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Speak Your Mind and Ride the Pine: Examining the Constitutionality of University-Imposed Social Media Bans on Student-Athletes

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Comments

SPEAK YOUR MIND AND RIDE THE PINE: EXAMINING THE CONSTITUTIONALITY OF UNIVERSITY-IMPOSED SOCIAL MEDIA BANS ON STUDENT-ATHLETES

"Student athletes nationwide are facing discipline for speaking their minds."[1]

I. Introduction

In November 2016, Louisiana-Lafayette ("ULL") football coach, Mark Hudspeth, suspended a handful of players for their role in a video in which the players can be seen singing along to the lyrics from a song entitled "FDT," an acronym for "Fuck Donald Trump."[2] The video, which was shared on social media two days after Donald Trump won the U.S. presidential election, depicted several Ragin' Cajun players making lewd gestures and singing controversial lyrics from the song by rappers, YG and Nipsey Hussle.[3] In a statement to the press, university Athletic Director, Scott Farmer, disparaged the players' actions and supported the suspensions, adding that "[t]his video in no way represents the views and values of the Ragin' Cajuns Football program, the Athletics Department or the University of Louisiana at Lafayette."[4] In his comments to the media regarding the incident, Hudspeth further added to the controversy, commenting that the lewd comments in the video

1. Samantha Harris, *Do Student Athletes Have Any Free-Speech Rights? Discipline of Columbia Wrestlers Raises the Question*, NY Daily News (Nov. 21, 2016, 5:09 PM), http://www.nydailynews.com/opinion/student-athletes-free-speech-rights-article-1.2882588.

2. *See* SI Wire, *Louisiana-Lafayette Suspends Four Players for 'F*** Donald Trump' Video*, Sports Illustrated (Nov. 11, 2016), http://www.si.com/college-football/2016/11/11/louisiana-lafayette-football-players-donald-trump-song-suspended [https://perma.cc/8TT3-YCH8] (detailing incident at University of Louisiana at Lafayette).

3. *See* Christopher Weingarten, *YG Talks Summer Protest Anthem 'FDT (F—k Donald Trump)'*, RollingStone (Sept. 1, 2016), http://www.rollingstone.com/music/features/yg-talks-summer-protest-anthem-fdt-f—k-donald-trump-w437360 [https://perma.cc/DB5H-CVSG] (detailing artist YG's inspiration behind controversial lyrics).

4. Alec Nathan, *University of Louisiana at Lafayette Disciplines Players After Anti-Trump Video*, BleacherReport (Nov. 12, 2016), http://bleacherreport.com/articles/2675615-university-of-louisiana-at-lafayette-disciplines-players-after-anti-trump-video [https://perma.cc/UVU2-W4XC] (quoting ULL athletic director, Scott Farmer).

were "very disappointing, especially towards one of the candidates" and that "[t]he few men involved did not even vote in the presidential election. So, they did not have a dog in the hunt."[5]

The situation at Louisiana-Lafayette is not an isolated incident as, throughout college athletics, student-athletes are forced to choose between exercising their constitutional right to free speech and riding the pine.[6] This article will attempt to elucidate arguments both in favor of and against student-athlete speech censorship.[7] Section I of this piece detailed the complicated situation at the University of Louisiana-Lafayette.[8] Section II of this piece will discuss the legal and historical background of the First Amendment, focus on the speech rights of ordinary students, specifically detailing the substantive rights of student-athletes, and paint the current landscape of student-athlete speech rights.[9] Section III will present arguments for and against student-athlete social media bans.[10] Finally, Section IV will recommend that universities implement narrowly-tailored social media bans that respect the rights of student-athletes and protect university interests.[11]

II. BACKGROUND

The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[12] During and after the United States Constitution's ratification process, many state representatives

5. Richard Johnson, *ULL Suspends 4 Players for Locker Room Video Involving 'F*** Donald Trump' Song*, SBNATION (Nov. 11, 2016), http://www.sbnation.com/college-football/2016/11/11/13581166/mark-hudspeth-suspends-players-donald-trump [https://perma.cc/RS22-WJRH] (quoting ULL head football coach, Mark Hudspeth).

6. *See, e.g.*, J. Wes Gay, *Hands off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?*, 39 FLA. ST. U. L. REV. 781, 781 (2012).

> Some National Collegiate Athletic Association (NCAA) student-athletes of various sports and institutions have recently been instructed that they are not permitted to use certain social media platforms. The purported reasons causing universities to implement these bans range from interests in image control to pressure from the NCAA to monitor and report potential NCAA infractions. However, these bans are likely unconstitutional.

Id.

7. *See infra* notes 160–201 and accompanying text.

8. *See supra* notes 1–5 and accompanying text.

9. *See infra* notes 12–159 and accompanying text.

10. *See infra* notes 160–201 and accompanying text.

11. *See infra* notes 202–207 and accompanying text.

12. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and

expressed concern that the new Constitution did not adequately protect the rights of the individual citizen; the drafting and eventual adoption of the Bill of Rights was in large part a result of these concerns.[13] The First Amendment proclaims, "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 to peaceably assemble, and to petition the government for a redress or grievance."[14] While the amendment was originally aimed toward the federal government, with the passage of the Fourteenth Amendment, the amendment's coverage was extended to states.[15]

A. Theories of Free Speech

In the 226 years since the First Amendment's ratification, commentators have offered a multitude of rationales for granting special protections to speech; three particular rationales have generally dominated debates regarding First Amendment theory.[16] The first is the idea that free speech is valuable as a means of pursuing truth, for "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[17] The second rationale is that free speech is necessary for citizens in a democracy to have the freedom to propose and debate public issues in order to govern themselves effectively.[18] In other words, "the principle of the freedom of speech . . . is a deduction from the basic American agreement that public issues shall be decided by universal suf-

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that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

13. *See, e.g.*, David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 456 (1983) ("Despite an early perception that a delineation of the rights of the people was unnecessary, Congress eventually decided that freedom of speech needed explicit protection against infringement by the federal government.").

14. U.S. CONST. amend. I.

15. *See, e.g.*, U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see also* Edwards v. South Carolina, 372 U.S. 229, 235 (1963) ("It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States.").

16. For further discussion about rationales for granting special protections to speech, see *infra* notes 17–24 and accompanying text.

17. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

18. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948) (discussing theories of free speech).

frage."[19] The third rationale is built on the idea that "[o]ur ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons."[20] All of these theories center on the idea that the First Amendment was established to "remove governmental restraints" from the field of public discourse.[21] As a general matter, "[a]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, ideas, subject matter, or content."[22] Any statute, regulation, or official act that needlessly encroaches on the exercise of First Amendment rights is unconstitutional; however, there are well-established restrictions on free speech.[23] For example, the Supreme Court has instructed that "[n]ot all speech is of equal First Amendment importance and where matters of purely private significance are at issue, First Amendment protections are often less rigorous."[24]

B. Government Restrictions on Speech

Generally, the Supreme Court has taken a categorical approach to government restrictions on speech.[25] The first category encompasses content-based restrictions which are considered particularly suspect and are unconstitutional unless necessary to achieve a compelling governmental interest.[26] Content-based restrictions receive the highest level of judicial scrutiny.[27] The second

19. *Id.* at 27.

20. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992).

21. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) ("[The First Amendment] is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.").

22. Police Dep't of City of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (holding Chicago city ordinance unconstitutional because it made distinction between peaceful and non-peaceful picketing based on subject matter).

23. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (listing low-value speech exceptions).

24. Snyder v. Phelps, 562 U.S. 443, 452 (2011).

25. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

26. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983) ("The burden on government to demonstrate the substantiality of its interests and the absence of less restrictive alternatives varies from case to case, depending upon the extent to which the restriction actually interferes with the opportunities for effective communication.").

27. *See, e.g.*, *id.* at 209 ("[L]aws that are content-based on their face require strict scrutiny whether they turn on communicative impact and thus employs the

category, content-neutral restrictions, are unconstitutional unless the restriction is closely related to accomplishing an important governmental interest.[28] The Supreme Court has explained that the determining factor in distinguishing between content-based and content-neutral speech restrictions is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[29] A third type of restriction on speech is prior restraint.[30] Prior restraints are government actions that prohibit speech or other expression before speech takes place.[31] The Supreme Court has stated that "[a]ny system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity."[32]

C. Speech Receiving Minimal Protections

Some types of speech receive minimal constitutional protection.[33] *Chaplinsky v. New Hampshire* introduced low-value speech exceptions to First Amendment jurisprudence.[34] In *Chaplinsky*, the Court explained that "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[35] This type of speech can be regulated because it neither impedes the debate of public issues nor risks censorship on matters of public significance.[36] Low-value speech receives the least amount of First Amendment protection; some of these unprotected categories include incitement to "imminent lawless action," "fighting words,"

communicative impact concept to expand the class of content-based restrictions.").

28. *See generally id.* at 190–93 (discussing content-neutral restrictions).

29. 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)).

30. *See* John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983) (discussing the history of prior restraint in the United States).

31. *See* 2 Smolla & Nimmer on Freedom of Speech § 15:1("The phrase 'prior restraint' is a term of art referring to judicial orders or administrative rules that operate to forbid expression before it takes place.").

32. *See, e.g.*, N.Y. Times Co. v. U.S., 403 U.S. 713, 714 (1971) (refusing to permit injunctions against New York Times and Washington Post that would prevent publication of classified government documents recounting history of Vietnam War).

33. *See, e.g.*, Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571–72 (1942) (listing types of speech least-protected by First Amendment).

34. *See id.*

35. *Id.* at 571–72.

36. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985) (plurality opinion) (holding that false statements in credit report did not involve matters of public concern to implicate First Amendment claim).

"true threats," obscenity, child pornography, defamation and "speech integral to criminal conduct."[37] The Supreme Court has refused to create new categories of low-value speech.[38] The Court has also permitted the government to regulate certain categories of speech in order to control the "secondary effects" of that speech.[39]

D. Public Forum Doctrine

Where speech takes place can also determine the outcome of a free-speech dispute.[40] The public has greater liberty to exercise its free-speech rights in so-called "traditional public forums," such as city streets, than it does in nonpublic forums, such as a public-school classroom.[41] In *Hague v. Committee for Industrial Organization*,[42] Justice Owen Roberts outlined the origins of the public forum doctrine:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and

37. *See* United States v. Stevens, 559 U.S. 460, 468 (2010) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1942)) ("speech integral to criminal conduct"); Virginia v. Black, 538 U.S. 343, 359 (2003) ("true threats"); New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography); Miller v. California, 413 U.S. 15, 23 (1973); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) ("imminent lawless action"); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *Chaplinsky*, 315 U.S. at 573 ("fighting words"); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603 (1986) ("Speech that concerns governmental processes is entitled to the highest level of protection; speech that has little or nothing to do with public affairs may be accorded less protection.").

38. *See, e.g.*, *Stevens*, 559 U.S. at 472 ("Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.").

39. *See* Renton v. Playtime Theatres, 475 U.S. 41, 51 (1986) (holding that zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single, or multiple-family dwelling, church, park, or school was constitutional).

40. *See generally* David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 145 (1992) (discussing evolution of public forum doctrine from device that protected speech to device that restricted speech).

41. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.") (internal quotations and citations omitted).

42. 307 U.S. 496 (1939).

> public places has from ancient times been a part of the privileges, immunities, rights, and liberties of citizens.[43]

In *Perry Education Association v. Perry Local Educators' Association*,[44] the Supreme Court created three categories of public forums: traditional public forums, limited public forums, and nonpublic forums.[45] In a traditional public forum, the government may not restrict speech based on content unless the "[r]egulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest."[46] Traditional public forums include streets, sidewalks, and parks.[47] The second category, known as limited or designated public forums, is "public property which the state has opened for use by the public as a place for expressive activity."[48] While the limited forum is open, the same restrictions governing traditional public forums apply.[49] Examples of limited public forums include universities, municipal theaters, and school board meeting rooms.[50] The third category is the nonpublic forum; or "public property which is not by tradition or designation a forum for public communication."[51] Governmental entities have expanded latitude in regulating nonpublic forums, as "[t]he state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[52] Even in nonpublic forums, restrictions on speech must be reasonable and viewpoint-neutral.[53]

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43. *Id.* at 515.

44. 460 U.S. 37 (1983).

45. *Id.* at 45 (defining different types of forums and each forum's allowable restrictions on speech).

46. *See, e.g.*, *id.* at 45.

47. *See, e.g.*, Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 650 (2010) ("Later cases describe locations like the city park in Davis or the city sidewalks in Hague as 'traditional public forums.'").

48. *Perry Educ. Ass'n*, 460 U.S. at 45.

49. *See, e.g.*, *id.* at 46 ("Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

50. *See, e.g.*, Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 301 (2009) ("[C]ase law reflects that they have done so with regard to a wide variety of such 'non-traditional fora'—ranging from government office waiting rooms, to college campus lawns, to national cemeteries.").

51. *See, e.g.*, *Perry Educ. Ass'n*, 460 U.S. at 46 (stating examples of limited public forums include university meeting facilities, municipal theaters, and school board meeting rooms).

52. *Id.*

53. *See, e.g.*, James F. Shekleton, *The Campus as Agora: The Constitution, Commerce, Gadfly Stonecutters, and Irreverent Youth*, 31 J.C. & U.L. 513, 595–96 (2005)

To enforce a content-based exclusion in a public forum the government must show that "[i]ts regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[54] To enforce content-neutral time, place, and manner restrictions, the state must narrowly tailor the constraint "to serve a significant government interest, and leave open ample alternative channels of communication."[55] Content-neutral justifications for regulating speech are, however, still subject to overbreadth challenges, as demonstrated by *Forsyth County, Ga. v. Nationalist Movement*,[56] a case that concerned the state's interest in preventing disturbances of the public peace that may be caused by controversial speech. [57] In *Forsyth*, the Court struck down an ordinance that allowed county officials to set permit fees for rallies and parades based on how much police protection was estimated to be required.[58] The *Forsyth* Court noted that such a permit system disproportionately burdens unpopular speech, allowing a "heckler's veto."[59]

E. Speech Rights of Students in Public Schools

As the adage goes, student-athletes are "students first and athletes second," so for the purposes of this piece, an overview of the speech rights of ordinary students may be helpful.[60] In the past, the Supreme Court has espoused the need for "vigilant protection

("Irrespective of the nature of the forum, government actions to exclude speakers based upon the content of their speech are subject to strict scrutiny, and government actions to exclude speakers based upon the viewpoint that they express are invalid *per se*.").

54. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

55. *Id.*

56. 505 U.S. 123 (1992).

57. *See id.* at 131.

58. *See id.* at 134 ("The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.").

