

# WHAT’S SAID IN THIS LOCKER ROOM, STAYS IN THIS LOCKER ROOM: RESTRICTING THE SOCIAL MEDIA USE OF COLLEGIATE ATHLETES AND THE IMPLICATIONS FOR THEIR INSTITUTIONS

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## INTRODUCTION

When Supreme Court Justice Byron White considered the question

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of student expression in *Hazelwood School District v. Kuhlmeier*, he wrote that state schools could restrict student speech “even though the government could not censor similar speech outside the school.”<sup>1</sup> But in this age of social media, where student expression has expanded far beyond the printed page and the schoolhouse gate, would Justice White rule the same way? And, more importantly for this note, how would the Justice feel today if he were not Justice White, but All-American College football player “Whizzer” White, and his coach suspended him for a posting on his @CUBuffs24 Twitter account?<sup>2</sup>

Thanks to a revolutionary change in the way Americans communicate, a similar question could soon arise in the context of intercollegiate athletics. Social media, such as Twitter and Facebook, have become pervasive among college students.<sup>3</sup> As a result, these forms of social media have also increased the ability of college student-athletes to communicate to the public outside the supervision of their institutions. Since 2008, there have been several high-profile instances of student-athletes making controversial statements through social media that have resulted in institution-imposed restrictions of their use, or even dismissal from the team.<sup>4</sup>

In response, this note attempts to answer the question of whether institution-imposed restrictions of student-athlete social media use constitute a violation of the student-athlete’s First Amendment rights. In Part I, the note lays out the Supreme Court’s framework for evaluating free speech in the educational setting, beginning with the landmark case *Tinker v. Des Moines Independent Community School District*<sup>5</sup> and ending with the Court’s analysis of speech in higher education. Part II examines the unique questions faced by higher education institutions in light of the explosion of social media sites like Facebook and Twitter. It also suggests creative approaches to traditional First Amendment analysis, including borrowing the *Pickering* balancing test for application in student-athlete social media cases. Part III applies the constitutional framework to recent instances of athletic department restrictions on

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1. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

2. White wore the number 24 during his career at the University of Colorado, whose mascot is a Buffalo.

3. Research has shown that 96 percent of college students used Facebook, while 14 percent used Twitter. See Nicholas Capano, Johanna Deris & Eric Desjardins, SOCIAL NETWORKING USAGE AND GRADES AMONG COLLEGE STUDENTS: A STUDY TO DETERMINE THE CORRELATION OF SOCIAL MEDIA USAGE AND GRADES 2 (2009), available at <http://www.unh.edu/news/docs/UNHsocialmedia.pdf>.

4. Suzanne Halliburton, *Burnette Apologizes to Teammates for Facebook Incident*, AUSTIN AMERICAN-STATESMAN, (Nov. 6, 2008, 04:33PM), [http://www.mo.statesman.com/blogs/content/shared-gen/blogs/austin/longhorns/entries/2008/11/06/burnette\\_ousted.html](http://www.mo.statesman.com/blogs/content/shared-gen/blogs/austin/longhorns/entries/2008/11/06/burnette_ousted.html).

5. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

social media statements, including blanket Twitter prohibitions,<sup>6</sup> a suspension due to statements advocating the suicide of rival fans,<sup>7</sup> and a dismissal following racist comments about President Barack Obama.<sup>8</sup> Part IV will conclude with a look forward at what a “perfect facts” case would look like for student-athletes claiming a First Amendment violation and strategies for institutions seeking to restrict speech.

## I. STUDENT SPEECH

*“Congress shall make no law . . . abridging the freedom of speech.”*<sup>9</sup>

College campuses hold a special place in American society as centers of learning. They are also unique from other levels of education because most of the students and faculty are adults, which gives them more freedom than younger students and presumably makes them less impressionable. That difference in age and maturity presents more complex legal problems than speech cases in other educational contexts, as do the distinctions between public and private institutions. Therefore, it is necessary to examine those complexities before continuing to the cases involving student-athletes, social media, and the First Amendment.

### A. *Tinker and its descendants*

The seminal statement in student free speech jurisprudence was written by Justice Fortas in *Tinker* when he wrote, “[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.”<sup>10</sup> From there, the framework for evaluating student free speech has developed through a line of Supreme Court cases that have further defined how courts should scrutinize student speech restrictions. Those cases have examined student speech in the context of school-sponsored publications,<sup>11</sup> sexually suggestive student government speeches,<sup>12</sup> and drug-related

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6. Clay Travis, *Boise State’s Chris Petersen Bans Twitter, Ignites 21st Century Debate*, AOLNEWS (Aug. 11, 2010, 12:10 PM), <http://www.aolnews.com/2010/08/11/boise-states-chris-petersen-bans-twitter-ignites-21st-century> (coach preemptively banning Twitter without any preceding controversy).

7. Jake Trotter, *OU Suspends Receiver Jaz Reynolds for Twitter Comments About Texas*, THE OKLAHOMAN (Sept. 29, 2010), <http://newsok.com/ou-suspends-receiver-jaz-reynolds-for-twitter-comments-about-texas/article/3499714>.

8. Halliburton, *supra* note 4.

9. U.S. Const. amend. I.

10. *Tinker*, 393 U.S. at 506.

11. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988).

12. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

student speech,<sup>13</sup> leaving courts with a content-based test.<sup>14</sup> The test at the time of this note is that student speech can be restricted under unique circumstances, and political speech will receive stricter scrutiny than other types of speech. The unique circumstances in which student speech may be restricted are as follows: (1) the expression leads school officials to reasonably forecast a substantial disruption or material interference with school activities;<sup>15</sup> (2) the expression is in a school-sponsored activity and might reasonably be perceived to bear the imprimatur of the school, and the restriction is “reasonably related to legitimate pedagogical concerns;”<sup>16</sup> (3) the expression includes vulgar speech or lewd conduct<sup>17</sup>, or (4) the student’s expression can be “reasonably viewed as promoting illegal drug use.”<sup>18</sup>

The development of this test began in 1969 with the Supreme Court’s decision in *Tinker*. A student group that wore black armbands in silent opposition to the Vietnam War sued the Des Moines school district after the students’ school suspended them for wearing the armbands.<sup>19</sup> There was no evidence that the students’ speech interfered with the school’s work or other students’ rights to go about their business.<sup>20</sup> The school maintained that the suspension was justified because it believed that the armbands would lead to an avoidable controversy in the school.<sup>21</sup> The Court did not accept this explanation and laid the foundational principle that educational institutions cannot impose view-point based restrictions on student speech unless the expression leads school officials to reasonably forecast a “substantial disruption of or material interference with school activities.”<sup>22</sup> In issuing its decision, the Court established a guiding principle in favor of student speech: “[i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.”<sup>23</sup>

Twenty years after this decision, which expanded student speech rights, the Court began to place limits on students’ freedom of expression in schools. The first step in this process occurred in *Bethel School District v. Fraser*, a case about sexually charged student speech. In *Bethel*, the Court examined whether a high school violated a student’s

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13. *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

14. *T.A. ex. rel. Amador v. McSwain Union Elementary Sch. Dist.*, No. CV-F-08-1986 2009 WL 1748793 (E.D. Cal. June 18, 2009).

15. *Tinker*, 393 U.S. at 514.

16. *Hazelwood*, 484 U.S. at 273.

17. *Bethel*, 478 U.S. at 685.

18. *Morse*, 551 U.S. at 403.

19. *Tinker*, 393 U.S. at 504.

20. *Id.* at 508.

21. *Id.*

22. *Id.* at 514.

23. *Id.* at 511.

First Amendment rights when it suspended him after he gave a speech that contained an “elaborate, graphic, and explicit sexual metaphor.”<sup>24</sup> The student gave a speech nominating a friend for student government, and several teachers and students were offended by the speech. It included language such as “Jeff is a man who will go to the very end—even the climax, for each and every one of you.”<sup>25</sup> The audience included several 14-year-old students, who, according to school officials, were confused and offended by the speech.<sup>26</sup> The Court held that the school did not violate the student’s First Amendment rights by suspending the student for this conduct because the school had to be able to “disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.”<sup>27</sup>

The *Bethel* Court made sure to emphasize that it was still employing the content-based test from *Tinker*, even though it reached the opposite result by holding that the suspension in this case did not violate the First Amendment rights of the student. The content in *Bethel* was “vulgar” and “lewd,” whereas the content in *Tinker* was political. The difference, the *Bethel* Court pointed out, was that the “penalties imposed in [*Bethel*] were unrelated to any political viewpoint.”<sup>28</sup>

The Supreme Court continued this process of limiting student speech in *Hazelwood*, where it held that controversial student speech could be restricted when it was connected to a school-funded or school-sponsored activity.<sup>29</sup> Students at East Hazelwood High School in Missouri contended that the school violated their First Amendment rights when it deleted two pages from an issue of the school-funded student newspaper.<sup>30</sup> The pages were ordered to be deleted by the principal because they contained stories about teen pregnancy and divorce.<sup>31</sup>

Once again, the Court emphasized the importance of content when evaluating student speech. The Court held that the principal’s actions were permissible under the Constitution because a school may distance itself from content “that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”<sup>32</sup> The Court based its decision on the fact that the school sponsored the activity, and therefore the

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24. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 678 (1986).

25. *Id.* at 687 (Brennan, J., concurring).

26. *Id.* at 683.

27. *Id.* at 685-86.

28. *Id.* at 685.

29. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

30. *Id.* at 262.

31. *Id.* at 263-64.

32. *Id.* at 271.

statements in the newspaper articles could be reasonably perceived “to bear the imprimatur of the school.”<sup>33</sup> Therefore, educators may restrict student speech in “school-sponsored expressive activities” as long as that restriction was “reasonably related to legitimate pedagogical concerns.”<sup>34</sup>

The Court’s most recent refinement of the content-based test resulted in yet another restriction of student speech rights. In 2007, the Court held in *Morse v. Frederick* that speech advocating illegal drug use could be restricted at school-sanctioned events.<sup>35</sup> In *Morse*, a group of students from Juneau-Douglas High School unfurled a banner that read “BONG HITS 4 JESUS” as the Olympic Torch Relay passed by the high school.<sup>36</sup> The school principal saw the banner and demanded it be taken down.<sup>37</sup> The one student who declined was suspended, and he filed a claim against the school for violating his First Amendment rights.<sup>38</sup> The Court again relied on the core of its student speech doctrine—viewpoint neutrality and content analysis—to uphold the restriction on speech as a valid exercise of educational control.<sup>39</sup> Ultimately, it held that advocating illegal drug use during a school-sponsored activity was beyond the protections provided for students by the First Amendment.

The Court’s decision in *Morse* solidified the modern framework for analyzing student speech in the context of elementary and secondary public schools. But this line of cases stemming from the *Tinker* analysis fails to contemplate student speech on public college campuses, where most students are adults and free expression is considered a cornerstone of the university experience. The next question that must be addressed, then, is how and under what circumstances may student speech be restricted on America’s college campuses?

### *B. The complexities of speech on college campuses*

While the *Tinker* jurisprudence is essential to the question of collegiate student-athlete speech, the fact that the Supreme Court has never clearly applied *Tinker* to speech occurring on college campuses is significant. The Court has recognized a distinction between college campuses, where the students are adults, and high school campuses, where they are not.<sup>40</sup> But it has not laid out guidelines for restricting speech on college campuses in the same way that it has for high school

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33. *Id.*

34. *Id.* at 273.

35. *Morse v. Frederick*, 551 U.S. 393, 401 (2007).

36. *Id.* at 397.

37. *Id.* at 398.

38. *Id.* at 398-99.

39. *See id.* at 403.

