12-2014

Sharing Stupid $h*t with Friends and Followers: The First Amendment Rights of College Athletes to Use Social Media

Meg Penrose
Texas A&M University School of Law, megpenrose@law.tamu.edu

Sharing Stupid $h*t With Friends and Followers: The First Amendment Rights of College Athletes to Use Social Media

*Professor Meg Penrose**

I. The Question

May state universities restrict or place limitations on their student-athletes' use of social media without running afoul of the First Amendment?[1] It is a given that state actors, which includes a state university's athletic department and its individual coaches, are bound by the First Amendment.[2] Institutional rules and regulations restricting speech or expression imposed by a coach or athletic director will undoubtedly implicate the First Amendment.[3] But, does implicating the First Amendment in this setting mean that coaches' rules and regulations regarding speech and expression violate the Constitution? Many argue yes. However, as former Coach Leo Corso of ESPN College Gameday fame is quick to respond: "Not so fast my friends."

The answer to this simple question is rather complex and quite uncertain, because implicating the First Amendment is not the same thing as violating the First Amendment.[4] Many laws implicate First Amendment rights, yet do not violate them.[5] As the Supreme Court explained, the First Amendment has "never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in

---

* Professor of Law, Texas A&M University School of Law. Professor Penrose would like to thank the SMU Journal of Science and Technology for hosting a wonderful Symposium. Particular thanks to the Executive Board and John and Lisa Browning. In addition, this paper benefitted greatly from feedback received during the Marquette Law School Sports Law Works in Progress Workshop hosted by Professor Matt Parlow. A special thanks to Professor Parlow and the esteemed participants including Professors Dionne Koeller, Adam Epstein, Nathanial Grow, Geoff Rapp, Marc Edlemen, Gordon Hylton, Patricia Cervenka and Mike McChrystal. Any errors that remain should be attributed solely to the author.

1. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.").

2. *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988) ("A state university without question is a state actor.").

3. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating, for the first time, the First Amendment via the Fourteenth Amendment to apply to state legislation as well as federal legislation).

4. *See* Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 803–04 (1984).

5. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).

any circumstances that he chooses."[6] Our employment, our status (e.g., being a student or military member), and our form and context of expression all work its way into the First Amendment analysis.[7] While a person may freely peruse pornography in the privacy and comfort of his or her home,[8] the government may curtail this right in other settings, like a school or prison.[9] Likewise, a person may yell at a family member or friend, but articulating truly threatening acts may result in criminal prosecution.[10] In short, when it comes to speech, context matters.[11] Athletics presents a very unique context for speech and expression. There are endless examples of athletes being disci-

6. Cohen v. California, 403 U.S. 15, 19 (1971).

7. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 400 (2007) (upholding school discipline against student holding up a sign reading "BONG hits 4 Jesus" across from school property); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686–87 (1986) (upholding school discipline for "lewd" speech made during a student assembly); *Taxpayers for Vincent*, 466 U.S. at 817 (permitting the outlawing of signs that created a visual blight); Brown v. Glines, 444 U.S. 348, 361 (1980) (upholding military regulation prohibiting service members from distributing or posting materials on an Air Force base without prior approval); Parker v. Levy, 417 U.S. 733, 761 (1974) (upholding court martial of military member whose speech was found to undermine Vietnam war efforts); Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) ("[A] teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."); Schenck v. United States, 249 U.S. 47, 52 (1919) (wherein Justice Holmes famously proclaimed, "The most stringent protection of free speech would not protect a man in falsely shouting fire is a theater and causing a panic.").

8. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (Justice Marshall exclaimed, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

9. *See* Thornburgh v. Abbott, 490 U.S. 401, 404 (1989) (upholding federal prison rules that empower wardens to prohibit any publication found "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity."); *Fraser*, 478 U.S. at 686–87 (upholding school discipline for "lewd" speech made during a student assembly).

10. *See Schenck*, 249 U.S. at 52.

11. *See, e.g.*, Snyder v. Phelps, 131 S.Ct. 1207, 1220 (2011) (disallowing monetary damages for inflammatory speech on protestors' placards during a military funeral); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (KKK member's conviction under Ohio law reversed because advocating violence does not equate planning for violence); Watts v. United States, 394 U.S. 705, 708 (1969) (finding a war protester's threat against then-President Lyndon Johnson deemed "political hyperbole" and therefore not capable of being criminally prosecuted).

plined by state universities (which is tantamount to state action) for speech.[12] For example, Florida State suspended Jameis Winston, a quarterback and Heisman trophy winner, for allegedly standing on a table in the student union repeating a common internet meme: "Fuck her right in the pussy."[13] This penalty implicates the First Amendment as the school did not discipline him academically, but did implement athletic discipline.[14]

How does a court accurately assess the First Amendment rights of student-athletes at public universities? Courts consider context and, specifically, the unique situation of the college athlete. College athletes are most assuredly students, but they are not *merely* students. College athletes are qualitatively distinct from the traditional college student, both from a regulatory and constitutional perspective. College athletes do more than attend class and seek degrees. College athletes seek championships. It is this unique status as an athlete that empowers coaches to require more of student-athletes than professors expect from the traditional college student. Simply put, college athletes are special and different when it comes to the college experience. The student-athlete wears dual hats, one as student and another as athlete. Their speech and expression rights fluctuate depending on which hat they are wearing.

This paper takes a closer look at the First Amendment rights of college athletes to access social media while simultaneously participating in intercollegiate athletics. The question posed is quite simple: can a coach or athletic department at a public university legally restrict a student-athlete's use of social media? If so, does the First Amendment provide any restraints on the type or length of restrictions that can be imposed? Thus far, neither question has been presented to a court for resolution. However, the answers are vital, as college coaches and athletic directors seek to regulate their athletes in a constitutional manner.

Nearly every college athletic program reminds its athletes that participating in intermural athletics is a privilege, not a right.[15] Framing participation as a "privilege" does not automatically diminish—and should not diminish—the Constitutional rights of a student-athlete. Athletics are about winning, teamwork, and sport. Can these values, which seek to sacrifice individuality for the good of the team, coexist with First Amendment rights?

---

12. *See, e.g.*, Dan Wolken, *Florida State Suspends Jameis Winston for Clemson Game*, USA TODAY, Sept. 20, 2014, http://www.usatoday.com/story/sports/ncaaf/2014/09/19/jameis-winston-suspended-florida-state-seminoles-football-clemson-tigers/15930703/.

13. *Id.*

14. *See id.*

15. *See, e.g.*, STUDENT ATHLETE SUPPORT SERV., MICHIGAN STATE UNIVERSITY STUDENT-ATHLETE HANDBOOK AND PLANNER 23 (2013–2014 ed. 2013), *available at* http://sass.msu.edu/academic/documents/FS12handbook.pdf.

II. The Myth of Athletic Expression—The "Privilege" of Participating

> *Do not have a false sense of security about your rights to freedom of speech. Understand that freedom of speech is not unlimited. The on-line social network sites are NOT a place where you can say and do whatever you want without repercussions.*[16]

These are the words and sentiments of many Division I athletic programs.[17] Such pronouncements seem very carefully constructed to suggest support for speech in the abstract, while making it clear that the school will actually limit speech and expression rights with possible repercussions and penalties.[18] This apparent assurance is NOT a full commitment to First Amendment principles of speech and expression. When it comes to social media, student-athletes are receiving mixed messages. On the one hand, student-athletes have the freedom to speak. But, using that freedom could cost them everything related to their athletic experience, including playing time and their scholarship.[19] This is a far cry from the extensive First Amendment protections usually afforded to traditional college students.[20]

16. Fla. State Univ., Public Media and Social Network Policy for Student-Athletes 2 [hereinafter Florida State Public Media and Social Network Policy] (emphasis in original), *available at* http://www.documentcloud.org/documents/1087501-florida-state-policy.html (requiring student-athlete signature); Oklahoma State University Student-Athlete Handbook 6 (2013–2014 ed. 2013) -[hereinafter Oklahoma State Student-Athlete Handbook] (emphasis in original), *available at* http://www.documentcloud.org/documents/1087506-oklahoma-state-policy.html (showing that the identical language is apparently written or advised by the same individual or firm).

