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Total Eclipse of the Tweet: How Social Media Restrictions on Student and Professional Athletes Affect Free Speech

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TOTAL ECLIPSE OF THE TWEET: HOW SOCIAL MEDIA RESTRICTIONS ON STUDENT AND PROFESSIONAL ATHLETES AFFECT FREE SPEECH

"*The Internet is the largest experiment involving anarchy in history. Hundreds of millions of people are, each minute, creating and consuming an untold amount of digital content in an online world that is not truly bound by terrestrial laws.*"[1]

I. Give Me Liberty, or Give Me "Likes": An Introduction

"Tweet it; tag it; post it" may well be the mantra of the twenty-first century.[2] The days of dial-up are long gone, and a little red notification symbol has replaced the formerly ubiquitous "you've got mail."[3] Online social media platforms such as Facebook, Twitter, Instagram, and Tumblr have become a daily component of our lives, a virtual portal to express not-so-inner musings and thoughts.[4] In fact, a resounding seventy-three percent of adults are reported to utilize social networking sites, as well as eighty-one percent of teens.[5]

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1. Eric Schmidt & Jared Cohen, *The New Digital Age: Reshaping the Future of People, Nations and Business* (Apr. 23, 2013), *available at* http://books.google.com/books?id=FL_LPoLdGKsC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (noting that Internet's ever-evolving nature is not readily defined by laws).

2. *See* Adam Popescu, *Just Who Uses Social Media? A Demographic Breakdown*, Mashable (Apr. 13, 2013), http://mashable.com/2013/04/12/social-media-demographic-breakdown/ (revealing high percentages of every demographic utilize social media).

3. *See Top 10 Social Networking Sites*, Discovery News (Dec. 12, 2012, 3:00 AM), http://news.discovery.com/tech/apps/top-ten-social-networking-sites.htm (ranking Facebook as number one social networking program, as of 2012).

4. *See* Patricia Reaney, *Email Connects 85 Percent of the World; Social Media Connects 62 Percent*, Huffington Post (Mar. 27, 2012, 2:23 PM), http://www.huffingtonpost.com/2012/03/27/email-connects-the-world_n_1381854.html (highlighting that social media is only second to e-mails in terms of Internet usage).

5. *See* Maeve Duggan & Aaron Smith, *Social Media Update 2013*, Pew Research Center (Dec. 30, 2013), http://pewinternet.org/Reports/2013/Social-Media-Update.aspx (reporting on high usage of social media by adults ages eighteen and older). *See also Part 1: Teens and Social Media Use,* Pew Research Center (May 21, 2013), http://www.pewinternet.org/Reports/2013/Teens-Social-Media-And-Privacy/Main-Report/Part-1.aspx (noting vast majority of teens are utilizing social media).

Athletes are no special exemption to this trend.[6] And for student athletes, social media is not merely a simple portal into the virtual lives of their friends, but a direct channel of communication with their growing fan base.[7] In the realm of professional athletics, social media facilitates an opportunity for athletes to strike endorsement gold by mentioning brands to their thousands, at times millions, of followers.[8] Many sports organizations, however, find social media's ease of expression troubling.[9] Due to the rapid distribution of a post to a multitude of followers on social media sites such as Twitter or Facebook, a public relations disaster is a simple "send" button away.[10] In order to combat athletes distributing potentially damaging statements, sports organizations, in both the collegiate and professional arena, have implemented restrictions on how athletes use social media.[11]

Such restrictions may starkly infringe upon athletes' fundamental First Amendment right to freedom of speech.[12] For student athletes competing in divisions set by the National Collegiate Athletic Association ("NCAA"), the policies, which state schools' implement, have a direct, negative effect on student athletes' right to free

6. *See* Eric Adelson, *Twitter 2012: How Athletes Have Used Social Media to Become the Media*, YAHOO! SPORTS (Dec. 23, 2012, 11:47 AM), http://sports.yahoo.com/news/twitter-2012—how-athletes-have-used-social-media-to-become-the-media-164755022.html (asserting that social media platforms such as Twitter allow for an "immediacy" and "intimacy" which connect athletes to their fans in an quick, effective manner).

7. *See Social Media Has Pros and Cons for Student Athletes*, DAILYTARHEEL (Aug. 30, 2013, 1:07 AM), http://www.dailytarheel.com/article/2013/08/social-media-has-pros-and-cons-for-student-athletes (describing costs and benefits for student athletes of disclosing information on social media).

8. *See* Ben Pickering, *Athletes and Social Media: Untapped Goldmine or PR Landmine?*, HUFFINGTON POST (Apr. 15, 2013, 1:42 PM), http://www.huffingtonpost.com/ben-pickering/athletes-and-social-media_b_3082184.html (describing brand growth opportunities for professional athletes who effectively use social media).

9. *See* Jed Hughes, *NFL Players' Use of Social Media Is a Cause of Concern for Teams*, BLEACHER REPORT (Mar. 13, 2013), http://bleacherreport.com/articles/1565617-nfl-athletes-use-of-social-media-is-a-cause-of-concern-for-teams (providing example of how sporting organization could adjust its previously lenient social media policy to limit public relations backlash of its athletes).

10. *See* Pickering, *supra* note 8 (asserting that quick distribution of social media can lead to disastrous press issues).

11. *See* Hughes, *supra* note 9 (noting organizations that have expressed restrictions on athletes' social media usage); Jamie P. Hopkins, Katie Hopkins & Bijan Whelton, *Being Social: Why the NCAA Has Forced Universities to Monitor Student Athletes' Social Media*, 13 U. PITT. J. TECH. L. & POL. 1,1 (2013) (highlighting that higher education schools across country are implementing social media restriction policies to curb their athletes from potentially damaging schools' reputation).

12. For a discussion of the constitutionality of student and professional athlete speech restrictions, see *infra* notes 196-289 and accompanying text.

speech.[13] Though professional athletes sign away their First Amendment guarantees in their private contracts, they must be extremely cognizant of the social media policies of their particular organization, as a deviation from their expressed standard of online conduct could result in ample fines and penalties.[14]

Part II of this Comment introduces a background of online social networking, and addresses whether speech made on such platforms falls within the purview of the First Amendment.[15] Part III discusses the free speech rights of college students, provides a background of common limits universities impose on student athletes' online speech, and examines the limits professional sporting organizations place on professional athletes' speech.[16] Part IV argues that universities' online speech restrictions for student athletes are unconstitutional and recommends permissible actions universities may take.[17] Part V analyzes the effectiveness of social media restrictions enforced by professional sport organizations, and provides tips for athlete compliance.[18] Part VI concludes that there should be less restrictions on athletes' speech, both at the collegiate and professional level.[19]

II. Planet of the Posts: The Rise and Importance of Online Speech

Specifically, the term social media refers to "forms of electronic communication . . . through which users create online communities to share information, ideas, personal messages, and other

13. *See* Hopkins, Hopkins & Whelton, *supra* note 11, at 31-32 (asserting unconstitutionality of certain schools' social media restrictions, as such restrictions may place overtly strict limits on athletes' freedom of speech).

14. *See* Len Berman, *When Social Media Gets Athletes in Trouble*, Mashable (Jan. 4, 2010), http://mashable.com/2010/01/04/social-media-athletes/ (highlighting examples of professional athletes being fined by their sport organizations for failing to adhere to their set social media guidelines).

15. For a discussion of the history of social media, see sources cited *infra* notes 20-36 and accompanying text.

16. For a discussion of the speech restrictions for collegiate and professional athletes, see sources cited *infra* notes 38-194 and accompanying text.

17. For a discussion of the constitutionality of social media restrictions by universities against their student athletes, see *infra* notes 196-271 and accompanying text.

18. For a discussion of the efforts sport organizations have taken to restrict the speech of their athletes, see *infra* notes 273-284 and accompanying text.

19. For a discussion of the need to implement less stringent online-speech policies, see Conclusion *infra* Part VI.

content . . . ."[20] Despite the fact that the term social media is currently applied liberally to ample Web sites, social media has a far humbler beginning.[21] Created in 1969, it is widely-held that CompuServe carved the first sphere of online social interaction, providing a platform for its members to not only share information, but to actually send electronic messages to one another.[22] Shortly after the inception of CompuServe, the first Bulletin Board System ("BBS") spun its way into the Web and cultivated an elementary foundation for an online digital community.[23] Through a dial-up connection, online users had the power to communicate in a true virtual community setting.[24] In the late 1980s, Quantum Computer Services, Inc. opened its virtual doors, but later decided to change its name to America Online Inc. ("AOL").[25] A decade later, AOL boasted a whopping five million members.[26] In 1997, AOL introduced its Instant Messenger feature ("AIM"), and Web surfers across the world began to add each other to their Buddy Lists.[27]

In 2002, Canadian-based platform Friendster heralded the modern form of social networks, allowing users to establish an on-

20. *See Social Media – Definition,* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/social%20media (last seen Feb. 3, 2014) (stating definition for social media).

21. *See* Shea Bennett, *A Brief History of Social Media (1969-2012) [Infographic]*, MEDIABISTRO (Jul. 4, 2013, 5:00 PM), http://www.mediabistro.com/alltwitter/social-media-1969-2012_b45869 (providing timeline of major events in history of social media). *See also* Gordon Goble, *The History of Social Networking*, DIGITAL TRENDS (Sept. 6, 2012), http://www.digitaltrends.com/features/the-history-of-social-networking/ (noting early beginnings of online social interaction).

22. *See id.* (highlighting that CompuServe offered initial version of true social interaction in an online environment). *See also* Dr. Anthony Curtis, *The Brief History of Social Media*, UNIVERSITY OF NORTH CAROLINA AT PEMBROKE (2013), http://www.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html (stating that CompuServe was "the first major commercial Internet service provider for the public in the United States").

23. *See* Scott Gilbertson, *Feb. 16, 1978: Bulletin Board Goes Electronic*, WIRED (Feb. 16, 2010, 12:00 AM), http://www.wired.com/thisdayintech/2010/02/0216cbbs-first-bbs-bulletin-board/ (describing formation of BBS by Ward Christensen and Randy Seuss, who wanted to create online platforms which resembled community bulletin boards).

24. *See id.* (noting that due to complexity of successfully dialing into BBSs, early users were generally computer enthusiasts).

25. *See 25 Years of AOL: A Timeline*, WASHINGTON POST (May 23, 2010, 7:08 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/23/AR2010052303551.html (providing list of major events in tech giant's corporate history).

26. *See id.* (describing AOL's high growth within half decade).

27. *See* Matt Petronzio, *A Brief History of Instant Messaging*, MASHABLE (Oct. 25, 2012), http://mashable.com/2012/10/25/instant-messaging-history/ (emphasizing that until 2005 AIM "dominated the instant messaging market with 53 million users").

line profile and connect with their real world friends.[28] MySpace launched a year later, providing a music-based version of Friendster aimed for teenagers.[29] Fast forward to a Harvard dorm room in 2004 where Mark Zuckerberg created "The Facebook."[30] Though initially only available to college students, The Facebook was a platform for university students to "add" each other as friends within their own collegiate networks; but in 2006, Facebook (no longer encumbered by an extraneous "the") opened its virtual gates to public access in order to expand its then already healthy 9 million-member user base.[31] That same year, Twitter weaved itself into the Web, and enabled its users to "tweet" status-like posts in 140 characters or less.[32] Instead of following Facebook and requiring two parties to "add" one another as friends, Twitter enabled users to simply "follow" other users.[33] A click of Twitter's "follow" button would ensure that whatever the followed-user tweeted would simultaneously appear on the following-user's News Feed; thus, a live, instantaneous gateway into thoughts of another became subscribable.[34]

As of 2014, Facebook and Twitter stand as social networking Goliaths.[35] In essence, the fundamental purpose of these Web sites is to provide an easily accessible virtual sharing platform, in which

28. *See* Richard Nieva, *Remember Friendster? Thought So*, CNET (Feb. 4, 2014, 4:00 AM), http://news.cnet.com/8301-1023_3-57618202-93/remember-friendster-thought-so/ (noting that at its inception, Friendster was premier social connectivity Web site).

