that if the reform necessary to conserve the educational and community values of the interscholastic athletic environment is to be achieved, such reform will only be achieved by a concerted grassroots effort of board of education members, school district superintendents, high school principals, athletic administrators, coaches, parents, students, and concerned outsiders.189 At the intercollegiate level, most major


189. Notwithstanding that the OHSAA Board of Control, Commissioner, and staff likely would be understandably cautious toward leading reform efforts that might transfer any portion of their power to anyone else (including the administrators and coaches at the member schools), the OHSAA membership likely still will be best served by good-faith pursuit of reform within the OHSAA itself rather than by the pursuit of reform in the courts, the general assembly, or a new association. The reforms suggested herein recognize that reforming the OHSAA structure and bylaws is the best vehicle for reform as this article’s suggestions are “Burkean” reforms:

The Burkean tends to look for institutional resistances and institutional possibilities. He thinks institutions are hard enough to build—and to control—without starting new ones prematurely. . . . The favorite tactic of the Burkeans is to create new checks and balances in old institutions.

See NOVAK, supra note 1, at 323-34.
reform has not been proactively spearheaded by the NCAA's governing boards and councils, chief executive officers, or staff. Indeed, the original governing association of college football, the Intercollegiate Rules Committee, rebuffed the calls from President Theodore Roosevelt for reform of the rules of college football and allowed itself to perish rather than take steps to prevent intercollegiate football players from literally being killed by the game. As chilling as this lesson is, it is also simultaneously instructive.

An interscholastic grassroots effort to conserve the educational and community values of the interscholastic athletic environment cannot flourish high school by high school. Successful conservation will be assured only when high school principals, athletic administrators, teachers, students, parents, and particularly coaches come together to collectively meet the challenge that inter-community recruiting and technological advancement present to the environment.190 As NCAA President Myles Brand observed, "Reform is hard to do, and the more good people you have working on the problems, the more likely you are to succeed."191

The OHSAA is familiar with mobilizing a special committee to address an issue of great importance to the membership. For instance, in July of 2002, the OHSAA adopted internal financial reforms recommended by a specially

The most successful external reformers at the NCAA level also have recognized that working within the existing association is the most effective way to achieve reform. The words of Hodding Carter, the President of the Knight Foundation, are instructive:

"[I am] not willing to draw the conclusion that the NCAA can't accomplish its mission,' [Carter] said. 'When you have a vehicle, you don't just park it on the side of the road and go try to find another one. The NCAA is the one place and the most logical place to make the reform effort.'"

See Brown, supra note 175.

Likewise, there is no reason to think that the OHSAA Board of Control, Commissioner, and staff cannot accomplish the OHSAA membership's mission and conserve the educational and community values of the interscholastic athletic environment.


In a provocative article criticizing the NCAA's enforcement process, Professor Burton Brody argued that the NCAA operated under the "association syndrome," which was defined as "the ability of a group [the NCAA] to hold values ... no single member of the group has or, at least, would admit to having... Under the 'association syndrome,' the sum is not greater than the parts; it is different from any of the parts." It seems that just as the NCAA membership might use the "association syndrome" in a pernicious way to promote collectively values that no individual institution would admit to holding, it can also ... use the same syndrome to promote collectively values, such as academic integrity in their athletic programs, that could not be promoted as a political matter in individual cases on their campuses, where the pressure of powerful alumni, boosters, legislators and trustees is intense and where such powerful individuals occasionally use their positions to coerce or cajole "wayward" presidents.

Id. (citing Burton Brody, NCAA Rules and Their Enforcement: Not Spare the Rod and Spoil the Child—Rather Switch the Values and Spare the Sport, 1982 Ariz. St. L.J. 109, 110 n.5).

appointed Independent Study Committee.\textsuperscript{192} The time is now for the OHSAA membership to consider reforming its structure, recruiting bylaw, and enforcement program. This article suggests several reforms for consideration. This is by no means an exhaustive list. Undoubtedly, alternative reforms may also be desirable. However, every reform suggested herein is calculated to conserve the educational and community values of the interscholastic athletic environment and thereby restore the OHSAA as the sole regulator of the environment and maximize the likelihood that the OHSAA will continue to play that role into the indefinite future.

**B. How The OHSAA Membership Can Reform The OHSAA’s Administrative Structure, Recruiting Bylaw, And Enforcement Program.**

The key to effectively regulating the interscholastic athletic environment is to promote a regulatory system under which: (a) expectations of a community high school’s coaches and supporters are clear; (b) compliance with those expectations is easy; and (c) the consequences of a failure to comply with those expectations is clear. Such a regulatory system will promote a balance between an OHSAA member’s competing interests in conserving the educational and community values of the interscholastic athletic environment and in exploiting that environment to realize competitive benefits. The principals, athletic administrators, and especially coaches at the OHSAA member schools are the persons in the best position to determine the proper balance. Thus, rather than attempt to strike the proper balance in lengthy pages of regulations (ala the NCAA) or by conferring absolute power upon a supreme regulatory authority (such as the OHSAA Commissioner), this article attempts to outline a framework that will empower the OHSAA membership and each individual OHSAA member to pro-actively monitor inter-community recruiting and balance the membership’s competing interests themselves.

1. The OHSAA Should Establish An Administrative “Private District Athletic Board” With A Seat On the OHSAA Board of Control.

As the NCAA has come to realize, it is critical that within athletic associations the governed members feel they have a sense of connection with those who adopt, interpret, and enforce the rules.\textsuperscript{193} Likewise, the OHSAA mem-


bership must realize that it must provide its private school members with a connection to these functions. A way to do so is by establishing a single-member administrative "Private District Athletic Board" that, similar to the current geographic district athletic boards (i.e., two representatives from each classification), is comprised of two representatives from the Northeast District and Southwest District (since more than 60 percent of all private schools are located in those two districts) and one representative each from the Northwest District and the Central District. Like the one geographic district that is currently reserved a public school representative on the Board of Control, the Private District Athletic Board would be reserved a seat on the Board of Control.

There is nothing radical about this proposed reform. It has long been established under the Voting Rights Act of 1965 that an acceptable remedy for discrimination that dilutes the value of a minority group’s vote is to establish a single-member district in which the minority makes up a majority of the voters. Furthermore, the OHSAA membership has no administrative rationale that would counsel against such a reform. Administratively, a private seat on the Board of Control could be created by consolidating the two seats reserved for the clearly over-represented Southeast and East Districts into one Southeast/East District seat and requiring the Southeast/East Board of Control member to attend the meetings of both the Southeast District athletic board and the East District athletic board. Finally, the opportunity for "reciprocal influence" could be maximized by requiring each member of the "Private District Athletic Board" to attend (as a non-voting, ex officio member) the meetings of one geographic district athletic board and act as a liaison between the geographic district board and the private district athletic board.

A seat on the Board of Control is worth 14.2 percent of the policy-making power of the OHSAA (one vote out of seven). Private schools make up almost exactly 14.2 percent of the OHSAA membership (117 of 824 schools). Thus, under the "one-person, one-vote" principle, a private district seat is a perfect fit. If such an arrangement were implemented, the maximum percentage deviation from the "one-person, one-vote" paradigm would be reduced from 165


195. See, e.g., Bush v. Vera, 517 U.S. 952, 977 (1995). Holding that if a state has a strong basis in evidence, for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2 [of the Voting Rights Act, 15 U.S.C. § 1973], and the districting that is based on race substantially addresses the § 2 violation, it satisfies strict scrutiny.

Id. See also Gaffney, 412 U.S. at 754 (holding courts do not have the right to invalidate a reasonable apportionment plan "because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State").
percent to 78 percent and the average percentage deviation would be reduced from 52 percent to 26 percent without any further reorganization of the existing geographic districts. The new actual ratio of schools-to-representatives on the Board of Control would be as follows:

- Central District: 84 schools to 1 representative (all public schools)
- Private District: 117 schools to 1 representative (all private schools)
- Southeast/East District: 119 schools to 1 representative (all public schools)
- Northwest District: 147 schools to 1 representative (all public schools)
- Southwest District: 149 schools to 1 representative (all public schools)
- Northeast District: 208 schools to 1 representative (all public schools)

2. The OHSAA Should Revise Its Recruiting Bylaw and Enforcement Program As It Relates to Allegations of Improper Recruiting.

Quite simply, the OHSAA’s current recruiting bylaw and program for enforcing the bylaw’s prohibition on recruiting does not remotely contain any type of regulatory framework that can fairly, effectively, and efficiently, promote the educational and community values of the interscholastic environment. The OHSAA membership’s “influence-based” bylaw and enforcement program encourage inter-community recruiting pollution and create potentially devastating economic liability for the OHSAA membership. The OHSAA membership should reform its recruiting regulations to require self-reporting of inter-community contact with prospects that emphasizes the educational interest of the prospect and the relationship between the competing community schools. Such a bylaw would provide as follows:

Section 9. Recruiting

4-9-1 General and Specific Prohibitions on Athletic Recruiting.

(a) Except as permitted by this section, the recruiting of any prospective student (“prospect”) for athletic purposes shall be strictly prohibited.