17. *See, e.g.*, Florida State Public Media and Social Network Policy, *supra* note 16, at 2; Oklahoma State Student-Athlete Handbook, *supra* note 16, at 6.

18. *See* Florida State Public Media and Social Network Policy, *supra* note 16, at 2; Oklahoma State Student-Athlete Handbook, *supra* note 16, at 6.

19. *See, e.g.*, Marcum v. Dahl, 658 F.2d 731, 734–35 (10th Cir. 1981) (upholding University of Oklahoma's legal right to withdraw the athletic scholarships of basketball players that publically criticized their coach); Williams v. Eaton, 468 F.2d 1079, 1083–84 (10th Cir. 1972) (upholding dismissal of University of Wyoming football players after a dispute regarding the wearing of black arm bands during a game with Brigham Young University).

20. *Cf.* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 667–71 (1973) (per curiam) (overturning a journalism student's expulsion, on First Amendment grounds, for publishing a story titled "Mother Fucker Acquitted." The story detailed the assault trial of a member of the organization "Up Against the

College athletes are legally distinguishable from their nonathletic peers.[21] As Justice Scalia explains, "going out for the team" voluntarily subjects one to far more regulations than a traditional student.[22] In the college setting, coming of age and breaking free from parental control may mean very little in the heavily regulated athletic arena.[23] "Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[24] Student-athletes are often deprived of an ordinary college experience because they are subject to extensive regulations, including: dress codes,[25] curfews, mandatory class attendance,[26] study hall obligations, and compulsory abstinence from tobacco and alcohol.[27] Speech, and the many restrictions placed on an athlete's speech, is yet another area where schools regulate college athletes differently from their contemporaries.[28] But for every regulation, there appears to be a counter-

Wall Mother Fucker," and the story printed a political cartoon of a police officer raping the Statute of Liberty and Lady Justice).

21. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995).

22. *Id.* at 657.

23. *See, e.g.*, Hill v. Nat'l Collegiate Ass'n, 865 P.2d 633, 658 (Cal. 1994) ("[Student-athletes are subject to] special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests . . . not shared by other students or the population at large.").

24. *Vernonia Sch. Dist.*, 515 U.S. at 657.

25. *See, e.g.*, UNIV. OF S. C., SOUTH CAROLINA STUDENT-ATHLETE CODE OF CONDUCT HANDBOOK 502M:1, *available at* http://netitor.com/photos/schools/scar/genrel/auto_pdf/Policy5.pdf (When traveling, male members of the South Carolina athletic program are to "refrain from wearing earrings" and female athletes are expected to "wear a dress, skirt, or dress slacks." The university justifies these restrictions because the student-athletes represent the school both on and off the field).

26. *See, e.g.*, VA. DEP'T OF ATHLETICS, VIRGINIA TECH STUDENT-ATHLETE HANDBOOK 7 (2014–2015 ed. 2014), *available at* http://www.hokiesports.com/sa handbook/sahandbook.pdf ("A textbook or good tutor is no substitute for attending class. Class absences are reported to your coach SAASS Advisor and may impact on your playing time or, ultimately, your athletic eligibility.").

27. *See, e.g.*, UNIV. OF DEL., UNIVERSITY OF DELAWARE STUDENT-ATHLETE HANDBOOK 13 (2011–2012 ed. 2011), *available at* http://www.udel.edu/ssa/Misc%20Documents/Handbook/StudentAthleteHandbook%2011-12%20FINAL.pdf (proscribing that the university will not tolerate underage consumption of alcohol or tobacco use).

28. *See* CLEMSON UNIV. ATHLETIC DEP'T, CLEMSON UNIVERSITY ATHLETIC DEPARTMENT STUDENT-ATHLETE HANDBOOK 38 (2013–2014 ed. 2013) [hereinafter CLEMSON STUDENT-ATHLETE HANDBOOK], *available at* http://www.nmn athletics.com/fls/28500/pdf/athletics/2013-14/201314_sahandbook.pdf?DB_OEM_ID=28500.

balancing perk. For example, at Clemson University, student-athletes are given priority in registration "so that student-athletes can arrange class schedules to accommodate their academic goals and athletic responsibilities."[29] This special registration is a benefit provided solely to athletes. But, with benefits comes obligations.

As this article explains, college athletes are not truly free to express themselves. Strict conference rules regarding sportsmanship,[30] team rules and regulations,[31] and penalties for "excessive celebration"[32] stop the lofty notions of free speech and expression right behind the college athlete's bench.[33] Fans taunt and curse players to get inside their heads, but NCAA sportsmanship regulations prohibit student-athletes from using obscene gestures or vulgar language in response.[34] In fact, some NCAA conferences require student-

29. *Id.*

30. *See, e.g.*, METRO ATL. ATHLETIC CONFERENCE, STUDENT-ATHLETE SPORTSMANSHIP STATEMENT 1 (2013–2014 ed. 2013) [hereinafter MAAC SPORTSMANSHIP STATEMENT], *available at* http://www.maacsports.com/fls/17400/pdf/MAAC%20Sportsmanship%20Bylaws.pdf?DB_OEM_ID=17400 (follow "Student-Athlete Sportsmanship Statement" hyperlink) ("significant penalties will be applied for fighting, taunting an opponent, or for any other unethical conduct").

31. *See, e.g.*, FLA. STATE UNIV. DEP'T OF ATHLETICS, SEMINOLE HANDBOOK & PLANNER 2014–2015 168 (2014–2015 ed. 2014) [hereinafter FLORIDA STATE SEMINOLE HANDBOOK], *available at* http://www.seminoles.com/fls/32900/pdf/student-services-handbook-1415.pdf ("inappropriate activity or language in violation of [this policy], including first time offenses, is subject to investigation and possible sanction by FSU . . . and/or the Athletics Department, [including] [i]ndefinite suspension [or] [d]ismissal from the team [and] [n]on-renewal of [the student's] athletic grant-in-aid").

32. *See* UNIV. OF WYO. DIV. OF INTERCOLLEGIATE ATHLETICS, UNIVERSITY OF WYOMING STUDENT-ATHLETE HANDBOOK 39 (rev. ed. 2014) [hereinafter WYOMING STUDENT-ATHLETE HANDBOOK], *available at* http://grfx.cstv.com/photos/schools/wyo/sports/academics/auto_pdf/2014-15/misc_non_event/sa-handbook-14.pdf ("[proscribing] taunting, trash-talking, profane/vulgar language, inappropriate 'celebrations' or a disrespectful attitude toward our opponents or officials").

33. *See* FLORIDA STATE SEMINOLE HANDBOOK, *supra* note 31, at 168 ("Student-athletes are highly visible representatives of the university and are expected to uphold the values and responsibilities of the University while meeting all requirements set forth by the ACC, the NCAA, FSU, and the FSU intercollegiate athletics program.").

34. *See, e.g.*, THE DEP'T OF ATHLETICS AT COLO. STATE, 2012–13 COLORADO STATE STUDENT-ATHLETE HANDBOOK 27 (2012–2013 ed. 2012) [hereinafter COLORADO STATE STUDENT-ATHLETE HANDBOOK], *available at* http://grfx.cstv.com/photos/schools/csu/genrel/auto_pdf/2013-14/misc_non_event/student-handbook.pdf (Colorado State's explanation of the "Mountain West Statement on Sportsmanship" is illustrative of other national conferences. Col-

athletes to sign sportsmanship agreements.[35] These agreements affirm that although "victory shall be the expected goal of every competitor, defeat is not a disgrace; the prospect of defeat is never an excuse for unethical behavior or a lack of sportsmanship."[36]

The NCAA, individual conferences, and coaches regularly reprimand or suspend student-athletes for unsportsmanlike behavior. For example, Saint Joseph's suspended junior basketball player Halil Kanacevic for two games after "[h]e made an obscene gesture."[37] Moreover, the NCAA reprimanded Marshall Henderson, a Mississippi basketball player, for "extend[ing] both middle fingers to the crowd as he left the court" following a loss.[38] Similarly, the Big Ten reprimanded Marcus Hall, an Ohio State football player, for making an obscene gesture directed at opposing fans while exiting a football game.[39] All three athletes were penalized for exercising their "right" to self-expression through a universal signal: the middle-finger.[40] The understood

orado State explains that publically criticizing or disparaging and using obscene gestures or unduly provocative language or action toward game officials, the Conference or its personnel, another institution, or a student-athlete or personnel of another institution violate the Sportsmanship Policy.).