59. *Id.* at 142 (Rehnquist, C.J., dissenting) ("Assuming 100 people march in a parade and 10,000 line the route in protest, for example, the Court worries that, under this ordinance, the county will charge a premium to control the hostile crowd of 10,000, resulting in the kind of 'heckler's veto' we have previously condemned.").

60. Amateurism, NCAA, http://www.ncaa.org/amateurism [https://perma.cc/RH85-UG8B] (last visited Aug. 13, 2017) ("Amateur competition is a bedrock principle of college athletics and the NCAA. Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority. In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second.").

of constitutional freedoms" in public school environments in order to encourage an atmosphere of learning and the sharing of ideas.[61] However, the Court has also "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[62] The Supreme Court has held that the state does not have a monopoly on a public school's teaching of values or beliefs.[63] However, the Court has also acknowledged that schools have certain obligations that make the educational setting a special environment for purposes of First Amendment jurisprudence.[64] Over the past fifty years, the Supreme Court has attempted to outline the general parameters of constitutionally protected student expression within public schools.[65]

1. *Establishment of Student Speech Rights*

In 1943, the Court ruled 6-3, in *West Virginia State Board of Education v. Barnette*,[66] that school officials who compelled school children to salute the American flag and recite the Pledge of Allegiance violated the First Amendment.[67] The Court reasoned that there was an individual "sphere of intellect and spirit" and that the state could not compel students to engage in actions that would compro-

61. Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

62. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (citations omitted).

63. *See generally* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding compulsory flag salute law unconstitutional).

64. *See* Morse v. Frederick, 551 U.S. 393 (2007) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–66 (1995)) ("[W]hile children assuredly do not shed their constitutional rights . . . at the schoolhouse gate, . . . the nature of those rights is what is appropriate for children in school.") (internal quotation marks omitted).

65. *See generally Morse*, 551 U.S. 393; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); *Tinker*, 393 U.S. 503; *Barnette*, 319 U.S. 624.

66. 319 U.S. 624 (1943).

67. *See generally id.* (holding compulsory flag salute law unconstitutional).

mise their core religious beliefs.[68] The Court's ruling in *Barnette* laid the foundation for future student-speech cases.[69]

In *Tinker v. Des Moines School District*,[70] the Court addressed the question of student symbolic speech.[71] In *Tinker*, students wore black armbands to school to express their opposition to the Vietnam War.[72] In response to the students' plan to wear the armbands, school administrators "adopted a policy that any student wearing an armband . . . would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[73] The student protestors filed a complaint in federal court, seeking both an injunction to prevent the school authorities from disciplining the students, as well as nominal damages.[74] In an opinion by Justice Abe Fortas, the Court concluded that the policy violated the students' First Amendment right and that the wearing of the armbands was "closely akin to 'pure speech,'" holding that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."[75] The *Tinker* Court also stated that behavior, which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," is not constitutionally protected.[76]

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68. *See id.* at 642 ("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. If there are any circumstances which permit an exception, they do not now occur to us.").

69. For further discussion about the Supreme Court's ruling in *Barnette*, see *supra* notes 66–68 and accompanying text. *See, e.g.*, *Does the First Amendment Apply to Public Schools?*, NEWSEUM INST., http://www.newseuminstitute.org/about/faq/does-the-first-amendment-apply-to-public-schools/ (last visited Nov. 6, 2017).

70. 393 U.S. 503 (1969).

71. *See generally id.* (holding that student speech that would obstruct educational process may be regulated).

72. *See id.* at 505–06 ("As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.").

73. *Id.* at 504.

74. *See id.* (noting suit was brought under 42 U.S.C. § 1983 (2012)).

75. *Id.* at 506.

76. *Id.* at 513 ("But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.").

2. *Narrowing Rights Established by Tinker*

Despite a robust defense of student free speech in *Tinker*, the Court subsequently limited these rights by acknowledging the state's substantial interest in teaching students socially-appropriate behavior.[77] In *Bethel School District Number 403 v. Fraser*,[78] Chief Justice Warren Burger distinguished a student's sexually explicit and offensive speech during a school assembly from *Tinker*'s non-disruptive, peaceful expression of a political view because the student's speech interrupted the work of the school and violated the rights of other students.[79] Whereas the students in *Tinker* were punished for a passive manifestation of their viewpoint, the student in *Fraser* was punished for using sexually-explicit language that the Court found inappropriate for a school setting.[80] The *Fraser* decision marked a change in the Court's handling of students' rights as the decision granted significant deference to school officials concerning appropriate behavior in the public school environment.[81]

In 1988, in *Hazelwood School District v. Kuhlmeier*,[82] the High Court adopted an even more deferential standard that has continued to govern regulation of student speech.[83] In *Hazelwood*, former staff members of a school newspaper filed suit claiming that their First Amendment rights had been violated when school officials prevented articles describing students' experiences with pregnancy and divorce from being published.[84] In *Hazelwood*, Justice White authored a majority opinion that held that a student-published pa-

77. *See generally* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding that schools may sanction students' lewd or inappropriate speech).

78. 478 U.S. 675 (1986).

79. *See id.* at 681 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.").

80. *See id.* at 675 ("During the entire speech, respondent referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor. Some of the students at the assembly hooted and yelled during the speech, some mimicked the sexual activities alluded to in the speech, and others appeared to be bewildered and embarrassed.").

81. *See, e.g.*, Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 TENN. L. REV. 481, 491 (2001) (discussing restriction of student speech from *Tinker* to *Fraser*).

82. 484 U.S. 260 (1988).

83. *See generally id.* (ruling on claim that First Amendment rights were violated by school's censorship of certain articles in student run newspaper).

84. *See id.* at 260 (explaining principal censored articles due to sexual content of pregnancy article and that divorced parents of students did not consent to divorce article).

per did not qualify as a "public forum" and, therefore, school officials retained the right to impose reasonable restrictions on student speech in said paper.[85] Justice White's opinion also declared that the school principal's removal of two articles from the newspaper did not violate students' speech rights, on the grounds that the articles unfairly intruded on the privacy rights of pregnant students.[86]

Hazelwood established that, in cases of "school-sponsored" speech, a court must determine whether the forum has been designated as public or reserved by the government as a nonpublic forum.[87] The Court determined that school officials had reserved the student paper as a nonpublic forum for journalism education and looked to school board policy, which stated that school-sponsored publications were developed within the adopted curriculum and regular classroom activities.[88] The *Hazelwood* Court required that a school's motivation for censorship be reasonably related to legitimate educational matters, but legal scholars have speculated that there might not be an actual limit to a school's ability to censor speech due to educational concerns.[89]

Hazelwood's impact was profound and immediate as, almost without exception, courts upheld school officials' decisions to censor many types of student speech.[90] The Court of Appeals for the Ninth Circuit relied on *Hazelwood* to reject Planned Parenthood's claim that the denial of its request to advertise in a school district's newspapers, yearbooks, and programs for athletic events violated free speech rights.[91] The Court of Appeals for the Sixth Circuit noted that "[c]ivility is a legitimate pedagogical concern" and a stu-

85. *See id.* at 260–61 ("The school newspaper here cannot be characterized as a forum for public expression. School facilities may be deemed to be public forums only if school authorities have by policy or by practice opened the facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations.").

86. *See id.* at 261 (holding that principal acted reasonably by requiring the deletion of pregnancy article, divorce article, and other articles that were to appear on same pages of newspaper).

