Florida State University Law Review

Volume 39 | Issue 3 Article 5

2012

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LAW REVIEW


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VOLUME 39 SPRING 2012 NUMBER 3

Recommended citation: J. Wes Gay, *Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?*, 39 FLA. ST. U. L. REV. 781 (2012).

# HANDS OFF TWITTER: ARE NCAA STUDENT-ATHLETE SOCIAL MEDIA BANS UNCONSTITUTIONAL?

J. WES GAY*



## I. INTRODUCTION

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.[1] The purported reasons causing universities to implement these bans range from interests in image control[2] to pressure from the NCAA to monitor and report potential NCAA infractions.[3] However, these bans are likely unconstitutional.[4] The United States Supreme Court has stated that a public educational institution cannot censor speech simply because it wishes to avoid "discomfort and unpleas-

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1. *See* Bradley Shear, *NCAA Student-Athlete Social Media Bans May Be Unconstitutional*, SHEAR ON SOCIAL MEDIA LAW (Aug. 11, 2011), http://www.shearsocialmedia.com/2011/08/ncaa-student-athlete-social-media-bans.html.

2. *Id.*

3. *See* Bradley Shear, *Does the NCAA Understand the Legal Implications of Social Media Monitoring?*, SHEAR ON SOCIAL MEDIA LAW (June 22, 2011), http://www.shearsocialmedia.com/2011/06/does-ncaa-understand-legal-implications.html.

4. *See* Shear, *supra* note 1; *see also* U.S. CONST. amend. I; Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

antness."[5] These bans are now more noticeable and have entered into the public discussion in part because other students at the same public educational institutions are not subject to the same restrictions as the student-athletes.[6] This Note will examine the recent social media bans and the constitutional issues they raise when public educational institutions restrict NCAA student-athletes from logging on and speaking out. This Note will contend that those bans that are not motivated by educational concerns are in fact unconstitutional restrictions on student-athletes' free speech rights.

## II. FOUNDATION OF FREE SPEECH PROTECTIONS FOR STUDENTS

### *A.* Tinker*,* Fraser*,* Hazelwood*, and* Morse

The First Amendment speech protections afforded to students have received distinct treatment by the Supreme Court.[7] The Court has noted the need for "vigilant protection of constitutional freedoms" in school environments in order to encourage an atmosphere of learning and the sharing of ideas.[8] However, the Court has also noted the importance of maintaining an atmosphere conducive to furthering educational pursuits and has recognized the need for school officials to implement policies that control student behavior at schools.[9] In fact, the Court encapsulated these competing interests in one of the most commonly quoted statements pertaining to free speech protections: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."[10] The Court went on to say, "On the other hand, the Court has 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."[11]

The Court's jurisprudence concerning free speech protections in schools has largely centered around and attempted to address the dynamic created by these conflicting interests. The Court has established the general framework for free speech protections for students over the course of forty years and through four major cases.[12]

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5. *Tinker*, 393 U.S. at 509.
6. *See* Shear, *supra* note 1.
7. 1 RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION 343-45 (2004).
8. Shelton v. Tucker, 364 U.S.479, 487 (1960).
9. *See* SCHNEIDER, *supra* note 7, at 343-45.
10. *Tinker*, 393 U.S. at 506.
11. *Id.* at 507.
12. *See generally* SCHNEIDER, *supra* note 7 (2004 & Supp. 2011).

In *Tinker v. Des Moines School District*, the Supreme Court began to establish what rules would be applied to determine what student speech or expression would be protected under the First Amendment and what would not. In the case, the Supreme Court considered student symbolic speech instead of actual, verbal speech.[13] A group of students had met outside of school and decided to wear black armbands to school as a symbol of their opposition to the Vietnam War.[14] The school's principals learned of the students' plan before they wore the armbands to school and implemented a policy that any student found wearing a black armband would be asked to remove it, and if the student refused, she would be suspended until she returned to school without the armband.[15] The students, aware of the new policy, wore the armbands to school and were suspended after refusing to remove the armbands.[16] The school's policy was solely aimed at the nonverbal, symbolic speech in the form of wearing black armbands to school.

The Court held that the school's policy violated the students' free speech rights under the First Amendment.[17] Justice Fortas, writing for the Court, acknowledged the powers held by school officials in relation to controlling student conduct, so long as it did not violate those students' constitutional rights.[18] However, the Court reasoned that when the students wore the black armbands, it was "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."[19] The issue the Court faced was not whether students wholly relinquished their First Amendment rights protecting pure speech. That question had long been answered in the negative.[20] The Court reiterated that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."[21] Instead, the Court was forced to consider, in the context of a unique situation, whether those rights were curtailed in some way due to a need to control student behavior and maintain school order.

The Court found it important to examine the nature of the students' speech and whether it had any adverse impact or influence on the school environment.[22] The Court stated that the students did not disrupt any classroom work, incite any violent reactions, or infringe

13. *Tinker*, 393 U.S. at 505-06.
14. *Id.* at 504-05.
15. *Id.* at 504.
16. *Id.*
17. *Id.* at 514.
18. *Id.* at 507.
19. *Id.* at 505-06.
20. *Id.* at 506.
21. *Id.*
22. *Id.* at 508.

the rights of the school or any other student.[23] The district court, which had ruled that the students' First Amendment rights had not been violated, reasoned that the school authorities were acting reasonably when they implemented the ban because they were afraid of a potential disturbance caused by the armbands.[24] The Supreme Court responded that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[25] Though the Court held that the students' First Amendment rights had been violated and reaffirmed the existence of those protections on school grounds, the Court did choose to qualify the free speech rights of students.[26] The Court stated that conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" would be viewed differently and would most likely not be constitutionally protected.[27]

*Tinker* remained the sole standard for free speech and expression protections until the Supreme Court decided *Bethel School District No. 403 v. Fraser*[28] in 1986.[29] In *Fraser*, the Court's decision described a less protective standard for student speech.[30] In the case, a student prepared a speech nominating his friend for an office in student government.[31] The student's speech relied on sexual innuendo as entertainment, and teachers advised the student that his speech was inappropriate and that he should not deliver it.[32] The student ignored the advice, delivered the speech to approximately 600 students, and was subsequently suspended from school.[33]

The Court distinguished this speech from the type in *Tinker* by noting that this student was suspended because he gave a lewd speech in front of the student body, while the students in *Tinker* were suspended for expressing a political viewpoint.[34] Chief Justice Burger, writing for the Court, reasoned that while this type of speech probably would have been protected in other (adult) forums, it was exactly the type of speech whose content (offensive sexual innuendo) was not appropriate for its forum, a school.[35] This notion of speech or expression and the forum in which it is spoken or expressed is an important consideration in determining if the speech is protected or un-