35. *See, e.g.*, MAAC SPORTSMANSHIP STATEMENT, *supra* note 30, ¶ 5 ("This form must be signed by all student-athletes who are participating on an intercollegiate team at a MAAC member school.").

36. *Id.* ¶ 3.

37. *Saint Joe's Suspends Halil Kanacevic*, ESPN.COM, http://espn.go.com/mens-college-basketball/story/_/id/8741752/saint-joseph-hawks-suspend-halil-kanacevic-two-games (last updated Dec. 12, 2012, 8:30 PM) (Kanacevic was also prohibited from participating in team activities for one week.).

38. *Marshall Henderson Reprimanded*, ESPN.COM, http://espn.go.com/mens-college-basketball/story/_/id/9425494/marshall-henderson-mississippi-rebels-reprimanded-gesture?src=mobile (last updated June 26, 2013, 6:21 PM) ("The NCAA issued the reprimand Wednesday, saying Henderson's actions failed to represent the 'highest standards of sportsmanship.'").

39. *Big Ten Reprimands Ohio State's Marcus Hall for Flipping Off Fans*, USA TODAY SPORTS (Dec. 2, 2013, 8:24 PM), http://www.usatoday.com/story/sports/ncaaf/2013/12/02/marcus-hall-ohio-state-reprimanded-for-flipping-off-michigan-fans/3817669 ("Hall raised both hands high and flipped off the Michigan fans").

40. *Id.*; *see Marshall Henderson Reprimanded*, *supra* note 38 and accompanying text; Scott M. Gleeson, *St. Joe's Player Kanacevic Suspended for Middle Finger*, USA TODAY SPORTS (Dec. 12, 2012, 7:30 PM), http://www.usatoday.com/story/sports/ncaab/2012/12/12/st-joes-forward-halil-kanacevic-gives-crowd-middle-finger-misses-key-free-throws-in-loss-to-villanova/1764061 (clarifying that Kanacevic "flashed the middle finger" towards the crowd).

and intended message was clear: "fuck you."[41] Each of the three athletes received some form of punishment or reprimand and each issued an official apology.[42]

If college athletes possessed the robust First Amendment rights of their more traditional classmates, their symbolic gestures would receive full protection.[43] In fact, Marshall Henderson simply responded *in kind* to the obscenities of spectators in the student section.[44] How common is it when walking around a college campus to happen upon the ubiquitous hand gesture or the F-bomb? Is the "F word," as it is often termed, somehow more egregious than other derogatory words or gestures?[45] The Supreme Court famously queried: "How is one to distinguish this [word or gesture] from any other offensive word [or gesture]? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."[46]

The F-word is given vigorous First Amendment protection outside of athletics, even in the college setting.[47] We hear it in music[48] movies,[49] and

41. *See generally* Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1719–20, 1727–28 (2006) (explaining that the word "fuck" has both sexual and nonsexual connotations).

42. *See Saint Joe's Suspends Halil Kanacevic*, *supra* note 37 (noting that Kanacevic apologized later); *Marshall Henderson Writes Apology*, ESPN.COM, http://espn.go.com/mens-college-basketball/story/_/id/9131763/marshall-henderson-ole-miss-rebels-writes-apology-letter (last updated Apr. 3, 2013, 9:57 PM) (explaining that Henderson posted an apology letter on the Ole' Miss website following a season-ending loss to LaSalle in the NCAA tournament); *Big Ten Reprimands Ohio State's Marcus Hall for Flipping Off Fans*, *supra* note 39 ("Hall apologized after the incident on his Twitter account").

43. *See, e.g.*, Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 667, 668, 671 (1973) (per curiam) (providing First Amendment protection against college disciplinary action for use of the term "Mother Fucker" in a journalism story).

44. *See* Huffington Post, *Marshall Henderson Middle Finger Exit: Ole Miss Star Flips Off Crowd After Loss to La Salle*, HUFFPOST SPORTS (Mar. 26, 2013, 4:51 PM), http://www.huffingtonpost.com/2013/03/26/marshall-henderson-finger-flips-off-ole-miss-la-salle_n_2956913.html (noting that Henderson was purportedly taunted by people in the stands).

45. *See* Fairman, *supra* note 41, at 1721–30 (exploring the "dichotomy over 'our worst word'" based on its taboo nature).

46. *See* Cohen v. California, 403 U.S. 15, 25 (1971).

47. *See Papish*, 410 U.S. at 670 ("Healy makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus [sic] may not be shut off in the name alone of 'conventions of decency'") (citing Healy v. James, 408 U.S. 169, 180 (1972)).

48. *See, e.g.*, PINK, *Fuckin' Perfect*, *on* GREATEST HITS . . . SO FAR!!! (LaFace Records & RCA Records 2010).

see it in political protests.[50] From Paul Cohen's jacket to Pink's popular song, resort to the F-word, once seen as taboo, is becoming increasingly common.[51] When nineteen-year-old Paul Cohen wore the phrase "Fuck the Draft" in a California municipal courthouse,[52] the Supreme Court upheld the phrase as protected speech.[53] In this renown case, Justice Harlan reiterated that "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."[54] Today, the middle-finger and the "four-letter" word this gesture represents are quite ordinary, particularly among college-aged individuals. Since *Cohen*, the "F-word" has seemingly lost much of its potency, except when it comes to athletes.[55] While permitting Americans to utter, scream, sing, or gesture "fuck" underscores our free society and illustrates free expression,[56] coaches, conferences, and the NCAA believe this word, and gesture, has no place in the realm of college athletics.

The NCAA, state universities, and college coaches exercise the very right withheld from the states—the right to "cleanse public debate" on the sporting fields of college campuses.[57] This "cleansing" is regularly explained either in terms of "sportsmanship" or packaged under the "privilege" of participating in intercollegiate sports.[58] In fairness, states often have greater reg-

49. *See, e.g.*, THE WOLF OF WALL STREET (Paramount Pictures 2013); *see also* Eliana Dockterman, *The Wolf of Wall Street Breaks F-Bomb Record*, TIME ENTM'T (Jan. 3, 2014), http://entertainment.time.com/2014/01/03/the-wolf-of-wall-street-breaks-f-bomb-record (discussing that Martin Scorsese's film purportedly used the F-word 2.81 times *per minute*, with over 500 "F-bombs" being used during the course of the film).

50. *See, e.g.*, *Cohen*, 403 U.S. at 16 ("[Cohen wore] the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft"); *see also* Alan E. Garfield, *To Swear or Not to Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 WASH. U. L. REV. 279, 279 (2012) (noting that Cohen's "Fuck the Draft" jacket brought the F-word to the highest court in the land for the first time).

51. *See* PINK, *supra* note 48; *Cohen*, *supra* note 50, at 16 and accompanying text.

52. *See Cohen*, 403 U.S. at 16 (underscoring the fact that women and children saw the phrase).

53. *Id.* at 26.

54. *Id.* at 25.

55. *But see* Garfield, *supra* note 50, at 279–80, 282, 286–87 (noting that only one individual has ever dared utter the F-word while appearing before the Supreme Court: Paul Cohen's attorney, Professor Melville Nimmer).

56. *See Cohen*, 403 U.S. at 24.

57. *See* Healy v. James, 408 U.S. 169, 180–81 (1972) ("[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment.").

58. *See, e.g.*, CLEMSON STUDENT-ATHLETE HANDBOOK, *supra* note 28, at 8 ("[p]articipation in athletics is a privilege that carries a tremendous amount of

ulatory powers when acting in an educational capacity, so flipping off a teacher while leaving class might also secure an official reprimand.[59] But, the NCAA, conferences, and coaches go much further in regulating what they believe to be unacceptable speech. Nearly every NCAA institution has a separate student-athlete code of conduct that supplements, not supplants, the more generic student codes of conduct governing the college experience.[60] For example, Virginia Tech reminds its student-athletes that:

> You have been admitted as a student into the academic programs at Virginia Tech. In addition, you are on an intercollegiate sports roster. It is a privilege, and not a right, to participate in intercollegiate athletics. As a student who participates in intercollegiate athletics, you become a member of a team. When you accept the privileges of being a Virginia Tech athletic member, you also accept the responsibilities of representing the university as a student.[61]

Additionally, student-athletes are regularly prohibited from using "profane language" or "vulgar gestures."[62] Most people—outside of their childhood homes—are probably not subject to such limitations on their language or gestures.