87. *See id.* at 267 ("[P]ublic schools do not possess all of the attributes of streets, parks, and other traditional public forums.").

88. *See id.* at 267–70 (quoting Hazelwood School Board Policy 348.5) ("School sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities.").

89. *See generally* J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706 (1988) (discussing limitations on student journalism).

90. *See generally* Martha M. McCarthy, *Post-Hazelwood Developments: A Threat to Free Inquiry in Public Schools*, 81 EDUC. L. REP. 685 (1993) (discussing how *Hazelwood* altered trajectory of student-speech rights).

91. *See generally* Planned Parenthood v. Clark Cty. Sch. Dist., 887 F.2d 935 (9th Cir. 1989) (concerning action brought by family planning group challenging rejec-

dent could be disqualified from running for Student Council President because their candidacy speech was ill-mannered and vulgar.[92] An Arkansas federal district court upheld a school's rejection of an individual's bid for student council when the court concluded that the school's actions were not taken to retaliate against the student's outspoken viewpoints but to foster the objectives of the Student Council.[93]

The final narrowing of *Tinker* came in *Morse v. Frederick*.[94] In *Morse*, the issue before the Court was whether school administrators violated the free speech rights of a high school student at an off-campus school event by confiscating a banner bearing the phrase "BONG HiTS 4 JESUS" and suspending him.[95] The *Morse* Court held that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[96] The Court declined to apply the *Tinker* standard, noting that neither *Hazelwood* nor *Fraser* did, and concluded that the speech was not protected due to the "serious and palpable" danger that drug use posed to the health and safety of students.[97]

An overview of the relevant case law narrowing *Tinker* shows that discourteous or profane student language may be prohibited under *Fraser*, administrators may censor school-sponsored speech due to any genuine educational concern under *Hazelwood*, and speech impacting student safety may be restricted or censored

tion of its advertisements for publication in high school newspapers, yearbooks, and athletic event programs).

92. Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) (concerning student disqualified as candidate for student council president due to rude language used in campaign speech).

93. *See* Bull v. Dardanelle Pub. Sch. Dist. No. 15, 745 F. Supp. 1455, 1461 (E.D. Ark.) (1990) ("[T]he policy serves legitimate ends. Members of the student council developed the criteria based on what characteristics they thought would be unfitting of a council member. The students were concerned with ensuring that qualified, responsible students were elected to the student council and they wanted to avoid popularity contests or making the election a farce.").

94. 551 U.S. 393 (2007).

95. *See id.* ("At a school-sanctioned and school-supervised event, petitioner Morse, the high school principal, saw students unfurl a banner . . . which she regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, Morse directed the students to take down the banner.").

96. *Id.* at 403.

97. *See id.* at 408 (Congress "[h]as provided billions of dollars to support state and local drug-prevention programs . . . and required that schools receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug-prevention programs "convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful").

under *Morse*.[98] "Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others."[99] After *Hazelwood*, the determination of how to examine a student's free speech claim became tied to the public forum doctrine, for if the expressive activity occurs in a nonpublic forum, then *Hazelwood* will apply.[100]

3. *Applying Speech Rights to College Students*

With the Sixth Circuit's 2012 ruling in *Ward v. Polite*,[101] four federal circuits have openly incorporated *Hazelwood* as the standard by which all student speech, even that of college students, is to be judged.[102] Only the First Circuit has specifically rejected *Hazelwood* in the post-secondary education setting.[103] However, the Supreme Court has specifically reserved the question of whether the *Hazelwood* standard applies at the college level.[104] In the early 1970s, prior to *Hazelwood*, the Supreme Court decided two cases that defined the Court's role in protecting the First Amendment rights of college-level students.[105] Although these cases acknowledged the competing interests of college officials and students, the Court

98. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding school may discipline student for inappropriate speech); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) (holding school retained right to impose reasonable restrictions on speech in student newspaper); Morse v. Frederick 551 U.S. 393 (2007) (holding student's speech was not protected due to "serious and palpable" danger that drug use posed to health and safety of students).

99. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (holding school district's anti-harassment policy to be unconstitutionally overbroad because it prohibited more speech than allowable under *Tinker*).

100. *See, e.g.*, Kincaid v. Gibson, 236 F.3d 342, 346 (6th Cir. 2001) ("Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum—rather than a nonpublic forum—we agree with the parties that *Hazelwood* has little application to this case.").

101. 667 F.3d 727 (6th Cir. 2012).

102. *See* Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005); Axson-Flynn v. Johnson, 356 F.3d 1277, 1284–85 (10th Cir. 2004); *see also* Alabama Student Party v. Student Gov't Ass'n, 867 F.2d 1344, 1347 (11th Cir. 1989).

103. *See* Student Gov't Ass'n v. Bd. of Tr. of the Univ. of Mass., 868 F.2d 473, 480 (1st Cir. 1989) (holding that state university's termination of legal services office did not violate students' First Amendment rights).

104. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.").

105. *See generally* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667 (1973); Healy v. James, 408 U.S. 169 (1972).

equated the speech rights of students to the rights of those outside of the school setting.[106]

In *Healy v. James*,[107] students trying to form a "Democratic Society" on a college campus claimed that their First Amendment rights were violated when school officials refused to officially recognize the organization.[108] The Court drew attention to the countervailing interests in the case as the interest of those in an "[e]nvironment free from disruptive interference with the educational process" and the "interest in the widest latitude for free expression and debate consonant with the maintenance of order."[109] Citing *Tinker*, the Court reaffirmed the application of the First Amendment at the college and university level.[110] The Court further explained its application of *Tinker*, "[w]hile a college has a legitimate interest in preventing disruption on the campus . . . a 'heavy burden' rests on the college to demonstrate the appropriateness of that action."[111] The Court clarified that "[t]he College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[112]

In *Papish v. Board of Curators of the University of Missouri*,[113] a graduate student claimed her First Amendment rights were violated when she was expelled from journalism school after dispensing a newspaper that included a political cartoon with profanity and a lewd sexual act involving a policeman, the Statue of Liberty and the Goddess of Justice.[114] The Court relied on *Healy* for the proposal that the "mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[115] The Court held that,

106. *See infra* notes 107–117 and accompanying text (discussing holdings of *Papish* and *Healy*).

107. 408 U.S. 169 (1972).

108. *See id.* ("[C]ollege president . . . was not satisfied petitioners' group was independent of National SDS, which he concluded has philosophy of disruption and violence in conflict with college's declaration of student rights.").

109. *Id.* at 171 (discussing interests of administrators and students being at opposed).

110. *See id.* at 180 ("At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment.").

111. *Id.* at 184.

112. *Id.* at 187–88 (holding that school did not meet heavy burden simply because school officials found views expressed to be abhorrent).

113. 410 U.S. 667 (1973).

114. *See id.* at 667–68 ("[O]n the front cover the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice.").