29. *See Do You MySpace?*, N.Y. TIMES (Aug. 28, 2006), http://www.nytimes.com/2005/08/28/fashion/sundaystyles/28MYSPACE.html?pagewanted=1&_r=0 (describing MySpace's ultra-popularity with American youth).

30. *See* Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (Jul. 24, 2007), http://www.theguardian.com/technology/2007/jul/25/media.newmedia (noting humble origins of Facebook).

31. *See* Janet Kornblum, *Facebook Will Soon Be Available to Everyone*, USA TODAY (Sept. 11, 2006), http://usatoday30.usatoday.com/tech/news/2006-09-11-facebook-everyone_x.htm (describing addition of 500 public networks to Facebook's Web site).

32. *See* Nicholas Carlson, *The Real History of Twitter*, BUS. INSIDER (Apr. 13, 2011, 1:30 PM), http://www.businessinsider.com/how-twitter-was-founded-2011-4 (highlighting founding story of popular social networking site).

33. *See id.* (describing functioning capabilities of Twitter).

34. *See id.* (noting quickness and real-time nature of tweeting).

35. *See* Brad Stone & Sarah Frier, *Facebook Turns 10: The Mark Zuckerberg Interview*, BLOOMBERG BUSINESSWEEK (Jan. 30, 2014), http://www.businessweek.com/articles/2014-01-30/facebook-turns-10-the-mark-zuckerberg-interview (stating that as of its tenth year anniversary, 1.23 billion people globally use Facebook). *See also* Jim Edwards, *Twitter's 'Dark Pool': IPO Doesn't Mention 651 Million Users Who Abandoned Twitter*, BUS. INSIDER (Nov. 6, 2013, 9:07 AM), http://www.businessinsider.com/twitter-total-registered-users-v-monthly-active-users-2013-11 (noting that while Twitter's total user base is not officially known, Twitter reports active user base of 200 million people).

participating users further fuel this increasingly inter-connected world.[36]

III. TAG ME, MAYBE?: AN OVERVIEW OF FREE SPEECH RIGHTS AND RESTRICTIONS FOR STUDENT AND PROFESSIONAL ATHLETES

"*Whoever would overthrow the liberty of a nation must begin by subduing the freeness of speech.*"[37]

Two hundred years after its inclusion to the Constitution, the Bill of Rights remains a monument to the legacy of freedom the Framers wished to cement; atop this monument lies the First Amendment and its guarantee of freedom of speech.[38] In this Part, Section A discusses free speech jurisprudence the limitations associated with free speech.[39] Section B explains the Supreme Court's stance on online speech.[40] Section C explores speech rights traditionally associated with high school students.[41] Next, it notes the relationship of free speech rights between high school students and college students, and Section D discusses the special distinction of collegiate athletes within these classifications.[42] Next, Section D illustrates how universities are infringing on the online speech rights of student athletes.[43] Finally, Section E outlines the social media

36. *See* Reaney, *supra* note 4 (suggesting that sharing aspect of social media certainly encompasses notions of speech and expression).

37. *See Amendment I: Freedom of Religion, Speech, Press, and Assembly*, THE RUTHERFORD INSTITUTE, https://www.rutherford.org/constitutional_corner/amendment_i_freedom_of_religion_speech_press_and_assembly/ (last visited Mar. 14, 2014) (quoting Ben Franklin to emphasize notion that freedom of speech and democracy are intertwined concepts).

38. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."). The Fourteenth Amendment ensures against states violating constitutional guarantees. *See* U.S. CONST. amend. XIV; Hopkins, Hopkins, & Whelton *supra* note 11, at 35-6 (discussing how Bill of Rights liability is extended to states).

39. For a discussion of the limitations associated with free speech, see *infra* notes 45-88 and accompanying text.

40. For a discussion of the Supreme Court's jurisprudence in relationship to Internet censorship, see *infra* notes 89-95 and accompanying text.

41. For a discussion of students' rights to free speech, see *infra* notes 99-103 and accompanying text.

42. For a discussion of collegiate students' right to free speech, see sources cited *infra* notes 104-118 and accompanying text.

43. For a discussion of the state universities' infringement of student athletes' free speech rights, see *infra* notes 119-171 and accompanying text.

speech restrictions professional sports organizations impose on professional athletes.[44]

A. Free Speech Jurisprudence

Government-enacted restrictions on speech are typically classified into two categories: content-neutral restrictions and content-based restrictions.[45] Prior restraint occurs when the government attempts to restrict speech before its utterance.[46] When determining a potential violation of free speech, each category asserts its own analysis; therefore, the classification of a government restriction is vital to determining its constitutionality.[47]

1. *Content-Neutral Restrictions*

Content-neutral restrictions can be identified as limitations upon the time, place, or manner of speech.[48] To determine if a law is content-neutral, the law must be "justified without reference to the content of the regulated speech."[49] As the Supreme Court

44. For a discussion of the speech restrictions on professional athletes, see *infra* notes 172-194 and accompanying text.

45. *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND PROPERTIES, § 11.2.1 at 960-61 (Vicki Been et al., 4th ed. 2011).

46. *See* Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV 53, 53 (1984) (stating that "[u]nder the prior restraint doctrine, the government may not restrain a particular expression prior to its dissemination even though the same expression could be constitutionally subject to punishment after dissemination.").

47. For an in-depth discussion of content-neutral restrictions, content-based restrictions, and prior restraint, see *infra* notes 48-98 and accompanying text.

48. *See* Clark v. Cmty. for Creative Non-Violence, 486 U.S. 288, 293 (1984) (stating that "expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions"). When the government implements restrictions that limit the expressive nature of speech, the government interest is examined to determine the restriction's validity. *See* Texas v. Johnson, 491 U.S. 397, 406 (1989) (citing Cmty. for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (1983) (Scalia, J., dissenting)) (asserting that content neutrality can also be applied to expressive conduct). *See also* United States v. O'Brien, 391 U.S. 367, 377 (1968) (noting that if government focused on "nonspeech" element of restriction, "incidental limitations on First Amendment freedoms" are permissible). The *O'Brien* Court established the following factors when determining if a government restriction on speech is constitutional: (1) if the restriction furthers a substantial government interest; (2) if that interest is unrelated to suppressing free expression; and (3) if incidental First Amendment infractions are no greater than what is necessary to further the government interest. *See id.* (listing ways in which government speech restriction can be appropriate limitation on First Amendment speech rights).

49. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984)) (stating that if government's purpose of speech restriction was unrelated to expressive content of speech, then speech restriction is classified as content-neutral).

stated in *Ward v. Rock Against Racism*, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[50] Thus, high emphasis is placed on the government's purpose in creating the law.[51]

Additionally, as the Supreme Court stressed in *City of Renton v. Playtime Theaters, Inc.*, a law is regarded as content-neutral if the government's ultimate purpose lies within the secondary effects of limiting speech, and not with the specific content of speech itself.[52] In *Renton*, the Court held that a Washington state zoning ordinance prohibiting the presence of adult theaters was a content-neutral restriction, as the ordinance was created in regards to controlling external factors such as the city's crime rate, commerce, and property values.[53] These external factors reflected the city's predominant concern with the secondary effects of the ordinance, and revealed that the city was not interested in "[suppressing] the expression of unpopular views.[54] Consequently, content-neutral restrictions may be determined by their correlation to secondary effects; however, an audience's reaction and the "emotive impact of speech" are not representative of a law's secondary effects.[55] Such considerations

50. *Id.* (holding that if government established regulation because it disagreed with content of speech, regulation would be invalid).

51. *See id.* at 801 (noting that law's constitutionality depends on government's interest in correcting overall societal issue).

52. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47-9 (1986) (describing secondary effects doctrine).

53. *See id.* at 48 (asserting that city's ordinance concerned secondary effects of speech as "[t]he ordinance by its terms [was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life'").

54. *See id.* (quoting Justice Powell as stating "[i]f the city had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location." (citing Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 82 (1976))). The *Renton* Court heavily emphasized if the city's ordinance relied upon the content of speech, the ordinance would no longer be considered content-neutral, but would rather be content-based. *See id.* at 48-9 ("The ordinance does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a form to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." (citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972))).

55. *See* Boos v. Barry, 485 U.S. 312, 320 (1988) (affirming *Renton*'s utilization of secondary effects doctrine, but limiting its application to "justifications for regulations [that] have nothing to do with content"). However, laws that focus on listeners' direct response to speech are distinguishable from *Renton*, and thus not susceptible to its analysis. *See id.* at 321 (arguing that targeting audience's emotional response to speech does not fall within secondary effects).

are seen as primary effects of speech restriction, and thus strip a law of its content neutrality.[56]

Once a law is classified as a content-neutral restriction, it is tested under intermediate scrutiny.[57] Intermediate scrutiny requires that legislation be narrowly tailored to promote a substantial government interest, while also leaving ample alternative channels of communication.[58] In analyzing whether the government action is narrowly tailored, the *Ward* Court held that restrictions cannot "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[59] Thus, a content-neutral restriction is appropriately narrowly tailored if the speech limitations directly align with the government's interest.[60] With regards to the availability of other communication methods, the speech limitation must not render alternative channels inadequate for speech.[61]

2. *Content-Based Restrictions*

Content-based restrictions on speech limit speech because of its "message, its ideas, its subject matter, or its content."[62] Due to their restrictions upon the substantive content of speech, content-

56. *See id.* (asserting that if law focuses on primary impact of speech, then law is content-based restriction).

57. *See* Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 805-06 (2004) (noting that time, place, or manner restrictions upon speech undergo intermediate scrutiny).

58. *See* Ward v. Rock Against Racism, 491 U.S. 781, 799-800 (1989) (describing prongs of intermediate scrutiny analysis for content neutral restriction on speech).

59. *See id.* (noting that restrictions on time, place, or manner of speech cannot burden speech that is extraneous to government interest).

60. *See id.* (stating that "even complete bans of speech could be construed as content neutral, 'but only if each activity within the proscription's scope is an appropriately targeted evil'" (quoting Frisby v. Shultz, 487 U.S. 474, 485 (1988))).

61. *See id.* at 802 (holding that ordinance limiting noise from bandstands left ample channels of communication as it did not restrict any expressive activity, only amplification of bandstand volume). However, the government bears no burden to ensure that the speech limitation is the least restrictive method for achieving its purposes. *See id.* at 800 ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.").

62. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). *See also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811-12 (2000) (emphasizing that "the essence of content-based restriction . . . focuses only on the content of the speech and the direct impact that speech has on its listeners" (quoting Boos v. Barry, 485 U.S. 312, 321 (1988))).

based restrictions are presumably invalid.[63] This adherence to the sheer right of speech is equally, if not more, accentuated when the government aims to restrict potentially offensive speech.[64] As Justice Brennan expressed in *Texas v. Johnson*, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[65]

As content-based restrictions limit the core content of speech, such restrictions must undergo a strict scrutiny analysis.[66] Content-based restrictions may pass strict scrutiny if the limitation is "narrowly tailored to promote a compelling Government interest . . . [and] [i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[67] In instances where speech limitations are designed to curb listeners' susceptibility to offensiveness, the Supreme Court directed, in *United States v. Playboy Entertainment Group, Inc.*, that "[w]here the designed benefit of a content-based restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists."[68] In *Playboy Entertainment*, the Supreme Court held that a law requiring cable providers to block sexually explicit programs during the hours chil-

63. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (stating that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of ideas expressed." (citation omitted)).

64. *See Boos*, 485 U.S. at 322 (noting that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment" (internal quotations marks omitted) (citations omitted)). *See also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817 (2000) ("It is through speech that our convictions and beliefs are influenced and expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.").

65. Texas v. Johnson, 491 U.S. 397, 414 (1989) (holding Texas law prohibiting flag burning was unconstitutional, as flag burning is expressive conduct that cannot be assuaged by Texas's fear of peace disturbance).

66. *See* Glendale Assocs., Ltd. v. NLRB, 347 F.3d 1145, 1155 (9th Cir. 2003) ("Content-based restrictions must be analyzed under strict scrutiny because such restrictions are especially likely to be improper attempts to value form forms of speech over others, or are particularly susceptible to being used by the government to distort public debate." (internal quotations omitted) (citation omitted)).