---

responsibility for the student-athlete [and] [a]s Clemson University's most visible ambassadors, student-athletes are expected to uphold high standards of integrity and behavior that will reflect well upon them, their families, coaches, teammates, the Athletic Department, and Clemson University").

59. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that the "School District acted entirely within its permissible authority in imposing sanctions upon [respondent] in response to his offensively lewd and indecent speech"). *But see* Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 668–71 (1973) (per curiam) (tolerating the use of the phrase "Mother Fucker" in the college setting despite a school policy prohibiting indecent conduct or speech).

60. *See, e.g.*, VIRGINIA TECH STUDENT-ATHLETE HANDBOOK, *supra* note 26, at 2 (setting forth the student-athlete's various responsibilities).

61. *Id.*

62. *See, e.g.*, IND. UNIV. ATHLETICS, STATEMENT OF PRINCIPLES ON THE CONDUCT OF PARTICIPANTS IN STUDENT ATHLETIC PROGRAMS § 2.1 (rev. ed. 2014) [hereinafter INDIANA UNIV. ATHLETICS STATEMENT], *available at* http://www.iuhoosiers.com/compliance/ind-compliance-conduct.html (stating further that student-athletes are prohibited "from demeaning or belittling another person"); THE UNIV. OF TEX. INTERCOLLEGIATE ATHLETICS, 2014-2015 STUDENT-ATHLETE MANUAL 8 (2014–2015 ed. 2014) [hereinafter UNIV. OF TEXAS STUDENT-ATHLETE MANUAL], *available at* http://texassports_com.s3.amazonaws.com/documents/2014/8/17/2014_15_UTexas_SAManual.pdf?id=3478 ("[p]rofanity and any other form of negative or inappropriate behavior and communication [are prohibited] . . . . [T]reat teammates, opponents, coaches, officials, and spectators with respect and courtesy").

The proscription against cursing or using offensive language is only the tip of expressive regulations imposed on student-athletes. Unlike traditional college students, student-athletes are given strict dress codes,[63] subjected to random drug testing,[64] and required to attend all classes[65] and study hall ses-

63. *Compare* LSU DEP'T OF ATHLETICS, LSU STUDENT-ATHLETE HANDBOOK 2014–2015, at 6 (2014–2015 ed. 2014) [hereinafter LSU STUDENT-ATHLETE HANDBOOK], *available at* http://students.lsu.edu/saa/code_10_2 (explaining to student-athletes that "[y]our head coach will let you know if he/she requires a specific dress code . . . . [you] should always exercise good judgment concerning the appropriateness of your attire"), *and* WYOMING STUDENT-ATHLETE HANDBOOK, *supra* note 32, at 128–29 (imposing a strict dress code during practices and workouts by giving athletes only five color choices and explicitly prohibiting the color green and clothing that either "supports other NCAA universities" or "contains profanity or degrading commentary/graphicsthat supports other universities, or that has profanity), *with* LA. STATE UNIV. & AGRIC. & MECH. COLL., LSU CODE OF STUDENT CONDUCT § 10.2 (rev. ed. 2014), *available at* http://saa.lsu.edu/sites/saa.lsu.edu/files/attachments/LSU%20Code%20of%20Student%20Conduct%20jan_14.pdf (deeming that nudity is offensive behavior and misconduct, but containing no other dress code requirements), *and* UNIV. OF WYO., 2014–2015 STUDENT CODE OF CONDUCT 6–9 (2014–2015 ed. 2014), *available at* http://www.uwyo.edu/dos/_files/docs/2014-2015%20code%20of%20conduct.pdf (containing no dress code requirements).

64. *Compare* OHIO STATE ATHLETICS, STUDENT-ATHLETE HANDBOOK 14 (2009) [hereinafter OHIO STATE STUDENT-ATHLETE HANDBOOK], *available at* http://grfx.cstv.com/schools/osu/graphics/pdf/handbook/Student-Athlete-Handbook.pdf (requiring consent and participation in the athletic department's mandatory drug test), *with* OHIO STATE UNIV., CODE OF STUDENT CONDUCT 6 (2012), *available at* http://studentaffairs.osu.edu/csc/ (prohibiting the "[u]se, production, distribution, sale, or possession of drugs," but no drug test requirement).

65. *Compare* THE UNIV. OF ARIZ. DEP'T OF INTERCOLLEGIATE ATHLETICS, STUDENT-ATHLETE HANDBOOK 34 (rev. ed. 2011) [hereinafter UNIV. OF ARIZONA STUDENT-ATHLETE HANDBOOK], *available at* http://azregents.asu.edu/rrc/Policy%20Manual/5-308-Student%20Code%20of%20Conduct.pdf (explaining that, except for travel, illness, or family emergencies, student-athletes are required to attend "scheduled classes," and tardiness to class will count as one-half an absence), N.M. STATE UNIV. AGGIE ATHLETICS, 2014–15 NM STATE STUDENT-ATHLETE HANDBOOK 12 (2014–15 ed. 2014), *available at* http://www.nmstatesports.com/ViewArticle.dbml?DB_OEM_ID=1900&ATCLID=204894176 ("[Student-athletes must] attend every class meeting, complete all assignments and exhibit appropriate behavior in class. . . . [and] be on time for every class and remain in class for the duration of the class period"), *and* COLORADO STATE STUDENT-ATHLETE HANDBOOK, *supra* note 34, at 26 (stating that "[s]tudent-athletes are expected to attend all classes except for absences due to competition, and/or illness/emergencies"), *with* UNIV. OF ARIZ., 5-308 STUDENT CODE OF CONDUCT (rev. 2014), *available at* http://azregents.asu.edu/rrc/Policy%20Manual/5-308-Student%20Code%20of%20Conduct.pdf (containing no attendance requirements), NEW MEXICO STATE UNIV., STUDENT CODE OF CONDUCT III.B. (2011), *available at* http://deanofstudents.nmsu.edu/student-

sions.[66] Additionally, student-athletes are prohibited from using tobacco or alcohol and, increasingly, subjected to stringent social media policies.[67] For example, Utah State's Athletic Department prohibits student-athletes from posting any images of "inappropriate behavior," including the display of firearms.[68] This prohibition impacts the student-athlete's First *and* Second Amendment rights.[69] But, before addressing these stringent social media policies and their constitutionality, the basic restrictions on student-athletes'

handbook/1-student-code-of-conduct/3-academic-misconduct.html (containing no attendance requirements, but prohibiting disruptive class room behavior), *and* COLO. STATE UNIV., COLORADO STATE UNIVERSITY STUDENT CODE OF CONDUCT (2012), *available at* http://www.conflictresolution.colostate.edu/Data/Sites/1/student-conduct-code/student-conduct-code-updated-07.15.2014.pdf (containing no attendance requirements).

66. *See, e.g.*, UNIV. OF N.M. ATHLETIC DEP'T, STUDENT-ATHLETE HANDBOOK 18 (2014) [hereinafter NEW MEXICO STUDENT-ATHLETE HANDBOOK], *available at* http://www.golobos.com/pdf9/2766497.pdf?DB_OEM_ID=26000 (establishing requirements for mandatory study hall).

67. *See, e.g., id.* at 40–41, 48; TEX. TECH UNIV. ATHLETIC DEP'T, TTU STUDENT-ATHLETE SOCIAL NETWORKING POLICY [hereinafter TEXAS TECH SOCIAL NETWORKING POLICY], *available at* https://www.documentcloud.org/documents/1087507-texas-tech-policy.html#document/p2 /a150066 (requiring student-athletes to provide their signature, which "shows that [they] accept any disciplinary action" for abusing the guidelines); *see also* Rex Santus, *Colleges Monitor, Restrict Athletes on Social Media*, STUDENT LAW REVIEW CTR. (Mar. 26, 2014), http://ajr.org/2014/03/26/social-media-monitoring-widespread-among-college-athletic-departments (providing documents that were requested and shared by the Philip Merrill College of Journalism at the University of Maryland from "athletic departments nationwide," including Texas Tech University's social networking policy for student-athletes).