23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 510.
27. *Id.* at 513.
28. 478 U.S. 675 (1986).
29. SCHNEIDER, *supra* note 7, at 350.
30. *See id.*
31. *Fraser*, 478 U.S. at 677-78.
32. *Id.*
33. *Id.* at 677.
34. *Id.* at 685.
35. *Id.* at 682-83.

protected. The Court emphasized the societal role that schools fill in teaching students the value of civility and the undermining nature of lewd and offensive speech.[36] The Court also noted that the speech had created a noticeable disturbance in the school, but it focused mainly on the speech itself as opposed to the reaction the speech engendered.[37] Though it is slight, this is an important distinction. The Court pointed to the negative effect the speech had on students mostly as proof of the offensive quality of the speech.[38] The implication is that even if student speech does not cause a disruption, it may still be restricted if it is offensive enough to the school environment.[39]

Thus, the Court reasoned that because the student's speech was inappropriate for the forum and not a political viewpoint (like the speech in *Tinker*), it was not protected speech.[40] The Court held that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [the student's] would undermine the school's basic educational mission."[41]

In *Hazelwood Independent School District v. Kuhlmeier*,[42] two years after *Fraser*, the Court addressed the issue of school-sponsored speech and what degree of First Amendment protection it should receive. In *Hazelwood*, a school principal drew the ire of students when he removed two articles from the school-sponsored and student-written newspaper before the articles were to be published.[43] One article told the story of a pregnant student, and while the story did not reveal the student's identity, the principal believed that the other details made the student's identity clear.[44] The other article offered a negative view of the father of another student, and the newspaper had not given the father an opportunity to respond or to consent to the publication of the article.[45]

Most importantly, the Court distinguished these circumstances from those found in *Tinker* and *Fraser* on the basis that those cases dealt with "personal" speech while *Hazelwood* was concerned with "school-sponsored . . . expressive activities."[46] Justice White, writing for the majority, focused on the predicament schools face when dealing with student speech that could possibly be perceived as the view-

36. *Id.* at 681-86.
37. *Id.*
38. *Id.*
39. *Id.* at 678.
40. *Id.* at 685.
41. *Id.*
42. 484 U.S. 260 (1988).
43. *Id.* at 262-63.
44. *Id.* at 263.
45. *Id.*
46. *Id.* at 271.

point of the school.[47] Justice White described this as speech or expression that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[48] The Court reasoned that a school should be afforded greater control over school-sponsored speech because it should be allowed to dissociate itself from speech that is, among other things, inadequate, inappropriate, or profane.[49] The Court stated that "[a] school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded . . . in the 'real' world—and may refuse to disseminate student speech that does not meet those standards."[50] Thus, even though *Hazelwood* dealt with—in the Court's opinion—a different type of student speech, the Court nonetheless effectively amended and shrunk the mostly protective standard in *Tinker*.

Then, in 2007, the Supreme Court decided its most recent case involving students and free speech protections. In *Morse v. Frederick*,[51] school officials suspended a student after he displayed a banner that read "BONG HiTS 4 JESUS."[52] The student displayed the banner at school-sponsored activity that was attended by students and other members of the public.[53] The Court worked through a lengthy discussion about the ambiguity of the phrase "BONG HiTS 4 JESUS."[54] The school officials argued that it was clearly a message meant to promote the use of drugs and thus an endorsement of an illegal activity.[55] The Court noted that the student's best argument was that the message essentially meant nothing and was merely " 'meaningless and funny.' "[56] But, Chief Justice Roberts stated that even if the meaning of the phrase was debatable, it still contained an "undeniable reference to illegal drugs."[57] Notably, the student raised another argument that the dissent found persuasive. The student argued that even if the message did have a clear and shocking meaning, he only intended it to get him on television.[58] However, Chief Justice Roberts, writing for the majority, responded by stating that an explanation for the student's motive was a separate matter from an interpretation of the message on the banner.[59] If the student's

47. *Id.* at 270-71.
48. *Id.* at 271.
49. *Id.*
50. *Id.* at 271-72.
51. 551 U.S. 393 (2007).
52. *Id.* at 397.
53. *Id.*
54. *Id.* at 400-03.
55. *Id.* at 401-02.
56. *Id.* at 402 (quoting Frederick v. Morse, 439 F.3d 1114, 1116 (9th Cir. 2006)).
57. *Id.*
58. *Id.*
59. *Id.*

speech does not qualify for First Amendment protection, the fact that the student harbored a harmless motivation does not matter.

The Court held that the school had not violated the student's rights because the banner was speech that was not protected by the First Amendment.[60] In reaching this conclusion, the Court focused on the reasonableness of the principal's actions in response to the banner.[61] The Court stated that it was reasonable to interpret the phrase as promoting illegal drug use.[62] Thus, the Court held that a principal may restrict a student's speech at a school event if that speech "is reasonably viewed as promoting drug use."[63] The Court cited *Tinker* but noted that while a dissenting opinion raised the issue of political speech,[64] neither party had claimed that the banner expressed a political viewpoint, thus making *Tinker* mostly inapplicable.[65] Accordingly, the Court seemed to work within the more restrictive framework of *Fraser* and reconfirmed the view that students' free speech protections must be applied with an understanding of the unique nature of the school environment.[66] However, the Court also made an interesting admission, stating that "[t]he mode of analysis employed in *Fraser* is not entirely clear."[67] The Court indicated that *Fraser* acknowledged that both the content of the speech and the manner of the speech (or its forum) must be examined when determining if the speech in question is protected under the First Amendment and that adults and children are treated differently in this context.[68] Although the Court in *Fraser* did distinguish the lewd speech from the political armbands in *Tinker*, Chief Justice Roberts stated that *Fraser* also did not expressly follow the substantial disruption analysis that *Tinker* supposedly required.[69] The Court noted that since the banner was not school-sponsored speech, *Hazelwood* did not apply.[70] Thus, Chief Justice Robert's majority opinion did not radically change the framework for student speech protections under the First Amendment, but it opened a debate concerning what *Tinker* does and does not prescribe and what analysis *Fraser* actually employed.[71]

Notably, the Court produced two concurring opinions in addition to Chief Justice Roberts' majority opinion. Justice Thomas, in a concurring opinion, stated that he approved of adding another exception

60. *Id.* at 400.
61. *Id.* at 401-03.
62. *Id.* at 401.
63. *Id.* at 403.
64. *Id.* at 425-29 (Breyer, J., dissenting).
65. *Id.* at 402-03.
66. *Id.* at 397.
67. *Id.* at 404.
68. *Id.*
69. *Id.* at 405.
70. *Id.* at 405-06.
71. *See* SCHNEIDER, *supra* note 7, at 217-23 (Supp. 2011).

to the *Tinker* analysis but would have preferred to "dispense with *Tinker* altogether, and given the opportunity, [he] would do so."[72] In Justice Alito's concurring opinion, he indicated his belief that the Court's decision was quite narrow.[73] Justice Alito did not think the Court's decision created any restrictions on political speech, nor did it expand any preexisting restrictions on student speech.[74]