(b) In addition to the general prohibition on the recruiting of any prospect for athletic purposes, an athletic agent or other representative of a

196. MEMBER SCHOOL DIRECTORY, supra note 68.
high school shall not intentionally initiate contact with any prospect excepted as permitted by this section or provide an extra benefit to any prospect as an inducement to enroll or remain at the high school.

4-9-2 Permissible Contact; Reporting of Inter-Community Contact; Rebuttable Presumption of Recruiting Infraction; Mandatory Mediation And Binding Arbitration.

(a) Without reporting its actions to the OHSAA or to the principal of any other high school, all high schools may conduct an “open house” and/or engage in mass marketing that is directed at a general population of prospective students provided that such an open house and/or mass marketing campaign promotes the total educational program (academics, all co-curricular activities, etc.) offered by the high school.\footnote{See OHSAA HANDBOOK, supra note 9, at 40, Bylaw 4-9-2. (providing that “[m]ass marketing of a school directed to a general population of students does not constitute prohibited recruiting”).}

(b) Without reporting its actions to the OHSAA or to the principal of any other high school, any athletic agent or other representative of any public high school, private high school, or parochial high school may contact in any manner and at any time or place any prospect enrolled within its community.

(c) Prior to enrolling at any high school, any prospect or his or her parents or legal guardians may contact any athletic agent of a high school for the purpose of obtaining information about the high school’s athletic programs as long as any contemplated enrollment of the prospect in the high school is consistent with the formally adopted enrollment policy of the district, archdiocese, diocese, religious order, headmaster, or other authority.

(d) In the event that any person contacts any high school’s athletic agent with regard to a prospect enrolled in a school outside of the contacted high school’s community prior to the prospect enrolling at the contacted high school or any high school’s athletic agent becomes aware of any such contact between such a prospect and any other representative of the high school, the contacted high school shall provide within seven (7) days of the contact a report to both the OHSAA Commissioner and the principal of any high school in the community in which the prospect is enrolled that contains the following directory information: (i) the name of the prospect; (ii) the name of the person initiating the contact; (iii) the names of the prospect’s parents or legal
guardians; (iv) the names of the contacted high school’s athletic agents or other representatives involved in the contact; (v) the name of the prospect’s current school; (vi) a list of all sports in which the prospect has participated since enrolling in the seventh grade or the equivalent of the seventh grade; (vii) the height and weight of the prospect.

(e) In the event that a contacted high school fails to substantially comply with Paragraph (d) of this bylaw and the principal of a high school that is directly aggrieved by the failure to comply registers a written complaint with the OHSAA Commissioner alleging a recruiting infraction against the contacted high school relating to a prospect, credible evidence that the contacted high school failed to substantially comply shall give rise to the rebuttable presumption of a recruiting infraction, irrespective of the intentions of the contacted high school’s athletic agent(s).

(f) Both the OHSAA and the contacted high school shall maintain copies of all reports for a period of five years and shall, upon reasonable request, make such reports available for inspection to: (i) any other prospect and/or the parents or legal guardians of any other prospect; (ii) any other member high school; (iii) any member of the media; and (iv) any member of the public. On an annual basis, the OHSAA shall make available on its web site a summary of the volume of reports that each school files with the OHSAA.

(g) In the event that a principal of a high school registers a written complaint with the OHSAA Commissioner alleging a recruiting infraction under this bylaw, the complaint shall be resolved by a process of mandatory mediation and (if necessary) binding arbitration pursuant to the provisions of this bylaw and Chapter 2711 (Arbitration) of the Ohio Revised Code.

4-9-3 Appointment and Duties of Independent Counsel/Mediator.

(a) At the annual organizational meeting of the Board of Control (Constitution, art. 5-9-1), the Board of Control shall appoint by majority vote an independent counsel/mediator to investigate any alleged recruiting infraction reported to the Commissioner by a principal of a member high school and to mediate the dispute between the high school alleging the recruiting infraction and the high school accused of committing the recruiting infraction.

(b) In the event that a principal of a high school registers a written complaint with the OHSAA Commissioner alleging a recruiting in-
fraction under this bylaw, the independent counsel/mediator shall seek all evidence that proves the alleged recruiting infraction and all evidence that refutes the alleged recruiting infraction and shall seek the advice of the appropriate high school coaches’ association in the mediation process.

(c) Within ten (10) days of the conclusion of the investigation, the independent counsel/mediator shall prepare a report that contains (i) a listing of all witnesses interviewed and signed affidavits from all witnesses summarizing the content of the interview, (ii) documents reviewed, (iii) proposed findings of fact, (iv) a proposed conclusion as to whether a recruiting infraction occurred and; if so, (v) recommended sanctions consistent with this bylaw. The independent counsel/mediator shall submit the report for comment to both the aggrieved high school and the accused high school. Both high schools shall have ten (10) days to provide comments upon the independent counsel/mediator report and/or supplement the report. Within ten (10) days of receiving comments and/or supplementations (if any), the independent counsel/mediator shall submit a final report containing the above information and his final determination and all comments and supplementations to the Committee on Recruiting Infractions.

4-9-4 Appointment and Duties of Committee on Recruiting Infractions.

(a) With the advice of the appropriate high school coaches’ association, a three-person Committee on Recruiting Infractions shall determine all cases involving an alleged violation of this bylaw that are not resolved by the aggrieved school and the accused high school through the mediation process. The Committee on Recruiting Infractions shall be comprised of the OHSAA Commissioner and one member with appropriate legal training and experience appointed by the majority vote of the representatives of the geographic district athletic boards on the Board of Control and one member with appropriate legal training and experience appointed by the representative of the private athletic district. The determination of the Committee on Recruiting Infractions shall be final.

(b) In the event that the aggrieved high school and the accused high school agree on the findings of fact, conclusion as to whether a recruiting infraction occurred, and recommended sanctions contained in the independent counsel’s final report, the Committee on Infractions shall adopt the final report and make the report available (with the names of all involved individuals redacted) on the OHSAA web site.
(c) In the event either the aggrieved high school or the accused high school does not agree with any part of the independent counsel/mediator's final report, the Committee on Recruiting Infractions shall hold a hearing on the contested matter(s). During the hearing, it shall be the burden of the party contesting any part of the independent counsel/mediator's report to prove its case by a preponderance of the evidence. The accused school and the aggrieved school shall have the right to present testimony from and/or cross-examine any witness identified in the independent counsel's report and to make a transcript of such testimony at its own expense.

(d) At the conclusion of the hearing, with the advice of the appropriate coaches' association, the Committee on Infractions shall determine by majority vote whether a recruiting infraction occurred and the appropriate sanctions consistent with this bylaw.

(e) After making its determinations, the Committee on Infractions shall draft a report that documents the Committee's final determination, specific findings made, sanctions imposed, and reasoning employed and make the report available (with the names of all involved individuals redacted) on the OHSAA web site.

4-9-5 Sanctions. In the event that the Committee on Infractions determines that a recruiting infraction occurred, the Committee shall presume to apply the following sanctions:

(a) A five-year probationary period requiring monthly written reports summarizing the high school's efforts to engage in compliance monitoring; 198

(b) Public censure;

(c) The termination of the contact between a prospect and the high school recruiting the prospect, or, if the prospect enrolls (or has enrolled) in the high school, ineligibility to represent the high school in any interscholastic postseason contest (unless eligibility is restored on appeal); 199

(d) A requirement that a member high school that has been found to

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198. By imposing a five-year period of probation, the OHSAA would discourage anyone from engaging in a repeat violation within the time period that a class of students is in school. Compare with NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA DIVISION III MANUAL, 2003-2004, at 205 (Bylaw 19.5.2.3.1) (hereinafter NCAA DIVISION III MANUAL, 2003-2004). "An institution shall be considered a 'repeat' violator if the Committee on Infractions finds that a major violation has occurred within five years of the starting date of a major penalty." Id.

199. Compare with id. at 203 (Bylaw 19.5.1. Penalties for Secondary Violations).
have committed a recruiting infraction show cause why an additional sanction of a one-year suspension from participation in the OHSAA playoffs should not be imposed upon the high school’s athletic program involved in the infraction if: (i) the high school does not take appropriate disciplinary action against the athletic agent involved in the infraction or (ii) the infraction was committed by some other representative of the high school and was not the first such violation by other representatives of the high school.200

(e) Notwithstanding the presumptive nature of this provision, the OHSAA Committee on Recruiting Infractions shall retain the authority to impose a reduced sanction in the event the violating high school or athletic agent demonstrates to the satisfaction of the Committee on Recruiting Infractions that extraordinary circumstances exist justifying a reduction in sanctions.

4-9-6 Definitions. For purposes of this section, the following terms shall have the following meaning:

(a) A “prospective student” or “prospect” shall mean any student who has enrolled in the seventh grade or any subsequent grade, or the grade corresponding to the seventh grade or any subsequent grade for a prospect from a foreign country.

(b) “Athletic agent of a high school” shall mean any athletic administrator, coach, or other employee, independent contractor, or volunteer associated with a high school’s athletic department.