67. *See Playboy*, 529 U.S. at 813, 813-817 (citations omitted) (providing template of strict scrutiny analysis and noting government holds burden to prove law's validity when restricting speech content).

68. *See id.* at 813 (stating that audience sensibility not compelling justification for government restriction of speech).

dren were most likely to watch television was an unconstitutional content-based restriction upon speech.[69] The Court noted, "even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."[70] Thus, the mere availability of alternative communication channels does not satisfy strict scrutiny; instead, the government must prove that its law is the least restrictive measure to effect its purposes.[71]

However, there are certain classifications of speech that the government may limit, even through content-based restrictions.[72] Speech that exempts the government from the rigidity of content-based restrictions may be divided into six classifications: obscenity, defamatory language, incitement, fraud, speech integral to criminal conduct, and fighting words.[73] Such speech is regarded as "low value," and thus not warranted First Amendment protection.[74]

3. *Prior Restraint*

Regardless if a speech restriction is classified content-neutral or content-based, the government is generally not permitted to restrict speech before it occurs.[75] Such action is known as prior re-

69. *See id.* at 827 (holding that § 505 of Telecommunications Act of 1996 failed to use least restrictive means for its purpose).

70. *See id.* at 814 (noting significance of less-intrusive available alternatives to blanket restrictions on speech).

71. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997) (stating if least restrictive alternatives are equally effective as enacted law, government failed burden to prove its utilization of least restrictive method).

72. *See* Daniel Berger, *Constitutional Combat: Is Fighting a Form of Free Speech? The Ultimate Fighting Championship and Its Struggle Against the State of New York Over the Message of Mixed Martial Arts*, 20 MOORAD SPORTS L.J. 381, 413-14 (2013) (naming "narrowly limited classes of speech" which are subject to content-based restrictions).

73. *See generally* Miller v. California, 413 U.S. 15, 36-7 (1973) (establishing obscenity as unprotected speech); New York Times v. Sullivan, 376 U.S. 254, 264-65 (1964) (precluding defamatory language from First Amendment protection); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (prohibiting speech causing incitement as protected); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (declining fraudulent speech as protected speech); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (refusing speech integral to criminal conduct as receiving First Amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (excluding fighting words from protected class of speech).

74. *See* Cass. R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 843 (1993) (concluding that low value speech of pornography and hate speech would cause "sufficient harms" under regulatory standards).

75. *See* New York Times v. United States, 403 U.S. 713, 716 (1971) (Black, J., concurring) (quoting James Madison as stating that "[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments . . . .").

straint.[76] Prior restraint restrictions reflect the government's efforts to restrain speech before it is spoken, as opposed to punishing it's effects afterwards.[77] These pre-emptive limitations on speech are highly frowned upon, as they are seen as impositions on speech based "on predictions of dangers that would not actually materialize and thus would not be the basis for subsequent punishments."[78] Once challenged, the government possesses a substantial burden to prove the validity of the speech restriction.[79] In *New York Times v. United States*, the Supreme Court rejected the U.S. government's effort to preliminarily suppress the publication of select classified articles within the New York Times.[80] As Justice Black noted in his concurrence, the government's justification of national security was far too overbroad and vague to constitute a compelling reason to override prior restraint.[81]

However, the Supreme Court has recognized instances in which the government may appropriately restrict citizens' speech before it occurs.[82] As the Court held in *Forsyth County v. Nationalist*

76. *See* Redish, *supra* note 46, at 53 (defining prior restraint doctrine).

77. *See* CHERMERINSKY, *supra* note 45, at 978-79 ("The clearest definition of prior restraint is as an administrative system or judicial order that prevents speech from occurring."). *See also* Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.").

78. *See* CHERMERINSKY, *supra* note 45, at 983 ("A free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.").

79. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (describing government's paramount burden when court examines prior restraint restrictions). *See also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." (citation omitted)); Near v. Minnesota, 283 U.S. 697, 733 (1931) (holding that "no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint" (citation omitted)).

80. *See* New York Times v. United States, 403 U.S. 713, 714 (1971) (holding that New York Times's speech was unconstitutionally restrained when government prohibited its publication of "History of U.S. Decision-Making Process on Viet Nam Policy").

81. *See id.* at 719 (stating that usage of term "security" constituted "a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."). Overbreadth issues may arise if a law is not narrowly tailored to support its goals. *See* Chemerinsky, *supra* note 45, at 972 ("A law is unconstitutionally overbroad, if it regulates substantially more speech than the Constitution allows to be regulated, and a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others.").

82. *See* Michael I. Meyerson, *Rewriting* Near v. Minnesota*: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1107-08 (2001) (describing instances in which government bans on speech do not fall under prior restraint and are permissible).

Movement, the government-enacted scheme must first not delegate broad authority to government officials.[83] Second, speech limitations must not restrict the content of the speech.[84] Third, the restrictions must be narrowly tailored to serve a significant government interest.[85] And last, the scheme must leave ample channels of communication.[86]

Ultimately, if the government would like to restrict speech in a constitutionally permissible fashion, the restriction should be narrowly tailored to serve a governmental interest unrelated to the actual content of speech.[87] Government action faces an uphill battle of validity when such restrictions are placed upon the content of speech or aim to restrict the speech before it occurs.[88]

B. Online Speech Jurisprudence

In the landmark decision of *Reno v. American Civil Liberties Union*, the Supreme Court refused to establish a layer of censorship over the Internet through the Communications Decency Act ("CDA").[89] While the CDA aimed to prohibit sexually-charged communication between adults and minors, the Court ultimately rejected the Act's restrictions on Internet speech, holding that the CDA's restrictions on conduct were overtly vague, and thus could result in a chilling of speech.[90] Further, the Court held that the

83. *See* Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 130 (1992) (recognizing that even though prior restraint faces strong presumption of invalidity, government may tailor speech limitation scheme to be constitutionally permissible).

84. *See id.* at 131 (asserting that if scheme involves "appraisal of facts, exercise of judgment, and the formation of an opinion," First Amendment considerations outweigh any benefit of censorship (citing Cantwell v. Connecticut, 310 U.S. 296, 305 (1940); Southeastern Promotions, Inc. v. Conrad, 420 U.S. 546, 553 (1975))).

85. *See id.* at 130 (arguing that in *Forsyth*, decision to limit speech solely resides with administrator's discretion). The Court pointed out that, in the case at hand, there were no "articulated standards" or "objective factors" to guide administrators when limiting speech. *See id.* at 133 (asserting that absence of guidelines allows administrators to make decision in arbitrary manner).

86. *See id.* at 130 (describing need for alternative methods of communication, in order to not entirely suppress citizens' speech).

87. *See generally* Ward v. Rock Against Racism, 491 U.S. 781 (1989).

88. *See generally* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000).

89. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 885 (1997) (holding that "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.").

90. *See id.* at 871-72 (arguing that CDA's "patently offensive" standard against online speech is too vague). Ultimately, the Court held that the CDA represented a blanket prohibition against the primary effects of speech, and was accordingly a content-based restriction on speech, and therefore constitutionally impermissible.

CDA's "lack of precision" in restricting online speech resulted in a large suppression of protected speech.[91] Justice Stevens opined that "the content on the Internet is as diverse as human thought" and provided the following commentary on the special importance of Internet speech:

> [T]he Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds . . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individuals can become a pamphleteer.[92]

While the use of a phone line has become nearly extinct, the notion of the significance of unrestrained Internet speech still thrives within the judiciary.[93] In *Ashcroft v. Free Speech Coalition*, the Court again refused to apply Internet censorship through Congress' Child Pornography Prevention Act of 1966 ("CPPA").[94] While Congress aimed to prohibit the possession or distribution of suggestive child images created through digital sources, the Court rejected the overbroad scope of the CPPA.[95]

See id. at 870 (rejecting *Renton* analysis because CDA targeted "direct impact of speech").

91. *See id.* at 874 (asserting that "[i]n order to deny minors access to potentially harmful speech, the CDA effectively [suppressed] a large amount of speech that adults have a constitutional right to receive and to address to one another.").

92. *See id.* at 870 (emphasizing importance of Internet as source of expression for citizens, and to respect its expressive nature, courts should apply strict scrutiny standards for its limitation).

93. *See generally* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (declining censorship of Internet through Child Pornography Prevention Act of 1996); Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004) (prohibiting Internet censorship through Child Online Protection Act).

94. *See Free Speech Coalition*, 535 U.S. at 258 (2002) (holding that Congress's limitation on Internet was too overbroad and thus unconstitutional). The Court also noted that because COPA's provisions are already deemed overbroad, no analysis needs to be conducted regarding the potential vagueness of statutory language. *See id.* at 255 (stating that "[t]he overbreadth doctrine prohibits the [g]overnment from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.").

95. *See id.* (stressing that "[p]rotected speech does not become unprotected merely because it resembles the latter").

This adherence to the strict scrutiny standard is noteworthy, as the Court is affirming the importance of open Internet speech and expression by forcing the government to meet the highest standards of compliance.[96] Consequently, speech uttered via social media may be even more protected as it serves as a figurative, albeit digital, message board to convey the writer's literal thoughts.[97] The inherent flexibility and sheer connectivity of social media allows users to directly engage in "public discourse," and thus further provides persuasion against its restriction.[98]

C. Student Speech Jurisprudence

In the oft-cited words of Justice Fortas in *Tinker v. Des Moines Independent Community School District*, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[99] In *Tinker*, the Court upheld the freedom of speech and expression of high school students who refused to remove their black armbands, which they wore to silently show "their disapproval of Vietnam hostilities and their advocacy of a truce" for the Vietnam War.[100] Analogizing the wearing of the armbands to "pure speech," the Court stated that school officials "sought to punish petitioners for a silent, passive expression of opinion."[101] Establishing the standard for student rights in school, the Court went on to assert that such pure speech, when accompanied with an "undifferentiated fear or apprehension of disturbance[,]" cannot permit school authorities to suppress stu-

96. *See Am. Civil Liberties Union*, 542 U.S. at 661 (affirming that Congress's second attempt at restricting availability of child pornography online still did not meet burdens associated with strict scrutiny).

97. *See Reno*, 521 U.S. at 870 (stressing importance of Internet as expressive speech).

98. *See Am. Civil Liberties Union*, 542 U.S. at 629 (asserting that social media's role in cultivating 'self-operating marketplace of ideas' further provides evidence of its need for speech protection).

99. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (asserting that even in school-controlled environments, students are still entitled to their constitutional freedoms).

100. *See id.* at 514 (noting that wearing of wristband was silent act of protest against Vietnam War efforts).

101. *Id.* at 508 (commenting that students' actions did not affect any of school's surroundings). "There is no evidence whatever of petitioner's interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." *See id.* (asserting there was no evidence to point to disrupting nature of students' expressive speech).

dent speech.[102] In the spirit of true, unencumbered freedom, Justice Fortas noted the following:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[103]

1. *College Student Speech*

In the context of higher education, state universities are the equivalent of state actors.[104] Thus, actions taken by state universities are regarded as public actions subject to constitutional review.[105] Conversely, private institutions are not state actors, therefore, not subject to First Amendment suits.[106]

Further, while *Tinker* established the foundation for student speech in the context of a high school, the question remains whether such standards apply to students within a university setting.[107] Though the Supreme Court has not yet expressly reconciled this issue, in *Healy v. James*, the Court noted that "the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,'" and, as such, the academic freedoms must certainly

102. *See id.* (highlighting that mere difference of opinion cannot be substantial grounds for revocation of freedom of speech and expression rights, as "any departure from absolute regimentation may cause trouble").

103. *See id.* at 508-09 (spotlighting importance of maintaining right to vocalize speech, as United States gains fortitude through discourse of varying opinion).

104. *See* Eric D. Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media By College Athletes and Recommended Best Practices For Athletic Departments*, 38 J.C. & U.L. 451, 453 (2012) (drawing parallel between state actors and state universities).

105. *See id.* (stating that actions taken by state universities are regarded as public actions subject to constitutional review).

106. *See generally* NCAA v. Tarkanian, 488 U.S. 179 (1988) (holding that NCAA, as private organization, not considered state actor).