115. *Id.* at 670 (citing *Healy*, 408 U.S. at 180).

constitutionally, the only restrictions the school could impose were reasonable time, manner, and place restrictions.[116] As previously noted, the Supreme Court reserved the question of whether the *Hazelwood* standard applies in the university setting.[117] However, the most recent clue to provide an indication as to what the Court might decide in the future is a footnote in *Board of Regents of the University of Wisconsin System v. Southworth.*[118] The footnote, found in a concurring opinion by Justice Souter, says that "[c]ases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools . . . ."[119] Although this footnote is not controlling, it does suggest that the Supreme Court has delineated a distinction when First Amendment rights are at stake between the amount of deference given to school officials at the high school and collegiate levels.[120]

F. Rights of Student-Athletes

1. *Contractual Nature of the Student-Athlete*

Before addressing the constitutional rights of student-athletes, it must be acknowledged that many aspects of the relationship between a college and its athletes are contractual in nature; individuals who receive athletic scholarships sign a Statement of Financial Assistance in which the individual agrees to attend the school and participate in athletics in exchange for financial aid.[121] NCAA rules hold that a university may lessen or withdraw a scholarship if the student-athlete "[v]oluntarily (on his or her own initiative) with-

116. *See id.* ("[T]he University's action here could be viewed as an exercise of its legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination.").

117. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."). For further discussion about the Court applying *Hazelwood* to universities, see *supra* notes 102–106 and accompanying text.

118. 529 U.S. 217 (2000) (holding that university violated student's First Amendment rights of free speech, free association, and free exercise in imposing student activity fee).

119. *Id.* at 238 n.4 (Souter, J., concurring).

120. *See* Frank D. LoMonte, *"The Key Word Is Student": Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 319 (2013) ("Justice David Souter's concurrence cited Hazelwood as an instance in which the ability of institutions to limit student expression has been confined to K-12 schools.").

121. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 416 (1992) (quoting Zumbrun v. Univ. S. Cal., 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972)) ("It is held generally in the United States that the 'basic legal relation between a student and a private university or college is contractual in nature.'").

draws from a sport at any time for personal reasons."[122] In *Taylor v. Wake Forest University*,[123] the court of appeals of North Carolina held that athletes are contractually obligated to maintain eligibility, physically and scholastically, when they accept a scholarship.[124] Since most athletic scholarships are subject to yearly renewal, student-athletes are "easily expendable should conflict arise."[125] The fluid nature of athletic scholarships presents many athletes with a dilemma: comply with censorship of their constitutional rights or risk missing out on a free education.[126]

Courts have held that there is no constitutional right to participate in athletics and have instead analogized participation in collegiate athletics to more of a contract expectation: "[a] student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement."[127] Courts have used the special status of athletics to uphold restrictions including a football team's "no-facial-hair-grooming" policy and a transfer rule.[128]

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122. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA MANUAL, bylaw 15.3.4.2(d) ("Aid based in any degree on athletics ability may be reduced or canceled during the period of the award if the recipient . . . . [v]oluntarily (on his or her own initiative) withdraws from a sport at any time for personal reasons.").

123. 191 S.E.2d 379 (N.C. Ct. App. 1972).

124. *Id.* at 382 ("Gregg Taylor, in consideration of the scholarship award, agreed to maintain his athletic eligibility and this meant both physically and scholastically.").

125. Maxwell Strachan, *Why the Mizzou Protests Are a Watershed Moment in Sports Activism*, HUFFINGTON POST (Nov. 10, 2015), http://www.huffingtonpost.com/entry/missouriprotestscoach_us_564244a9e4b0307f2caf3cf2 [https://perma.cc/57SJ-WCXV]; *see also* MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 111 (4th ed. 2016) ("Beginning in 2012, the NCAA authorized universities to award multi-year scholarships of up to five years.").

126. *See* Marcus Hauer, *The Constitutionality of Public University Bans of Student-Athlete Speech Through Social Media*, 37 VT. L. REV. 413, 426 (2012) ("Should a court find that the preemptive bans are constitutional, players midway through a college career may be forced to abandon social media as an outlet for speech. To do otherwise, they would risk losing their athletic scholarship and perhaps the opportunity to earn a college degree.").

127. Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159 (5th Cir. 1980) (denying claim that transfer rule resulted in denial of equal protection).

128. *See* Humphries v. Lincoln Par. Sch. Bd., 467 So. 2d 870, 872 (La. Ct. App. 1985) (holding that improving academic and athletic performance by football team's members were constitutionally permissive objectives of grooming policy); *see also* Ind. High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222, 243 (Ind. 1998) (holding that "prevent[ing] the evils associated with recruiting of high school athletes and transfers motivated by athletics" is constitutionally permissible objective of transfer rule).

In *Hysaw v. Washburn University of Topeka*,[129] black football team members at the University boycotted practice to protest the unequal amount of athletic scholarships they received in comparison to white players.[130] When the athletes refused to apologize for the boycott, they were dismissed from the team.[131] The *Hysaw* court found that the players did not have a property interest in the contractual rights to play football for the university, but only had a property right in the scholarship funds; therefore the university and its officials were not liable under the civil rights statute.[132]

One of the most significant cases in the realm of student-athlete rights was the Supreme Court's decision in *Vernonia School District v. Acton*.[133] In *Vernonia*, the Court determined that a school district's student-athlete warrantless drug-testing policy was constitutional.[134] In finding the program valid, the Court identified that student-athletes willingly subject themselves to a greater amount of regulation than the normal student by voluntarily electing to participate in athletics: "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[135]

2. *History of Student-Athlete Rights*

The Supreme Court has allowed state actions against student-athletes to stand even when those same actions would be unconstitutional if applied to non-student-athletes.[136] Coaches have refused to recruit tattooed athletes or mandated that athletes with tattoos

129. 690 F. Supp. 940 (D. Kan. 1987).

130. *See id.* at 946 (1987) (denying defendants' motion for summary judgment).

131. *See id.* at 943 ("Defendants claim that the reasons plaintiffs were not allowed to return to the team were that they had missed practice and positional meetings and had failed to show leadership. Plaintiffs claim they were not allowed to return because they boycotted in protest of the alleged racial mistreatment of black football players at Washburn.").

132. *See id.* at 944 ("The court has determined that the only interests created by those agreements are interests in receiving scholarship funds. Any other terms plaintiffs attempt to read into those agreements are, without supporting evidence, no more than unilateral expectations.") (internal quotations omitted).

133. 515 U.S. 646 (1995) (holding that suspicion-less drug policy was constitutional under Fourth Amendment).

134. *See id.* at 657 ("Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.").

135. *Id.*

136. *See generally id.* For further discussion of *Vernonia School District v. Acton*, see *supra* notes 133–135 and accompanying text.

keep them covered.[137] The Alabama, Florida, and Texas A&M football teams all forbid freshman players from talking to the media.[138] Historically, college athlete speech rights have fared little better.[139]

The First Amendment is often implicated when a student-athlete's speech is censored.[140] In *Williams v. Eaton*,[141] University of Wyoming football players were dismissed from the team for violating a longstanding team rule that prohibited team members from engaging in protests.[142] The Wyoming players wanted to wear black armbands in protest of the University's scheduled home game with Brigham Young University ("BYU"), a Mormon University, to protest Mormon teachings regarding alleged racial policies.[143] The Court of Appeals for the Tenth Circuit found for the University, holding that the dismissal "[p]rotected against invasion of the rights of others by avoiding a hostile expression to them by some members of the University team."[144]

In 1981, the Court of Appeals for the Tenth Circuit also ruled, in *Marcum v. Dahl*,[145] that it was permissible to dismiss certain members of the women's basketball team, at the University of Oklahoma, for making disparaging remarks about the team's head

137. *See* ROBERT PALESTINI, A GAME PLAN FOR EFFECTIVE LEADERSHIP: LESSONS FROM 10 SUCCESSFUL COACHES IN MOVING THEORY TO PRACTICE 156 (2008) (discussing legendary University of Tennessee women's basketball coach, Pat Summitt, and her policy on player tattoos).