(c) “Other representative of a high school” shall mean any person who is known (or who should have been known) by any athletic agent of a high school to: (i) be employed by the high school; (ii) be enrolled as a student at the high school; (iii) have graduated from the high school; (iv) have participated in or to be a member of an agency or organization promoting the high school’s athletic programs; (v) have made a financial contribution to the high school, the high school’s athletics department, or to an athletic booster organization supporting the high

200. Compare id. at 204 (Bylaw 19.5.2.2(I)(3)-(5). Disciplinary Measures). See also McMillen & Coggins, supra note 4, at 59 (noting “Anne Arundel County, [Maryland,... took the healthy step in 1988 of including a clause in every high school coach’s contract that recruiting an athlete will jeopardize the coach’s position”). Cf Wright v. Ark. Activities Ass’n., 501 F.2d 25, 29 (8th Cir. 1974) (holding that high school athletic association bylaw that provided discretion to the executive director to affix a penalty for violations for which no specific penalty was ascribed did not authorize the director to condition a sanction of one-year probation in lieu of a one-year “death penalty” on the school not employing the coach as a teacher and that such sanction violated the coach’s right to substantive due process).
school’s athletic programs; (vi) have been involved otherwise in promoting the high school’s athletic programs.\textsuperscript{201}

(d) "Enrolled at a high school" shall mean when a prospect has graduated from the eighth grade and has either (i) been accepted for enrollment by the high school and executed an enrollment contract or its equivalent with the high school and made a non-refundable deposit of at least $500 to the high school; or (ii) reported to an in-season practice with an athletic team that is under the jurisdiction of the high school’s athletic department; or (iii) attended one day of classes as a student at the high school.

(e) "Community" shall mean (i) a high school at which a prospect is enrolled; (ii) in the case of a public high school and subject to the formally adopted enrollment policy of the school district, any middle school at which a prospect is enrolled that is part of the same school district as a public high school; (iii) in the case of a private high school and subject to the formally adopted enrollment policy of the headmaster or other authority, any middle school at which a prospect is enrolled that is affiliated with the high school; (iv) in the case of a parochial high school and subject to the formally adopted enrollment policy of the archdiocese, diocese, religious order, or other authority, any middle school at which a prospect is enrolled that shares the same faith as the high school.

(f) "Contact" shall mean any face-to-face encounter or any communication in any form during which any dialogue occurs in excess of an exchange of a greeting. Any face-to-face encounter that takes place on the grounds of a prospect’s high school or middle school or at the site of organized competition involving a prospect or a prospect’s high school, middle school, or amateur team shall be considered a contact (but not an intentionally initiated contact), regardless of whether any communication occurs (with the exception of encounters that occur in the usual course of good sportsmanship at the site of competition at which the contacting high school athletic agent is competing, e.g., a post-game congratulatory handshake).\textsuperscript{202}

(g) "Recruiting" shall mean (i) any contact between a high school’s athletic agent or other representative with a prospect enrolled outside of a high school’s community or (ii) any contact between a high

\textsuperscript{201} See NCAA DIVISION III MANUAL 2003-2004, \textit{supra} note 197, at 67 (Bylaw 13.02.7. Representative of Athletics Interests).

\textsuperscript{202} Cf. \textit{id.} at 66 (Bylaw 13.02.2. Contact).
school's athletic agent or other representative with the parents, legal guardians, or relatives of a prospect enrolled outside of a high school’s community.

(h) “Extra benefit” shall mean any benefit provided on the basis of athletic ability by an athletic agent or other representative to a prospect or a prospect’s parents, legal guardians, relatives, or friends that is not generally available to any other member of the high school’s student body on a basis unrelated to athletic ability.203

(i) “Appropriate disciplinary action” against any athletic agent of a high school that violates this bylaw shall mean (i) for a first infraction, a suspension from participating in and preparing for 20 percent of the violating athletic program’s regular-season athletic contests for a one-year period; (ii) for a second infraction, a suspension from participating in and preparing for 50 percent of the violating athletic program’s regular-season athletic contests for a one-year period; (iii) for any infraction after a second infraction, a suspension from participating in and preparing for 100 percent of the violating athletic program’s regular-season athletic contests for a one-year period.

(j) “Cause for not taking disciplinary action” against any athletic agent of a high school that violates this bylaw shall include, but not be limited to: (i) credible evidence that the athletic agent at the violating school engaged in meaningful discussion with an athletic agent or principal at the aggrieved school prior to the enrollment of the prospect about the best academic and other educational interests of the prospect and the potential effects that the prospect’s participation at the violating high school would have on the future relationship between the high schools; (ii) credible evidence that the athletic agent of the high school that violated this bylaw committed the infraction inadvertently and that the high school, upon becoming aware of the infraction, engaged in a timely and full investigation of the infraction and promptly self-reported the infraction to the OHSAA Commissioner, and took all available measures to prevent or mitigate harm caused by the infraction and to prevent another infraction from occurring in the future; (iii) credible evidence with respect to an infraction committed by other representatives of the high school that no athletic agent of the high school was involved in or had knowledge of the infraction and that the athletic agents or other representatives of the high school, upon becoming aware of the infraction, engaged in a timely and full

203. Cf. id. at 111 (Bylaw 16.02.3. Extra Benefit).
investigation of the infraction and promptly self-reported the infraction to the OHSAA Commissioner and that the infraction was the first infraction committed by other representatives of the high school.

This proposed recruiting bylaw is comprised of five major components: (a) an enforceable, definition of recruiting based on objective contact rather than subjective influence that compels pro-active self-reporting of potential recruiting infractions; (b) a recognition that a high school’s and its athletic agents’ interest in protection from arbitrary enforcement is just as important as the OHSAA membership’s interest in effective and efficient enforcement; (c) an independent counsel/mediator to investigate and mediate, with the advice of the appropriate high school coaches’ association, allegations of improper recruiting; (d) a three-person Committee on Recruiting Infractions to resolve, with the advice of the appropriate high school coaches’ association, cases involving allegations of improper recruiting that are not resolved by mediation; and (e) a requirement that a high school’s inter-community recruiting contact be available to the OHSAA membership, parents, media, and the public.

a. The proposed recruiting bylaw creates an enforceable definition of recruiting based on objective contact rather than subjective influence and compels pro-active self-reporting of potential recruiting infractions.

This new bylaw would formalize and codify the OHSAA membership’s self-policing function. Moreover, the new bylaw would transform the OHSAA membership’s enforcement focus from reacting to a recruiting infraction to pro-actively preventing an infraction from ever occurring. The OHSAA itself has publicly recognized that it is a “‘self-enforcing body’” and that the “‘organization is only as good as [the] member schools helping to enforce [the bylaws].’” There is little doubt that the OHSAA membership

204. Through the use of a “rebuttable presumption,” this bylaw also would compel potential recruiters to generate documentation of their inter-community contact or else, by default, generate objective evidence of a recruiting infraction. A “rebuttable presumption” is a conclusion which the law requires a decision-maker to reach once prerequisite facts are established and no contrary evidence is produced. WEISSENBERGER’S FEDERAL RULES OF EVIDENCE § 301.2 (1987). “Presumptions are largely products of evidentiary necessity . . . that operate to . . . counterbalance[e] one party’s superior access to proof.” Id. at § 301.3. In the context of a dispute between competing OHSAA member schools on the issue of whether one school improperly recruited a prospective student from another school’s community, the school accused of the recruiting activity always will have vastly superior access to the proof of recruiting. Thus, attaching a rebuttable presumption of a recruiting infraction to unreported inter-community contact between a high school and a prospect would create a fair, effective, efficient, and (most importantly) enforceable recruiting bylaw.

could be counted on to carry out a pro-active enforcement role. For example, in February of 2003, administrators at twice-penalized Massillon Washington High School engaged in a rigorous, pro-active investigation of alleged inter-community recruiting and self-reported their findings to the OHSAA when they became aware that boosters may have engaged in the recruiting activity.\textsuperscript{206}

In other states, some high school coaches already voluntarily engage in similar self-reporting of inter-community contact as a matter of good practice. For instance, in Georgia, Marietta High School basketball coach Charlie Hood reportedly has stated:

I’m an honest guy, a down-to-earth guy, and I’m not going to bend or break any rules. . . . First thing I do [when contacted by] a player [who is considering a transfer to Marietta High School] is to talk to their coach and tell them, “Hey, I was contacted by so and so.”\textsuperscript{207}

Pro-active, self-reporting regulation is a proven method for fairly, effectively, and efficiently regulating activity that influences an environment when the administrative authority does not have the staff and resources to police the regulated activity on its own. The federal Clean Water Act (“CWA”) is a classic example. The CWA makes it unlawful for any person to discharge any pollutant into the nation’s waters except in compliance with the Act.\textsuperscript{208} However, because state EPAs do not have the staff to monitor the compliance of every pipe or other source that influences the nation’s waters, the CWA requires the source to monitor its own influence and report the results to regulators in “Discharge Monitoring Reports.”\textsuperscript{209} There is consensus that the CWA