### *B. The Erosion of* Tinker *or a Standard of Deference?*

*Tinker* has long been viewed as the "high-water mark" of First Amendment protections for student free speech.[75] However, the Supreme Court's decision and reasoning in *Morse* represented the third time in as many opportunities that the Court chose to apply a more restrictive standard of free speech protection for students.[76] Instead of viewing the Supreme Court's jurisprudence as evolving away from a more protective standard of student speech, some observers have argued it may be more helpful to understand *Tinker* as it has operated over time instead of how it was initially received.[77] In other words, instead of student speech being a story of the erosion of *Tinker*,[78] it has in fact always been about deference to the reasonable judgments of school officials.[79] A recent useful example of deference towards school officials can be found in *Christian Legal Society Chapter v. Martinez*.[80] The Court was quite deferential to the University of California Hastings College of Law after it decided to reject the Christian Legal Society's application to become a registered student organization.[81] The group included discriminatory membership guidelines in the group's bylaws and wanted to receive the school funding and access to school facilities that came with being a recognized student organization.[82] In siding with the school's decision to deny the application, the Court reiterated that school officials may impose restrictions on speech that are reasonable when factors such as forum and the impact of the restrictions are considered.[83]

72. *Morse*, 551 U.S. at 422 (Thomas, J., concurring).
73. *Id.* at 422 (Alito, J., concurring).
74. *Id.* at 422-24 (Alito, J., concurring).
75. Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1282 (2008).
76. *See id.* at 1282-88.
77. *Id.* at 1284-88.
78. *Id.* at 1285-88; *see also Morse*, 551 U.S. at 422 (Thomas, J., concurring).
79. Nuttall, *supra* note 75, at 1285.
80. 130 S. Ct. 2971 (2010).
81. *Id.* at 2987-91.
82. *Id.* at 2978-81.
83. *Id.* at 2987-91.

## III. FREE SPEECH FOR COLLEGE STUDENTS

### *A. A Higher Standard,* Hosty*, or Neither?*

The Supreme Court has never explicitly addressed whether a college student's speech should be protected more, less, or no differently than a high school student's speech.[84] However, in *Healy v. James*,[85] the Supreme Court addressed the constitutionality of the Central Connecticut State College's decision not to allow the Students for a Democratic Society to be recognized as an official campus organization.[86] The Court held that the college violated the students' First Amendment rights and noted 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."[87] Additionally, for many years after *Tinker*, lower federal courts consistently recognized a higher level of speech protection for college students—especially when the speech involved student-run publications.[88] Repeatedly, lower courts have stated that a public university violates a student's First Amendment speech protections when the university disciplines a student simply because it does not approve of the speech's content.[89] Throughout those cases, a clear theme emerged—when applying the substantial disturbance test from *Tinker*, discomfort or disagreement on behalf of the school officials could not constitute a substantial disturbance to school operations.[90] However, the Supreme Court then decided *Hazelwood* and *Fraser* in the years following *Tinker* and *Healey*. Both of those cases cut into the *Tinker* standard of significant speech protection, and *Hazelwood* specifically addressed a high school newspaper.[91] But since *Hazelwood* clearly reduced free speech protections for high school students, observers felt comfortable that nothing in *Hazelwood* indicated the Supreme Court's desire for it to spread to college newspapers.[92] By all accounts, those predictions proved quite accurate until, in *Hosty v.*

84. *See* Jessica B. Lyons, Note, *Defining Freedom of the College Press after* Hosty v. Carter, 59 VAND. L. REV. 1771, 1774 (2006).

85. 408 U.S. 169 (1972).

86. *Id.* at 170-71.

87. *Id.* at 180.

88. *See* Lyons, *supra* note 84, at 1778.

89. *See id.*

90. *Id.* at 1777-78 (discussing Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983); Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975); and Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971)).

91. *See supra* Part II.A.

92. Lyons, *supra* note 84, at 1780 (quoting STUDENT PRESS LAW CTR., LAW OF THE STUDENT PRESS 56 (2d ed. 1994), for the editor's confident assertion that it would be unlikely for *Hazelwood* to apply to college publications, as a court would have to ignore or overrule more than twenty years of First Amendment precedent).

*Carter*,[93] the Seventh Circuit Court of Appeals applied *Hazelwood* to allow the administrators of a public university to restrict student speech in a school-sponsored publication and discipline students for speech that did not merit the university's approval.[94] The court in *Hosty* offered a surprising rationale for why *Hazelwood* should be considered the appropriate analysis for restricting university-sponsored publications.[95] While the *Hazelwood* Court devoted substantial time and effort to considering the effect the speech would have on other students or whether the speech was inappropriate considering the students' maturity level, the court in *Hosty* instead chose to force the *Hazelwood* analysis into a discussion distinguishing public forums from private forums.[96] The students argued that the notion of different types of speech being appropriate for different maturity levels has played a key role in determining whether to restrict student speech.[97] The students also argued that the consideration of different maturity levels played a key role in courts hesitating to expand high school-type restrictions to college campuses.[98] However, the court made the fairly nonsensical claim that "there is no sharp difference between high school and college papers."[99] Under this reasoning, the next logical step is that there is no difference in maturity levels between high school and college students, and their speech should be restricted in the same ways. Not only are there decades of case law that disagree with this rationale, there is another area of First Amendment jurisprudence that closely mirrors free speech in how it places substantial emphasis on age and maturity level.[100]

### *B. Establishment Clause Comparison*

As noted above, the Court in *Hazelwood* based a large portion of its reasoning on the notion that a school official is in the best position to make a reasonable determination as to whether the content of a school-sponsored publication is either inappropriate for its readership or represents the school in a poor way.[101] Aside from examining the official's judgment, a key portion of that test is predicated on the understanding that middle and high school students are not of the same age or maturity level as adults, and this difference is a sensible reason to allow speech restrictions in certain cases.[102] It should be

93. 412 F.3d 731 (7th Cir. 2005).
94. *Id.* at 733-34.
95. Lyons, *supra* note 84, at 1792-93.
96. *Hosty*, 412 F.3d at 735-38.
97. *Id.* at 734-35.
98. *Id.*
99. *Id.* at 735; *see also* Lyons, *supra* note 84, at 1798.
100. Lyons, *supra* note 84, at 1796-97.
101. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-76 (1988).
102. *Id.* at 271-72; *see also* Lyons, *supra* note 84, at 1796.

understood that the Court's concern regarding student speech and maturity level did not spontaneously reappear in *Hazelwood*. On the contrary, the Court decided *Fraser* after weighing the reality that the particular speech involved was not necessarily inappropriate outside of school but that the special nature of the school environment made the lewd and offensive speech inappropriate and subject to restriction.[103] This special nature is produced by several factors—pedagogical concerns being prominent among them—but a key concern is the maturity levels of middle and high school students.[104]