40. *See, e.g., Keyishian v. Bd. of Regents Univ. of State of N.Y.*, 385 U.S. 589, 603 (U.S. 1967).

campuses. It has, however, explicitly applied *Tinker* to some campus speech,<sup>41</sup> while in other cases it has used strong words to signal that the same type of restrictions placed on high school students would not be allowed on a public college campus.<sup>42</sup> Commentators have also noted the unique and essential differences that exist between high school and college environments.<sup>43</sup> As a result, these discrepancies have left an even murkier picture of First Amendment law on college campuses.

The Court has often noted the unique role and place occupied by public universities in the nation's discourse. The phrase "marketplace of ideas" is often used when college campuses are referenced in Supreme Court decisions,<sup>44</sup> and the Court has singled out the delicate balance between maintaining order and restricting speech as "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."<sup>45</sup>

The Court has also explicitly referred to *Tinker* for guidance when scrutinizing speech restrictions on public college campuses.<sup>46</sup> In *Healey v. James*, where a student group challenged the administration's denial of recognition because of the group's unconventional political stance, the Court stated that, "[a]t the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment."<sup>47</sup> The *Healey* Court relied on language from *Tinker* to examine the case, reaffirming that each alleged restriction must be examined "in light of the special characteristics of the . . . environment."<sup>48</sup> It also failed to distinguish college campuses from secondary schools by recognizing that, in relying on language from *Tinker*, there is a "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."<sup>49</sup>

This failure to make a distinction between college campuses and secondary schools in *Healy* set the stage for the continued use of strong

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41. *Healy v. James*, 408 U.S. 169, 180 (1972).

42. *Bd. of Regents v. Southworth*, 529 U.S. 217, 221 (2000).

43. HARVEY A. SILVERGLATE, DAVID FRENCH & GREG LUKIANOFF, *FIRE'S GUIDE TO FREE SPEECH ON CAMPUS* xiv (Found. for Individual Rights in Educ. 2005) [hereinafter "FIRE'S GUIDE"] (the group's mission is "to defend and sustain individual rights at America's colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience — the essential qualities of individual liberty and dignity.").

44. *See, e.g., Keyishian*, 385 U.S. at 603.

45. *Rosenberger v. Rector & Visitors Univ. of Va.*, 515 U.S. 819, 835 (1995).

46. *Healy*, 408 U.S. at 180.

47. *Id.*

48. *Id.*

49. *Id.*

language to link college and high school campuses together. The Court's own strong language stated that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary."<sup>50</sup> And in *Papish v. Board of Curators of University of Missouri*, a case decided soon after *Healey*, the Court pointed to *Tinker* to support the general proposition that public universities have some ability to restrict speech so they can maintain order on campuses.<sup>51</sup> These cases indicated that the Court could potentially turn to the *Tinker* jurisprudence when faced with student speech on college campuses.

The Court's most recent decisions on the restriction of campus expression, however, did not rely on the secondary school-based reasoning of *Tinker*. Instead, the Court signaled that colleges are indeed different than high schools. In *Rosenberger v. University of Virginia*, the Court held that the university could not withhold student funds from a Christian student publication because of its religious viewpoints.<sup>52</sup> Although the Court did not explicitly give speech on a college campus a special status, it did note the unique role of discourse on college campuses. Justice Kennedy wrote that:

In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. . . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.<sup>53</sup>

In another case, *Bd. Of Regents v. Southworth*, the Court held that the unique academic and cultural position that universities occupy allows each institution to decide how to serve its students, as long as it does not violate students' civil rights.<sup>54</sup> In doing so, the Court recognized that college students should, as a result of their status as students engaged in higher education, "have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall."<sup>55</sup>

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50. *Id.*

51. *Papish v. Bd. of Curators Univ. of Mo.*, 410 U.S. 667, 670 (1973).

52. *Rosenberger v. Rector & Visitors Univ. of Va.*, 515 U.S. 819, 823 (1995).

53. *Id.* at 836.

54. *Bd. of Regents Univ. of Wisc. v. Southworth*, 529 U.S. 217, 221 (2000).

55. *Id.* at 233.

While the Court has partially applied the *Tinker* line of reasoning to collegiate student speech analysis, there is scholarship that argues for a completely different standard. The Foundation for Individual Rights in Education (FIRE) is an organization that points to several reasons for a different standard. The first is that public high school students are “almost exclusively children” and “college students are almost exclusively adults.”<sup>56</sup> FIRE argues that the distinction is used by the Court in “other constitutional contexts,” such as the Twenty-Sixth Amendment.<sup>57</sup> The organization also relies on the familiar sentiment that universities are places for the free exchange of ideas, going as far to say that colleges are “so strikingly different, in so many essential ways, from the heavily regulated and more constricted public high school.”<sup>58</sup> The authors of FIRE’s book strongly state that “[a]rguments that attempt to end that tradition by citing those constitutional principles that apply to our nation’s children are constitutionally flawed, intellectually dishonest, and terribly demeaning to the young adults of our colleges and universities.”<sup>59</sup>

Unfortunately for FIRE, the organization fails to assert any explicit statement from the nation’s highest court to support its strongly worded position. While the Court has used language that signals that restrictions of speech on college campuses should be evaluated differently than speech in high school halls, the Court has also shown a propensity to look to the *Tinker* line of cases for guidance in college cases. Therefore, the exceptions available to high schools that restrict speech might also be available to colleges that do the same. While those colleges surely must consider the special role of higher education institutions in our society, as the Supreme Court’s decisions have indicated, there might be instances where colleges could regulate speech under the *Tinker* doctrine.

### C. Public vs. private institutions

The NCAA includes more than 1,000 institutions, and the membership is a mixture of private and public schools. It is worthwhile, then, to briefly examine the distinction between private and public schools in the First Amendment context. The Supreme Court long ago held that the First Amendment applies to states as well as to the federal government,<sup>60</sup> so it is well-established that state actors can be liable for

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56. FIRE’S GUIDE, *supra* note 43, at 47.

57. *Id.*

58. *Id.* at 48.