68. UTAH STATE UNIV., UTAH STATE UNIVERSITY 2013-2014 STUDENT-ATHLETE HANDBOOK 38 [hereinafter UTAH STATE POLICY], *available at* http://grfx.cstv.com/photos/schools/ust/genrel/auto_pdf/2013-14/misc_non_event/S-A Handbook13-14draft2.pdf ("Generally [student athletes cannot use social networking cites that] contain images that are damaging to the individual or Utah State's reputation."). *See also* former TEXAS TECH SOCIAL NETWORKING POLICY, which previously prohibited the display of firearms (compared to other NCAA schools, this restriction is more ironic and peculiar because the Texas Tech mascot is the Red Raider, who holds "guns in the air." Essentially, the policy prohibits student-athletes from posting pictures of the team mascot, pictures of student-athletes showing the student hand sign of "guns in the air," or any other Red raider picture running afoul of this curious proscription.) (on file with author).

69. *See* U.S. CONST. amend. I (freedom of speech and right to assemble); U.S. CONST. amend. II ("the right of the people to keep and bear Arms").

speech and expression deserve more attention.[70] Advocates for full social media rights that rely on the purported free speech rights of student-athletes fail to acknowledge the oppressive restrictions currently in place.[71] Under existing student-athlete conduct regulations, would limiting any particular method of communication via social media really alter the status quo?[72] To illustrate, Montana State University (MSU) reminds its student-athletes that:

> It is a privilege and not a right to be a student-athlete at MSU. On and off campus and in cyberspace communities, every student athlete is expected to conduct himself or herself in a manner that exhibits honor and respect to a team, department, University and surrounding community for a duration of his or her tenure as a student-athlete.[73]

However, if MSU wants to regulate behavior both "[o]n and off campus," then what does adding "cyberspace" really accomplish?[74] Does MSU's "Cyberspace" prohibition provide additional clarification?[75] More importantly, if coaches can generically restrict speech and expression at the granular level, then how does regulating the use of social media alter the equation?

Consider "trash" talk, for example. Trash talk violates conference "sportsmanship" policies, which may result in sanctions. Two notable exam-

70. *See, e.g.*, NEW MEXICO STUDENT-ATHLETE HANDBOOK, *supra* note 66, at 32 (advising student-athletes that they may not text or talk during class).

71. *See, e.g.*, ARIZ. STATE UNIV. INTERCOLLEGIATE ATHLETIC DEP'T, STUDENT-ATHLETE CODE OF CONDUCT POLICY 1 [hereinafter ARIZONA STATE STUDENT-ATHLETE CODE OF CONDUCT], *available at* http://www.asu.edu/aad/manuals/policyarchives/ICA/Nov2007/ica401a.pdf ("[P]olicy covers behavior both on and off-campus [and punishment for violations] may include loss of scholarships, as well as restrictions in practice or competition.").

72. *See* WYOMING STUDENT-ATHLETE HANDBOOK, *supra* note 32, at 32 ("[A]s a UW student-athlete, you are expected to behave both on-and-off campus in a manner which brings credit to the University and your team, [which] includes, but is not limited to, your behavior/actions while utilizing social networks (e.g., Facebook, Twitter, blogs, etc.)").

73. MONT. STATE UNIV. – BOZEMAN, STUDENT-ATHLETE CODE OF CONDUCT 1–4 [hereinafter MSU STUDENT-ATHLETE CODE OF CONDUCT], *available at* http://www.montana.edu/policy/student_conduct/ (requiring student-athletes to initial each Section and sign the last page).

74. *See id.* at 1.

75. *See id.* at 2 ("Cyberspace ([i]ncluding social networking websites): Student-athletes are permitted to have profiles on social networking websites such as Myspace and Facebook, [but cannot post]offensive or inappropriate pictures [or] comments [and] any information placed on the website(s) [cannot] violate the ethics and intent behind the MSU Student Code of Conduct, the student-athlete code of conduct, and all other applicable state, federal, and local laws.").

ples involve conference sanctions against football players for both figurative and literal trash talk. The Pac-12 reprimanded Matt Barkley, the highly-regarded University of Southern California quarterback, for referring to an Arizona State University opponent as a "dirty player."[76] In imposing an official reprimand, the Pac-12 Commissioner explained that all of its student-athletes "must adhere to the Pac-12's policies on sportsmanship and standards of conduct, which call for our student-athletes to treat opponents with respect and create and ensure a collegiate atmosphere in which to conduct competition. In these circumstances, Mr. Barkley's comments were a clear violation of conference rules . . . ."[77]

The Big 12 followed suit by officially reprimanding Texas Longhorn linebacker Steve Edmond for calling Baylor "trash" after Baylor won the conference championship.[78] The Big 12 Commissioner defended the reprimand, explaining, "Mr. Edmond violated the Conference rule that prohibit[s] coaches, student-athletes, athletic department staff and university personnel from making negative public comments about other member institutions. Consistent with our standard for such violations he is being issued a public reprimand."[79] It should shock readers to learn that universities and athletic conferences can reprimand and potentially suspend a college athlete for remarking that another athlete is a "dirty player"[80] or that another team is "trash."[81]

Instead of decrying the social media restrictions, society should focus on far more intrusive First Amendment sacrifices student-athletes make.[82] The

76. Pedro Moura, *Pac-12 Reprimands Matt Barkley*, ESPN.COM (Sept. 27, 2011, 10:52 PM), http://espn.go.com/los-angeles/ncf/story/_/id/7028640/pac-12-reprimands-usc-trojans-matt-barkley-comments.

77. *Id.* Of note, Arizona State actually defeated USC 43–22 following Barkley's comments.

78. *See* Tom Fornelli, *Big 12 Reprimands Texas' Steve Edmond for Baylor Trash Talk*, CBSSPORTS.COM (Apr. 25, 2014, 4:30 PM), http://www.cbssports.com/collegefootball/eye-on-college-football/24539231/big-12-reprimands-texas-steve-edmond-for-baylor-trash-talk.

79. *Id.*

80. Moura, *supra* note 76.

81. Fornelli, *supra* note 78.

82. *See, e.g.*, UNIV. OF ARIZ. DEP'T OF INTERCOLLEGIATE ATHLETICS, STUDENT-ATHLETE HANDBOOK 98–99 (2011) [hereinafter ARIZONA STUDENT-ATHLETE HANDBOOK], *available at* http://athletics.arizona.edu/cats/2011-12_Student Handbook.pdf ("It is expected that you will not post any pictures or other content that might cause embarrassment to you, your team or The University of Arizona (e.g., obscene language, pictures at parties with alcohol, references to drugs or sex, weapons, etc.)"); UTAH STATE POLICY, *supra* note 68 ("Generally [student athletes cannot use social networking cites that] contain images that are damaging to the individual or Utah State's reputation.").

First Amendment not only protects against laws "abridging the freedom of speech,"[83] but also protects against legal consequences or criminal prosecutions for exercising the right to speak.[84] If public universities can legally require student-athletes to treat opponents with "dignity and respect" and to "avoid conduct that demeans [or] harasses" any person, such as prohibitions against "using excessive profane language or vulgar gestures," then these universities have seriously curtailed the free speech rights of student-athletes.[85] Further, if schools can prevent student-athletes from posting certain items on their social media accounts, such as "offensive or foul language"[86] or displays of firearms or weapons,[87] what speech rights truly exist for these individuals?[88]

Before tackling the larger First Amendment issues related to social media usage, scholars and student-athlete advocates should attack the far more pervasive speech and expression rights curtailed under governing student-athlete codes of conduct and conference rules. The question regarding student-athletes' rights to free expression raises far more complex issues than social media advocates admit or nonathletes comprehend.[89]

III. Regulating Athletes in 140 Characters or Less

Student-athletes should understand that participating in athletics at The Ohio State University is a privilege and not a right. There-

83. U.S. Const. amend. I.

84. Snyder v. Phelps, 131 S. Ct. 1207, 1217 (2011) (holding offensive signs by Westboro Baptist Church were protected speech); Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding that burning the American flag was "expressive conduct" protected under the First Amendment); Cohen v. California, 403 U.S. 15, 26 (1971) (holding that wearing a jacket with "Fuck the Draft" on it is not a criminal offense).