Likewise, Establishment Clause jurisprudence has a long history of factoring in students' various maturity levels when deciding whether the clause bars the establishment of religion at schools of various educational levels.[105] In *Tilton v. Richardson*,[106] the Supreme Court addressed whether the Higher Education Facilities Act of 1963 violated the Establishment Clause because it granted federal government funding to some colleges that were related to churches.[107] In the plurality opinion, the Court stated that one of the reasons it was less concerned about religious indoctrination at the college level was because college students, by virtue of their age and maturity level, were simply less impressionable and less likely to be caught up in religious indoctrination.[108] Conversely, in *Lee v. Weisman*,[109] the Supreme Court ruled that a middle school violated the Establishment Clause when it brought in clergymen to deliver nonsectarian prayers.[110] Justice Kennedy, writing for the plurality, noted that part of the Court's rationale was based on widely accepted psychological research showing that adolescents are often heavily influenced by peer pressure to conform with others' beliefs and behaviors.[111] Thus, the Supreme Court, with respect to another First Amendment right, has made a clear determination that age and maturity level should be weighed when determining how and when rights of students will be protected or restricted. More importantly, the Court has indicated that the conclusion this determination reaches is one of different treatment for high school students than college students.[112] It is useful to note the analogous rationales found in pre-*Hosty* student

103. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684-85 (1986).
104. *Id.*
105. Lyons, *supra* note 84, at 1796.
106. 403 U.S. 672 (1971).
107. *Id.* at 674-75. The Court examined four issues in the case, determined that only one part of the Act was unconstitutional, and did not strike down the entire Act. 403 U.S. at 689. *See also* Lyons, *supra* note 84, at 1796.
108. *Id.* at 686.
109. 505 U.S. 577 (1992).
110. *Id.* at 587-90.
111. *Id.* at 593-94.
112. Lyons, *supra* note 84, at 1796.

speech jurisprudence and Establishment Clause jurisprudence.[113] Finally, when *Hosty* is reexamined with this connection in mind, its reasoning appears increasingly tenuous.[114]

## IV. ONLINE STUDENT SPEECH: A PATCHWORK DOCTRINE

To date, the Supreme Court has not come close to addressing the discussion of what protections exist for online student speech.[115] However, the Supreme Court has addressed general online speech, and many lower federal courts have been forced to decide cases involving online student speech.[116] An examination of those cases offers some indications as to whether bans on student-athletes from using social media are unconstitutional.

In *Reno v. ACLU*,[117] the Supreme Court held that online speech is no different than other speech and requires full protection under the First Amendment.[118] The suit was brought in response to the passage of the Communications Decency Act of 1996, which Congress intended to effectively restrict indecent adult online speech so minors would not be exposed to such content while surfing the Internet.[119] In support of its holding, the Court described in great detail the pervasive nature of the Internet in the increasingly technological and connected world.[120] The Court concluded by stating that online speech is " 'the most participatory form of mass speech yet developed.' "[121]

In the arena of online student speech, the lower courts have been left to grasp for conclusions with little to no guidance from the Supreme Court. Accordingly, the courts have drawn a few distinctions in student speech that they believe are meaningful: off-campus online speech versus on-campus online speech, online speech brought on campus by the speaker versus online speech brought on campus by another student, and online speech which may foreseeably be brought on campus versus online speech that cannot foreseeably be brought on campus.[122]

Interestingly, the lower courts have been in near agreement that the *Tinker* substantial disruption test is the appropriate analysis for

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113. *Id.*
114. *See, e.g.*, *id.*
115. *See, e.g.*, Allison E. Hayes, *From Armbands to Douchebags: How* Doninger v. Niehoff *Shows the Supreme Court Needs to Address Student Speech in the Cyber Age*, 43 AKRON L. REV. 247, 255, 271 (2010).
116. *Id.* at 255-62.
117. 521 U.S. 844 (1997).
118. *Id.* at 849; *see also* Hayes, *supra* note 115, at 256.
119. *Reno*, 521 U.S. at 849-59.
120. *Id.* at 849-53.
121. *Id.* at 863 (quoting ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996)).
122. Hayes, *supra* note 115, at 256-60.

online student speech.[123] The substantial disruption test is best suited for a majority of the types of online student speech that have come under the courts' review.[124] Among these online student speech cases, restrictions on speech were upheld where the school officials could show that the speech either actually caused a substantial disruption to school operations, was very likely to cause a substantial disruption when the school officials intervened, or was dangerous.[125] Essentially, the various distinctions mentioned above (on-campus online speech versus off-campus online speech, etc.) proved to have less to do with the overall analysis of the case and more to do with the way the courts framed the facts.[126] Ultimately, while school officials may have had to show more cause in order to satisfy the substantial disruption test if another student brought the speech to campus or if the speech had not even been brought to campus at all, the substantial disruption test remained as the threshold question.[127] Since, as described earlier, the *Tinker* test affords significant latitude to high school officials in determining what is a reasonable response to a substantial disruption, that threshold likely was not raised significantly higher. When the schools have simply stated that they did not approve of the student speech in question, the courts have usually turned to the rhetoric of strong protections for student speech found in *Tinker* and have held that the students' rights had been violated.[128] But when the

123. *See id.*

124. A brief review of the Supreme Court's student speech cases (where the speech did not occur on the internet) illustrates the utility of the *Tinker* test. *Morse* appears to apply narrowly to student speech that advocates illegal drug use. Morse v. Frederick, 551 U.S. 393, 403 (2007); *see* Hayes, *supra* note 115, at 255. *Hazelwood* applies to school-sponsored student speech. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271-73 (1987). *Fraser* applies to "offensively lewd and indecent speech." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1985).

125. Hayes, *supra* note 115, at 256-60. *See also* Wisniewski v. Bd. of Educ., 494 F.3d 34, 38-40 (2d Cir. 2007) (holding that a student, who created digital icon on his personal computer that portrayed one person shooting another person and implied that the person being shot was the school principal, would have likely caused a substantial disruption if the icon had been viewed by administrators on school grounds); Layshock v. Hermitage Sch. Dist., 412 F. Supp. 2d 502, 508 (W.D. Pa. 2006) (holding that a student caused a substantial disruption of school operations when he posted offensive and false information about the school principal, causing the school to shut down its computer system for five days); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 869 (Pa. 2002) (holding that a student-created website, which graphically portrayed ways an algebra teacher should die, caused a substantial disruption because the teacher suffered emotional injuries and feared for her safety).

126. *See* Hayes, *supra* note 115, at 256-60.