59. *Id.*

60. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and

restricting freedom of speech. The Court has also clearly established that “[a] state university without question is a state actor.”<sup>61</sup> Those schools would then be subject to the established First Amendment principles concerning forum and view-point analysis. Private schools would not be subject to a federal civil rights claim because the Bill of Rights only applies to state actors,<sup>62</sup> but there are other possible causes of action under traditional contract law and specifically enacted state laws.

A breach of contract suit would be the most successful option for a student-athlete suing a private university. The suit would follow the essential common law theory that a university failed to live up to its end of the bargain.<sup>63</sup> According to FIRE, the theory would be that in consideration for the student paying tuition and fees, the institution would agree, among other things, to adhere to its established policies regarding speech on campus.<sup>64</sup> FIRE cautions potential plaintiffs that schools can follow their rules in a “general way” and still meet the obligations of the contractual relationship.<sup>65</sup> According to FIRE, the “consensus of the courts is that the relationship between a student and a university has, as one judge put it, a ‘strong, albeit flexible, contractual flavor,’ and that the promises made in handbooks have to be ‘substantially observed.’”<sup>66</sup>

The unique relationship between a scholarship student-athlete and a university could add a twist to that analysis, though. Student-athletes who receive some sort of financial aid, whether a full grant-in-aid or partial aid, might not provide the same type of consideration as a student who pays full tuition. However, student-athletes who sign a financial aid agreement with a school create the contractual relationship by agreeing to compete athletically for the school in consideration for free or reduced tuition. In such a case, the student-athlete’s services—i.e., athletic ability—would substitute for the tuition and fees paid by a non-athlete. Therefore, the contractual relationship would still exist and the school would still be obligated to at least “generally” adhere to its established policies governing free speech.

However, the remedy in a breach of contract claim against a private university might not be enough incentive for a student-athlete to bring a claim. The remedy would be much different from a civil rights claim

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‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

61. NCAA v. Tarkanian, 488 U.S. 179, 192 (1988).

62. Slaughter-House Cases, 83 U.S. 36, 57 (1873) (predating several Amendments that have subsequently been applied to the states through the doctrine of incorporation).

63. FIRE’S GUIDE, *supra* note 43.

64. *Id.*

65. *Id.* at 37.

66. *Id.*

under the First Amendment, which FIRE recognized by noting that courts will generally not award monetary damages in contract cases.<sup>67</sup> Ordering specific performance of the contract could also be practically difficult because of the relatively brief career of a college-student athlete. According to NCAA bylaws, once a student-athlete enrolls at an institution, they only have five years in which to complete four seasons of eligibility.<sup>68</sup> If a student-athlete did decide to sue their institution, a suit could jeopardize at least one of those four seasons of eligibility. It is likely that litigation might extend beyond the five-year window in which the student-athlete could compete. Therefore, a judgment ordering specific performance would often be impossible and the student-athlete could not compete.

When a contractual claim is not available, or simply not attractive, some states provide statutory causes of action for plaintiffs whose speech has been restricted by a private university.<sup>69</sup> California has passed the “Leonard Law,” which states that “no private postsecondary educational institution” shall restrict speech that “is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.”<sup>70</sup> Meanwhile, other states have ruled that private universities cannot totally restrict speech. According to FIRE, *State v. Schmid*<sup>71</sup> is a vital case because the New Jersey Supreme Court ruled that a state constitutional guarantee that “every person may freely speak . . . on all subjects” prevented Princeton University from requiring all persons unconnected with the university to obtain permission to distribute literature on campus.<sup>72</sup> Yet, those were two examples of some narrow exceptions to the majority rule that private universities are not subject to constitutional limitations. As FIRE points out,

[W]hile the Leonard Law and *Schmid* are important to discussion of free speech at private campuses, students should not conclude that similar statutes or cases exist in the majority of states. In fact, far more states have *rejected* claims of rights to freedom of expression on privately owned property than have accepted such claims.<sup>73</sup>

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67. *Id.*

68. NCAA, *Division 1 Manual 2011-12*, Art. 14.2.1, Aug. 2011, available at <http://www.ncaapublications.com/productdownloads/D112.pdf> (not providing exception for sitting out due to pending litigation).

69. FIRE’S GUIDE, *supra* note 43, at 55.

70. CAL. EDUC. Code § 94367(a) (West 2009).

71. *State v. Schmid*, 423 A.2d 615 (N.J. 1980).

72. FIRE’S GUIDE, *supra* note 43, at 55.

73. *Id.* (emphasis in original).

Therefore, a plaintiff pinning its hopes on a state cause of action will probably be disappointed unless they attend school in a state like California or New Jersey.

Like most free speech issues, the complexity of student speech will only increase thanks to the Internet, a widely versatile and accessible medium for expression. The explosion of social media, combined with its ability to reach places and audiences that traditional speech never could, has raised entirely new questions about student speech. With college-aged Americans leading the way in the emergence of social media, it only makes sense that many of the Constitutional issues arising from social media have and will continue to originate on college campuses.

## II. SOCIAL MEDIA, SPEECH AND COLLEGE SPORTS

Social media websites such as Facebook and Twitter have become extremely popular, permeating nearly every aspect of modern life. Facebook alone counts more than 500 million active users worldwide, with 50 percent of the users logging onto Facebook every day.<sup>74</sup> Facebook operates as a way to stay in contact with friends and family, allowing users to post photos of themselves and comment on photos of friends.<sup>75</sup> There is also a host of different games and applications for entertainment, as well as pages, groups, events, and community pages with which users can interact.<sup>76</sup> There are over 900 million objects that people interact with, and there are more than 30 billion pieces of content shared each month.<sup>77</sup> But the feature of the website that is most important to this discussion is the “status update” function of each user. It allows users to post any statement they desire and broadcast it to their “friends,” or anyone else who can access their profile.<sup>78</sup> Facebook allows users to set privacy settings to allow only the people they want to see the different aspects of their page, such as status updates, photos, and religious and political views.<sup>79</sup> By narrowing the scope of those who can see their pages, users can either expand or shrink the audience that can see the statements posted on their status updates, or comments to the updates and photos of “friends.” The looser the privacy settings, the greater the possibility the general public will see a statement on Facebook. When that loosely protected page belongs to a student-athlete,

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74. *Newsroom*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Jul. 19, 2012).