107. *See generally* J. Wes Gay, Note, *Hands off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?*, 39 FLA. ST. U. L. REV. 781, 789-792 (2012) (asserting that "age and maturity level should be weighed when determining how and when rights of students will be protected.").

be protected.[108] Relying on *Tinker*'s analysis, the *Healy* Court examined whether a student activity caused a disruption within the academic community and concluded that students, even in light of their fundamental right of speech, must still respect the school regulations "with respect to the time, the place, and the manner" in which speech activity is to be conducted.[109]

Lower courts have penned their insistence upon the special circumstances concerning collegiate learning environments.[110] In *DeJohn v. Temple University*, the Third Circuit recognized distaste for the creation of a chilling effect on student speech.[111] Citing *Healey*, the *DeJohn* court affirmed that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," and thus held that Temple University's policy against harassment was an overbroad prohibition of students' rights to speech.[112] The Third Circuit further held, in *McCauley v. University of the Virgin Islands*, that since "[t]he university atmosphere of speculation, experiment, and creation is essential to the quality of higher education," public universities need lenience in their restrictions of student speech to best encourage the minds of students.[113]

2. *Collegiate Athlete Speech Restrictions*

All college students are not created equal.[114] Though a bold claim, the veracity of the statement is readily apparent when com-

108. Healy v. James, 408 U.S. 169, 180 (1972) (applying *Tinker* standards to collegiate environment).

109. *See id.* 192-93 (stating that school mandated agreements to comply with university's code of conduct is not infringement of students' right to free speech).

> A college administration may impose a requirement . . . that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. . . . This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.

See id.

110. *See generally* DeJohn v. Temple Univ., 537 F.3d 301 (2008); McCauley v. Univ. of the Virgin Islands, 618 F.3d 232 (2010).

111. *See DeJohn*, 537 F.3d at 313-14 (noting that "overbreadth review is a necessary means of preventing a 'chilling effect' on protected expression" (citing Broadrick v. Oklahoma, 413 U.S. 601, 630 (1973)).

112. *See id.* at. 319-20 ("[W]e do believe that a school has a compelling interest in preventing harassment. Yet, unless harassment is qualified with a standard akin to a server or pervasive requirement, a harassment policy may suppress core protected speech.").

113. *See McCauley*, 618 F.3d at 242-43 (stressing that "[f]ree speech is 'the lifeblood of academic freedom'" (citing *DeJohn*, 537 F.3d at 314)).

114. *See* Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. MARSHALL REV. INTELL. PROP. L. 509, 510 (2013) (emphasizing special nature of college athletes as compared to their typical college student counterparts).

paring typical college students to college athletes.[115] The responsibilities of student athletes have rarely been bound to the locker room and the field; accordingly, student athletes face a host of restrictions compared to their fellow classmates.[116] Subject to specialized Student Athlete Codes of Conduct, collegiate athletes face rules concerning matters such as drug testing, academic standards, and curfews.[117] Alongside these separately tailored codes of conduct, universities also utilize documents such as the National Letter of Intent and the Student Athlete Statement to create a contractual relationship to additionally bind athletes to further specifications.[118]

D. Online Speech Restrictions on Student Athletes

It is without doubt that student athletes can use social media for positive sharing activities, such as connecting with friends, family members, and fans.[119] Conversely, however, the potential remains for student athletes to employ their virtual voice to spread negativity.[120] Cautious of social media's darker aspects, the NCAA requires schools to engage in some form of review over student athletes' social networking.[121] However, universities are without detailed guidance on how to appropriately conduct such monitoring, and as a result, schools have established an array of restrictive social media policies against student athletes.[122] Schools justify their constricting online speech standards by citing to the importance of

115. *See id.* at 510-11 (noting that collegiate athletes "regularly agree to rules and regulations that are not imposed on ordinary college students, including policies relating to grooming, gambling, drinking, pornography, taunting, cursing, and even tobacco use.").

116. *See id.* at 523 (arguing that "athletes have long been held to different standards, and their speech rights are qualitatively distinct from the public's at large").

117. *See id.* at 524 (commenting on amount of deference and power collegiate athletes confer upon their coaches and educational institutions overall).

118. *See* Patrick Stubblefield, *Evading the Tweet Bomb: Utilizing Financial Aid Agreements to Avoid First Amendment Litigation and NCAA Sanctions*, 41 J. L. & EDUC. 593, 598-99 (2012) (describing presence of contractual relationship between collegiate athletes and institutions).

119. *See* Kayleigh R. Mayer, Comment, *Colleges and Universities All Atwitter: Constitutional Implications of Regulating and Monitoring Student Athletes' Twitter Usage*, 23 MARQ. SPORTS L. REV. 455, 457 (2013) (noting that student athletes can utilize social media to "show their personalities, pump up fans for games, and thank fans for their continued support").

120. *See id.* (noting potential of negative effects of social media usage).

121. For a discussion of NCAA required social media monitoring, see *infra* notes 124-139 and accompanying text.

122. For a discussion of differing university social media policies, see *infra* notes 140-159 and accompanying text.

maintaining institutional image, as well as a general desire to control the scope of student athletes' online speech.[123]

1. *NCAA Policies on Social Media Monitoring*

The NCAA is responsible for encouraging the regulation of student athlete speech.[124] Initiated to equal the playing field in terms of recruitment, the NCAA does not mandate its over 1,000 member schools to monitor student athletes' social media activity in one precise manner.[125] Rather, the NCAA simply requires that schools engage in some form of meaningful monitoring of the athletes' online activity, leaving the method of this review entirely up to the schools.[126] Noting its absence in defined policy, the NCAA has stated that "[w]hile we do not impose an absolute duty upon member institutions to regularly monitor such sites, the duty to do so may arise as part of an institution's heightened awareness when it has or should have a reasonable suspicion of rules violations."[127]

In 2011, the NCAA took an active stance in enforcing social media guidelines within its member schools.[128] The University of North Carolina at Chapel Hill ("UNC") football program was subject to an NCAA investigation after defensive lineman Marvin Austin tweeted from a party in Miami.[129] After an exploration of Austin's Twitter history, it became evident to the NCAA that recruiting violations were occurring.[130] The NCAA prompted an investigation against UNC and sanctioned the school for failing to effectively monitor Austin's flagrant social media activity.[131] Ultimately, the investigation resulted with the suspension of thirteen

123. For a discussion of university justifications, see *infra* notes 160-171 and accompanying text.

124. *See* Hopkins, Hopkins & Whelton, *supra* note 11, at 13-14 (commenting that "NCAA has recommended that its member schools monitor the social media of their athletes when concerns arise").

125. *See id.* at 14 (noting NCAA's imposition of restrictions on "electronic communications" during student athlete recruitment process, yet failure to create comprehensive student athlete social media policy).

126. *See id.* at 18 (stating that NCAA does not have absolute policy for its member schools to follow in terms of social media regulation).

127. *See id.* (describing that while NCAA does not have its own policy, it relies on member schools to conduct their own reviews).

128. *See id.* (discussing NCAA's decision in enforcing social media restriction against member school).

129. *See* Davis Walsh, Note, *All A Twitter: Social Networking, College Athletes, and the First Amendment*, 20 WM. & MARY BILL RTS. J. 619, 622 (2011) (describing background of Austin's Twitter activity which raised suspicions from NCAA).

130. *See id.* at 622-23 (noting Austin's Twitter presented evidence of attending formal dinners and parties).

131. *See id.* at 623 (stating NCAA sanctions against UNC).

players, a permanent dismissal of Austin from the team, and the subsequent firing of coach Butch Davis.[132]

In sanctioning UNC, the NCAA did not capitalize on the opportunity to establish a clear social media monitoring policy for its member institutions to follow.[133] Consequently, collegiate athletic programs continue to engage in varied forms of social media monitoring, regardless of whether these methods are potentially unconstitutional.[134] Though these online speech restrictions may in fact be First Amendment violations, it is unlikely that student athletes will bring suit.[135] Because only a small percentage of college athletes move on to the professional sporting realm, playing at the collegiate level may well be the last chance for most student athletes to compete in a sport they love.[136] In weighing the decision to bring suit against an athletic department, students run the risk of "alienating teammates, coaches, and fans."[137] The glacial pace of litigation is also a concern for student athletes wanting to bring suit.[138] By the time a final court decision is reached, the student athlete's college athletic career will likely be over.[139]

2. *Universities' Policies Restricting Social Media Use*

Without specified guidance, universities across the country have adopted varying policies concerning the social media regulation of their athletes.[140] Many NCAA member schools hold, or

132. *See id.* (commenting on disciplinary effects of NCAA investigation).

133. *See* Hopkins, Hopkins & Whelton, *supra* note 11, at 18 (noting NCAA failing to establish uniform social media policy).

134. *See id.* at 19 (commenting on varied forms of social media restrictions).

135. *See* Marcus Hauer, Note, *The Constitutionality of Public University Bans of Student-Athlete Speech Through Social Media*, 37 VT. L. REV. 413, 420 (2012) (asserting that "if [student athletes are] forced to choose between their sport and free speech rights, the speech rights lose").

136. *See id.* (noting that 1 in 50 collegiate football players will receive opportunity to play in NFL).

137. *See id.* at 420-21 (emphasizing student athletes' burden of choice between fighting for their rights to free speech or readily complying with general direction of their respective teams).

138. *See id.* (adding that even if lawsuit is victorious, student athletes' collegiate careers will be over).

139. *See id.* at 421 (summarizing that in face of constitutional violations, student athletes will likely choose compliance with school policy).

140. *See* Ken Paulson, *Free Speech Sacks Ban on College-Athlete Tweets*, USA TODAY (Apr. 15, 2012, 6:27 AM), http://usatoday30.usatoday.com/news/opinion/forum/story/2012-04-15/twitter-social-media-college-sports-coaches-ban/54301178/1 (providing examples of student athletes subject to repercussions due to violation of their school's social media restrictions).

have held, full bans on student athletes' usage of social media.[141] The following schools have participated in fully banning their athletes from using social: Boise State University, Mississippi State University, University of New Mexico, University of Miami, University of South Carolina, University of Iowa, University of Kansas, University of North Carolina, University of Las Vegas, Clemson University, Old Dominion University, University of Missouri, and Kent State University.[142]

Some schools, such as Boise State University, have forfeited their outright bans on social media.[143] Instead, they place heavy guidelines and restrictions on what student athletes can and cannot post on social media.[144] Further, in addition to continually requesting that student athletes' social media accounts be set to private settings, Boise State mandates that its athletes provide a report of social media usage to their Athletics Compliance office.[145] Even with these general guidelines, specific teams within the Boise State program may ban participation from certain Web sites at the coach's discretion.[146] Similarly, within the aftermath of UNC's NCAA investigation, the school updated its social media policy to require that if student athletes make online statements that violate NCAA or university rules, the school could take disciplinary measures.[147] Instead of requiring student athletes to report on their

141. *See id.* (listing multiple schools whom have experimented with social media bans).

142. *See generally* Hopkins, Hopkins & Whelton, *supra* note 11, at 37-39; Penrose, *supra* note 114, at 519-20; Stubblefield, *supra* note 118, at 598.

143. *See Student Athlete Handbook,* Boise State University Dep't of Athletics, *available at* https://s3.amazonaws.com/os_uploads/292945_BsuStudentAthleteHandbook2012-2013.pdf (last visited Feb. 4, 2014) (providing long list of guidelines student athletes must follow in regards to social media activity).

144. *See id.* (stating Boise State student athlete social media policy).

145. *See id.* (stating Boise State student athlete social media policy).

146. *See id.* (allowing individual coaches to impose additional restrictions to online activity of student athletes). In 2010, Villanova University's basketball team took a similar hard stance on the subject of social media for its athletes. *See* Brian Ewart, *The Social Media Age at Villanova*, VUHoops.com (Jan. 25, 2012, 12:14 PM), http://www.vuhoops.com/2012/01/25/social-media/ (noting social media ban of Twitter and Facebook for Villanova's basketball team). Heralded by coach Jay Wright, Wildcat basketball players were prohibited from utilizing Twitter and Facebook, in efforts to shield players for the scrutiny of the public eye. *See id.* (describing special media pressures student athletes face, in comparison to average college students).