127. *See id.*

128. *Id.* at 286-87. *See also* Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 458 (W.D. Pa. 2001) (holding that a school could not suspend a student for writing a lewd and offensive email about the school's athletic director because the email did not cause any disturbance of school operations); Emmett v. Kent Sch. Dist No. 415, 92 F. Supp. 2d 1088, 1089-90 (W.D. Wash. 2000) (holding that a school could not expel a student for creating a website that a local news report erroneously labeled a "hit list" because the website was not viewed on campus and did not cause a substantial disruption); Beussink v. Woodland

schools argued that the speech had or would cause a substantial disruption, focusing the discussion on the reasonableness of their judgment as school officials, the courts have upheld the restrictions on student speech.[129] This clear division in arguments that do or do not persuade courts to enforce restrictions on student speech highlights two key flaws in applying *Tinker* to online student speech. First, *Tinker* has—over time—allowed courts to be too deferential to school officials to judge what type of speech will or does cause a substantial disruption.[130] School officials are inclined to err on the side of restricting speech in favor of maintaining order and also insufficiently qualified to receive such considerable deference on an issue concerning First Amendment rights. In *West Virginia State Board of Education v. Barnette*,[131] the Supreme Court made clear that such extensive deference undermines the role of courts.[132] The Court stated that it "cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."[133] Second, the lower courts' distinctions between where online speech originates and who causes that speech to appear on campus have proven unhelpful. This is likely due in large part to the reality that the medium for that speech is the most pervasive, universal, and easily accessible method of communication in human history. These unhelpful distinctions illustrate why the *Tinker* test for online student speech is both outdated and insufficient.

## V. STUDENT-ATHLETES BANNED FROM USING SOCIAL MEDIA

### *A. Current Landscape in College Athletics*

Now another form of speech has emerged that is changing the way individuals communicate with one another, share ideas, and express themselves. The emergence and ubiquitous nature of social media has arguably impacted every facet of modern life, collegiate athletics included. At the same time, the world of collegiate athletics has become increasingly commercialized, highly lucrative for some schools,[134] and a boon for major conferences and broadcasting compa-

R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1179-80 (E.D. Mo. 1998) (holding that a school could not suspend a student for creating a website that was very critical—and used offensive language—of the school's administration solely on the basis that the website upset the school's principal).

129. *Id.*

130. *See id.*

131. 319 U.S. 624 (1943).

132. *See id.* at 640.

133. *Id.*

134. *See generally* Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY, Oct. 2011, at 80; Editorial, *College Sports: Boola Boola vs. Moola Moola*, L.A. TIMES, Oct. 17, 2011, at A14.

nies in the form of television rights agreements worth billions of dollars.[135] Perhaps the best example of this booming market is the newly launched Longhorn Network, a television network created by the University of Texas and ESPN that exclusively televises University of Texas athletics and is reportedly worth 300 million dollars.[136] Additionally, coaches' salaries in major sports like football and basketball have exploded in recent years.[137] Many college football and basketball coaches earn more than one million dollars a year, and in a few instances, even some assistant football coaches earn salaries that dwarf those of high school coaches and college coaches in other, less visible sports.[138] This relatively sudden influx of money into collegiate athletics has played a key role in creating stronger competition among coaches and schools.[139] One product of this competition is the desire among coaches to exert the utmost control over their programs in hopes of winning as many games as possible.

Athletic department fundraising concerns are another source that creates demand for on-field success. In 2010, a report showed that only 14 of the 120 athletic departments in the Football Bowl Subdivision made a profit in the previous year.[140] The report showed that the only two sports that made money for schools were football and men's basketball and that more football programs were profitable than men's basketball programs.[141] However, as the study shows, only a few universities have football programs and men's basketball programs that are profitable enough to pay for and exceed the costs of the other sports and the athletic department as a whole.[142] These two sports and the revenues they bring in invariably come under closer scrutiny when school officials examine budgetary issues. Therefore, school administrators have an incentive to support whatever policies the coaches deem important for success, because that success equals more notoriety, more ticket sales, more alumni donations, and more revenue. When such large sums of money are on the line, school ad-

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135. Pete Thamel, *With Big Paydays at Stake, College Teams Scramble for a Spot*, N.Y. TIMES (Sept. 19, 2011), http://www.nytimes.com/2011/09/20/sports/ncaafootball/in-conference-realignment-colleges-run-to-paydaylight.html?pagewanted=all.

136. Aaron Kuriloff & David Mildenberg, *ESPN Longhorn Network Cash Tips College Sports into Disarray*, BLOOMBERG BUSINESSWEEK. (Nov. 10, 2011, 6:12 AM), http://www.businessweek.com/news/2011-11-10/espn-longhorn-network-cash-tips-college-sports-into-disarray.html.

137. Erik Brady et al., *Salaries for College Football Coaches Back on Rise*, USA TODAY (Nov. 17, 2011, 11:02 AM), http://www.usatoday.com/sports/college/football/story/2011-1117/cover-college-football-coaches-salaries-rise/51242232/1.

138. Gary Klein & Bill Dwyre, *Auburn's Gus Malzahn Says He's in No Hurry to Become a Head Coach*, L.A. TIMES, Jan. 9, 2011, at C7.

139. *See, e.g.*, *Ralph Friedgen Out at Maryland*, ESPN.COM (Dec. 23, 2010, 2:29 PM), http://sports.espn.go.com/ncf/news/story?id=5938838.

140. Associated Press, *NCAA Report: Economy Cuts into Sports*, ESPN.COM (Aug. 23, 2010, 7:28 PM), http://sports.espn.go.com/ncf/news/story?id=5490686.

141. *Id.*

142. *Id.*

ministrators are inclined to allow—even actively support—student-athlete speech restrictions. This desire is manifested in many different policies, and one of them has been bans on social media.

### *B. Examples of Bans on Social Media*

Several athletic departments of public universities have banned student-athletes within those departments from speaking through social media.[143] The Mississippi State University men's basketball team and the New Mexico State University men's basketball team have implemented bans on social media.[144] Both of those bans are still in effect.[145] The University of Georgia men's basketball program enforced a ban on social media for one season, but has recently lifted the ban.[146] 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,[147] the Boise State University Broncos,[148] the University of Iowa Hawkeyes,[149] and the University of Kansas Jayhawks.[150] Admittedly, bans on only a handful of public university teams may not appear to indicate that similar bans will spread. However, that is a false reading. Social media is a recent phenomenon, and considering the exponential growth of attention that collegiate athletics demand, the possibility that bans on student-athletes from using social media could proliferate is much more likely.

### *C. Why Student-Athletes Are Banned from Using Social Media*

Recent studies have shown that an overwhelming majority of college students and young adults use social media websites.[151] Notably, no public universities have banned the general student body from using social media. While this discrepancy in treatment among col-

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143. Shear, *supra* note 1.