138. *See* Mike Bianchi, *Will Muschamp Is Less Accessible to Media Than—Wait for It—Nick Saban*, ORLANDO SENTINEL (Aug. 18, 2012, 8:08 PM), http://articles.orlandosentinel.com/2012-08-18/sports/os-mike-bianchi-florida-gators-0819-20120818_1_muschamp-florida-gators-coach-urban-meyer [https://perma.cc/52G3-J3GG] (criticizing "freshman ban" and noting irony that "these players are old enough to fight for their country, vote and call audibles in front [of] 100,000 enemy fans . . . but they're not mature enough to talk to the media for 10 minutes after the game?"); Andy Staples, *With Heisman Ceremony Looming, Johnny Football Finally Speaks*, SPORTS ILLUSTRATED (Nov. 26, 2012, 6:03 PM), https://www.si.com/more-sports/2012/11/26/johnny-football-finally-speaks-verge-heisman [https://perma.cc/8JF2-CSPH] (indicating that Texas A&M coach allowed exception to his policy of not allowing freshman to speak to press in hopes of accelerating Manziel's Heisman campaign).

139. For further discussion about the history of athlete-speech over the last forty years, see *infra* notes 140–147 and accompanying text.

140. *See* Noel Johnson, *Tinker Takes the Field: Do Student Athletes Shed Their Constitutional Rights at the Locker Room Gate?*, 21 MARQ. SPORTS L. REV. 293, 297 (2010) (discussing constitutional rights of student-athletes at college level).

141. 468 F.2d 1079 (10th Cir. 1972).

142. *See id.* at 1084 ("Without deciding whether approval of the armband display would have involved state action or a violation of the religion clauses, we are persuaded that the Trustees' decision was lawful within the limitations of the *Tinker* case itself.").

143. *See id.* at 1081.

144. *Id.* at 1084.

145. 658 F.2d 731 (10th Cir. 1981).

coach to the press.[146] The *Marcum* court concluded that "[t]he plaintiffs' First Amendment rights were not violated by the defendants' refusal to renew the plaintiffs' athletic scholarships" because the "[c]ontroversy resulted in disharmony among the players and disrupted the effective administration of the basketball program."[147]

3. *Modern Landscape of Student-Athlete Speech Rights*

Public universities such as Boise State University, University of Iowa, and University of Kansas have all instituted social media bans for football players.[148] In 2011, University of South Carolina head football coach, Steve Spurrier, banned his players from using Twitter.[149] When asked by reporters why he had banned his players from using the social media site, Spurrier said, "[w]ell, we have some dumb, immature players that put crap on their Twitter, and we don't need that. So, the best thing to do is just ban it."[150] In 2011, Florida State coach, Jimbo Fisher, temporarily banned Twitter for his team after a loss because he was unhappy in how they responded to negative tweets.[151] In 2012, Fisher reinstituted the ban when one of his players used Twitter to complain about being pulled over by the police and various members of the team tweeted about a range of topics from killing cops to disparaging child support payments.[152]

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146. *See id.* 733 (stating players alleged that school's non-renewal of scholarships implicated freedom of speech and due process violations).

147. *Id.* at 734–35.

148. *See* Gay, *supra* note 6, at 796 ("A larger number of public schools have banned college football players from using social media. Their teams are as follows: the University of South Carolina Gamecocks, the Boise State University Broncos, the University of Iowa Hawkeyes, and the University of Kansas Jayhawks.").

149. *See* David Cloninger, *Spurrier Bans Team from Twitter*, GAMECOCKCENTRAL.COM (Aug. 4, 2011), http://southcarolina.rivals.com/content.asp?CID=1247470 [https://perma.cc/C5YJ-M78M] (discussing University of South Carolina head football coach Steve Spurrier's team wide ban of social media).

150. *Id.* (quoting Coach Spurrier on his Twitter policy).

151. *See* Kristian Dyer, *Florida State Bans Its Players from Twitter*, YAHOO! SPORTS (July 20, 2012, 6:26 PM), http://sports.yahoo.com/blogs/ncaaf-dr-saturday/florida-state-bans-players-twitter-222622167—ncaaf.html [https://perma.cc/442F-MZEH] (discussing FSU Twitter ban).

152. *See id.* (discussing FSU player tweeting rap lyrics containing phrase "kill the cops"). *See also*, Erin Sorensen, *College Football 2012: Florida State Players Show Why Twitter Should Be Banned*, BLEACHERREPORT (July 9, 2012), http://bleacherreport.com/articles/1252534-college-football-2012-florida-state-players-show-why-twitter-should-be-banned ("Florida State head coach Jimbo Fisher has found his players tweeting things such as, '[c]hild support is worse than aids.'").

Student-athlete activity on social media platforms present a unique dilemma for colleges and universities.[153] Student-athletes' social media posts are closely monitored by hundreds of thousands of followers and the posts can reveal potential school, conference, and NCAA violations.[154] Examples such as Ohio State quarterback, Cardale Jones' infamous tweet make the attractiveness of social media policies readily apparent.[155] The motivations for restricting student-athletes' social media use are obvious: "[s]chools and coaches wish to avoid negative attention and embarrassment. They want student-athletes to create a positive image of the school and the team and are willing to censor student-athletes to achieve this end even if it may be unconstitutional."[156]

If the individuals subject to these speech restrictions were merely students at their respective universities, these bans or restrictions would be open-and-shut cases of government censorship.[157] However, because these individuals are student-athletes, the situation is more complex: "[t]here is no question that student-athletes agree to increased regulation of their lives in exchange for the ability to represent their university on an athletic team. And yet there must be some limits on the university's ability to intrude upon its athletes' rights."[158] As educational institutions attempt to toe the line between freedom and control, it is time to think about just how far institutions may go in the name of protecting the reputation of their athletic programs.[159]

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153. *See, e.g.*, Kayleigh R. Mayer, *Colleges and Universities All Atwitter: Constitutional Implications of Regulating and Monitoring Student-Athletes' Twitter Usage*, 23 MARQ. SPORTS L. REV. 455, 456 (2013) ("[T]witter becomes a problem when student-athletes tweet about other players, dissatisfaction with their coaches, playing time frustrations, or intimate details about their personal lives.").

154. *See generally* Jon Solomon, *What to Do About Social Media? Colleges Tackle How to Monitor What Athletes Are Saying*, AL.COM (July 24, 2011, 8:00 AM), http://www.al.com/sports/index.ssf/2011/07/what_to_do_about_social_media.html [https://perma.cc/55C9-MBPA] (discussing UNC football player Marvin Austin whose tweets of watch he bought, designer purse, and bill for over one hundred dollars at Cheesecake Factory brought NCAA investigations on UNC).

155. *See* Cardale Jones (@Cordale10), TWITTER (Oct. 5, 2012, 8:43 AM) ("Why should we have to go to class if we came here to play FOOTBALL, we ain't come to play SCHOOL classes are POINTLESS.").

156. Gay, *supra* note 6, at 797.

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

158. Harris, *supra* note 1.

159. *See, e.g.*, Mina Kimes, *Social Media Bans May Violate College Athletes' First Amendment Rights*, ABCNEWS (Sept. 2, 2015), http://abcnews.go.com/Sports/social-media-bans-violate-college-athletes-amendment-rights/story?id=33482714 [https:/

III. DISCUSSION

The Discussion section frames the debate regarding speech rights as applied to student-athletes.[160] Section A will discuss arguments against the constitutionality of social media bans as applied to student-athletes.[161] Section B will detail arguments supporting the constitutionality of student-athlete social media bans.[162] Finally, section IV of this article will recommend that universities implement narrowly-tailored social media bans that respect the rights of student-athletes while protecting university interests.