147. *See Policy on Student Athlete Social Networking and Media Use,* University of North Carolina at Chapel Hill, *available at* http://cosida.com/media/documents/2012/9/UNC__Social_Media_Policy.pdf (last visited Mar. 14, 2014).

social media activity, however, UNC hired a designated administrator to monitor the content of student athletes' social networking.[148]

In order to ensure the most thorough monitoring of the online activity of its athletes, select schools have gone so far as to hire third party companies to conduct sweeping analyses of their athletes' social media activity.[149] Companies such as UDiligence, Varsity Monitor, and Central Social require student athletes of participating schools to download their company software onto the student's computing device; once installed, the program scans the social media activity of the student athletes.[150] Then, the program looks for specific trigger words that could convey an infraction of student conduct guidelines—essentially anything that could assert the "discussion of drug or alcohol use, obscenities, offensive comments, or references to potential NCAA violations like agents or free gifts."[151] Moreover, schools even tailor the specific trigger words to more accurately reflect their particular code of athlete conduct.[152] Once an infraction is spotted, the online content is flagged and submitted via e-mail to the university's athletic department.[153]

Such programs present glaring privacy issues for student athletes.[154] In order to install the program, students must disclose not merely their usernames, but their passwords to ensure monitoring around the clock.[155] State legislatures have recognized this crass opportunity for the infringement of privacy rights, and select states have passed laws prohibiting higher education institutions from the

148. *See id.* (noting UNC's decision to assign administrator tasked with monitoring student athletes' social media accounts).

149. *See* John Browning, *Universities Monitoring Social Media Accounts of Student-Athletes: A Recipe for Disaster*, 75 TEX. B.J. 840 (2012) (describing recent proclivity of universities to hire social media monitoring companies in order to ensure student athletes are complying with schools' social media policies).

150. *See id.* at 842 (commenting that students are essentially forced to download surveillance software).

151. *See id.* (noting that chief executive of Varsity Monitor stated that "[w]e look for things that could damage the school's brand and anything related to their eligibility.").

152. *See id.* (highlighting that schools can tailor range of activity monitored by such companies).

153. *See id.* (describing procedure for monitoring of student athlete accounts by third parties).

154. *See* Pete Thamel, *Tracking Twitter, Raising Red Flags,* NEW YORK TIMES (Mar. 30, 2012), http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?pagewanted=all&_r=0 (stating that third party monitoring of student athletes' social media accounts can be an invasion of privacy akin to "reading their mail or listening to their phone calls").

155. *See id.* (emphasizing struggle between schools' interest of compliance with NCAA weighed against student athletes' right to privacy).

social media account monitoring of their athletes.[156] Furthermore, the University of Kentucky and the University of Louisville, both users of third party monitoring software, faced much public scrutiny due to their list of trigger words.[157] In addition to terms such as "beer," "keg," and "ice," the schools red flagged words such as "Arab" and "Muslim."[158] Including such terms may demonstrate that schools are not simply limiting potential reputational backlash, but rather they are suppressing speech that may well relate to the daily life of an athlete.[159]

3. *University Justifications for Restricting Student Athletes' Online Speech*

In the case of student athletes, universities, in particular, are wary of the negative potential of social media—one negative tweet, and student athletes could shed damaging light onto their educational institution.[160] Thus, while their fellow classmates are free to engage Internet speech, student athletes' social media activity is increasingly monitored and regulated by their respective athletic departments to combat the potential for disrespectful online activity.[161]

Universities cite to a variety of reasons for justifying their restriction on the speech of student athletes.[162] The most commonly cited concern is the fear of reputational damage to the institution itself.[163] Collegiate athletic programs are highly concerned with maintaining good rapport with their fan base.[164] Accordingly, the

156. *See* Browning, *supra* note 149, at 843 (stating that Maryland, Delaware, and California have passed legislation barring universities from infringing upon privacy rights of their student athletes).

157. *See id.* (providing example of trigger word mishap with University of Kentucky and University of Louisville).

158. *See id.* (giving examples of trigger words used by universities). *See also* Hopkins, Hopkins & Whelton, *supra* note 11, at 39 (discussing trigger word situation with University of Kentucky and University of Louisville).

159. *See id.* (noting true core of restriction hits heart of free speech rights).

160. *See* Mayer, *supra* note 119, at 457 (commenting that negative ways student athletes can utilize social media include "[using] it to make negative comments about other players or students, to voice concerns with their playing time and frustrations with their coach, or to get into detail about their personal lives, usually by tweeting pictures.").

161. *See id.* (stating need for monitoring social media of student athletes, as such online accounts present direct reflections of school).

162. *See* Penrose, *supra* note 114, at 538 (beginning to describe reasons cited by schools to limit student athlete speech rights).

163. *See id.* (highlighting major concerns of schools when considering social media usage by student athletes).

164. *See id.* (noting importance of institutional reputation in eyes of school's fan base).

permanent nature of online activity is particularly worrisome to universities, as the inability to erase potentially offensive expression presents a challenge to the ease of regulating a university's reputation.[165]

Turner Gill, head coach of the University of Kansas men's football team, stated the following reasoning for implementing a ban on Twitter for his players: "The reason we decided to not allow our players to have a Twitter account is we think it will prevent us from being able to prepare our football program to move forward. Simple as that."[166] This statement encapsulates two driving motivations of schools for limiting the social media usage of its athletes.[167] First, institutions demand that student athletes constantly present a positive image of the schools and their programs.[168] Second, the statement reveals universities' sheer willingness to censor student athletes to achieve this goal, even by perhaps unconstitutional methods.[169] Fundamentally, the concerns held by higher education institutions base themselves on a common premise—being a student athlete is a privilege.[170] Consequently, an examination of collegiate athletic programs' social media policies implies that student speech is also considered a privilege.[171]

E. Professional Athlete Speech Restrictions

The influence of social media is certainly reflected in the field of professional athletics.[172] The accounts of sporting organizations and individual athletes boast follower numbers in the millions; for example, not only does the National Basketball Association possess

165. *See id.* at 539 (stating that rights of individual players would be violating principles of "team unity, discipline, and on-field success").

166. *See* Gay, *supra* note 107, at 797 (asserting that many coaches offer similar rationales when asked for reasoning behind restricting athlete social media use).

167. *See id.* (describing motivations that university officials possess when implementing social media policies). Additionally, universities have "a strong interest in supporting policies that achieve on-field results at the expense of other important values—like constitutionally protected student speech." *See id.*

168. *See id.* (arguing importance of positive student athlete appearance).

169. *See id.* (noting measures implemented by higher education institutions to ensure positive images of their student athletes).

170. *See* Penrose *supra* note 114, at 513-14 (noting that engaging in extracurricular activities, such as collegiate sport teams, is regarded as privilege).

171. *See id.* at 523-25 (arguing that student athletes "have long been held to different standards" than non-athlete peers, and that social media usage should not be exception).

172. *See* Irwin A. Kishner & Brooke E. Crescenti, *The Rise of Social Media: What Professional Teams and Clubs Should Consider*, 27 ENT. & SPORTS LAW. 24, 24 (2010) ("There is no doubt that sports have a significant presence in the social media world.").

11.5 million followers on Twitter, but basketball star LeBron James himself has a Twitter account catering to nearly 15.2 million followers.[173] Many professional athletes flock to social media Web sites to engage in an open communication outlet; such virtual platforms not only create direct channels of communication with wide fan bases, but they can also help establish an endorsement opportunity to supplement athletes' paychecks.[174]

Much like the higher educational institutions previously discussed, professional sporting organizations are wary of this unfettered line of communication created by social media.[175] Unlike these higher education institutions, however, there is no First Amendment freedom of speech guarantee to professional athletes signed to play in these leagues.[176] Consequently, in an effort to curtail their organizations being cast in a negative light, the following sport organizations have taken advantage of their discretion to restrict speech, and have implemented restrictive social media policies.[177]

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173. *See NBA (@NBA) on Twitter*, TWITTER, https://twitter.com/NBA (last visited Oct. 2, 2014) (stating NBA's follower count is approximately 11.5 million users). *See also Lebron James (@KingJames) on Twitter*, TWITTER, https://twitter.com/KingJames (last visited Oct. 2, 2014) (stating LeBron James' follower count is approximate 15.2 million users). Football players also possessed a multitude of Twitter followers. *See Chad Johnson (@Ochocinco) on Twitter*, TWITTER, https://twitter.com/ochocinco (last visited Oct. 2, 2014) (listing follower count of 3.61 million). *See also Reggie Bush (@ReggieBush) on Twitter*, TWITTER, https://twitter.com/ReggieBush (last visited Oct. 2, 2014) (listing follower count of 2.93 million).

174. *See* Pickering, *supra* note 8 (noting that some athletes, such as Shaquille O'Neal, utilize their social media presence to schedule "impromptu meet-ups with fans"). *See id.* (commenting that in order to help athletes "build their personal brand, ... [s]ome of the larger artist management firms and sports marketing agencies have begun to embrace a more social strategy for their clients").

175. *See* Judy Battista, *The N.F.L. Has Identified the Enemy and It Is Twitter*, N.Y. TIMES, Aug. 4, 2009, at B13, *available at* http://www.nytimes.com/2009/08/04/sports/football/04twitter.html (highlighting that football coaches are weary of team information being leaked to public, as "the casual nature of Twitter could inspire the budding bloggers in their locker rooms to inadvertently disclose more than they should about injuries, game plans and what is said behind closed doors."). *See also* Kishner & Crescenti, *supra* note 172, at 25 (asserting that "all teams and clubs should enact policies to restrict players and personnel from disparaging such teams' and clubs' sponsors, giving sponsors comfort that their brand will be protected.").

176. *See* Kishner & Crescenti, *supra* note 172, at 24-25 ("First Amendment protections only apply when a restriction on speech is being imposed by a governmental agency, not a private organization.").

177. For a discussion of the social media policies implemented by the National Football League (NFL), National Basketball Association (NBA), and National Hockey League (NHL), see *infra* notes 178-194 and accompanying text.

1. *National Football League*

In 2009, the National Football League ("NFL") implemented organization-wide social media restrictions against its players, coaches, and operations personnel.[178] The still-standing policy prohibits use of social media from 90 minutes before a game is scheduled to kick-off until after the post-game media interviews.[179] Individuals may not update any social media account during the game or permit a third party to update the account.[180] Thus, the limitations place no restrictions on the content of the speech, merely its timing in relation to officiated game times.[181]

Even after the organization-wide restrictions were established, players still fumble over the guidelines.[182] For example, in 2010, Chad Johnson, then named Chad Ochocinco and playing as a wide receiver for the Cincinnati Bengals, was slapped with a $25,000 fine for tweeting within the prohibited time before a game.[183]

More recently, in an interesting overlap between the collegiate and professional sporting spheres, the NFL Players Association ("NFLPA") signified the importance of educating top college recruits in appropriate social media etiquette.[184] Throughout the weeklong Collegiate Bowl, held in January 2013, the NFLPA "made it a priority to educate top prospects on the dangers of tweeting their minds."[185] However, in a relaxation of its policies, the NFL

178. *See League Announces Policy for Social Media for Before and After Games*, NFL (Aug. 31, 2009, 6:53 PM), http://www.nfl.com/news/story/09000d5d8124976d/article/league-announces-policy-on-social-media-for-before-and-after-games (noting that before this general NFL policy was set, social media restrictions were at discretion of individual teams).

179. *See id.* (stating restricted times for social media usage on game days).

180. *See id.* (prohibiting designated player representatives from updating player's social media accounts during games).

181. *See* Hughes, *supra* note 9 (opining that NFL's policy is not particularly "rigid" toward content of athletes' online speech).

182. *See* Maria Burns Ortiz, *Guide to Leagues' Social Media Policies*, ESPN (Sept. 27, 2011), http://espn.go.com/espn/page2/story/_/id/7026246/examining-sports-leagues-social-media-policies-offenders (providing examples of NFL players breaching organizations' social media policies).

183. *See id.* (stating that Ochocinco was fined for utilizing Twitter seventy-seven minutes before preseason game against Philadelphia Eagles). *See also* ESPN .com News Services, *Chad Ochocinco Changes Last Name*, ESPN NFL (July 24, 2012, 2:08AM), http://espn.go.com/nfl/story/_/id/8191660/chad-ochocinco-miami-dolphins-says-last-name-johnson-again (reporting that Chad Johnson, in preparation for marrying Evelyn Lozada, formally changed his last name from Ochocinco back to Johnson).