144. Diamond Leung, *Steve Alford Bans Players from Tweeting*, ESPN.COM (July 19, 2011, 9:53 PM), http://espn.go.com/blog/collegebasketballnation/post/_/id/33080/steve-alford-bans-players-from-tweeting; Brandon Marcello, *Rick Stansbury Bans Mississippi State from Twitter After Criticism*, USA TODAY (Feb. 3, 2011, 6:36 PM), http://content.usatoday.com/communities/campusrivalry/post/2011/02/mississippi-state-basketball-twitter-ban/1.

145. Leung, *supra* note 144; Marcello, *supra* note 144.

146. Marc Weiszer, *Coaches Try to Let Players Tweet Freely*, DOGBYTES ONLINE, BLOG (June 9, 2011), http://dogbytesonline.com/coaches-try-to-let-players-tweet-freely-46223/.

147. David Cloninger, *Spurrier Bans Team from Twitter*, GAMECOCKCENTRAL.COM (Aug. 4, 2011), http://southcarolina.rivals.com/content.asp?CID=1247470.

148. Darren Rovell, *Coaches Ban of Twitter Proves College Sports Isn't About Education*, CNBC.COM (Aug. 8, 2011, 10:23 AM), http://www.cnbc.com/id/44058540/Coaches_Ban_Of_Twitter_Proves_College_Sports_Isn_t_About_Education.

149. James Steward, *Ferentz Keeps Social Media on Lockdown*, KRCG.COM (Aug. 9, 2011, 6:11 PM), http://www.kcrg.com/sports/local/Ferentz-Keeps-Social-Media-on-Lockdown-127343833.html.

150. *KU Notebook - Gill Bans Twitter*, KAN. CITY STAR, Aug. 5, 2011, B6.

151. Amanda Lenhart et al., *Social Media and Young Adults*, PEWINTERNET.COM (Feb. 3, 2010), http://www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx.

lege students who are members of school athletic teams and those students who are not is possibly sufficient evidence of a violation of First Amendment rights, the reasons that school officials and college coaches have offered for the bans are even more transparent.

In August 2011, Steve Spurrier, the head coach of the South Carolina Gamecocks football team, banned his players from using Twitter.[152] A few players had made offensive statements on their Twitter accounts that had begun to draw negative attention to the football program.[153] That media attention caused Spurrier to address the issue.[154] First, it is noteworthy that the players' online speech is the type that would be protected under the standard that the Supreme Court created in *Reno v. ACLU*.[155] Spurrier, when asked by reporters why he had banned his players from using Twitter, said, "Well, 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 . . . ."[156] Another example is found in a statement made by Turner Gill, head coach of the Kansas Jayhawks football team, also in August 2011. At the press conference in which he announced the ban on his football team from using Twitter, he stated, "The reason we decided to not allow our players to have a Twitter account is we feel like it will prevent us from being able to prepare our football program to move forward. Simple as that."[157]

Each school and coach has offered this type of rationale for banning student-athletes from using social media.[158] The motivations for restricting student-athlete's speech are easy to discern. Schools 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. They also have a strong interest in supporting policies that achieve on-field results at the expense of other important values—like constitutionally protected student speech.

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152. Cloninger, *supra* note 147.

153. *Id.*

154. *Id.*

155. 521 U.S. 844, 849 (1997). In *Reno*, the Court held that adult online speech should receive full protection under the First Amendment—even if the speech is indecent—because it is no different than any other speech. *Id.*; *see also supra* Part IV. I state that the players' online speech is the *type* that would be protected under *Reno* because, viewed in a simplified way, it is nothing more than online speech made by an adult. I only raise this point to reinforce the fact that nearly all college students have reached the age of legal adulthood by the time they enroll in school. Of course, the players are also student-athletes, which raises other issues that are the main focus of this Note.

156. Cloninger, *supra* note 147 (internal quotation marks omitted).

157. *KU Notebook*, *supra* note 150 (internal quotation marks omitted).

158. *See, e.g.*, Cloninger, *supra* note 147; *KU Notebook*, *supra* note 150; Rovell, *supra* note 148; Steward, *supra* note 149.

While varied, these reasons have a commonality: schools and coaches consider speech by student-athletes to be a privilege, not a right. And when that speech raises the possibility of embarrassment or poor play in games, many schools and coaches have chosen harsh bans on protected speech instead of choosing constructive policies. Universities and coaches should implement policies aimed at teaching student-athletes that some types of speech—while constitutionally protected—may not be in the best interests of the team.

However, there is potentially another reason why schools and coaches have been, and will continue to be, motivated to ban student-athletes from using social media. They need not look any further than the cautionary tale that is the University of North Carolina men's football team. In May 2010, then-North Carolina football player Marvin Austin made a handful of late-night posts on his Twitter account.[159] The posts were cryptic but seemed to indicate that he was at LIV (a posh Miami nightclub) and was enjoying bottle service.[160] NCAA rules regarding student-athletes receiving improper benefits are detailed and strict.[161] By July, the NCAA had interviewed Austin and other North Carolina football players regarding whether they received any improper benefits from school boosters or sports agents.[162] In response, North Carolina suspended Austin indefinitely for the entire 2010-11 season.[163] Additionally, North Carolina declared seven other football players ineligible for at least one game and did not allow an additional six players to play in the first game while both the school and the NCAA continued their investigations.[164] Ultimately, the NCAA found evidence that several North Carolina football players had received improper benefits.[165] The NCAA also found evidence that some North Carolina football players had committed academic fraud.[166] When the dust finally settled, several

159. J.P. Giglio, *UNC's Austin Posted More Than 2,400 Twitter Updates*, NEWS & OBSERVER (July 31, 2010, 6:31 AM), http://www.newsobserver.com/2010/07/21/590713/austin-prolific-tweeter.html.

160. *Id.* "Bottle service" refers to ordering whole bottles of alcohol, often champagne. This practice is expensive and usually reserved for wealthy patrons. *See* Pascale Le Draoulec, *Most Expensive Bottle Service*, FORBES.COM (Nov. 2, 2007, 6:00 PM), http://www.forbes.com/2007/11/02/vodka-clubs-bottle-forbeslife-cx_pl_1102bottleservice.html.

161. NCAA Operating Bylaws, 2011-12 NCAA DIVISION I MANUAL, *available at* http://www.ncaapublications.com/productdownloads/D112.pdf.

162. Brooke Cain, *A Timeline of the NCAA's Investigation of UNC*, NEWS & OBSERVER (July 28, 2011, 8:13 AM), http://www.newsobserver.com/2011/07/27/1373930/a-timeline-of-the-ncaas-investigation.html.

163. *Id.*

164. *Id.*

165. Kelly Parsons, *UNC Outlines Self-Imposed Football Sanctions in Response to NCAA*, DAILY TAR HEEL (Sept. 22, 2011, 12:47 AM), http://www.dailytarheel.com/index.php/article/2011/09/unc_outlines_selfimposed_sanctions_in_response_to_ncaa.