75. *Id.*

76. *Id.*

77. *Id.*

78. FACEBOOK, <http://www.facebook.com> (last visited Jul. 19, 2012).

79. *Privacy Settings*, FACEBOOK, <https://www.facebook.com/settings/?tab=privacy> (last visited Jul. 19, 2012).

it can create a situation where a university would restrict or punish controversial speech.

Whereas the statements made via status update on Facebook are just one aspect of the website, Twitter is almost solely based on such “status” statements. The website is also made up of individual profiles that are connected to each other.<sup>80</sup> Each user can post “Tweets,” which are comments no longer than 140 characters.<sup>81</sup> Other users then “follow” the profile of friends, families, celebrities, or anyone else whose Tweets they want to read.<sup>82</sup> The lure of reading Tweets has attracted 175 million registered users, with 95 million Tweets written every day.<sup>83</sup>

Student-athletes have proven they are not immune to Twitter’s lure. And while most of those 95 million daily Tweets do not usually have implications for student-athletes and their institutions, a few notable exceptions have brought them into the national spotlight. In order to fully discuss the implications of those situations it is necessary to evaluate how existing First Amendment jurisprudence applies, and how it should be molded to fit the new technology discussed above.

#### *A. Bridging the gap from traditional First Amendment analysis to the Internet*

Restrictions of First Amendment free speech rights in the educational setting have traditionally focused on the “forum” where the speech is taking place. Thanks to the physically unattached nature of the Internet, though, social media speech does not easily fit into forum analysis, or the traditional methods of “view-point” and “time, place, manner” analysis that stem from it. Therefore, any state action against status updates, comments, or Tweets should be analyzed with a creative approach. Meanwhile, the other unique aspects of student-athlete social media speech, namely, that it takes place off-campus and without any school resources, should be considered as well.

##### 1. Borrowing from the *Pickering* balancing test

Several institutions have already encountered this new frontier because they have dealt with cases of controversial student-athlete social media speech. None of the restrictions in those cases have been challenged by the student-athletes, but they provide interesting test cases for analysis. Examining the cases, which include total social media bans

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80. *About*, TWITTER, <http://twitter.com/about> (last visited May 25, 2012).

81. *Id.*

82. *Id.*

83. *Id.*

imposed by coaches<sup>84</sup> and the suggestion by student-athletes suggesting to hunt President Barack Obama,<sup>85</sup> will help develop a framework for controversial social media cases. This note argues that the framework should include a formulation similar to the *Pickering* balancing test that would be applied to determine if a First Amendment violation has actually occurred.<sup>86</sup> The *Pickering* test requires courts to balance a state employee's interest in commenting upon matters of public concern against the state's interest in efficiently providing public services.<sup>87</sup> The test was articulated by the Supreme Court in the employment law context, but it would transfer easily to the student-speech cases at issue here. In the student-athlete speech context, the student-athlete's interest in commenting upon matters of public concern would be balanced against the institution's interest in efficiently providing high-level education.

The threshold question in any inquiry, though, is whether a student-athlete has been punished for their statements, like those cases in the *Tinker* progeny. If the answer is no, then there can be no First Amendment violation. If the answer is yes, the balancing test should be applied. If a student-athlete is disciplined for controversial social media speech and a court finds that the student-athlete's interest in making those comments outweighed the institution's interest in efficiently providing high-level education, the institution would be liable for a First Amendment violation. With that test in mind, the outcome of any existing or future case can reasonably be predicted.

## 2. First Amendment analysis of social media

The deceptively simple threshold question of whether speech was punished or restricted might not ever arise, though, because some social media restrictions might never actually punish student-athletes. Instead, the restriction could simply be a total and all-inclusive ban on social media use, or use of a specific website. In those cases, the prohibitions would likely survive scrutiny because they would satisfy—albeit in a new and unique fashion—traditional methods of First Amendment analysis.

The premise that a universally applied ban on speech must be

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84. Tim Gardner, *Boise State coach Chris Petersen bans players from using Twitter during season*, USATODAY.COM (Aug. 9, 2010), [http://content.usatoday.com/communities/campus\\_rivalry/post/2010/08/boise-state-coach-chris-petersen-bans-players-from-using-twitter-during-season/1#.UCkmswWUXA](http://content.usatoday.com/communities/campus_rivalry/post/2010/08/boise-state-coach-chris-petersen-bans-players-from-using-twitter-during-season/1#.UCkmswWUXA)

85. Halliburton, *supra* note 4.

86. *Pickering v. Bd. of Ed. Township*, 391 U.S. 563, 568 (1968).

87. *Id.*

“view-point neutral”<sup>88</sup> could apply to social media speech, even though the Court’s “view-point” analysis has mostly focused on restricting access to campus property or funds. The institution could argue that it is restricting all student-athlete speech on the team, and that it did not punish or support any particular view-point. The institution could also attempt to extend the “time, place, manner” defense to its actions in a blanket-ban social media case. The Supreme Court has established that state actors may “enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>89</sup> In these type of blanket ban cases, the school could argue that restricting social media posts (the “manner” of speech) is allowable under the Constitution because it serves the interest of preventing the university from being associated with objectionable speech, that it is narrowly tailored to limit only social media use, and that it still allows for student-athletes to speak in traditional methods. Of course, a student-athlete who made controversial comments on Twitter could rebut the “time, place, manner” defense if he showed that the school prevented every student-athlete from using Twitter only as a ploy to prevent him from making more controversial statements on Twitter.