184. *See* Hughes, *supra* note 9 (describing NFLPA's proactive role on informing top NFL recruits of social media dangers).

185. *See id.* (lauding NFLPA for instructing NFL recruits to exercise caution in online posting).

encouraged athletes to utilize social media during the 2012 Pro Bowl, citing a need to appease fans' "'insatiable appetite for football.'"[186]

2. *National Basketball Association*

In similar stride to the NFL, the NBA established organization-wide social media limitations in 2009.[187] Akin to the NFL restrictions, the NBA prohibited the use of communication devices by players, coaches, and operations personnel beginning 45 minutes before a game until the completion of responsibilities after the game.[188]

Additionally, unlike the NFL, the NBA has taken an affirmative stance on fining athletes for the content of their online speech, beyond time limit infractions.[189] Mark Cuban, the notoriously colorful owner of the Dallas Mavericks, was fined $50,000 by the NBA for his negative Twitter comments, which disparaged league officiating.[190] New York Knicks player Amare Stoudemire was also fined $50,000 for messaging anti-gay slurs to a fan.[191]

186. *See NFL to Allow Players to Tweet During Pro Bowl*, ESPN CHICAGO (Jan. 25, 2012, 7:35 PM), http://espn.go.com/chicago/nfl/story/_/id/7503314/nfl-allow-players-tweet-pro-bowl (quoting NFL spokesman Brian McCarthy as stating "'NFL players have been very active on social media and enjoying [sic] talking to fans. The nature of the Pro Bowl enables us to have players tweet during the game.'").

187. *See NBA Issues Policy on Twitter Use Before, After Games*, NBA (Sept. 30, 2009, 11:28 PM), http://www.nba.com/2009/news/09/30/nba.twitter.rules.ap/ (reporting that NBA sent memo to teams concerning new social media policies for league).

188. *See id.* (remarking that, in addition to policies described in memo, individual teams may establish their own social media guidelines).

189. *See* Hughes, *supra* note 9 (recognizing that NBA athletes have been punished for content of their speech, unlike NFL athletes). By contrast, Tank Carder, linebacker for the Cleveland Browns, was not punished under the NFL's social media policy for anti-gay remarks on Twitter. *See id.*

190. *See* Jeff Zillgitt, *NBA Fines Mark Cuban $50,000 for Twitter Comments*, USA TODAY (Jan. 8, 2013, 8:10 PM), http://www.usatoday.com/story/sports/nba/mavericks/2013/01/08/dallas-mavericks-owner-mark-cuban-fined/1819001/ (reporting that Cuban's impermissible Tweet stated "Im sorry NBA fans. Ive tried for 13 years to fix the officiating in this league and I have failed miserably. Any Suggestions ? I need help"). Since becoming owner of the Mavericks in 2000, Cuban has amassed over $2 million in fines from the NBA. *See id.*

191. *See* Melissa Rohlin, *Amare Stoudemire Tweets Anti-Gay Slur to Fan, NBA Will Review*, L.A. TIMES (June 25, 2012, 11:39 AM), http://www.latimes.com/sports/sportsnow/la-amare-stoudemire-tweets-gay-slur-to-fan-nba-will-review-20120625,0,3287295.story#axzz2v9LcvbU2 (stating that Stoudemire directly messaged to fan anti-gay slurs and obscene language via Twitter). *See also* Hughes, *supra* note 9 (reporting final fine amount was $50,000).

3. *National Hockey League*

In 2011, social media restrictions were etched into the ice.[192] After extensive discussions with the National Hockey League Player's Association (NHLPA), the National Hockey League (NHL) instituted "blackout periods" on game days, in which players are restricted from social media use two hours prior to a game and until post-game obligations have been fulfilled.[193] The league expressly noted, however, that the opportunity for disciplinary measures could still arise if such online statements "have or are designed to have an effect prejudicial to the welfare of the League, the game of hockey or a member club, or are publicly critical of officiating staff."[194] Thus, the social media policy is effectively two pronged: first, it declares required blackout periods, and second, it suggests ways for "proper" social media usage.[195]

IV. HALTING THE HASHTAGS: ANALYZING THE UNCONSTITUTIONALITY OF STATE UNIVERSITIES' RESTRICTIONS ON STUDENT ATHLETE ONLINE SPEECH

"*[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.*"[196]

Universities that establish online speech restrictions must recognize the First Amendment rights of student athletes.[197] This Part will analyze the constitutionality of two main categories of restrictions that universities have established: full bans of social media and

192. *See NHL Institutes New Social Media Policy*, NHL (Sept. 15, 2011, 12:00 PM), http://www.nhl.com/ice/news.htm?id=588534 (reporting that NHL policy established social media restrictions for its participants).

193. *See id.* (noting social media time restrictions on game day).

194. *See id.* (commenting on possibility of discipline as response to inappropriate online conduct).

195. *See* Greg Wyshynski, *Inside the NHL's New Social Media Policy for Players*, YAHOO! SPORTS (Sept. 15, 2011, 2:05 PM), http://sports.yahoo.com/nhl/blog/puck_daddy/post/Inside-the-NHL-s-new-social-media-policy-for-pla?urn=nhl-wp12624 (describing dual-nature of NHL social media restrictions).

196. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (emphasizing sheer importance of respecting all forms of opinion in context of First Amendment).

197. *See generally* Walsh, *supra* note 129, at 619 (highlighting need to recognize student athlete First Amendment rights).

restricted use.[198] After analyzing the constitutionality of such restrictions, this Part concludes by recommending the best course of action for universities to follow.[199]

A. Full Social Media Bans are Unconstitutional Violations of Prior Restraint

As mentioned in Part III, the doctrine of prior restraint refers to governmental action that aims to suppress the opportunity of speech before it occurs, rather than its resulting effects.[200] When collegiate athletic programs establish full bans on social media, prior restraint issues are raised because teams are attempting to prohibit speech before the speech has even commenced.[201]

Universities hold the burden of proving that their speech limitations are constitutionally permissible when those limitations completely ban student athletes from using social media.[202] In order for universities to successfully defend their restrictive policies, they must meet four conditions.[203] First, the restrictions cannot allocate broad powers to the institution.[204] Second, any restrictions that aim to limit the time, place, and manner of student athletes' speech cannot be based on the content of the speech.[205] Third, the restrictions must be narrowly tailored enough to promote a significant

198. For a discussion of ways universities limit student athletes' social media expression, see *infra* notes 199-258 and accompanying text.

199. For a discussion of recommendations for universities when creating their social media policy for athletes, see *infra* notes 259-271 and accompanying text.

200. *See* Redish, *supra* note 46, at 53 (providing definition for prior restraint).

201. *See* Stubblefield, *supra* note 118, at 597 (2012) (highlighting that prior restraint is seen as "a ban of social media restrict[ing] all speech made in that forum, both protected and unprotected").

202. *See* Carroll v. Pres. & Comm'rs of Princess Anne, 393 U.S. 175, 181 (1968) (emphasizing severity of prior restraint by affirming that "[p]rior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement").

203. *See* Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 130 (1992) (listing four factors, that if properly adhered, will permit government to limit speech before it occurs). *See also Carroll*, 393 U.S. at 181 (holding that "prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" (quoting Freedman v. Maryland, 380 U.S. 51, 58 (1965))).

204. *See Forsyth*, 505 U.S. at 127, 130, 132-33 (noting importance of government scheme not to allocate administrative officials with too much power to determine impermissibility of certain speech).

205. *See id.* at 134-37 (prohibiting government from pre-emptively enacting content based restrictions).

state interest.[206] Last, the restriction needs to "leave open ample alternatives for communication."[207]

When universities completely ban the use of social media, the first two prongs of this analysis can be easily met.[208] However, in regards to the first prong, educational institutions must be careful not to allocate themselves too much authority when constructing social media policies.[209] Deciding to entirely ban social networking use sharply decreases schools' power and discretion, because schools are prohibiting student athletes from participating in the speech entirely, and not arbitrarily deciding its permissibility.[210]

Universities can readily pass the second prong, as well, when they choose to apply a blanket ban to social media.[211] With the imposition of a complete ban, schools are not restricting the content of student athletes' speech, but rather their ultimate usage.[212] Consequently, social media bans cannot be construed as content-based restrictions on speech, but rather content neutral time, place, and manner restrictions on speech.[213]

However, the third and fourth prongs raise a difficult standard for schools banning social media.[214] In regard to the third prong, the restriction must be narrowly tailored and must be in furtherance of a significant state interest.[215] An overall ban on social media is, by no means, a narrowly tailored restriction; schools are intending to blockade online speech on the broadest possible

206. *See id.* at 130 (stating that content-neutral time, place, and manner restrictions must be "narrowly tailored to serve a significant governmental interest.").

207. *See id.*

208. *See* Stubblefield, *supra* note 118, at 598 (noting state universities will face little difficulty in successfully asserting that complete bans on social media do not confer broad, discretionary authority to school officials and such bans are not indicative of content based restrictions on speech).

209. *See id.* at 597 (stating government officials may not be granted broad discretion in their implementation of speech restriction).

210. *See Forsyth*, 505 U.S. at 132-33 (examining whether administrators were forced to examine objective standards or guidelines when choosing to limit speech).

211. *See* Stubblefield, *supra* note 118, at 598 (arguing that when universities enact overall bans on social networking, they can readily prove its validity).

212. *See id.* at 600 (positing that universities can argue that full social media bans do not limit content of speech, but forum in which speech would occur).

213. *See id.* (noting that social media bans are limit on manner of speech, and student athletes are still free to engage in traditional speech methods).

214. *See id.* 598 (asserting that universities will fail to prove that full social media bans are narrowly tailored and result in ample alternative communication channels).

215. *See* Forsyth, 505 U.S. at 130 (asserting that prior restraint may be permissible if content neutral restrictions pass intermediate scrutiny).

level.[216] Further, universities have not yet provided a significant enough interest to justify their restriction on student athlete speech.[217] As previously mentioned, universities assert that limiting student athletes' online speech is significant to uphold the reputation of educational institutions and to limit the opportunity for a school's brand to be tarnished by potential offensiveness.[218]

However, when deciding on Internet censorship, the Supreme Court did not even find the restriction of child pornography to be a compelling enough reason to uphold the constitutional validity of a congressional act.[219] Even in light of an issue as sensitive as child pornography, the Supreme Court declined to impose censorship over the Internet due to the challenged law's overbroad terms.[220] In comparison, universities certainly cannot solely cite to potential reputational damage as a basis to fully ban student athletes' online speech.[221] Such bans are similarly overbroad, and therefore fail the third prong of prior restraint analysis.[222]

In regards to the fourth prong, universities do not leave opportunities for alternative communication when they choose to ban student athletes' use of social media.[223] This statement would still be true even if a university limited the ban to one social media Web

216. *See* Bentley, *supra* note 104, at 460 (asserting that full bans on social media restrict unnecessary amount of student athlete speech). If universities entirely restrict the social media of student athletes, not only will student athletes be unable to comment about an upcoming game, but they are also unable to virtually voice their ideas and thoughts unrelated to their athletic program. *See id.* (highlighting that total bans on social media suppress all forms of speech and are consequently not narrowly tailored).

217. *See* Stubblefield, *supra* note 118, at 598 (arguing that even if schools point to protecting "the health, safety, and morals" of student athletes as justification for pre-emptively restricting their speech, student athletes may still incur harm, for example, if student athlete "misuses the forum and suffers the repercussions of those actions").

218. For an in-depth discussion of university justifications for limiting student athletes' social media usage, see *supra* notes 160-171 and accompanying text.

219. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 252-53 (2002) (asserting that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning [speech]").

220. *See id.* at 258 (holding CPPA provisions as overbroad, and thus unconstitutional). In its decision, the Court noted that the congressional act was not only directed to obscene, unprotected speech, but reaches beyond obscenity to target any speech of a sexual nature. *See id.* at 240 (explaining CPPA's overbroad provisions).