\textsuperscript{206} Id. See also Tom Reed, Massillon Takes Revelations To OHSAA, AKRON BEACON J. (Feb. 19, 2003); Curt Conrad, Massillon Investigation Continues, MANSFIELD NEWS J. (Feb. 20, 2003), available at http://www.mansfieldnewsjournal.com/news/stories/20030220localsports/1023315.html; Joe Shaheen, Hennon Vows To Get To Truth In Probe, MASSILLON INDEP. (Feb. 21, 2003), available at http://www.indeonline.com/left.php?ID=103768r=1; Joe Shaheen, Mansfield Helps In Recruiting Probe, MASSILLON INDEP. (Feb. 25, 2003). A local columnist stated that the OHSAA “laid out a perfect ruling. It places the penalties and the noose on the necks of those that have strayed too far from their own business.” Porter, supra note 73. Based on Massillon’s investigation, the OHSAA placed the school on three-years probation and ruled that “no member of the Massillon football coaching staff or Massillon’s athletics director, currently head coach Rick Shepas, shall have any contact with future student-athletes not already enrolled at the school.” See Jim Thomas, OHSAA Puts Tiger Football On Pobation, CANTON REPOSITORY (Sept. 26, 2003), available at http://www.cantonrep.com/archive/index.php?ID=122907&r=3&Category=11. The suggested bylaw in this article essentially would create a framework that would ensure a similar outcome in all future recruiting cases.


has proven one of the environmental movement’s success stories due to “its success in motivating . . . source controls.”210 The CWA’s successes include:

Within ten years of the CWA’s passage [in 1972], water scientists and regulators reported significant improvements in water quality.

. . . A rough, but illustrative, benchmark of these collective improvements is offered by the EPA: “In 1972, most estimates were that only thirty to forty percent of assessed waters met water quality goals such as being safe for fishing and swimming. Today, state monitoring data indicate that between sixty to seventy percent of assessed waters meet water quality goals.”211

The interscholastic athletic environment resembles a river. A parent’s decision about where and how his or her child will be educated can be quite liquid and athletic considerations may turn the tide.212 One does not have to be a “water scientist” to understand that a regulation that motivates people to decrease water pollution in a river will have a beneficial impact on “big fish” and “little fish” and all “schools of fish” in the river. Under its current recruiting bylaw, the OHSAA is futilely attempting to regulate the entire interscholastic environment under a recruiting bylaw that only analyzes the reaction of “big fish” to inter-community recruiting pollution. In all but the rarest of cases, simply grabbing an isolated elite student from the river guarantees the creation of a perception that the river of prospective students is “clean” and uncontaminated by improper recruiting because the sampled prospect (i.e., the prospect allegedly recruited) will deny that he or she was in any way polluted by improper “influence.”213 Students who are targets of inter-community recruiting are far more likely to report recruiting contact before changing high schools than they are to admit that they were influenced by recruiting after changing schools.214 Thus, the OHSAA could regulate recruiting far more ef-

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211. Id. at 42-43.

212. See, e.g., Scott, 2000 WL 988532, at *5 (“Of utmost concern to the Scott family was Jessie’s ability to get a college [athletic] scholarship. . . . Plaintiff-appellee Jessie Scott also indicated that he was frustrated with Perry High School’s football program and did not believe that he was being used enough.”).

213. See, e.g., Johnson, supra note 131 (quoting TSSAA Executive Director Ronnie Carter as stating, “I have never found kids that thought they were being exploited [by recruiting].”).

214. Cf. Scott, 2000 WL 988532, at *2 (“Coach Wakefield testified that he first learned about the alleged attempted recruiting of plaintiff-appellee Jessie Scott in January of 1998 when plaintiff-appellee Jacqueline Scott, Jessie’s mother, ‘briefly mentioned that she had been contacted by some people at Massillon possibly for Jessie to come there and be an athlete there’ . . . .”), with id. at *3.
 efectively by changing its method of analysis to one focused on contact rather than influence. By requiring each school to continuously self-monitor and self-report the amount of contact that it has with the river, the OHSAA can reliably analyze at the source the influence that each school has on the river of prospective students. The OHSAA then can make determinations in cases involving recruiting allegations that are based on verifiable, objective evidence as to whether or not a school alleged to have committed a recruiting infraction has influenced the river of prospects in an impermissible manner.

Such a regulatory scheme would benefit all students, not just those of elite ability. The National Federation of State High School Associations has collected a great amount of evidence that indicates that a high school student who participates in athletics is more likely to achieve more in both the classroom and career than the student who does not participate.215 "There is no right to a position on an athletic team. There is a right to compete for it on equal terms."216 In order for a community student of average athletic ability to compete for a position on an athletic team on equal terms, the average community student must know prior to enrolling if coaches or supporters of a high school athletic program and elite athletes from outside the traditional community are making contact.217 If an average community student is informed prior to enrollment that his or her community high school has been involved in extensive contact with elite athletes from outside the community, then the average community student can choose to attend an alternative high school in order to increase the likelihood that he or she will be able to obtain the

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215. Nat'l Fed. of State High Sch. Ass'ns, The Case for High School Activities, available at http://www.nfhs.org/case.htm (last visited Feb. 9, 2004) (citing studies in North Carolina, Colorado, and New Mexico that indicate that students who participate in athletics achieve higher academic grade point averages than students who do not participate and a 1987 survey of individuals at the executive vice-president level or above in 75 Fortune 500 companies indicating that 95 percent of those corporate executives participated in sports during high school) (on file with author). See also Alice Thomas, Involved students have edge, COLUMBUS DISPATCH, May 17, 2003, at 4B ("[In the college admissions process], [a]ctivities often push students ahead of their academically similar peers who aren't involved, college officials say.").


217. The athletically-average student from within a high school's traditional community does not need to be informed of the contact between the high school and elite athletes from within the traditional community in order to make an informed choice because it is reasonable to presume that such a student either will have competed on the same team with such an elite athlete in the community's feeder middle schools or competed against such an elite athlete in a league composed of a group of feeder middle schools.
educational value of athletic participation.

Under similar circumstances, highly successful high school coaches have advocated similar full-disclosure policies. For example, in the context of colleges who recruited his top interscholastic players, former Moeller football coach Gerry Faust (who became the head football coach at the University of Notre Dame in 1981 based on his outstanding success at the high school level), advocated that such a player should be provided analogous full disclosure in the intercollegiate recruiting process even if the player did not ask for the information:

A boy has to know how many people are ahead of him, and what the coach thinks of those people. Also, what other players is the school recruiting at the boy’s position? Does the coach think another prospect has more potential, if he can get him? These are things a boy should ask; most of them will not, though. But a head coach who is an honest head coach should convey this to the boy so the athlete knows where he stands. Then, if he chooses the university, he is less likely to be disappointed.\(^\text{218}\)

Consistent with these remarks, under the suggested bylaw, all prospective students (not just athletically-gifted students) would be able to accurately evaluate the “athletic education” opportunity at a high school. Moreover, the bylaw would create competition within a high school community between the majority of persons with primarily a community interest in promoting athletics for their educational and community values and the minority of persons with primarily a competitive interest in emphasizing or even restricting participation opportunities to athletically-gifted or elite students irrespective of community affiliation.\(^\text{219}\) As a result, all high schools should face more robust internal opposition to inter-community recruiting.

By promoting internal competition between those who value interscholastic athletics primarily for educational and community values and those who value athletics primarily for competitive and economic values, the OHSAA

\[\text{218. DRESSMAN, supra note 44, at 160.}\]
\[\text{219. Cf Sue Kiesewetter, Millions Go Into Facilities Despite Little Student Growth, CINCINNATI ENQUIRER, Aug. 29, 2000, at A1 (quoting Moeller’s principal as stating, “Our mission is to serve the 11 or 12 feeder elementary schools and the Catholic population in those parishes.”), with Paul Daugherty, A Recruiting Scandal Of Pee-Wee Proportions, CINCINNATI ENQUIRER, Jan. 13, 2002, 16C (quoting Moeller football coach Bob Crable as stating, “Kids see how champions are treated. If Moeller being perceived as a winner brings kids here, we don’t have to worry about recruiting. Why do you think guys want to play for the (San Francisco) 49ers?”), and DRESSMAN, supra note 44, at 177 (“There were, of course, many boys cut from the Moeller football team each year [during the 1970s under coach Gerry Faust] who could have played, perhaps even started, at other high schools.”).}\]
membership likely could achieve improvements in overall competitive equity. After all, to the extent that a high school athletic program is compelled by educational and community considerations to place a higher value on a community student who is less athletically gifted than a student from outside the community, that athletic program will field less talented students. The OHSAA membership cannot stop a high school from *valuing* an athletically-gifted student in another member's community. The OHSAA membership can make a high school pay for *devaluing* a student of average or below-average athletic ability in its own community as inevitably results from inter-community recruiting. Because less talented students are an overwhelming majority, all high schools likely cannot afford that socio-economic cost if consumers of secondary education have all inter-community recruiting information when choosing between educational options. If such information became available, one would expect inter-community contact to decrease and those schools that have relied upon such contact to achieve competitive dominance to win fewer championships.