85. Indiana Univ. Athletics Statement, *supra* note 62.

86. *See, e.g.*, Utah State Policy, *supra* note 68.

87. *See, e.g.*, Arizona Student-Athlete Handbook, *supra* note 82.

88. At least two state universities, including Texas Tech University and Utah State University, have required their student-athletes to refrain from posting any display of firearms on their social networking sites. Texas Tech Social Networking Policy, *supra* note 67; Utah State Policy, *supra* note 68. This requirement implicates not only the student-athlete's First Amendment rights to freedom of speech and expression, but also potentially the athlete's Second Amendment rights as well. Texas Tech and Utah State do not require nonathlete students to make such sacrifices on their personal social media sites.

89. *See* Richard v. Perkins, 373 F. Supp. 2d 1211, 1217 (D. Kan. 2005) (finding no First Amendment violation following track athlete's dismissal from the team). The Court further noted that student-athletes do not possess "constitutionally protected property or liberty interests in participating in intercollegiate athletics." *Id.* at 1219.

> *fore, student-athletes have no right to expect privacy in what they post on social media.*[90]

Most NCAA institutions have separate social media policies designed specifically for athletes, in addition to separate student-athlete codes of conduct.[91] Many of these social media policies, much like the student-athlete codes of conduct, begin by reminding student-athletes that playing and competing for the university is a "privilege, not a right."[92] These policies, such as the University of Nebraska's, frequently point out that the public sees the student-athletes as "role models in the community."[93] The University of Nebraska also cautions that "[a]s leaders we have the responsibility to portray our team, our University and ourselves in a positive manner at all times. Sometimes this means doing things that are of an inconvenience to us, but benefit the whole team."[94]

Many public universities generically prohibit negative or offensive social media content that would seem constitutionally suspect if a school were

90. OHIO STATE UNIV., OSU STUDENT-ATHLETE STANDARDS OF CONDUCT AND SOCIAL MEDIA POLICY 3 [hereinafter OSU POLICY], *available at* http://s3.documentcloud.org/documents/1087505/ohio-state-policy.pdf (requiring student-athlete signature).

91. *See, e.g.*, Univ. of Mich., *Social Media Guidelines*, MGOBLUE.COM, http://www.mgoblue.com/compliance/sa-social-media.html (last visited Apr. 3, 2015) ("Along with [student-athlete privileges come] expectations and responsibilities as a Michigan student-athlete [and students-athletes] are held to a higher standard and are recognized both locally and nationally because you choose to represent this University and your respective sport."); UNIV. OF N.M., UNIVERSITY OF NEW MEXICO SOCIAL NETWORKING POLICY FOR STUDENT-ATHLETES 33 [hereinafter NEW MEXICO POLICY], *available at* http://www.golobos.com/fls/26000/pdf/fff.pdf?DB_OEM_ID=26000 (reminding student-athletes that they have a responsibility to positively portray the team and University at all times.).

92. *E.g.*, N.C. STATE UNIV., NC STATE STUDENT-ATHLETE GUIDELINES FOR THE USE OF SOCIAL NETWORKING SITES 1 (2010) [hereinafter NC STATE GUIDELINES], *available at* http://grfx.cstv.com/photos/schools/ncst/sports/compliance/auto_pdf/2011-12/misc_non_event/Social_Networking_Policy.pdf; NEW MEXICO POLICY, *supra* note 91; UNIV. OF NEB., SOCIAL NETWORKING POLICY FOR STUDENT-ATHLETES (2008) [hereinafter NEBRASKA POLICY], *available at* http://www.huskers.com/ViewArticle.dbml?DB_OEM_ID=100&ATCLID=3630560; UNIV. OF N.C. AT CHAPEL HILL, POLICY ON STUDENT-ATHLETE SOCIAL NETWORKING AND MEDIA USE 1 (2012) [hereinafter UNC POLICY], *available at* http://www.goheels.com/fls/3350/pdf/Compliance/SocialNetworkingPolicy.pdf?SPID=111196.

93. NEBRASKA POLICY, *supra* note 92.

94. *Id.*

not permitted to restrict a student-athlete's social media usage.[95] For example, the University of Nebraska informs its student-athletes that:

> If a student-athlete's profile and its contents are found to be inappropriate in accordance with [the school's social media policy, including using inappropriate or offensive language], he/she will be subject to the following penalties: 1) written warning; 2) a meeting with the Director of Athletics and Head Coach; 3) penalties as determined by the athletics department, for example, suspension from athletic team.[96]

Ohio State similarly admonishes its student-athletes that "[y]ou shall not post or contribute any content to any social networking or other internet site(s) that reflects negatively (*determined at the sole discretion of the University*) on yourself, your team and/or teammates, your coach(es) or the Department of Athletics."[97]

Most, if not all, First Amendment scholars would disagree with a state, city, or municipality passing an ordinance that bans social media postings that negatively reflect on an individual or others, especially where those entities possesses the *sole discretion* to determine whether the posting appears negative.[98] While these policies do advise students, providing a warning that

95. *See, e.g.*, COLO. STATE UNIV., 2012–13 COLORADO STATE STUDENT-ATHLETE HANDBOOK, INTERNET ETHICS POLICY 22–23 (2012) [hereinafter COLORADO STATE POLICY], *available at* http://grfx.cstv.com/photos/schools/csu/genrel/auto_pdf/2013-14/misc_non_event/student-handbook.pdf (empowering the Athletic Department to temporarily or permanently suspend an athlete from the team or take away athletics scholarship if student-athletes have "offensive" or "inappropriate" materials posted on their social media sites); LA. STATE UNIV., LSU STUDENT-ATHLETE HANDBOOK 2014–2015 7 (2014), *available at* http://compliance.lsu.edu/studentathletes/Documents/LSU%20Handbook%2014-15.pdf ("[i]nappropriate language, behavior or on-line postings may result in suspension or dismissal from the LSU Athletics program."); MO. STATE UNIV., SOCIAL NETWORKING & NEW MEDIA POLICY 22 (2013–2014), *available at* http://grfx.cstv.com/photos/schools/mosu/genrel/auto_pdf/2013-14/misc_non_event/2013-14Student-AthleteHandbook.pdf (disallowing use of any "offensive or foul language" that is embarrassing or could jeopardized the university's reputation, including postings by others on the athlete's page); NEW MEXICO POLICY, *supra* note 91 (proscribing postings or comments regarding personal use of tobacco and alcohol); UTAH STATE POLICY, *supra* note 68 (preventing athletes from posting any "display" of "firearms").

96. NEBRASKA POLICY, *supra* note 92, at 2.

97. OHIO STATE UNIV. DEP'T OF ATHLETICS STUDENT-ATHLETE STANDARDS OF CONDUCT, STUDENT-ATHLETE STANDARDS OF CONDUCT 2 (2009–10) [hereinafter OHIO STATE STANDARDS OF CONDUCT], *available at* http://grfx.cstv.com/photos/schools/osu/genrel/auto_pdf/2010-11/misc_non_event/sa-handbook4.pdf (emphasis added).

98. *Id.* (emphasis added).

consequences may follow, they also chill student-athletes' abilities to act like regular college students enjoying the full range of First Amendment rights. North Carolina State's social networking guidelines embody precisely the type of policy that would chill speech. The policy begins:

> As a public institution of higher education, NC State University supports and encourages its student-athletes' rights to freedom of speech, expression and association, including the use of social networks. Nevertheless, as representatives of the university, student-athletes are held to a higher standard and are role models. Playing and competing for NC State is a privilege, not a right. In this context, each student-athlete has the responsibility to portray him or herself, the team, and NC State in a positive manner . . . . Student-athletes will be held responsible for their actions.[99]

While referring to this policy as "expectations," the University retains the power to impose "the loss of athletic privileges or other sanctions as appropriate, including the non-renewal or reduction in athletic grant-in-aid or dismissal from a team."[100]

The neighboring University of North Carolina (UNC) at Chapel Hill fares no better in proclaiming it "recognizes and supports its student-athletes' rights to freedom of speech, expression, and association, including the use of online social networks. . . . [H]owever, each student-athlete must remember that playing and competing for The University of North Carolina is a privilege, not a right."[101] Notably, UNC requires and reserves the right to have "at least one" coach, administrator, other staff member, or even an outside vendor to have "access to, [to] regularly monitor[ ] the content of, and/or [to] receiv[e] reports about team members' social networking sites and postings."[102] If a student-athlete violates the law, NCAA policies, or a litany of University rules and regulations, the University can ask the student to remove the offending posting or photo, dismiss the athlete from the team, and/or reduce, cancel, or non-renew the student's athletics grant-in-aid.[103]

The Supreme Court generally disfavors content-based proscriptions.[104] While the law has routinely deemed certain forms of speech as possessing low intrinsic value and, therefore, undeserving of First Amendment protec-

99. NC STATE GUIDELINES, *supra* note 92, at 1.

100. *Id.* at 1–2.