Two initial test cases involve blanket bans. Boise State University head football coach Chris Petersen placed a ban on all social media use at the beginning of the 2010 football season.<sup>90</sup> Petersen said he made the blanket prohibition because it could be a distraction to his team.<sup>91</sup> His players initially were upset with the decision but did not raise any challenges to the coach’s authority and all players either suspended or deleted their accounts.<sup>92</sup> Other blanket prohibitions have been enacted, including one by former University of Miami head football coach Randy Shannon.<sup>93</sup> Shannon, though, only banned Twitter use and not Facebook.<sup>94</sup> Shannon acknowledged “that it is a free country,” but he said his program had unspecified problems with Twitter and not Facebook.<sup>95</sup> His only publicly stated reason was that “we have to shut it

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88. See, e.g., *Christian Legal Soc. Chapter v. Martinez*, 130 S.Ct. 2971, 2984 (2010) (holding that “the Court has permitted restrictions on access to a limited public forum . . . with this key caveat: Any access barrier must be reasonable and viewpoint neutral.”).

89. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

90. Gardner, *supra* note 84.

91. *Id.*

92. *Id.*

93. Jorge Milian, *Randy Shannon: “It’s a free country” but no Twitter for players*, The PALM BEACH POST (Sept. 15, 2010), <http://blogs.palmbeachpost.com/canewatch/2010/09/15/randy-shannon-its-a-free-country-but-no-twitter-for-players/>.

94. *Id.*

95. *Id.*

down and get back focused on football.”<sup>96</sup> Both restrictions would likely be defensible on either of the “view-point” or “time, place, manner” theories already discussed.

### III. EVALUATING THE CASES

Meanwhile, several other state universities have targeted specific student-athletes and their controversial social media posts. A selection of those cases will be detailed below. The cases have not been litigated, and it does not appear from available media reports and public statements that they will be. But the facts of each case will be detailed and analyzed with the balancing test borrowed from *Pickering* and the other existing doctrines of student speech.

#### *Case No. 1: Oklahoma player suspended after Tweets encouraging Austin residents to commit suicide*

University of Oklahoma football student-athlete Jaz Reynolds was suspended by the school after posting a Tweet suggesting fans in Austin, Texas should kill themselves.<sup>97</sup> Oklahoma was scheduled to play the University of Texas later in the week, and Reynolds posted the Tweet on the same day that a student killed himself in the University of Texas library.<sup>98</sup> Reynolds’ Tweet read, “Hey everyone in Austin, tx . . .kill yourself #evillaugh.”<sup>99</sup> He followed that five minutes later with another Tweet that read, “Everyone in austin, tx disregard that last tweet . . .y’all will mess around n do it lmao.”<sup>100</sup>

Reynolds, who did not play the rest of the season after making his statements, would have difficulty succeeding with a First Amendment claim because his statements did not refer to a matter of public concern. The statements were not political, academic, or religious—categories of speech that would be given more deference in a balancing test evaluation. The University of Oklahoma could also employ an “imprimatur” defense, although it would be difficult to argue that anyone could reasonably believe the University of Oklahoma would encourage anyone to commit suicide, even if it was its rival school.

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96. *Id.*

97. Trotter, *supra* note 7.

98. Tony Plohetski, Ben Wear, Steven Kreytak, & Patrick George, *UT gunman the only victim in morning of chaos*, AUSTIN AMERICAN-STATESMAN (Sept. 30, 2010), <http://www.statesman.com/news/local/ut-gunman-the-only-victim-in-morning-of-943439.html>.

99. Trotter, *supra* note 7.

100. *Id.*

*Case No. 2: Kentucky player and coach squabble through Twitter*

A battle of words between a University of Kentucky basketball student-athlete and his coach spilled over onto Twitter, creating a potential dispute over the unique status of a coach as an instructor in the educational context. The back-and-forth between coach and player, and the player questioning the coach's authority, raises interesting questions that exist only in the university environment. In the end, though, the coach ensured that he would win that battle by preventing the student-athlete from using Twitter.<sup>101</sup>

Kentucky coach John Calipari—arguably the most famous college basketball coach in the country—took issue with the Tweets of Josh Harrellson, a senior forward on the basketball team. Harrellson posted his Tweets in response to criticism from Calipari, who then responded to Harrellson's posts with Tweets of his own. Even though those Tweets from Calipari did not acknowledge the irony of his decisions, the coach stopped short of suspending Harrellson from playing and the university did not suspend him from school.<sup>102</sup>

Harrellson fired the first Tweet after an intrasquad scrimmage in which he recorded 26 rebounds. The junior college transfer did not have much success in his first two seasons at Kentucky, averaging only 7.2 minutes per game, 2.7 points per game, and 2.0 rebounds per game.<sup>103</sup> But when he did show some success in the scrimmage, Calipari was not exactly complimentary. The coach said, "Either we're the worst offensive rebounding team in America or he's gotten better, one of the two. I haven't figured it out."<sup>104</sup> Harrellson responded by Tweeting, "Either we are the worst offensive rebounding team or he had gotten better'!!! Just amazing to me I can't get a good job or way to go . . . It is just amazing to me but I look past it and keep trucking! You can't stop this train!!!"<sup>105</sup> Calipari then took to his Twitter account, again giving Harrellson a backhanded compliment by posting, "Please don't fault Josh. He's never dealt w/ how to handle success. I promoted him to the 1st team & told the team to applaud his effort." Calipari continued by announcing Harrellson's suspension via Twitter and adding that "[h]e won't be tweeting until he's responsible enough to handle success &

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101. Knox Bardeen, *Josh Harrellson Suspended From Twitter by John Calipari*, AOL NEWS (Oct. 29, 2010 12:33 PM), <http://ncaabasketball.fanhouse.com/2010/10/29/josh-harrellson-suspended-from-twitter-by-john-calipari>.

102. *Id.*

103. For player biography see *Josh Harrellson*, UK MEN'S BASKETBALL, [http://www.ukathletics.com/sports/m-baskbl/mtt/harrellson\\_josh00.html](http://www.ukathletics.com/sports/m-baskbl/mtt/harrellson_josh00.html) (last visited Jul. 19, 2012).