An anecdotal analysis of the Moeller football program arguably supports this conclusion. From 1963 through 1974, Moeller won 86.7 percent of its games (104-14-2) under coach Faust, however, Moeller did not win any state championships during this 12-year period. In 1975, the school won its first state football championship and began an era of competitive dominance in which it won 98.6 percent of its games (70-1) and 5 state championships in 6 years. Arguably, the environment that produced this *athletic monopoly* began to develop in 1969 and 1970. During those years, some students and faculty expressed the view that "sports were overemphasized" and a need existed "to put these things in perspective." The faculty "polarized into two camps" over athletics. Following the three "least successful years in the history of

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220. From 1963 through 1971, the Ohio state football champion was determined by a vote of Associated Press sports writers. In 1972, the OHSAA began sponsoring the current high school football championship tournament to determine the state champion.


Sports versus other priorities was a conflict that surfaced early in 1969-'70. I think a lot of people felt that sports were overemphasized and that athletes were treated differently—that we needed to put these things in perspective. For example, when we came back in school in September, two sophomores were caught drinking during a football game and the administration wanted to kick them out. But, just two weeks before this incident between six to eight senior football players were also caught drinking and nothing much happened to them. This was our (the student council's) first controversy with the administration. The kids (sophomores) didn't get kicked out, but the incident demonstrated an attitude I believe the faculty shared.

*Id.* (quoting Steve Ashbrock).

222. *See DRESSMAN, supra* note 44, at 71 ("Coaches seldom visited the faculty lounge, because
the Moeller football program" under coach Faust, the Moeller principal was forced to resign.\textsuperscript{223} Between 1970 and 1973, half of the faculty left the school.\textsuperscript{224} By 1980, "[a]lmost a third of the faculty coached football."\textsuperscript{225} During his tenure at the school, coach Faust influenced the hiring of faculty and negotiated faculty salaries.\textsuperscript{226}

In the fall of 1982, Steve Klonne became the head coach of the Moeller football program. Thereafter, the Moeller program took a different approach than it had under coach Faust. According to Jim Higgins, who served as an assistant coach under both Faust and Klonne:

Gerry (Faust) went out and really got great players... He did not recruit illegally, but he knew every kid in the district and from other school systems. He got their interest. It's always been Steve's philosophy to take who comes and coach them.

There have been years when we haven't had that great talent, where we haven't been anything like the old Moeller teams. That is Steve's biggest asset, to take what comes to him and make the very best of

\begin{itemize}
  \item few of them taught academic subjects, and teachers who did not coach were almost never seen in that club room known as the coaches' office.
\end{itemize}

\textsuperscript{223} See id.; Archbishop Moeller High School, \textit{supra} note 221.

\textsuperscript{224} DRESSMAN, \textit{supra} note 44, at 72.

There was a philosophical difference among the staff that had to be resolved. In three years, half the faculty left. If the jocks did not win the battle outright, they at least contributed significantly to a broader victory. At the forefront of that triumph was a hybrid named Dick Barattieri, a muscular former college football player whose combined machismo and intellect destroyed the myth that a jock cannot possibly appreciate the arts and culture, too... He proposed adding to the Moeller curriculum an advanced humanities program for seniors that would prepare them for the intense examination of societal differences they would confront through college study and life experience.

\textit{Id.} See also Archbishop Moeller High School, \textit{supra} note 221, at 8-9 (crediting John Massarella, "a refined, academically oriented teacher," who left Moeller in the early 1970s as the creator of the school's Humanities Program) (on file with author).

\textsuperscript{225} DRESSMAN, \textit{supra} note 44, at 75.

\textsuperscript{226} \textit{Id.}

Almost a third of the faculty coached football, and half of the teachers coached something. "A coach is more bound to the school," [former Moeller Principal] Father [Lawrence] Krusling contended... Moeller had so many coaches, he said, "because we analyzed our needs. Every time we had a teaching vacancy to fill, I went to Gerry [Faust] and asked him if he needed another coach in any sport. If he could find someone in the right teaching field who also was a coach in the sport where we needed more help, and if that teacher met our standards and qualifications, he got the job over an equally qualified teacher who didn't coach."

\textit{Id.; FAUST & LOVE, supra} note 2, at 23 ("[A]t Moeller I was traveling to speak all around the country, I was athletic director, football coach, booster club moderator, fund raiser and in charge of salary negotiations with the faculty.").
Initially, the school's success under coach Klonne closely resembled its success under coach Faust during the late 1970s. In the four years between 1982 and 1985, Moeller won two more state championships and 93.8 percent of its games (45-3). Though the school remained highly competitive after 1985 and won 73.2 percent its games (123-45) and reached the state finals 3 more times (1989, 1993, and 1997) while Klonne was coach, Moeller did not win another state championship after the 1985 senior class—the last class that had reached middle school before coach Faust left Moeller—graduated from high school. However, Moeller's modest decrease in the results on the football field did not adversely impact the school's overall health as evidenced by the fact that Moeller achieved the greatest fund-raising success in school history during the last years of the Klonne-era.

Moreover, Moeller students as a whole may have significantly increased their level of academic excellence during the Klonne-era. According to the Moeller Gridiron Guide, between 1975 and 1980, an average of 21 students per year either received an athletic scholarship to college or went on to play college football. During this period of the Faust-era, the academic guidance department competed with the athletic department "to see if [it] could match [the athletic department] in the number of scholarships." In contrast, the

227. Tom Gamble, Klonne's Team Back On Top, KENTUCKY POST (Nov. 28, 1997), available at http://www.cincypost.com/sports/1997/moeller112897.html. The OHSAA never investigated Moeller during the Klonne-era and the only OHSAA investigation of a potential recruiting infraction that occurred during the Faust-era involved future Notre Dame player Hiawatha Francisco. The investigation was requested by coach Faust himself and the OHSAA found no wrongdoing by coach Faust or Moeller. See Tom Groeschen, OHSAA Cleared Moeller, Faust in 1980 Case, CINCINNATI ENQUIRER, Jan. 18, 2002, at 3D. See also DRESSMAN, supra note 44, at 90.

There were many players of suspicious origins on the Moeller roster over the years, but always there were plausible explanations. The classic case was a tailback with the Heisman Trophy name of Hiawatha Francisco, who was running 'four-five forties' when he arrived as a freshman in 1979. Hiawatha's mother rented a house from Gerry, and, inevitably, the player-coach-landlord relationship made headlines.

Id.

228. See Kiesewetter, supra note 219.

At Moeller High School in Kenwood, enrollment is 930, up slightly from last year's 918, said Principal Dan Ledford. Despite the [modest] increase—and with no plans to grow much bigger—the school is in the middle of a three-year, $8 million construction project begun last year. It will add a new gymnasium and library, eight [new] classrooms, new weight and wrestling rooms, along with remodeled living quarters for faculty priests.

Id.


230. DRESSMAN, supra note 44, at 75.
Moeller Class of 2002, which participated in football under coach Klonne for three years, accumulated 77 academic scholarships in comparison to 10 athletic scholarships. The point of this analysis is not to suggest that coach Faust was hostile or even ambivalent toward the educational and community values of the interscholastic athletic environment. Indeed, even those who clashed with coach Faust over the proper role for athletics in the secondary educational system acknowledged that subjectively he cared deeply about those values. The point of this analysis is not even to contend that, from a subjective perspective, coach Klonne cared more about the educational and community values of the interscholastic environment or operated a "better" Moeller football program than coach Faust. Rather, the point of this analysis is to show that if the

"We've always had a rivalry between the guidance department and the athletic department," said Brother Robert Flaherty, director of guidance, "to see if we could match them in the number of scholarships. The hard part for us is getting kids to take the time to fill out all the paperwork involved in applying for an academic scholarship."

Id.

231. Coach Klonne elected to leave Moeller prior to the 2001 football season after being informed by the school that the season would be his last as head coach. See Neil Schmidt, What Happened to Moeller's Klonne?, CINCINNATI ENQUIRER, Aug. 26, 2001, at 1A ("Despite compiling a 169-48 (.778) record in 19 years as head coach, despite winning two state championships and reaching the final three other times, Mr. Klonne was offered one season as a lame duck [head] coach and the chance to be an assistant thereafter."). Former Moeller star, Notre Dame All-American, and New York Jet Bob Crable succeeded Klonne. See Kevin Goheen, '70s Star Crable to Coach Moeller, CINCINNATI POST, May 31, 2001, at 1B ("Gerry Faust couldn't wait for his old Moeller and Notre Dame football captain to call him. Faust called Bob Crable around 5:30 Wednesday afternoon from his home in Akron to congratulate him on his new job [as Moeller’s head football coach]."). Approximately 8 months later, the OHSAA placed Moeller on probation for recruiting infractions committed under coach Crable. See Goheen, supra note 88.


233. See Archbishop Moeller High School, supra note 221, at 8.

We [i.e., Moeller students] had other issues with the administration, and Gerry Faust and I disagreed most on several of them, but we finally did reach agreement. We agreed that athletics should not be diminished, but academics should be advanced. Gerry was right. He had done his job. Now teachers had to work harder to do theirs. They did, and big things happened.

Id.; DRESSMAN, supra note 44, at 93.

Gerry [Faust] became a very powerful man. The question when you acquire power is, do you use it to serve or do you use it to exploit? I think Gerry used it to serve. He did a lot for other kids from other schools. He was generous to many people.