101. UNC POLICY, *supra* note 92, at 1.

102. *Id.* at 2.

103. *Id.*

104. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (Justice Scalia explained that "[t]he First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.").

tion,[105] the student-athlete speech codes target speech that is otherwise both protected and, at times, celebrated.[106] As one scholar recently inquired: what about the rights of student-athletes to raise and discuss issues relating to unionizing?[107] Modern student-athlete litigation, such as the *O'Bannon* case, may ultimately permit students to unionize or receive compensation for their names, images and likenesses.[108] The Supreme Court historically places great value on political speech and speech that implicates important public issues.[109] And, yet such student-athlete commentary could place the institution or athletic department in a negative light. Student-athlete speech codes that proscribe large categories of speech *based solely on content* raise serious questions as to their constitutionality. Such content-based prohibitions run afoul of the First Amendment and are likely unconstitutional; however, that is a topic for another day.[110]

105. *See* Miller v. California, 413 U.S. 15, 36 (1973) (finding that obscenity constitutes low value, unprotected speech); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (finding that words creating imminent incitement to violence qualify as low value, unprotected speech); N.Y. Times v. Sullivan, 376 U.S. 254, 264–65, 292 (1964) (holding libel and defamation are low value, unprotected speech, though the standard of review necessary for recovery varies depending on whether the individual is a public or private figure); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (holding "fighting words" constitute low value, unprotected speech).

106. Even extraordinarily offensive speech receives robust First Amendment protection when the speaker is addressing matters of public concern. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1217 (2011) (noting that Westboro Baptist Church's signs addressed societal issues and not merely private concerns). Thus, while perhaps patently offensive, these signs receive full First Amendment protection against content-based restrictions. *Id.* at 1220.

107. *See* Knapp v. Nw. Univ., 101 F.3d 473, 476 (7th Cir. 1996); *see* O'Bannon v. Nat'l Collgate Athl. Ass'n, No. C 09-1967 CW, 2010 WL 445190, at *1 (N.D. Cal. Feb. 8, 2010). During the Marquette Law Sports Law Works in Progress, Professor Dionne Koller expressed concerns about speech codes that prohibit student-athletes from openly discussing matters of public concern relating to student-athletes. Dionne Koller, Professor of Sports Law at University of Baltimore, Address at Marquette Law Sports Law Works in Progress (on file with author).

108. Marc Edelman, *The District Court Decision in* O'Bannon v. National Collegiate Athletic Association*: A Small Step Forward for College Athlete Rights, and a Gateway for Far Grander Change*, 72 WASH. LEE L. REV. 2319 (2014).

109. *Snyder*, 131 S. Ct. at 1207 (distinguishing the content-based nature of the proscriptions at issue thereby negating any claim of content-neutral time, place, and manner regulations).

110. This author believes that the majority of current student-athlete speech codes would fail First Amendment scrutiny because the vast majority of them are content-based, thus invoking strict scrutiny review. Under strict scrutiny, a law or regulation must respond to a "compelling state interest" and be "narrowly

In embracing content-based proscriptions, most commentators fail to appreciate the danger of giving universities sole discretion to punish a student athlete's expression, usually after the fact, for a statement that causes a negative reaction. Under most student-athlete speech codes, the university has sole discretion to determine what constitutes a negative reflection, yet provides no real advance warning to student-athletes. In effect, universities have empowered themselves with the ability to restrict unwanted behavior and discussion, like communications from student-athletes on the formation of unions or the use of their names, images and likenesses. Therefore, universities could punish student-athletes for supporting the outcome in the *O'Bannon* case over social media by determining—after the fact—that such conduct negatively reflects upon the respective institutions. Fortunately, no such incidents have occurred publicly. These content-based regulations present facially problematic, if not constitutionally infirm, issues. Advance prohibition in the form of a limited in-season social media ban, in some ways, would give greater procedural rights and arguably far more substantive protection to student-athletes. Student-athletes could more easily avoid problems with the university if they had more certainty about what the university would perceive as "reflect[ing] negatively" on the university.[111]

Rutgers University, another state institution, counsels that "[s]tudent-athletes could face discipline, including loss of scholarship and even dismissal from a team for inappropriate postings" on social media.[112] This admonition parallels the one issued by Montana State University-Bozeman, indicating its student-athletes "are permitted to have profiles on social networking sites . . . provided that a) no offensive or inappropriate pictures are posted, [and] b) no offensive or inappropriate comments are

tailored" with "no less restrictive means" available to address the compelling state interest. A college's only viable interest in regulating the *content* of an athlete's speech (e.g., no cursing or use of the F-word)—as opposed to the venue (e.g., all speech on social media)—would be reputational interests. Such reputational interests would hardly be compelling under a valid strict scrutiny assessment. While this article only uses generic speech codes to illustrate the highly regulated nature of college athletics and does not otherwise evaluate them, a future article should address these content-based regulations.

111. *See* NAACP v. Button, 371 U.S. 415, 433 (1963) ("[First Amendment freedoms] are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."); OHIO STATE STANDARDS OF CONDUCT, *supra* note 97.

112. RUTGERS UNIV., 2014–2015 STUDENT-ATHLETE HANDBOOK & PLANNER 45 (2014), *available at* http://grfx.cstv.com/photos/schools/rutu/genrel/auto_pdf/2014-15/misc_non_event/sahb-2014-2015.pdf.

posted. . . ."[113] However, neither offers any additional guidance or definitional clarity to expound on precisely what qualifies as inappropriate, much less offensive, social media postings. Certainly, the eighteen to twenty-three year-old student athletes' definition of "inappropriate" or "offensive" could vastly differ from that of a coach, athletic director or university administrator.[114]

If student-athletes possessed full First Amendment rights in regards to social media, courts would likely find the following regulations unconstitutionally vague: Nebraska's "inappropriate or offensive language" proscription, Ohio State's "reflect negatively" admonition, and, Rutgers' prohibition on "inappropriate" social media postings.[115] Similarly, the University of North Carolina at Chapel Hill restricts student-athletes from posting any "disrespectful comments" or "derogatory or defamatory language."[116] What reasonable person could know, in advance, what exactly these state institutions seek to proscribe as inappropriate or disrespectful? Under a facial challenge, courts will find an ordinance unconstitutionally vague when persons of ordinary intellect must guess as to its meaning and differ as to its application.[117] Just like beauty, speech is in the eye of the beholder. One man's offensive comment is another's satire.[118] Beyond the constitutional infirmity for vagueness, a state regulation is likely unconstitutionally overbroad when it envelops more speech than is necessary to address the state's interest in limiting expression.[119] These burgeoning social media policies appear to cre-

113. MSU STUDENT-ATHLETE CODE OF CONDUCT, *supra* note 73 (requiring both the student-athlete's initials following each Section and signature indicating agreement/waiver at the end of the document).

114. *See NAACP*, 371 U.S. at 438 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms").

115. *See, e.g.*, Grayned v. Rockford, 408 U.S. 104, 108–09 (1972) (The *Grayned* Court describes an unconstitutionally vague ordinance) ("Vague laws offend several important values. [W]e assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policeman, judges and juries for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory application.").

116. NC STATE GUIDELINES, *supra* note 92.

117. *See* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

118. Cohen v. California, 403 U.S. 15, 25 (1971) (Justice Harlan exclaimed that "one man's vulgarity is another's lyric").