104. Bardeen, *supra* note 101.

105. *Id.*

failure.”<sup>106</sup>

The dispute between Calipari and Harrellson may be entertaining, but it also provides an opportunity for a unique analysis. There was some form of punishment against the student-athlete in this case, but the significance of that punishment is still questionable. The punishment did not keep Harrellson from going to school or playing basketball. He could also still speak publicly - just not through Twitter. But there was a public condemnation of his speech because he was publicly suspended from Twitter use. Calipari never stated what Harrellson’s punishment would be if he did Tweet while under suspension, and Harrellson never tweeted while under suspension.

The content of Harrellson’s speech would likely not be considered a matter of public interest, but the other side of the balancing test – the school’s interest in efficiently providing high-level education – deserves some attention because it could also involve *Tinker* in this case. The Kentucky controversy involves the unique situation of a student-athlete criticizing a coach, which could interfere with efficiently providing an education, if athletics are indeed part of a student-athlete’s education – a premise the NCAA strongly supports.<sup>107</sup> *Tinker* could also come into play because criticizing a coach could be a “substantial disruption of or material interference with school activities,” which is an allowable reason for restricting speech.<sup>108</sup> The university could make arguments under both theories. In a balancing test argument, the school’s interest outweighs the student-athlete’s interests because undermining a coach’s authority would prevent the coach from efficiently providing an education to the other student-athletes on the team. The school could also argue that allowing a student-athlete to criticize a coach would “substantially disrupt” his ability to do his job because athletics require a strong, credible leader. The student-athlete, however, could rely on the Supreme Court’s language about the specially protected speech on college campuses that challenge authority, such as the *Rosenberger* court’s statement that students should be able to “engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.”<sup>109</sup>

The key question would be whether Harrellson’s criticisms of his coach fall into the scope of that protection. They likely would not. Criticizing a coach when it purely involves athletics is not philosophical,

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106. *Id.*

107. According to the NCAA, its core purpose is to “integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount.” *See generally About the NCAA*, NCAA, <http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa> (last visited March 26, 2012).

108. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

109. *Bd. of Regents Univ. of Wisc. v. Southworth*, 529 U.S. 217, 233 (2000).

religious, scientific, social, or political speech. Calipari, and most coaches, certainly would steadfastly believe they have the authority to restrict any speech that was a “substantial disruption of or material interference” with running their team. Therefore, a claim by Harrelson would likely fail because the punishment had little effect and the restriction would be upheld in a balancing test analysis or under a *Tinker* analysis.

*Case No. 3: Texas kicks player off team after racist Facebook posts*

In what may be the best case for a successful First Amendment claim, University of Texas student-athlete Buck Burnette was kicked off the team for alleged racist social media posts about President Barack Obama.<sup>110</sup> According to published reports, Burnette posted a racist Facebook message about President Barack Obama when Obama was elected in 2008.<sup>111</sup> The Facebook account was deactivated before the exact message was able to be published by media outlets, but Burnette reportedly posted that hunters should gather because Obama was in the White House, and referred to Obama with a racist slur.<sup>112</sup> While the University of Texas kicked Burnette off the team, he did not fight the dismissal and his father said Burnette realized his statements could be viewed as representing the team.<sup>113</sup>

This case would pass the threshold examination because there was punishment for the speech, and because the punishment was severe. The content of the speech would also receive the highest scrutiny of any of the test cases because it involved political speech.<sup>114</sup> The university does, however, have the ability to restrict speech if it would be a “substantial disruption of or material interference with school activities,” and it could argue that racist statements and urgings of violence would fall into those categories. That argument could be attacked, though, because the ambiguous Facebook posting of one student-athlete would likely not substantially disrupt or materially interfere with activities on a major campus.

It is important in this case to recognize that while racist speech may be reprehensible to a large segment of society, it is a view-point that some still hold in America. As Justice Kennedy wrote in *Rosenberger*, “[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and

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110. Halliburton, *supra* note 4.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686 (1986) (distinguishing cases that were related to a “political viewpoint.”).

creative inquiry in one of the vital centers for the Nation's intellectual life."<sup>115</sup> Therefore, the University of Texas may have difficulty justifying limiting speech simply on the basis of its disagreeable content.

The school could also employ the imprimatur defense, but that argument could be attacked as well. Unlike the University of Oklahoma case, where the statements were directed at an opponent's hometown, it is clear in this case that the student-athlete was not directing his comments at anyone involved with University of Texas athletics, or any other athletic group. Therefore, it could be argued that it would not be reasonable to perceive that the University of Texas would allow a student-athlete to make such statements, and thus, an imprimatur defense would fail.

Finally, a balancing test might come out in Burnette's favor. Political speech would certainly be a matter of public concern, especially if it was about a presidential election. In order to prevail then, the institution would have to show that it could not efficiently provide a high-level education to students if it were not allowed to punish Burnette's speech. Factors that should be given equal weight in such a case include, but should not be limited to: 1) if the speech was about the institution, 2) the severity of the punishment, 3) the impact the speech had on the entire campus, and 4) the potential for jeopardizing campus safety. For the above reasons, this case may be the most likely to succeed if a First Amendment claim were brought. But, considering that Burnette did not fight his dismissal and his father acknowledged the statements could be damaging to the university, it does not appear that a claim will arise from this controversy.

With those cases in mind, as well as the balancing test and existing student speech jurisprudence applied to them, this note will now turn to litigation strategies in student-athlete free speech cases involving social media.

#### IV. LITIGATION STRATEGIES

The unique convergence of athletics, the intellectual environment of a college campus, and the explosion of social media has created the potential for a high-profile First Amendment case in college sports. That high-profile case has yet to make it into a court. However, it would be helpful to consider what such a case would look like, and what the result would be for a student-athlete and the university. For the student-athlete, a winning claim will likely rest on political, academic, or religious speech that was arbitrarily punished simply because it was unpopular with university officials or its fan base. For the institution, a valid

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115. *Rosenberger v. Rector & Visitors Univ. of Va.*, 515 U.S. 819, 836 (1995).

restriction of speech will rest on its decision to prevent objectionable speech that was associated with athletics, and not the controversial intellectual discourse that is common - and embraced - on college campuses. Regardless of which side would prevail in such a case, the increase in student-athletes' ability to speak out publically directly increases the likelihood that a controversy will soon arise.