166. Jonathan Jones, *UNC NCAA Football Academic Fraud Cases Details Released*, DAILY TAR HEEL, (Sept. 22, 2011, 12:47 AM), http://www.dailytarheel.com/index.php/article/2011/09/unc_ncaa_football_academic_fraud_case_details_released.

North Carolina football players lost substantial portions of their athletic eligibility, head coach Butch Davis was fired, and Athletic Director Dick Baddour resigned.[167] Had Austin's Twitter posts not caught the eye of the NCAA, it seems safe to assume that the NCAA's spotlight would not have been focused on the North Carolina football program, and the many other violations would have gone unnoticed and unreported.

When the NCAA sent its Notice of Allegations to North Carolina on June 21, 2011, one allegation in particular stood out for the purposes of this Note.[168] In allegation No. 9(b), the NCAA alleged: "In February through June 2010, the institution did not adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program . . . ."[169] This marked the first time that the NCAA either openly described a duty to monitor student-athletes' social media accounts or alleged that a school had failed to meet its duty.[170] It does not require any imagination to perceive the shock waves that this new policy sent through collegiate athletics. Was it simply a coincidence that the South Carolina, Kansas, and Iowa football programs all implemented bans on social media only a few weeks after the NCAA punished North Carolina for not monitoring its student-athletes' Twitter accounts? Or is it more likely that schools would rather implement wholesale restrictions on student speech than open themselves up to NCAA scrutiny? The latter seems decidedly more plausible.

## VI. CONSTITUTIONALITY OF BANS UNDER CURRENT FRAMEWORK

Are public universities unconstitutionally restricting the First Amendment speech rights of student-athletes when those universities ban social media? For the purposes of this Note, this question will be applied within the framework of the *Tinker* test. There are many reasons why the *Tinker* substantial disruption standard should be applied instead of the other student-speech tests. First, speech through the medium of social media is online speech. As discussed above, lower federal courts have been mostly consistent in their judgment to apply *Tinker* to online speech instead of the other student-speech tests.[171] Second, while the college student-speech versus grade school student-speech distinction has produced a separate ju-

167. *Butch Davis Fired by Tar Heels*, ESPN.COM (July 27, 2011, 10:51 PM), http://espn.go.com/college-football/story/_/id/6809612/butch-davis-fired-north-carolina-football-coach; *Dick Baddour Stepping Down at UNC*, ESPN.COM (July 31, 2011, 10:13 AM), http://espn.go.com/college-sports/story/_/id/6812203/dick-baddour-north-carolina-tar-heels-stepping-athletic-director.

168. Parsons, *supra* note 165.

169. Response to Notice of Allegations, from Univ. of N.C. at Chapel Hill to NCAA, 9-6 (Case No. M357), http://media2.newsobserver.com/smedia/2011/09/19/14/36/YYh2Q.So.156.pdf.

170. Parsons, *supra* note 165.

171. *See supra* Part IV.

risprudence with the application of other tests, the cases that comprise that area of law have largely involved school-sponsored newspapers or student organizations seeking the official approval of the school.[172] Additionally, there are readily identifiable complications with applying the frameworks of the other cases.

*Fraser* does not apply as aptly as *Tinker* in large part because it applies narrowly to a student's lewd and offensive speech in the setting of a school program or event.[173] And, as discussed above, federal courts have consistently applied *Tinker* to online student speech instead of *Fraser*.[174] *Morse* does not apply as aptly as *Tinker* because it applies narrowly to student speech that promotes illegal drug use.[175] However, it is arguable that the *Hazelwood* analysis (student speech made under the imprimatur of the school) could apply to student-athlete speech via online social media. Accordingly, the following is a short discussion of potential arguments for applying *Hazelwood* instead of *Tinker*.

Schools could potentially make the argument that student-athletes bear the imprimatur of the school since they represent the school in athletic competition. However, this argument is flawed because the speech that the schools are restricting is spoken through the students' personal social media accounts and not speech spoken while the students are participating in a game or when the students are speaking to the media on behalf of the team and the university. The student-athletes' social media accounts identify the students as individuals and not as the school or the team, or a mouthpiece for either. Moreover, many schools and many coaches also have social media accounts through which they make announcements and interact with the public.[176] If certain accounts should be considered the mouthpiece for a school or athletic program, surely these accounts are more reasonable examples.

Additionally, the schools may argue that the student-athletes bear the imprimatur of the school because they receive school funding in the form of athletic scholarships. This argument also fails because many college students receive funding in the form of various scholarships and grants, and those students are not banned, and could not be banned, from using social media websites because such a policy would be an unconstitutional infringement on their First Amendment rights. In *Perry v. Sindermann*,[177] a state junior college professor challenged the college's decision not to rehire him after he publicly criticized the school.[178] The Supreme Court held that even if a

172. *See supra* Part III.A.
173. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
174. *See supra* Part IV.
175. Morse v. Frederick, 551 U.S. 393, 403 (2007).
176. *See, e.g.*, Weiszer, *supra* note 146.
177. 408 U.S. 593 (1972).
178. *Id.* at 594-95.

person has no right to a governmental benefit, that person cannot be denied that benefit on a basis that violates her constitutionally protected right of free speech.[179] The Court reasoned that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."[180] Thus, it is incorrect to connect a student-athlete's acceptance of an athletic scholarship from a public university with a requirement that she also forfeit First Amendment free speech rights.

Lastly, applying the *Hazelwood* test, as the Seventh Circuit Court of Appeals did in *Hosty*, has been met with sufficient criticism—applying a standard originating in a case dealing with the speech of students in high school as opposed to the speech of students in college—that it makes its applicability to this topic less likely.[181] Thus, this Note analyzes the constitutionality of social media bans on student-athletes under the *Tinker* test.

### *A. Social Media Bans on Student-Athletes Are Unconstitutional Under* Tinker

Under the substantial disruption test found in *Tinker*, public universities unconstitutionally restrict the First Amendment speech rights of student-athletes when they ban those students from using social media. In order for these bans to be constitutional, the schools and coaches would have to show that the banned speech either has disrupted or would substantially disrupt school operations. *Tinker* has almost always been applied to school settings, used to evaluate whether the speech caused a substantial disruption to the institution's educational objectives. Are the things that student-athletes say on their social media profiles so inciting as to cause a substantial disruption of the universities' pedagogical concerns? Or is it more likely that the speech will most often go unnoticed? And in the few instances that such speech does get noticed, it may only raise athletic ineligibility issues—issues separate from the pedagogical concerns of the school since a student-athlete's enrollment in the school is unaffected by his or her continued participation in collegiate sports.