A. Argument Against Constitutionality of Social Media Bans

The first step in analyzing a potential First Amendment claim is to determine what type of government regulation occurred.[163] The forum analysis is inapplicable to internet speech as courts have refused to treat the internet as a public forum, with the exception of government operated websites.[164] Therefore, the regulation of student-athletes' social media use does not fit neatly into this particular traditional analysis:

> [I]nstead of applying a forum analysis for social media postings by college and university students, courts typically treat social media postings as "off-campus speech" and will only uphold a college or university's regulation of a student's social media activity if the college or university can prove the speech was (1) a material disruption to the school, and/or (2) falls under another category of unprotected speech.[165]

/perma.cc/6R3M-ARSU] (discussing constitutionality of social media bans for collegiate athletes).

160. *See infra* notes 163–201 and accompanying text.

161. *See infra* notes 163–180 and accompanying text.

162. *See infra* notes 181–201 and accompanying text.

163. For further discussion of forum analysis see *supra* notes 40–59.

164. *See* Elizabeth Henslee, *A Funny Thing Happened on the Way to the Public Forum: Why a Public Forum Analysis Applied to the Library Should Protect Internet Services and Delivery Systems*, 43 CAP. U. L. REV. 777, 821 (2015).

> Despite this argument, the Court has failed to treat the internet as a public forum taking a strict construction of the public forum doctrine and placing an emphasis on the 'tradition' and 'history' of the traditional public forum thereby making the internet ineligible for consideration due to its recent appearance in American culture and communication.

Id.

165. *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, 457 (2012) (discussing application of traditional public forum analysis to student-athlete social media use).

For a social media regulation to be valid under the disruption test, outlined in *Tinker*, university athletic departments must prove that the prohibited speech would materially disrupt the institution's educational operations.[166] However, federal district courts nationwide have found the *Tinker* test difficult to apply; "[i]t is not entirely clear whether Tinker's rule applies to all student speech that is not sponsored by schools . . . or whether it applies only to political speech or to political viewpoint-based discrimination."[167]

An important clue to understanding *Tinker*'s application to post-secondary institutions can be found in the fourth footnote of *Board of Regents of the University of Wisconsin System v. Southworth*, which indicates that college students are granted greater speech protection than high school students.[168] The protection gap between college and high school is best evidenced by *Papish v. Board of Curators of the University of Missouri*, where the Supreme Court affirmed a lower court's ruling that no disruption of a university's functions occurred due to a student distributing newspapers containing vulgar language and cartoons.[169] *Papish* stands in stark contrast with *Poling*, where the Supreme Court upheld a high school's decision to disqualify a student from running for Student Council President because the student's candidacy speech contained expletives.[170] Following the trend of granting college students greater speech protection than high school students, the Court in *Healy v. James* stated that on-campus college speech deserved protection equaling that of off-campus speech.[171]

Southworth, *Papish*, and *Healy* indicate that ordinary college students may engage in on- or off- campus speech that does not substantially disrupt the operation of the school.[172] Unfortunately, this reasoning does not align perfectly with the reality of the college athlete as the Supreme Court has stated that by voluntarily agreeing to participate in athletics, student-athletes forgo some of the rights

166. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969). For further discussion about *Tinker*'s substantial disruption test, see *supra* note 76 and accompanying text.

167. Guiles v. Marineau, 461 F.3d 320, 326 (2d Cir. 2006).

168. For further discussion about *Southworth*, see *supra* notes 118–159 and accompanying text.

169. For further discussion about *Papish*, see *supra* notes 113–116 and accompanying text.

170. For further discussion about *Poling*, see *supra* note 92 and accompanying text.

171. For further discussions about *Southworth*, *Papish*, and *Healy*, see *supra* notes 168–171 and accompanying text.

172. For further discussion about *Healy*, see *supra* notes 107–112 and accompanying text.

afforded to ordinary students.[173] Nonetheless, even accepting the Court's assertion, it stands to reason that a college athlete's speech should receive protection somewhere between the speech of an ordinary college student and that of a high school student.[174]

If student-athlete speech rights exist somewhere in the grey area between high school and college, it is logical to use *Tinker*'s application to high school to form the floor of athlete speech protections.[175] To uphold a speech restriction under *Tinker*, student speech must substantially interfere with the work of the school or impinge upon the rights of other students.[176] Courts have narrowed *Tinker* at the high school level to allow administrators to prevent speech that would prohibit discourteous or profane student language, censor school-sponsored speech due to genuine educational concern, and restrict speech impacting student safety.[177] It is hard to argue that even the most profane tweet authored by even the most popular student-athlete would cause the substantial disruption of a college campus as required under a more relaxed version of the *Tinker* test.[178] Further, a university's main reason for implementing a ban on social media is to protect the reputation of the student-athlete's team, the athletic department, and the university at large.[179] It appears that such a purpose fails to meet the "substantial disruption" requirement of the *Tinker* test, even when compared to its application at the high school level; however, courts have looked to other precedent to support bans on student-athlete online speech.[180]

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173. For further discussion about *Vernonia*, see *supra* notes 133–135 and accompanying text.

174. For further discussion about collegiate athletes receiving speech protection between the rights of a college student and a high school student, see *infra* notes 175–180 and accompanying text.

175. For further discussion about using high school student speech protections as a floor for college athletes, see *infra* notes 176–180 and accompanying text.

176. For further discussion about *Tinker*, see *supra* notes 70–76 and accompanying text.

177. For further discussion about case narrowing *Tinker*, see *supra* notes 77–100 and accompanying text.

178. For a further examples of student-athlete social media posts, see *supra* 148–156. For a further discussion of the *Tinker* test as applied to college athletes, see *supra* notes 175–177.

179. For further discussion about why schools implement social media bans for student-athletes, see *supra* notes 148–159 and accompanying text.

180. *See, e.g.*, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Illinois, 391 U.S. 563 (1968). For further discussion about the *Pickering* decision, see *infra* notes 191–198 and accompanying text.

B. Argument for the Constitutionality of Social Media Bans

Various court decisions suggest that coaches and state-sponsored institutions can set constraints on their athletes' speech, including their use of social media.[181] Even the Supreme Court has recognized that student-athletes participating in extracurricular sports "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."[182] The Court noted that due to all the restrictions placed upon them, athletes are constitutionally different and that "[s]omewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[183]

In the realm of collegiate athletics, coaches have extraordinary authority over their athletes; as evidenced by its holding in *Vernonia*, the Supreme Court silently approves this structure and the decision's consequential division between student-athletes and their peers.[184] However, this distinction is by no means a legal fiction as intercollegiate student-athletes are in fact unique from ordinary college students and are subjected to different regulations than the student body at large.[185] The distinction between the student-athlete and their peers exists for two main reasons: "(1) student athletes are highly regulated both on and off the field or court, and (2) team unity outweighs any unfettered right to free expression."[186] Some states, such as California, have held that even the bodily conditions of students may be strictly regulated:

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181. *See* Lowery v. Euverard, 497 F.3d 584, 588, 591 (6th Cir. 2007) (noting "top-down" nature of school authority, particularly in relation to athletics); Wildman *ex rel.* Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 771 (8th Cir. 2001) (holding that requiring player to apologize to team by letter prior to rejoining team after criticizing her coach did not violate First Amendment rights of student-athlete); Williams v. Eaton, 468 F.2d 1079, 1084 (10th Cir. 1972) (noting that University of Wyoming was well within its rights to protect invasion of rights of other teammates as basis for prohibiting wearing of armbands as form of hostile speech toward Mormon religion).

182. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) (explaining that students who participate in school-sponsored athletics have lower expectation of privacy than general students).

183. *Id.* at 657.

184. *See supra* note 173.

185. *See* Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. MARSHALL REV. INTELL. PROP. L. 509, 512 (2013) ("State colleges and universities have enormous control and influence over their athletes, and the First Amendment imposes no impediment to protecting both the athletes and the universities they represent.").

186. *Id.* at 546.

> [P]articipation in intercollegiate athletics, particularly in highly competitive postseason championship events, involves close regulation and scrutiny of the physical condition and bodily condition of student athletes. Required physical examinations (including urinalysis), and special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests are routine aspects of a college athlete's life not shared by other students or the population at large.[187]

Athletes are held to different academic standards, class attendance standards, and character standards than non-athlete students.[188] On top of all these guidelines and regulations, athletes are also subject to obligatory athletic codes of conduct and coach-imposed "team rules" that control conduct both on and off campus.[189] By voluntarily participating in meticulously-organized and intensely-controlled athletic programs, college athletes subject themselves to greater restrictions on their conduct and speech than athletes at lower levels of sports.[190]

For this school of thought, the approach from *Pickering v. Board of Education* could be the applicable standard.[191] In *Pickering*, the Supreme Court held that public employees had the right to speak on issues of public importance without being disciplined for their viewpoint.[192] *Pickering* is not a perfect fit, as applying the "public employee" label to student-athletes is theoretical and highly contro-

187. Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 658 (Cal. 1994).

188. *See, e.g.*, Meg Penrose, *Tinkering with Success: College Athletes, Social Media and the First Amendment*, 35 PACE L. REV. 30, 43 (2014) (Student-athletes "often must maintain a particular grade point average to remain on the team. They must attend study hall, have unique access to tutors and tutoring, and find themselves traveling the country, if not the world, in pursuit of athletic competition").

189. *See, e.g.*, Penrose, *supra* note 185, at 513 ("Athletes have always been subjected to greater scrutiny and regulation by the State, via their coaches and state university athletic departments.").

190. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) ("By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."); *see also* Hauer, *supra* note 126, at 427 ("Thus the burden on college student-athletes is greater than that on high school athletes, all while protecting a lesser state interest.").

191. 391 U.S. 563 (1968) (holding public high school teacher had right to speak on issues of public importance without being fired).

192. *See, e.g.*, *id.* at 574 ("Absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.").

versial.[193] However, courts have applied the *Pickering* ruling to student-athlete speech.[194] For example, in 1981, University of Oklahoma student-athletes filed suit against the university when the student-athletes' attempts to have their head coach removed resulted in losing their athletic scholarships.[195] The Court of Appeals for the Tenth Circuit upheld the university's decision not to renew the athletes' scholarships by analyzing the case under the public employment line of cases established by *Pickering*.[196] The court reasoned that the athletes' critical speech did not rise to the *Pickering* level of matters of public concern and was hesitant to declare that locker room speech rises to the level of speech that *Pickering* protects.[197] Because case law is mixed regarding whether a college athlete equates to a university employee, there are some questions about applying a pure *Pickering* standard to the unique situation of a college athlete.[198]

Alternatively, a state university could implement a policy that prevented student-athletes from posting content that would fall under a category of low value or unprotected speech.[199] This type of policy would likely be valid because low-value speech receives the least amount of First Amendment protection; however, the policy would have a limited application because these classes of speech are narrowly defined and the Supreme Court has refused to create new categories of low-value speech.[200] Further, the effectiveness of this

193. *See* Sean Alan Roberts, *College Athletes, Universities, and Workers' Compensation: Placing the Relationship in the Proper Context by Recognizing Scholarship Athletes as Employees*, 37 S. TEX. L. REV. 1315 (1996) (defining student-athletes as employees for purposes of workers' compensation.). *See also* Lori K. Mans & J. Evan Gibbs, *Student Athletes as Employees?*, FLA. B.J. (Apr. 2015) (discussing Northwestern University Football team's representation petition).

194. *See* Marcum v. Dahl, 658 F.2d 731, 734–35 (10th Cir. 1981) (affirming dismissal of action).

195. *See, e.g.*, *id.* at 733 (discussing athletes' comments to press that, if head coach remained in position, they would quit the team).

196. *See, id.* at 734 (citing *Pickering* and affirming trial court's finding that Plaintiffs' comments were not regarding matters of public concern and were not protected by First Amendment).

197. *See id.* ("[P]roblems created by the controversy between the scholarship and non-scholarship players were internal problems [on the team] with which the defendants were required to deal in their official capacities" and were not matters of "general public concern and the plaintiffs' comments to the press did not invoke First Amendment protection.").

198. *Compare* Van Horn v. Indus. Accident Comm'n, 219 Cal. App. 2d 457, 466 (1963) (finding that football player who died on school-sponsored airplane trip was employee for Worker's Compensation purposes) *with* Coleman v. W. Mich. Univ., 336 N.W.2d 224, 228 (Mich. Ct. App. 1983) (finding that football player on scholarship was not employee for Worker's Compensation purposes).

199. For a discussion of low value speech see *supra* notes 33–39.

200. For a discussion of low value speech see *supra* notes 33–39.

type of policy would likely be moot as the government is already given wide discretion to regulate speech that would fall under one of the defined categories.[201]

IV. CONCLUSION

In conclusion, an outright ban on student-athlete use of social media would seem to be unconstitutional under the substantial disruption test outlined in *Tinker*.[202] Restrictions on social media posts' content are a more complicated question because, while applying the *Pickering* standard to college athletes may not be ideal, fcis]Pickering offers a more realistic approach than *Tinker*.[203] Moreover, there are less invasive methods to control a student-athlete's possibly offensive or repugnant social media activity.[204] Universities could require student-athletes to participate in classes that instruct how to use social media as a positive tool or schools could require student-athletes to include a disclaimer on their public profiles that the views of the profile reflect those of the athlete and not of the institution itself.[205] Both of these proactive steps would protect a school's reputation and distance the institution from the possibly distasteful viewpoints of a player.[206] To date, no student-athlete has challenged one of these social media bans (and it is unlikely one will), but, by implementing narrowly-tailored social media bans, universities can protect their own reputations and in-

201. For a discussion of low value speech see *supra* notes 33–39.

202. For further discussion about the constitutionality of bans on social media, see *supra* notes 163–201 and accompanying text.

203. *See* Gay, *supra* note 6, at 803 (2012) ("[I]t is also possible that the Tinker test is an insufficient standard for this uniquely twenty-first century speech . . . courts should decide whether those restrictions are significantly and narrowly tailored to not constitute an undue restriction on student-athletes' rights of free speech.").

204. For further discussion about non-intrusive methods universities have used to curb social media use of student-athletes, see *infra* notes 205–206 and accompanying text.

205. *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 L. 18, 19 (2010) (arguing for use of disclaimer on social media accounts).

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

terests while also respecting the speech rights of their student-athletes.[207]

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207. *See* Bentley, *supra* note 165, at 458–64 (providing list of tips universities could follow to permissibly monitor student athlete online activity).

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