221. *See* Stubblefield, *supra* note 118, at 598-99 (arguing that full social media bans are not narrowly tailored to achieve universities' interest because such complete bans restrict more speech than necessary).

222. *See generally Free Speech Coalition*, 535 U.S. at 252 (describing CPPA's lack of narrow tailoring leading to its overbreadth).

223. *See* Stubblefield, *supra* note 118, at 598 (proclaiming that "[s]ocial media offers a unique avenue of expression, and a court could determine that social me-

site, such as Twitter or Facebook.[224] Though social media Web sites can be quickly lumped together, each social media Web site is a separate platform, designed for a particularized use.[225] By banning athletes from Twitter, there exists no other opportunity for an athlete to "tweet"—i.e., send 140- character-driven communications to friends, family members, and fans.[226] Thus, student athletes' speech rights are restricted without availability for an alternative, as no other social media platform is designed to effect communication the same manner as Twitter.[227] Therefore, a ban on student athletes' social media usage violates the fourth prong of prior restraint, as the specialized nature of social media Web sites leave no room for alternative communications.[228]

Ultimately, when universities decide to enforce a ban on student athletes' usage of social media, the ban will fail prior restraint analysis, due to its shortcomings relative to the third and fourth prongs.[229]

B. "Limited-Use" Policies on Social Media Are Unconstitutional Content-Based Restrictions

Instead of implementing outright bans on social media usage, universities such as Boise State and UNC have placed restrictions on the content of student athletes' speech in social media.[230]

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dia is the only means by which a student athlete can communicate at-will with the public at large.").

224. *See* Mayer, *supra* note 119, at 463 (discussing issue of prior restraint even as applied to one particular social media platform).

225. *See* Eric Ravenscraft, *Which Social Network Should I Use?*, LIFEHACKER (Aug. 07, 2013, 10:00 AM), http://lifehacker.com/which-social-network-should-i-use-894808717 (describing various social media Web sites' differing purposes and usage opportunities).

226. *See* Mayer, *supra* note 119, at 463 (declaring that "[i]f schools completely ban Twitter usage, they could be imposing a prior restraint as the schools would be restricting all speech made in that forum and not just a particular type of speech.").

227. *See* Carlson, *supra* note 32 (highlighting unique features associated with Twitter).

228. *See* Eileen Bernardo, *The Unique Benefits of Each Social Platform*, IMEDIACONNECTION (Feb. 19, 2013), http://www.imediaconnection.com/content/33619.asp (describing particularized advantages associated with specific social media Web sites).

229. *See* Stubblefield, *supra* note 118, at 598 (asserting that full bans on social media are not narrowly tailored enough to support universities' interest in restricting speech, and such bans leave no alternative channel for online speech).

230. *See Boise State Student Athlete Handbook*, *supra* note 143 (disclosing Boise State's social media restrictions for its collegiate athletes); *UNC Social Media Policy*, *supra* note 147 (revealing UNC updated policy toward social networking for student athletes).

Though these restrictions do not entirely ban the use of social networking, the policies can be unconstitutional as content-based restrictions due to their restriction of the actual content of student athletes' speech.[231]

Accordingly, the social media policies are presumptively invalid, and universities face a heavy burden to prove that their online speech restrictions are the least-restrictive, narrowly tailored method to effectively serve their compelling interest.[232]

Under strict scrutiny analysis, such social media restrictions are not narrowly tailored.[233] For example, Boise State's social media policy broadly prohibits the use of "offensive language" in all online activity of student athletes.[234] This general prohibition contains no specification or examples as to what precisely constitutes "offensive."[235] Accordingly, restrictive social media policies utilizing broad language in their limitation of speech are impermissible, as the broad language suppresses protected speech.[236] This chilling effect of online speech is far too great a burden upon student athletes' right to free speech.[237] Due to these policies' broad structure, the limitations upon online speech are also not created in the least restrictive manner possible.[238]

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231. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (establishing that speech restrictions based on content of speech are unconstitutional).

232. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 815 (2000) (stating content based restrictions must undergo strict scrutiny because such restrictions burden content of speech).

233. *See* Walsh, *supra* note 129, at 642 (asserting that UNC's updated policy is content based restriction subject to strict scrutiny, as policy targets speech's content).

234. *See Boise State Student Athlete Handbook*, *supra* note 143 (providing example of prohibited online speech for student athletes).

235. *See id.* (lacking in establishing standards for what constitutes offensive).

236. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871 (1997) (holding that without definitions, statutory language could lead to speaker uncertainty). The ability to effect uncertainty in speakers indicates that the regulation itself possesses vagueness issues. *See id.* at 871-72 (stressing that vagueness of law leads to "obvious" chilling of speech).

237. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867 (1991) (postulating that "[a]ny substantial 'chilling' of constitutionally protected expression is intolerable.").

238. *See Reno*, 521 U.S. at 879 (describing that government has burden to prove less restrictive alternative to speech limitation would not be effective method). When a regulation is vast in breadth, it is clearly not narrowly tailored to achieve government goals, and thus courts will favor less restrictive speech policies. *See id.* at 882 (analogizing situation to "burn[ing] the house to roast the pig" (internal quotation marks omitted) (citing Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 127 (1989))).

Further, universities have failed to establish a compelling interest as a justification for their restrictions.[239] Boise State specifically refers to maintaining the reputation of the institution as a factor for limiting student athletes' online speech.[240] However, a desire to shield fans from potentially offensive language or content is by no means an appropriate justification for limiting student athletes' fundamental right to free speech.[241] As the Supreme Court held in *Playboy Entertainment*, "the Constitution exists precisely so that opinions and judgments . . . can be formed, tested, and expressed. What the Constitution says is that . . . judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority."[242] The Court noted that "[t]echnology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."[243] Thus, the advent of technology encourages the public discourse idealized by the Constitution, and universities cannot interject their own judgments at the cost of suppressing student athletes' rightful expression.[244]

Additionally, the *Tinker* Court held that schools may not prohibit student speech because of mere apprehensions of disturbances.[245] Disregarding this principle, state universities implement restrictive online speech guidelines from precisely the "apprehension" of disturbance *Tinker* warns against.[246] There is a harrowing

239. For a discussion of inadequate justifications of university enacted social media policies, see *supra* notes 160-171 and accompanying text.

240. *See Boise State Student Athlete Handbook*, *supra* note 143 (describing reasoning for enacting social media limitations).

241. *See* Texas v. Johnson, 491 U.S. 397, 415 (1989) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." (citing West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943))).

242. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) (highlighting importance of individuals' ability to formulate personal opinions, without extraneous interference by government).

243. *Id.* (stressing that advent of technology heightens "capacity" for individual to engage in decision-making process, and government should particularly take steps to detangle involvement in digital sphere).

244. *See id.* (positing that "were we to give the [g]overnment the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas.").

245. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (holding that schools must have greater "than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" when implementing restrictions upon student speech).

246. *See* Gay, *supra* note 107, at 797-98 (providing reasoning for universities restricting speech on fear of future repercussions).

lack of evidence pointing to the notion that a student athlete's negative online social activity will directly result in a disturbance within a school.[247] Thus, schools fail the *Tinker* analysis when they implement restrictive policies towards student athletes' online speech.[248]

In response to the above assertions, universities will presumably argue against the contention that that their restrictions on social media are based upon the central content of student athlete speech.[249] Instead, schools will likely assert that these limitations are created in regards to controlling the secondary effects of student athletes' online speech.[250] By framing their restrictions as being cultivated through secondary effects, universities may attempt to categorize their ban as a content-neutral restriction on speech.[251] If the limitations are classified as content-neutral, universities' social media policies will no longer face a presumption of invalidity and universities will be met with a lesser burden of justifying the constitutionality of their speech restrictions.[252]

Although universities may want to utilize the secondary effects doctrine to circumvent the legal rigidity associated with content-based restrictions, an examination of social media policies for student athletes' online speech reveal that the limitations are far from founded upon secondary effects concerns.[253] As previously discussed, speech restrictions formulated on secondary effects impose limitations without regard to the content of speech; instead, secon-

247. *See id.* (leaving direct, impactful disturbances to athletic programs absent list of justifications for restriction student athlete speech).

248. *See Tinker*, 393 U.S. at 514 (examining record to establish factors leading to plausible substantial disruption within school from speech, but failing to find evidence).

249. *See* Stubblefield, *supra* note 118, at 597 (asserting universities would defend themselves based on time, place, or manner restrictions).

250. *See* Penrose, *supra* note 114, at 527-28 (discussing universities' considerations when implementing social media policies). Universities could assert that in the grand scheme of collegiate athletics, the legacy of the individual athlete will eventually be overshadowed by the "enduring nature of the university." *See id.* at 527 (arguing that individual athletes could never be "larger than the legendary" statuses of major universities across United States). Thus, when establishing speech restrictions, universities could argue that they are basing limitation on maintenance of long-standing reputation. *See id.* (noting that majority of collegiate sport fans "are more tied to the lasting nature of the institution rather than the fleeting nature of the college athlete").

251. *See* Boos v. Berry, 485 U.S. 312, 320 (1988) (denying respondent's argument for content neutral speech classification under secondary effects doctrine).

252. *See* Huhn, *supra* note 57, at 805-06 (noting intermediate scrutiny is proper analysis for content neutral restrictions).

253. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986) (determining secondary effects by examining effects on prohibiting adult theaters altogether, but not by individual content of adult films).

dary effects justifications assert that the restriction is designed to influence external factors unrelated to speech.[254]

Regardless, when universities limit their student athletes' speech based on a fear of reputational damage, they fail to muster support for the secondary effects doctrine.[255] The Supreme Court has repeatedly held that the fear of audience offensiveness is not a proper example of a speech restriction's secondary effects.[256] Conversely, crafting speech limitations to minimize an audience's reaction is seen as targeting the primary effects of speech, and thus triggers a content-based restriction analysis.[257]

Accordingly, universities will likely fail at their attempt to categorize their restrictive social media policies as content-neutral restrictions, as their limitations restrict the primary effects of speech.[258] Further, when universities implement policies restricting social media usage to broad factors, such as "offense," the limitations represent unconstitutional content-based restrictions upon speech as they suppress more speech than necessary.[259]

C. Recommendation

While universities' restrictions on the social media activity of their student athletes are unconstitutional, this finding does not entirely render an athletic department powerless in terms of monitoring the online activity of student athletes.[260] If universities truly desire a formal social media policy for student athletes, universities

254. *See id.* at 48-49 (noting that ordinance banning adult theaters fit within central concern of ensuring that government cannot grant forum use for acceptable views but deny use for less favored views).

255. *See Boos*, 485 U.S. at 320 (upholding *Renton* decision because government concern of secondary effects of speech truly did not correlate with speech's content). However, the *Boos* Court draws a distinction between secondary effects and laws that focus on the "direct impact" of speech to audience. *See id.* at 321 (denying audience reaction to speech as example of secondary effects).

256. *See id.* (holding that government's justification of protecting dignity of foreign diplomats was not proper example of secondary effects as it was far too subjective). *See also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 49, 56 (1988) (asserting that citizens must tolerate offensive speech within public debate in order to allocate "adequate breathing space" to First Amendment freedoms).

257. *See Boos*, 485 U.S. at 321 (stating that because provision targeted speech content, it is classified as content based restriction).

258. *See* Texas v. Johnson, 491 U.S. 397, 412 (1989) (applying *Boos* analysis of content based restrictions to flag burning).

259. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 885 (1997) (declining Internet censorship because congressional act's overbreadth would negatively impact "exchange of ideas").

260. *See* Bentley, *supra* note 104, at 458-64 (providing list of tips universities could follow to permissibly monitor student athlete online activity).

could implement time, place, or manner restrictions.[261] Such restrictions would be considered content-neutral, and if effectively constructed, would be constitutional limitations on speech.[262]

Furthermore, there are far less First Amendment-intrusive methods universities may take if they wish to curb student athletes' potentially distasteful social media activity.[263] For example, universities could take the proactive approach of educating student athletes of the dangers associated with social media.[264] This approach is similar to the NFLPA's actions at the Collegiate Bowl.[265] If schools themselves began conducting formal education sessions on the possible negative effects of social media, student athletes are likely to be more knowledgeable about their virtual footprint and take their decision to post online more seriously.[266]

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261. *See id.* (arguing beneficial aspects of content-neutral restrictions from university prospective).