Additionally, there do not appear to be any instances in which something a student-athlete said on her social media account caused any protests, led to the cancellation of classes, or affected the school's educational environment in any noticeable ways. Also, the student-athletes' social media speech has not violated any other person's

179. *Id.* at 597-98.
180. *Id.* at 597.
181. Hosty v. Carter, 412 F.3d 731, 735 (7th Cir. 2005); *see also* Lyons, *supra* note 84, 1796-98.

rights. In only a few instances has the student-athlete speech that ultimately caused a ban been speech that was offensive or lewd.[182] Moreover, that type of speech is protected speech on college campuses when the speech does not bear the imprimatur of the school, which student-athlete speech does not.

In contrast, the public universities and coaches have usually explained that the bans were necessary because a student-athlete had posted something that the university found embarrassing or that the university or coach simply did not agree with.[183] These explanations are very similar to the online student speech cases in which the school officials did not show evidence of a substantial disruption. Instead, the officials argued that it was not an unconstitutional restriction on the students' speech because they found the speech distasteful or disagreeable.[184] And since the courts should defer to the school officials' judgment in school matters, it was not unconstitutional when the officials restricted student speech they found inappropriate—or so the school officials argued.

In those cases, however, the courts held that when there was no substantial disruption, school officials violated the student's First Amendment free speech rights when they restricted the speech or punished the students.[185] Like the schools in those cases, these public universities and coaches are banning student-athletes from using social media because they do not like what a few student-athletes sometimes say. Like the schools in those cases, these school officials and coaches can only rely on deference to their judgment because they have not shown that a student-athlete has caused a substantial disruption in the school environment through social media use.

Under the *Tinker* substantial disruption test, these bans on social media use are unconstitutional. University officials and coaches have not offered an example of a student-athlete causing a substantial disruption in the school environment through social media use. None of the student-athletes who were banned from using social media had used it to infringe on another student's rights prior to the bans being implemented. Clearly, these bans on social media by public universities are motivated by concerns over image control and interests in further success in a multi-billion dollar industry—concerns that are glossed over with rhetoric trumpeting the privilege of being a collegiate athlete. Unfortunately, these bans are implemented with little

182. A review of the news articles that reported the social media bans and are cited in this Note reveals that only the South Carolina Gamecocks had players who tweeted offensive speech prior to the ban. *See, e.g.*, Cloninger, *supra* note 147.

183. *See, e.g.*, Cloninger, *supra* note 147; *KU Notebook*, *supra* note 150.

184. *See* cases cited *supra* note 128.

185. *Id.*

protest because, of all the parties involved, the student-athletes are in the weakest position to refuse these constitutional infringements.

### *B. A Narrowly-Tailored Test Is More Reasonable*

Since it is very possible that team-wide and season-long bans are unconstitutional infringements on student-athletes' First Amendment rights, public universities and their athletic coaches should instead choose policies that would pass a narrowly tailored test. While the current types of bans are likely unconstitutional under *Tinker*, it is also possible that the *Tinker* test is an insufficient standard for this uniquely twenty-first century speech. Accordingly, when deciding the constitutionality of certain restrictions on social media, courts should decide whether those restrictions are significantly and narrowly tailored so as to not constitute an undue restriction on student-athletes' rights of free speech.

Universities and coaches could combine minimal restrictions on social media with educational programs aimed at teaching student-athletes about the potential pitfalls of rash or offensive social media speech. Administrators and coaches could choose to implement social media bans for shorter periods of time instead of banning use for the entire season. Depending on the sport, some seasons can last longer than five months. Instead, coaches might only ban social media use twenty-four hours before and after a competitive event. This "quiet period" would assist coaches and programs in maintaining focus and avoiding embarrassing distractions on the eve of a competition, while also not silencing student-athletes for entire semesters.

Another policy that could satisfy a narrowly tailored test would be one that only restricted the student-athletes from discussing certain topics or subjects on their social media accounts. Such subjects could include statements that advocate for either illegal activities or violations of the university's or college's academic honor code. Another subject could include sensitive information that would give athletic opponents a competitive edge, as such information could ultimately bring some degree of harm to fellow teammates. One more example is if a student-athlete makes embarrassing or offensive comments while clearly attempting to speak on behalf of the university or team. These examples illustrate the reasonableness and utility of a narrowly tailored test because it addresses the conflict created by the dual, competing interests that lie at the heart of this matter: the interest in allowing school administrators and coaches to employ some reasonable measures of control to maintain order and the interest in protecting students' First Amendment free speech rights.

Additionally, this facet of a narrowly tailored test would adequately reflect what the Establishment Clause cases have borne out over

time—that college students are at a higher maturity level than high school students. College students are more mature and their speech should not be restricted to the same extent as high school students. Likewise, a policy that only restricts social media use for short, specific windows of time instead of season long bans also acknowledges college students' higher maturity level. College students are mature enough and capable of following such guidelines. They should be allowed the opportunity to exercise discretion that this narrowly tailored rule permits, instead of being unduly censored by season long bans.

A narrowly tailored test acknowledges that student-athletes—often between the ages of eighteen and twenty-two and living away from home for the first time—sometimes say things that bring negative attention to their universities. It is an unfortunate reality that the increased notoriety of collegiate athletes makes it easier for their speech to garner negative attention than other students might otherwise would. And, though it is rare, there have been examples of some student-athletes who have brought frequent embarrassment to themselves and to their universities without much remorse.[186] A narrowly tailored test would likely permit universities to ban such repeat offenders and reckless individuals from using social media while they are participating in collegiate athletics. In contrast, a narrowly tailored test would not allow blanket bans on student-athletes whose speech had never caused controversy and who may have chosen a different school had they been aware of the possibility of these social media bans before enrolling.

Under either the *Tinker* substantial disruption test or a narrowly tailored test, these team-wide and season-long social media bans are likely violations of the student-athletes' First Amendment speech rights. However, adopting a narrowly tailored test to be applied to student-athletes' First Amendment rights would represent a meaningful effort towards protecting their speech and expression during a highly influential time in their lives.

## VII. CONCLUSION

The recent bans on social media speech that public universities and college coaches have forced on student-athletes are likely unconstitutional. The *Tinker* substantial disruption test only allows school officials to restrict student speech if the speech causes, or would foreseeably cause, a substantial disruption in the school environment. To date, no student-athlete's social media speech has caused a substantial disruption in the school environment. However, the substantial disruption test is likely ill-suited for speech communicated through

186. *Maurice Clarett Timeline*, USATODAY.COM (Apr. 20, 2004, 8:00 PM), http://www.usatoday.com/sports/football/nfl/2004-04-20-clarett-timeline_x.htm.

the ubiquitous and transformative social media. Social media speech and its effects raise issues of time and space, and those issues require a nuanced approach. A narrowly tailored approach would better serve both the student-athletes and the public universities. It would allow university officials and coaches to maintain an educational environment that furthers their pedagogical and extracurricular interests. More importantly, it would afford student-athletes stronger free speech protections than those that already exist.