Id. (quoting former Cincinnati Elder Athletic Director Rev. Edward Rudemiller).

234. The evidence does suggest that the Moeller football program was more "environmentally friendly" under coach Klonne than under coach Faust. Compare Kevin Goheen, Moeller Shakeup Shocks Area Coaches; Klonne, Principal Mum On Reasons, CINCINNATI POST, Mar. 14, 2001, at C2
OHSAA membership enacts reforms that regulate inter-community recruiting contact and conserve the educational and community values of the interscholastic athletic environment, the OHSAA membership will simultaneously improve competitive equity between its member schools, without harming any individual member, and thereby increase the quality and economic value of the total “interscholastic athletic product.”

(“Neither football coach Steve Klonne nor Moeller principal Dan Ledford will say why the 2001 season will be the last for Klonne. But if Klonne is being forced out as the Crusaders’ head man, as sources close to the Moeller program have reported, it won’t go over well in Cincinnati coaching circles.”), with DRESSMAN, supra note 44, at 92 (“The Moeller district encompassed 11 mostly small public school districts. Virtually every football coach at all of those high schools was convinced that Gerry [Faust] had stolen at least one good athlete from him at one time or another.”).

235. There is evidence to suggest that an individual OHSAA member that is perceived by its own community as a guardian of the interscholastic athletic environment’s educational and community values stands to reap increased individual economic benefits. See, e.g., Wolff, supra note 27.

Several studies have found that athletic success by itself has no effect on alumni giving. On the contrary, according to at least one study, when winning is accompanied by the outrages with which you have become all too familiar, football glory may actually discourage contributions. In 1986, the year after Tulane shut down its basketball program in the wake of a point-shaving scandal, donations to that school leaped by $5 million.

Id.

236. No sporting association in the United States understands better the benefit of maintaining its inter-community value in addition to the individual value of its members than the National Football League ("NFL"). See, e.g., James Boswell, Revenue Sharing:—Sound Business or Welfare?, at http://www.buzzle.com/editorials/text8-6-2001-4216.asp (Aug. 6, 2001) (on file with author). The NFL maintains its inter-community value primarily through revenue sharing. The NFL’s 2002 revenue-sharing plan includes an equal sharing of all network television, network radio, national sponsorship, and licensing revenues as well as a 60-40 split of gate receipts. Id. This commitment to the inter-community value of the association as well has the value of the individual franchises has been critical to the NFL’s success in conserving the value of the individual franchises—such as the Green Bay Packers franchise—for the benefit of all. See Mike O’Hara, The Cold Truth: Revenue Sharing Keeps NFL’s History Intact, DETROIT NEWS (Nov. 11, 2002), available at http://www.detnews.com/2002/sports/0211/09/sports-5897.htm.

The NFL has revenue sharing. And while that might grind the men who own baseball’s Yankees, basketball’s Lakers—and yes, our hockey champs here in Detroit—think how hollow the NFL would be today if the Packers somehow dropped out of the league because they couldn’t survive on their income from local television.

Id. This commitment to the inter-community value of the association also provided the NFL the flexibility it needed to effect major structural change and relatively peaceful realignment of its members. See Boswell, supra (“Our traditional revenue-sharing policies have served the league and its clubs well over the decades,” said NFL Commissioner Paul Tagliabue. . . . “The [60-40 split of gate receipts] we approved today enhances those policies, and enables us to base future realignment on its merits, not on resulting economics.”). In contrast, the NCAA membership, particularly those Division IA members who make up the schools in the college football Bowl Championship Series (“BCS”), appear to place far less importance on the inter-community value of their product. See, e.g., National Symposium on Athletics Reform, Postseason Football Play and the Bowl Championship Series: A Conversation (Nov. 11, 2003), available at http://symposium/tulane/edu/panel2.txt.
b. The proposed recruiting bylaw is based on the recognition that a high school's and its athletic agents' interest in protection from arbitrary enforcement is just as important as the OHSAA membership's interest in effective and efficient enforcement.

In order to balance a high school coach's legitimate, competing interests, the suggested bylaw is based on the recognition that a high school's and its athletic agents' interest in protection from arbitrary enforcement (i.e., exploitation) is just as important as the OHSAA membership's interest in effectively and efficiently enforcing its bylaws. Thus, the suggested bylaw empowers an athletic agent to protect himself or herself from the arbitrary treatment that intercollegiate coaches have complained about in the context of NCAA enforcement while simultaneously empowering an athletic agent to conserve the educational and community values of the interscholastic athletic environment.

While it is important to safeguard athletic agents against arbitrary en-

[T]he thousand institutions that make up the NCAA, in Division IA the 117, as represented by the presidents . . . decide what they're going to ask the NCAA to do, what powers it has, and they retain for themselves other powers. The institutions have autonomy, and they've always retained for themselves far more power than they've ceded to the NCAA . . . . [T]hey have formally ceded [the power to regulate academics of the universities, regulate what they can and can't pay, and regulate what alumni can do in respect to summer jobs, etc.] to the NCAA, but in Division IA football—and this is unique because in no other subdivision or championship has this happened—but in IA football they have decided, the presidents who are the decision-makers here, have decided to retain the powers for postseason football to themselves.

Id. (comments of NCAA President Myles Brand). "In the current BCS controversy we have about 63 schools sharing in almost half billion dollars over the last five years, but 54 schools on the outside looking in are left to divide approximately 16 million dollars." Id. at 13 (comments of Len Elmore).

[T]he one thing that I find very curious that we never really talk about enough in intercollegiate athletics when we try to effect change, if we want to, is that we don't talk enough about our external community. Our internal community is loud, it tells us what its mission is, academia and so forth; but our external community plays a major role in how the rest of the university operates, and that external community often wants to be a champion. If it's not a champion, it wants the opportunity to be a champion. It's important for their ethos, it's important for their collective ego.

Id. at 63 (comments of former UCLA Athletic Director Pete Dalis). This lack of emphasis on the inter-community value of intercollegiate athletics has led one conference commissioner to give the NCAA a "D" for leadership—the value that Pacific Lutheran University football coach Frosty Westering identified as the hallmark educational value of intercollegiate athletics.

The area where I give [college sports] a "D" is leadership, behavior and attitudes. . . . It concerns me, and I don't want to be critical because you never know when your time will come, but when a college president in relating or describing the position of his conference relative to adding Boston College, and he related it to a suit that he was going to wear for awhile and try out, but then it needed to be altered again, I think that shows a lack of sensitivity on the system. I think that's the real problem we have from an individual leadership and attitude standpoint. We're so self-interest motivated that we lose sight of what's good for the system.

Id. at 22-23 (comments of Conference USA Commissioner Britton Banowsky).
forcement, it also must be recognized that for any regulation to be effective, there must be clearly defined consequences for persons who engage in the regulated activity without complying with the regulation. The suggested bylaw restores meaningful enforceability to the OHSAA’s recruiting bylaw by creating a clear “three strikes and you’re out” policy for an athletic agent that engages in or knowingly permits unreported inter-community contact with prospective students. Where a high school’s athletic agents cannot maintain control over the actions of other representatives of the school’s athletic interests, the athletic program will be subject to a one-year suspension from eligibility for postseason participation for any second or subsequent infraction. Thus, the bylaw empowers the OHSAA membership to meaningfully deter inter-community recruiting while also reducing the potential that innocent students will be forced to bear the consequences resulting from the actions of others who engage in illicit inter-community recruiting.\(^{237}\)

The suggested bylaw is based on the symbiotic relationship between power and responsibility.\(^{238}\) A symbiotic relationship is the polar opposite of an exploitive relationship. In a symbiotic relationship, two dissimilar organ-

\(^{237}\) Accord NCAA On-line, *Frequently Asked Questions about the NCAA Enforcement Process*, at http://www.ncaa.org/enforcement/faq_enforcement.html (last modified Nov. 6, 2003) (on file with author). “[T]he focus of the penalties is to ensure that there is sufficient deterrent so that the respective institutions will establish an environment which will preclude future violations.” *Id.* (noting that in 1992 the NCAA “added language to the enforcement procedures which, in effect, states that the interests of innocent individuals should be taken into account when imposing penalties”); Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 373 (8th Cir. 1977) (Bright, J., concurring).

In my judgment, the ruling of the Association visits the sins of the “fathers” (the University’s basketball coaches) upon the relatively innocent “sons” (the basketball players). The obvious injustice of the NCAA rulings indirectly affecting the athletes in question seems to reflect some degree of vindictiveness, not necessarily against the student athletes, but against the University of Minnesota, to punish it for the previous improprieties of the basketball coaching staff. . . . Although the rulings of the NCAA indirectly require that the University of Minnesota inflict upon the athletes in question punishment which seems grossly disproportionate to the offense committed by each of them, this court lacks the power in this case to redress the apparent moral wrong absent a constitutional violation.


Perhaps the most sympathetic group of those who are punished unfairly by NCAA sanctions are the members of the team who must endure sanctions. Because NCAA investigations can drag on for years, when the penalties are finally handed down, most of the coaches and players responsible for the violations are gone, leaving the current heirs of the program to pay for past transgressions.