262. *See id.* (highlighting that content-neutral restrictions provide easier benchmarks for limitations of speech).

263. *See* Vicki Blohm, *The Future of Social Media Policy in the NCAA*, 3 HARV. J. SPORTS & ENT. L. 277, 294 (2012) (arguing that NCAA should lift policy requiring social media monitoring to better reflect "hands off" approach present in nonsporting world). Without restrictions, student athletes' online speech is entirely within their discretion, much like average citizens. *See id.* (asserting that student athletes "must be given an opportunity to learn that nothing done on the internet is private, and actions have real repercussions in the media, from future employers, or with graduate school admissions officers.").

264. *See* Hauer, *supra* note 135, at 434 (recommending that educational approach would help ease school officials' fear of social media misuse). By formally educating athletes on social media, student athletes can learn how to effectively block threatening posts and set appropriate privacy settings on their accounts. *See id.* (suggesting universities should utilize real world examples of social media mishaps to put issue in perspective for students). *See also* Browning, *supra* note 149, at 842 ("[C]olleges and universities concerned about social media fallout would be better advised to do what they do best: educate. Schools can and should teach their student athletes about the dangers of misusing social media, thereby protecting their brands while refraining from invasive, legally-dubious conduct.").

265. *See* Hughes, *supra* note 9 (showcasing NFL's concentrated efforts to address social media awareness at early stage of athletes' careers). *See also* Bill Speros, *NFL Rookies Still Adjusting to Social Media*, ESPN (May 14, 2013, 2:00 PM), http://espn.go.com/blog/playbook/trending/post/_/id/16881/nfl-rookies-still-adjusting-to-social-media (providing examples of young NFL players whose careers have been shaped negatively or positively by social media).

266. *See* Allie Grasgreen, *Tweet Smart, Tweet Often*, INSIDE HIGHER ED (Aug. 20, 2013), http://www.insidehighered.com/news/2013/08/20/instead-telling-athletes-not-tweet-colgate-shows-how-social-media-can-work-them (describing how Colgate University provides student athletes with formal class on social media perils). In these sessions, Colgate stresses to student athletes that their online activity is their personal brand, and students should proactively take charge of positively branding themselves in the media. *See id.* (recommending that student athletes set personal goals for their online social networking). *See also* Hauer, *supra* note 135, at 435 (stressing that universities should emphasize lasting impact social media catastrophes can have on individual's athletic career).

Additionally, schools could request that student athletes include a disclaimer on their public profiles.[267] Such disclaimers could be a one-sentence statement expressing that the views of the profile reflect those of the account holder, not the educational institution.[268] Hence, disclaimers provide a layer of protection to schools' reputations, as disclaimers distance schools from the specific views of each individual student athlete.[269]

Currently, universities are exercising nearly free-reign in creating social media restrictions for student athletes.[270] And while student athletes are unlikely to file lawsuits, universities should neither take advantage of student athletes' silence nor impose it.[271] By implementing less intrusive measure—such as non-content based limitations, education, and disclaimers—universities can respect the free speech rights of student athletes and also protect their institutional interests.[272]

V. TO POST, OR NOT TO POST? THAT IS THE QUESTION: EVALUATING PROFESSIONAL SPORT LEAGUES' RESTRICTIONS ON SOCIAL MEDIA

"*If liberty means anything at all, it means the right to tell people what they don't want to hear.*"[273]

Professional sporting organizations are private entities, not state actors, and thus they can infringe on professional athletes' right to speech without being subject to First Amendment liabil-

267. *See* Jaia A. Thomas, *My Coach Won't Let Me Twitter? Understanding the Legal Implications of Social Media On and Off the Field*, 28 ENT. & SPORTS LAW 18, 19 (2010) (arguing for use of disclaimer on social media accounts).

268. *See id.* (stating that sample disclaimer statement could be as follows: "The views and ideas expressed on this Twitter account do not express the views and ideas of the [organization] and its affiliate companies.").

269. *See id.* (positing that disclaimer could provide "extra coating" from liability between leagues and views of individual athletes).

270. For a discussion of the varying types of social media restrictions universities have implemented against student athletes, see sources cited *supra* notes 124-159 and accompanying text.

271. *See* Hauer, *supra* note 135, at 421 (noting universities are unlikely targets of First Amendment lawsuits in this situation, as student athletes are improbable plaintiffs).

272. *See* Bentley, *supra* note 104, at 458-75 (providing three main "best practices" tips for universities: (1) refrain from non-content based bans of social media, (2) utilize "reasonable restrictions" on social media and educate student athletes on social media repercussions, and (3) evaluate inappropriate social media conduct by special circumstances of each situation).

273. *See Freedom and Liberty Quotes*, TENTMAKER, http://www.tentmaker.org/Quotes/freedom_liberty_quotes6.htm (last visited Sept. 10, 2014).

ity.[274] Even though sports organizations are not encumbered by First Amendment liability, leagues are still free to implement social media policies that are less intrusive on athletes' autonomy.[275] For example, organizations could take note of the NFL's allowance of social media for special events such as the Pro Bowl.[276] By lifting the time prohibitions of online activity for a particularized event, the NFL is acknowledging the sheer significance social media and social media's ability to connect players with fans in a positive manner.[277] If other leagues implement similar stances for specialized games, they could receive reputational boosts from the promotion of interconnectedness between the field and fans.[278]

Furthermore, the time limit ban prohibiting social media postings until after a game has been completed is, essentially, meaningless.[279] League guidelines direct that players are required to spend a portion of their post-game time in interviews with the media and generally interacting with the press.[280] However, this press requirement is not altogether different from players posting statements to

274. *See* Michael Dolgow, *Where Free Speech Goes to Die: the Workplace*, BUSINESSWEEK (Aug. 3, 2012), http://www.businessweek.com/articles/2012-08-03/where-free-speech-goes-to-die-the-workplace (describing that private employers are free to limit their employees' freedom of speech).

275. *See* Frank LoMonte, *College Sports and Social Media: Leave Your Rights in the Locker Room?,* AMERICAN BAR ASSOCIATION (Apr. 21, 2014), http://apps.americanbar.org/litigation/committees/civil/articles/spring2014-0514-college-sports-social-media-leave-your-rights-locker-room.html (asserting that although employers can establish contractual relationships to limit rights of employees, this may not be most appropriate course of action).

276. *See NFL Will Allow Players to Tweet During Pro Bowl*, *supra* note 185.

277. *See* Kevin Nogle, *Pro Bowl 2013: NFL Again Sets Up Twitter Hubs on Sidelines*, THE PHINSIDER (Jan. 27, 2013, 1:42 PM), http://www.thephinsider.com/2013/1/27/3921698/pro-bowl-2013-nfl-again-sets-up-twitter-hubs-on-sidelines (reporting that NFL continued to lift its social media restrictions at 2013 Pro Bowl).

278. *See* David Cattai, *Best Twitter Reactions to NFL Pro Bowl*, BLEACHER REPORT (Jan. 28, 2014), http://bleacherreport.com/articles/1937856-best-twitter-reactions-to-nfl-pro-bowl (compiling list of Pro Bowl players' top social media interactions after intensive game). Players received thousands of "retweets" from supporting fans, and 2014 Pro Bowl was viewed by over 11 million people. *See id.* (declaring game as "most-watched all-star game out of the major sports").

279. *See* Joe Librizzi, *Why the NFL and NBA's Twitter and Social Media Policy is Wrong*, BLEACHER REPORT (Dec. 20, 2009), http://bleacherreport.com/articles/311770-why-twitter-and-social-media-policy-in-nfl-and-nba-is-wrong (questioning restrictions on post-game social media usage due to social media's similar structure to post-game interviews).

280. *See 2014 NFL Media Policy*, PRO FOOTBALL WRITERS OF AMERICA, http://www.profootballwriters.org/nfl-media-policy/ (last visited Mar. 4, 2014) (stating that football players must make themselves accessible to media after every game). *See also NBA Revises Media Policy for Players, Coaches*, SPORTS ILLUSTRATED (Sept. 20 2013, 2:47 PM), http://sportsillustrated.cnn.com/nba/news/20130920/nba-revising-media-policy-tom-frank/ (remarking that NBA requires athletes to avail themselves to media fifteen minutes before and after game).

their social media accounts.[281] Anything a player might tweet could easily be said in a post-game interview.[282]

Therefore, if sports leagues are genuinely interested in diminishing the negative publicity athletes can generate through their online speech, professional sports organizations should focus more on educating their athletes on social media usage, as opposed to implementing vapid bans on athlete postings.[283] Leagues should ensure that professional athletes are extremely cognizant of the far-reaching effects of social networking.[284] Social media allows fans to no longer be in the backseat of their favorite players' ride to victory; social media provides for a direct, two-way channel of communication that gives fans a clear line of communication to players.[285] Consequently, professional athletes should be highly mindful of the fact that this communication can quickly turn from friendly to ferocious.[286]

In light of social media's mercurial nature, a simple time limit ban is not the most effective way to deter athletes from making offensive postings.[287] Thus, sports organizations or individual professional teams should take a meditated approach to educating athletes on the reaching effects of online speech in order for athletes to learn the consequences of pushing the send button.[288] A

281. *See* Chris Greenberg, *Richard Sherman's Rant May Have 'Scared Erin Andrews,' Definitely Bothered Some on Twitter*, HUFFINGTON POST (Jan. 20, 2014, 12:04 AM), http://www.huffingtonpost.com/2014/01/20/richard-sherman-rant-erin-andrews_n_4629510.html (explaining how Seattle Seahawks cornerback Richard Sherman aggressively spoke with sports broadcaster Erin Andrews after victory against San Francisco 49ers). When Andrews attempted to interview Sherman after the victory, Sherman shouted "Don't you ever talk about me" and "Don't you open your mouth about the best, or I'll shut it up for you real quick." *See id.* (providing Sherman's statements in regards to 49ers wide receiver Michael Crabtree).

282. *See id.* (stating that post-game social media bans represent hollow attempt at curbing professional athletes' online speech).

283. *See* Lauren McCoy, *140 Characters or Less: Maintaining Privacy and Publicity in the Age of Social Networking*, 21 MARQ. SPORTS L. REV. 203, 215-16 (2010) (emphasizing importance of athlete awareness in scope of their online activity).

284. *See id.* at 217 (remarking that "[t]he biggest problem with social networking is that few are truly cognizant of its reaches, and focusing on social networking usage during games will do little to curb this effect.").

285. *See* Kishner & Crescenti, *supra* note 172, at 25 (arguing that social media has turned sports fans from casual observers to active participants and reshapes communication between athletes and fans as dialogues).

286. *See id.* (remarking that negative commentary can be natural result of open dialogue).

287. *See* McCoy, *supra* note 279, at 217 (asserting that athletes can readily engage in offensive online conduct after time restrictions are over).

288. *See id.* at 216 (highlighting need for league "in-depth policy" to mitigate social media disasters).

time limit ban will simply restrict athletes' speech for short periods of time on game day—once that limit passes, there is nothing to curb athletes from garnering negative attention for their social networking.[289] However, the educational approach will impart knowledge about online activity that is applicable to all days of the year, and will ultimately enable athletes to use social media in a smarter, more sensible fashion.[290]

VI. Conclusion

Universities and sports organizations are increasingly implementing measures to restrict how their athletes use social media. This restrictive attitude may conflict with the First Amendment, which protects the fundamental right to freedom of speech. Consequently, when public higher education institutions restrict their student athletes' usage of social media, universities are likely unconstitutionally infringing on their student athletes' right to freedom of speech. Although professional, private sports leagues are not bound by the provisions of the First Amendment, their restrictions upon athletes' utilization of social media is detrimental to the connectivity and growth social media can provide to athletes. Ultimately, the best course of action for both universities and sports organizations alike, would be to adopt the least restrictive social media policies, while also educating athletes about the consequences and effects of online speech.

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289. *See id.* at 217 (asserting that "[s]imply banning use of these sites will not solve any problems; instead athletes, like everyone else, need to learn how to use these sites in a professional manner that protects their privacy and maintains the reputation of the organizations they represent.").

290. *See id.*

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