Student-athletes penalized for speaking out would be most successful if their claim had three key components. The first and most important component would be speech that was political, academic, or religious. That would be beneficial because those categories would be more likely to fall under the "matters of public concern" required by a balancing test, and the Supreme Court has shown a willingness to protect those statements when they originate from a campus. The second component would be speech that does not bear the "imprimatur" of the school or is not connected to school athletics. The third component would be speech that does not implicate or even hint at violence, which could give the institution cause to restrict the speech on safety or "inability to efficiently provide high-level education" grounds.

When considering those components, the student-athletes mentioned above in the test cases would likely fail in a First Amendment claim. Most of the cases do not have the first component—political, academic, or religious speech. Most of the test cases also do not have the second component—a lack of imprimatur. The student-athlete often identified himself as a member of the school's athletic teams when he posted the social media message. Schools could also ground their restrictions in the fact that the student-athlete's Twitter handle featured some reference to the school, such as the student-athlete's jersey number or a commonly known slogan. Perhaps even placing the logo of the school on the Twitter page, as some athletes do,<sup>116</sup> could be a strong enough connection to warrant a restriction by the institution. And any statement that is related to an athletic event, like Jaz Reynolds' Tweet about the University of Texas when his University of Oklahoma team was playing Texas that week, could also fall into the "imprimatur" defense. By making these types of connections to the institution, whether explicitly or not, the student-athlete could run the risk of having his Tweets or Facebook posts punished by his school, with no legal recourse under the First Amendment. Therefore, such a claim would not be viable in these situations.

Speech that mentions violence or conduct that could jeopardize campus safety will likely not survive judicial scrutiny. The Court's

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116. See, e.g., Travis Howard (Travishoward\_18) on TWITTER, [http://twitter.com/#!/Travishoward\\_18](http://twitter.com/#!/Travishoward_18) (Twitter page of Travis Howard, who wears jersey number 18 for the Ohio State University.) (last visited January 17, 2011).

famous line from *Tinker*, that speech can be restricted when it forecasts a “substantial disruption of or material interference with school activities,” dealt with elementary and secondary schools.<sup>117</sup> But the Court has also never denied that the standard would apply on college campuses. Campus administrators would be justified in reasonably attempting to ensure safety with several recent outbursts of deadly violence on college campuses, such as the shootings at Virginia Polytechnic Institute<sup>118</sup> and Northern Illinois University.<sup>119</sup> However, strongly worded references to violence or racist and bigoted messages, like former University of Texas student-athlete Buck Burnette’s alleged racist and violent Facebook posts at the University of Texas, could justifiably be restricted because of the potential danger the messages pose for campuses. That is why an ideal claim for the student-athlete would not contain any references to violence, because those would have the potential to cause a “substantial disruption of or material interference with school activities.” Restricting that type of speech could also be upheld under *Brandenburg v. Ohio* if the speech was meant to incite or produce “imminent lawless action and [was] likely to incite or produce such action.”<sup>120</sup>

Universities should always be careful in the way they restrict speech, though. It is tempting—especially for athletic departments, which are often in the public eye more than other departments—to try and control any negative attention to the program. Allowing a student-athlete to voice somewhat controversial political or academic views on Twitter or Facebook would be preferable to a First Amendment suit that could result in far worse press and litigation costs. If the student-athlete’s statement is truly egregious and damaging to the program, it is likely that it would either reasonably be perceived to bear the imprimatur of the school or cause substantial disruption on campus. Those cases would be clear. But punishing speech because of a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” would be a questionable decision.<sup>121</sup>

However, these tough decisions often are not made in the athletic director’s office or even in the general counsel’s office. They are made in coaches’ offices. College coaches are notorious for wanting to keep a tight rein on their programs, and it is important for their superiors or those responsible for legal issues in the department to educate coaches on these issues. It is impractical at best, and hopeful at worst, that a coach

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117. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

118. Christine Hauser & Anahad O’Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES (April 16, 2007), <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html>.

119. Mike Stuckey, *College shooter’s deadly rampage baffles friends*, NBCNEWS.COM (Feb. 16, 2008), [http://www.msnbc.msn.com/id/23171567/ns/us\\_news-crime\\_and\\_courts/](http://www.msnbc.msn.com/id/23171567/ns/us_news-crime_and_courts/).

120. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

121. *Tinker*, 393 U.S. at 509.

would consult their sport supervisor, athletic director, or general counsel when they first read and react to a social media post they do not like. Therefore, universities should take the proactive step of educating coaches on this issue. At most, coaches would recall the educational training on the issue and consider the ramifications of any restriction of speech. And, at the very least, the university could assert that it did its due diligence in educating coaches about restrictions, which could reduce the university's liability.

## V. CONCLUSION

Social media has revolutionized how public discourse takes shape in America, and all it takes is a flip through the television or radio channels to see that a fair amount of that discourse is devoted to sports. Therefore, it is likely that the theoretical issues discussed in this note will become a reality—and perhaps in high-profile fashion. While student-athletes likely would not consider the complexities of the issue when they are Tweeting after practice or on the way to the library, they or their attorney will surely look to the judicial system once they are dismissed from the team or university because of the Tweet. It is also important for universities to consider the *Tinker* cases and the language from other Supreme Court decisions when it encounters controversial social media statements by its student-athletes. Careful analysis could lead to a successful defense. Or they could simply not punish unpleasant speech as a reasonable allowance for student-athletes to speak their minds. After all, one of those student-athletes Tweeting or Facebooking right now could be formulating perspectives that one day will be voiced from the Supreme Court bench.