*Id.*

238. The symbiotic relationship of power and responsibility has been eloquently described by one of this nation’s most-effective advocates, Gerry Spence, as follows: “Responsibility is the symbiotic twin of power. Neither power nor responsibility can be effectively exercised without the other. They are like a binary star, two ends revolving around a center.” GERRY SPENCE, *HOW TO ARGUE AND WIN EVERY TIME* 42 (1995).
isms live together in a mutually beneficial relationship. In contrast, in an exploitive relationship, one organism is benefited at the expense of the other. Currently, the OHSAA membership's enforcement program separates power and responsibility in the enforcement of alleged recruiting infractions. As the OHSAA Commissioner has recognized, it is the OHSAA membership that has the responsibility to enforce the OHSAA bylaws as the OHSAA is a "self-policing body" and the "organization is only as good as [the] member schools helping to enforce [the bylaws]."

But the OHSAA Commissioner has all the power to enforce the OHSAA bylaws as those bylaws give the Commissioner unlimited discretion to determine the proper sanction for a recruiting infraction. By fusing the responsibility and power to regulate recruiting, the OHSAA membership will empower itself to autonomously regulate recruiting to the maximum extent possible.

The suggested bylaw is supported by the position of former college coaches who long-ago began advocating that the responsibility for maintaining the integrity of intercollegiate athletics should be placed primarily on the shoulders of the coaches. For example, Sports Illustrated's Herman Hickman, who was a well-respected football coach at Yale before joining the magazine, included placing responsibility for the integrity of college football on the coach as part of his "Nine Points For Survival" plan for college football:

The responsibility for proper practices in recruitment and subsidization of players should be placed squarely on the shoulders of the head football coach.

The president of the institution and his faculty committee on athletics should demand that the coach be personally and directly responsible to the president and his committee for his actions. They should insure and assure him against undue pressure to win games at any cost. They should free him of financial worries about gate receipts, and they should fire him if he or any of his assistants directly or indirectly give, have given, promise or condone any financial aid to players or prospective players beyond the regulations of the institution.

In addition to Hickman, former University of Alabama football coach Paul

239. See WEBSTER’S DICTIONARY, supra note 35, at 1195 (defining “symbiosis” as “the intimate living together of two dissimilar organisms in a mutually beneficial relationship”).

240. Id. at 438 (defining “exploitation” as “coaction between organisms in which one is benefited at the expense of the other”).

241. See Porter, supra note 205.

242. See OHSAA HANDBOOK, supra note 9, at 47 (Bylaw 12).

"Bear" Bryant and former University of Missouri Hall-of-Fame athletic director and football coach Don Faurot recognized the coach must play a key role in preventing recruiting abuses from occurring. Even the most prosecuted (and perhaps persecuted) coach in intercollegiate history, Jerry Tarkanian, has advocated placing the responsibility for rules compliance on the coaches:

I've . . . always said we need an organization like the NCAA, we need an enforcement staff, and they should be able to enforce the rules. And they should suspend coaches that violate the rules. I'm in total agreement with all that. But you need an NCAA enforcement program to stand for everything that that's good—fair play, education.

In summary, the proposed recruiting bylaw would empower OHSAA members to balance on a daily basis the OHSAA membership's competing interests in conserving the educational and community values of the interscholastic environment and exploiting the environment through inter-community recruiting for its competitive value. Those schools that seek to overemphasize the competitive value of interscholastic athletics by extensive inter-community recruiting will have to internalize the socio-economic costs of such excesses. Those schools that seek to avoid regulation and externalize the socio-economic costs of inter-community recruiting by not reporting inter-community contacts will simultaneously generate objective evidence of a recruiting violation that can be efficiently enforced by sanctions that are both fair and meaningful. Unlike complex NCAA rules, the suggested bylaw makes expectations clear, compliance easy and straightforward, and the consequences for the failure to comply clear.

c. The proposed recruiting bylaw requires the OHSAA Board of Control to appoint an independent counsel/mediator to investigate and mediate, with the advice of the appropriate high school coaches' association, allegations of recruiting infractions.

As the TSSAA learned in Brentwood Academy, a high school athletic association that uses untrained and relatively inexperienced executive officers and staff members to investigate allegations of improper recruiting simply invites alienation of its member schools. Allegations of inter-community recruiting involve emotionally-charged parties on both sides of the allegations. Thus, an independent investigation that (to the maximum extent possible) is untainted by the perception of political favoritism is a necessity, not a lux-


245. YAEGER, supra note 44, at 229.
Often, but not always, the OHSAA has appointed an independent counsel to conduct its investigation of allegations of recruiting infractions. Requiring the use of an independent counsel/mediator appointed by the majority vote of the Board of Control will assure the complainants that their allegations are competently investigated and that all relevant information, documentary and otherwise, is sought and obtained. Furthermore, the use of an independent counsel/mediator that is obligated to seek and develop all available and relevant evidence that would refute the allegations and exonerate the accused member school should assure the accused member school that its rights will not be trampled. A requirement that the OHSAA’s independent counsel/mediator to seek out facts that refute allegations of improper recruiting is a fundamental requirement of an enforcement program that is truly cooperative. A requirement that the independent counsel/mediator obtain the advice of the appropriate high school coaches’ association will further ensure that those who have the most at stake in the interscholastic athletic environment will have an important voice in how the environment is regulated.

An independent counsel/mediator also will be bound by the legal profession’s well-established and enforceable code of ethics and will have his or her own insurance for the professional acts that he or she undertakes in the investigation and mediation. Because a prevailing party currently can recover its attorney fees in an action against the OHSAA, challenges to the OHSAA imposition of sanctions are sure to attract capable attorneys to prosecute the challenges. Thus, the use of a skilled and independent counsel to investigate recruiting allegations and mediate the dispute in the course of the investigation is critical to reducing the OHSAA membership’s exposure to potential liability under *Brentwood Academy*. Such a requirement also will reduce the perva-

246. Cf. id. at 253-54 (advocating the NCAA reform its enforcement program by hiring better staff and investing in better training).


248. See *NCAA DIVISION III MANUAL*, 2002-2003, at 273 (hereinafter *NCAA DIVISION III MANUAL 2002-2003*) (Bylaw 32.3.11. “The enforcement staff shall attempt to develop any information that would corroborate or refute alleged violations of NCAA legislation reported in previous interviews.”). See also *YAEGER*, supra note 44 at 254-55 (advocating the NCAA reform its enforcement program by instituting joint and parallel investigations with universities).


250. Compare *YAEGER*, supra note 44, at 252-53 (“Duke University law professor John Weistart said the NCAA’s $1.5 million average annual legal bill should indicate how important it is for the organization to have the very best enforcement staff available. ‘If you pin down the amount paid for legal fees in connection with NCAA infraction proceedings, it’s clear that that number just absolutely exploded in the last few years,’ Weistart said. ‘That means the NCAA needs to be equipped to deal
sive entwinement of the OHSAA with its public school members by eliminating the perception that the OHSAA Commissioner is acting as both prosecutor and judge.

d. The proposed recruiting bylaw requires the OHSAA Board of Control to appoint a three-person Committee on Recruiting Infractions to resolve, through binding arbitration with the advice of the appropriate high school coaches' association, allegations of recruiting infractions that are not resolved by mediation.

The TSSAA's "star-chamber" like decision-making process in the Brentwood Academy case demonstrates that any high school athletic association membership that continues to entrust exclusive power to its executive officer, staff, and board of control to resolve disputes involving inter-community recruiting allegations is inviting its own demise. The TSSAA's executive director initially determined without a hearing that Brentwood Academy had violated the TSSAA's recruiting bylaw and imposed sanctions (including a two-year playoff ban). Subsequently, the TSSAA conducted two hearings, the second before the full board of control. While Brentwood Academy made presentations at both hearings, the TSSAA staff presented no evidence at either hearing. During the first hearing, the TSSAA executive director denied Brentwood Academy the opportunity to cross-examine one of the TSSAA staff members that participated in the investigation "by stating that the hearing was a meeting of 'school people' about 'school issues' and not a court." Following the second hearing, the board of control privately deliberated in executive session. During these deliberations, the board of control considered ex parte, post-hearing evidence to which Brentwood Academy had no opportunity to reply. At no time before or during any proceeding did the TSSAA tell Brentwood Academy the names of its accusers.

These gross procedural shortcomings sounded remarkably similar to the NCAA's procedural "parade of horribles" articulated by the NCAA membership in the 1970s and 1980s:

The enforcement staff was accused of failure to cooperate with the institution under investigation, even though under NCAA policy the investigation is supposed to be a cooperative endeavor. Failure to cooperate was exemplified by refusal to identify the sources of allegations

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251. WEBSTER'S DICTIONARY, supra note 35, at 1150 (defining "star chamber" as a court "characterized by secrecy and often being irresponsibly arbitrary and oppressive").

252. BRENTWOOD ACADEMY II, supra note 8, at 39-45.
or share the whereabouts of witnesses, refusal to reveal the content of statements that had been made to investigators, and refusal to provide the institution with investigatory guidelines prepared by the NCAA. More general criticisms included the complete lack of discovery of evidence that the staff intended to rely upon in presenting its case, and complaints that the pre-hearing role of the Committee on Infractions and its Chair created at the very least the appearance that the case had been prejudged.\footnote{253}

Under its current regulatory system, the OHSAA membership has no safeguards in place to ensure a similar travesty cannot occur in Ohio. Under its current bylaws, the OHSAA empowers a single individual with no legal training, its Commissioner, to "decide all questions and interpretations of the Constitution, Bylaws, and Regulations" and to "impose and enforce penalties" for the violations thereof.\footnote{254} In addition, the Commissioner and his assistants can play a key role in investigating the allegations. Thus, there is little or no formal separation of the OHSAA's prosecutorial function and its judicial function. Such a framework is fraught with peril in cases involving recruiting allegations that by their very nature involve polarized sides predisposed to conclude that the decision-maker is politically biased if the decision is adverse.\footnote{255}

At one time, the NCAA was accused of similar procedural shortcomings and respected educators advocated reducing the exclusivity of the NCAA's judicial function. For instance, in 1956, President G.D. Humphrey of the University of Wyoming stated:

I am... in favor of eliminating the judicial function of the National Collegiate Athletic Association. I think that it's perfectly right that the NCAA should act as the executive branch in the control of its members, i.e., investigate and report rules violations to the individual institutions and conferences, but I think it should be the responsibility of the institutions and the conferences to mete out the penalties.\footnote{256}

In the late 1980s, Duke University sports law professor John Weistart echoed President Humphrey's comments and advocated reform of the NCAA's judicial function: "One of the first things I would do is work on the credibility

\footnote{253. Young, \textit{supra} note 72, at 754-56.} \footnote{254. See OHSAA HANDBOOK, \textit{supra} note 9, at 27 (CONST. art. 6-1-1, 6-1-2).} \footnote{255. Cf. Young, \textit{supra} note 72, at 817 (stating the 1991 NCAA Special Committee found a problem with the then-existing NCAA enforcement program to be "a widespread perception that there [was] inadequate separation between the enforcement staff and the Committee on Infractions" that "led to a perception that the Committee on Infractions act[ed] as both prosecutor and judge").} \footnote{256. \textit{See} Hickman, Part II, \textit{supra} note 243, at 60.}
of the people who make the enforcement decisions. . . . I would go to a system in which I used completely outside decision makers."\(^{257}\)

In response, the NCAA’s 1991 Special Committee recommended and the NCAA adopted a reform pursuant to which those cases involving allegations of major violations that are not resolved by summary disposition are now subject to an infractions hearing before an independent hearing officer.\(^{258}\) This reform was called by some legal observers "the single most important recommendation in the package [of reforms]."\(^{259}\) As contemplated in the NCAA’s reform:

The hearing officer would be a retired judge or other person "trained in weighing conflicting evidence, judging credibility and determining whether the burden of proof has been satisfied," who is not connected to the NCAA in any way. A pool of such individuals would be selected by the NCAA Administrative Committee, and given training on NCAA regulations.\(^{260}\)

The OHSAA should establish a three-person Committee on Recruiting Infractions to resolve, through binding arbitration with the advice of the appropriate high school coaches’ association, those cases involving allegations of recruiting infractions that cannot be resolved by the mediation. The Committee should be comprised of the OHSAA Commissioner and one member appointed by the representative of the Private District Athletic Board on the Board of Control and one member appointed by the vote of the other five district athletic board representatives on the Board of Control. The OHSAA should require that the Board of Control’s appointees be from the general public and have appropriate legal training and experience in order to ensure that determinations of recruiting cases are made with an understanding of the OHSAA’s purpose, but also with an appreciation for the evidentiary and constitutional issues that are critical to the OHSAA membership avoiding liability as a "state actor."\(^{261}\)

Finally, perhaps most importantly, the OHSAA membership likely will be

\(^{257}\) See YaeGER, supra note 44, at 256-57.

\(^{258}\) See Young, supra note 70, at 817-18. See also NCAA DIVISION III MANUAL, 2002-2003, supra note 248, at 201, 278 (Bylaw 19.2.2. Decision to Use Hearing Officer, and Bylaw 32.8. Hearings Before an Independent Hearing Officer).

\(^{259}\) See Young, supra note 72, at 830.

\(^{260}\) Id. at 817-18.

\(^{261}\) See Broyles, supra note 237, at 517-519 ("The biggest problem with the NCAA’s enforcement program is the lack of an independent decision-making body. This single attribute is responsible for most of the injustices that occur during Infractions Committee hearings. . . . Until these structural deformities in the enforcement program are addressed, attempts to correct other inadequacies and injustices are doomed as little more than ineffective public relations maneuvers.")
able to eliminate its potentially devastating exposure to legal-fee liability under Brentwood Academy to an accused OHSAA member school that vindicates itself in the arbitration process. Since there is no authority for an award of legal fees to a prevailing school in either the suggested bylaw or the Ohio statute governing arbitration, a vindicated school will have to bear the legal fees incurred to vindicate itself. Furthermore, such an arbitration process likely would preclude a school found to have committed a recruiting infraction from obtaining legal fees by seeking to vindicate a federal constitutional right as the basis for avoiding sanctions for the infraction.

e. The proposed recruiting bylaw requires that a high school's inter-community recruiting contacts be made available to the OHSAA membership, parents, media, and the public.

As stated by the late Supreme Court Justice Louis Brandeis, "Sunshine is the best disinfectant." Under the suggested bylaw, both OHSAA member high schools and the OHSAA itself would compile inter-community recruiting reports and make them available to the OHSAA membership, parents, media, and the public. The OHSAA also would publish on its website an annual summary of the volume of reports that each school submits to the OHSAA.

The suggested bylaw recognizes the OHSAA membership's interest and a non-recruited, community student's interest in making an OHSAA member high school's involvement in inter-community contact public. In addition, the suggested bylaw does not infringe on any recruited prospect's interest in privacy. The purpose of the bylaw is not to check up on the prospect, but to


263. See, e.g., Bolt v. City of Homer, No. 98-35765, 2000 U.S. App. LEXIS 3671 (9th Cir. Feb. 11, 2000) (affirming trial court's dismissal of plaintiff's action under 42 U.S.C. § 1983 because arbitrator had already resolved plaintiff's free speech claim in arbitration and arbitrator's decision was entitled to preclusive effect). See also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (recognizing that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum." (citation omitted)).

264. The Family Educational Rights and Privacy Act ("FERPA") of 1974, which is also known as the "Buckley Amendment," generally prohibits educational agencies or institutions from maintaining policies or practices that permit the release of education records or other personally identifiable information of students without the consent of the student or his or her parents. However, the Buckley Amendment expressly exempts prospects from the definition of "student." See 20 U.S.C. § 1232g(a)(6) (2002) ("For the purposes of this section, the term 'student' includes any person with
scrutinize the high school's potential inter-community recruiting activity.

The suggested bylaw recognizes that "privacy and anonymity are not the same."265 The difference between anonymity and privacy has been explained as follows: "Privacy is the right to be left alone. Anonymity is the peculiar desire to be unknown and unaccountable. . . . Privacy is a matter of private behavior. Anonymity, . . . is a public concern. Why do you want an anonymous identity. . . .? So you can avoid answering for what you say and do."266

The suggested bylaw would prevent individual OHSAA member high schools that engage in inter-community recruiting contact from remaining anonymous. The suggested bylaw would compel such a high school to answer to both its own community and the OHSAA membership for its inter-community recruiting activity. As a result, it is likely that inter-community recruiting would decrease.

VI. CONCLUSION

As the Knight Commission observed in its 2001 report, "[i]t is tempting to turn away from bad news."267 But those who care about the future of the educational and community values of the interscholastic athletic environment cannot turn away from the bad news that has been clearly broadcast in the cases of LeBron James v. Ohio High School Athletic Ass’n and Brentwood Academy v. Tennessee Secondary School Athletic Ass’n. If the OHSAA membership turns away from the bad news contained in these cases, the future of

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265. Alan M. Dershowitz, Why Fear National ID Cards?, N.Y. TIMES, Oct. 13, 2001, at A23 ("[P]rivacy and anonymity are not the same. American taxpayers, voters and drivers long ago gave up their right of anonymity without loss of our right to engage in lawful conduct with zones of privacy."").


267. KNIGHT COMMISSION 2001 REPORT, supra note 14, at 12.
the educational and community values of the interscholastic athletic environment is bleak indeed.

In order to combat the threats posed by inter-community recruiting, television, and high schools, parents, and students that arm themselves with talented legal teams, the OHSAA membership must summon the spirit of the "high form of community" that its coaches are so skilled at instilling in their interscholastic athletic teams. The OHSAA membership also must reform the OHSAA's administrative structure, recruiting bylaw, and enforcement program so that the membership can fairly, effectively, and efficiently conserve a little bit of the educational and community values of the interscholastic environment on a daily basis. If the OHSAA membership fails to do so, the result will be the "intercollegiatization" and degradation of an environment that for nearly 100 years has been characterized by its educational and community values and the economic devaluation of the "interscholastic athletic product."