119. *See* Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574–75 (1987) (striking down resolution as unconstitutional because the resolution created a virtual "First Amendment Free Zone"); Erznoznik v. City of

ate, at least constitutionally, more problems than they solve as the language used to curtail speech lacks both guidance and fair notice.[120]

Indiana University gives some advance warning that student-athletes' "conduct . . . shall reflect the fact that by virtue of their participation in student athletic programs sponsored by Indiana University, they are representing the University. As a result, participants are expected to exhibit a higher standard of behavior."[121] But, this warning still lacks adequate notice.[122] Similar formulas are found throughout existing policies, such as Arizona's admonishment that:

> As a student-athlete at the University of Arizona you are not only representing yourself and your team, but the entire university and community. Because of your higher profile on campus, it is important that you be concerned with what is being published on social networking sites, such as Facebook and MySpace.[123]

These speech codes demonstrate the reality that much of a college athlete's speech and expression is heavily regulated. Such regulations are well established, predating social media, and often allow coaches to make rules aimed at ensuring team unity, conformity and discipline. The strongest, and most broad proscription uncovered is the former Texas Tech Student-Athlete Social Networking Policy, which required the acknowledgement and signature of each athlete along with their Facebook, e-mail, Twitter, YouTube Instagram, Google+, and G-mail account information.[124] The student-athlete's signature:

> [S]hows the Texas Tech University Athletic Department that you, as a student athlete and representative of Texas Tech University, are willing to adhere to the TTU Social Networking Policy and to take extreme caution when using any social networking Web site, and also shows that you accept any disciplinary action if these previous guidelines are abused.[125]

Jacksonville, 422 U.S. 205, 217–18 (1975) (striking down law as unconstitutionally overbroad).

120. *See* Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 609 (1967) ("Where statutes have an overbroad sweep, just as where they are vague, 'the hazard of loss or substantial impairment of those precious rights may be critical . . . . Since those covered by the statute are bound to limit their behavior to that which is unquestionably safe").

121. INDIANA UNIV. ATHLETICS STATEMENT, *supra* note 62.

122. *See* Grayned v. Rockford, 408 U.S. 104, 108–09 (1972).

123. UNIV. OF ARIZONA STUDENT-ATHLETE HANDBOOK, *supra* note 65, at 98.

124. TEXAS TECH SOCIAL NETWORKING POLICY, *supra* note 67, at 2.

125. *Id.*

When this rather draconian policy was in effect, it was hard to agree with Texas Tech when it prefaced its social media policy with an assurance that "Texas Tech University supports and encourages the individuals' right of free speech."[126] Texas Tech athletic department officials indicate they have withdrawn the policy, but would not specify when or why.[127] The former Texas Tech language is similar to other schools whose policies remain in effect, such as Utah State.[128] Utah State uses identical language from the discarded Texas Tech policy with strong anti-posting rules, such as "no display of alcohol or firearms, no offensive or foul language . . . does not contain images that are damaging to the individual or Utah State's reputation," which seems to undermine any hollow assurances of "free speech."[129] Free speech permits controversial postings, with an appreciation that the marketplace of ideas is strengthened by more, not less, speech.[130]

Most authors proclaim that universities have the right to punish students for their indiscriminate postings, finding fault only with wholesale bans of social media sites. However, the reality is that First Amendment analysis receives the highest form of scrutiny when a regulation is content-based, such as Utah State's anti-firearms regulation.[131] These anti-speech codes, and the numerous variations of content-based prohibitions imposed upon student-athletes at state schools, are far more offensive to the First Amendment than limited in-season social media bans. Content based proscriptions are far more likely to be struck down if challenged in court than a more limited time, place and manner regulation, such as an in-season ban on certain (though not all) forms of social media. To pass constitutional scrutiny, state action that restricts speech based on the content of that speech (i.e. speech relating to firearms) must pass the highest, most-searching level of constitutional review—strict scrutiny.[132] In contrast, content neutral restrictions, such as plac-

126. *Id.* at 3.

127. E-mail from Texas Tech Athletic Department representative, to author (Sept. 9, 2014, 5:08 CST) (on file with author) (This representative would not discuss any facts regarding the retracted policy other than to decisively proclaim that the policy is no longer valid.).

128. E-mail from Utah State Athletic representative, to author (Sept. 25, 2014, 1:49 CST) (on file with author) (Utah State Athletic Department representative indicated that their student-athlete code relating to social media remains valid.).

129. UTAH STATE POLICY, *supra* note 68, at 38.

130. *See* Healy v. James, 408 U.S. 169, 180 (1972) ("[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas' . . . .").

131. *See, e.g.*, Police Dept. of Chicago v. Mosely, 408 U.S. 92, 99 (1972) (The Supreme Court has explained that where an ordinance describes impermissible conduct "not in terms of time, place and manner, but in terms of subject matter," such regulation is constitutionally suspect.).

132. *See* Carey v. Brown, 447 U.S. 455, 461–62 (1980); *see also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512–20 (1981) (plurality).

ing limits on student-athlete's use of Twitter during season (regardless of content) must only pass the more moderate intermediate level of scrutiny.[133] Courts often strike down laws challenged under strict scrutiny as unconstitutional. Courts require that the law respond to a compelling state interest by imposing a narrowly tailored regulation that employs the least restrictive means to further its interest. Narrowly tailored regulations are extraordinarily precise and limit only as much speech as necessary—truly necessary, not merely convenient—to meet the compelling state interest.[134]

Utah State's no display of firearms policy strikes at the very heart of free speech. Student-athletes cannot post pictures of friends and family members serving in our military or police forces. Student-athletes cannot post pictures of hunting trips or outings at a shooting range, despite the fact that both events are wholly legal in Utah and throughout the United States. But, Utah State is not alone in banning displays or descriptions of firearms and weapons; Arizona also limits this particular form of expression, as did Texas Tech previously, which aimed at curtailing full and free expression.[135] And, what is the compelling state interest for banning such pictures? Do they ban pictures of families, friends, or even political candidates for reputational and image issues?

Many of these athlete-specific social media policies illustrate the hollow proclamations of free speech rights possessed by student athletes. They also remind student-athletes that poor decision making regarding social media can result in the athlete losing his or her privilege to participate in intercollegiate athletics. Speech tethered to content is not free speech. Content-based restrictions are constitutionally suspect and far more likely to violate the First Amendment than in-season bans that give students a much clearer, more transparent choice of sports or social media.[136] Where is the outrage about these pervasive and existing policies, rather than the few coaches and schools

133. *See* Mary M. Penrose, *Tinkering With Success: College Athletes, Social Media and the First Amendment*, PACE L. REV. (forthcoming Feb. 2015) (manuscript at 5) (Social Media Symposium).

134. *Cf.* Shelton v. Tucker, 364 U.S. 479, 488 (1960) (explaining in a different First Amendment context that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.").

135. *See* UTAH STATE POLICY, *supra* note 68, at 38; UNIV. OF ARIZONA STUDENT-ATHLETE HANDBOOK, *supra* note 65, at 98–99.

136. *Cf.* NAACP v. Button, 371 U.S. 415, 433 (1963) ("First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

that impose season-long bans?[137] At least coaches who ban social media during season make clear their desire to focus on team and sport over social media. This is better than the plethora of content-based codes prioritizing reputational issues over speech. In contrast, the schools with seemingly supportive policies lull their student-athletes into believing they have freedoms while simultaneously offering stern admonishments that will keep students wondering and cautious. This contingent free speech often yields a more draconian result than policies that directly restrict social media usage during limited periods.[138] Unlike limited time, place and manner regulations, the subtle pressures of vague, overbroad and content-based proscriptions strike at the heart of the First Amendment. These content-based speech codes not only quash speech, but also chill expression due to uncertainty and intentionally unclear guidelines.

Arguably, these social media warnings and long list of prohibited communications fail to provide college athletes with the full range of speech and expression protections enjoyed by other college students. Each of these particular speech regulations imposed by athletic departments invite the question: does the First Amendment apply fully in the athletic realm? Those who focus solely on the student's right to access and use social media while participating in college athletics miss the equally important, if not more vital, constitutional protection against repercussions for exercising a constitutional right to speak or express oneself. What do we make of an athlete's right to discuss the name, likeness and image/rights to publicity or unionization issues addressed in the *O'Bannon* and *Knapp v. Northwestern* decisions? How did the former Texas Tech policy and the current policies of Utah State, Arizona, Ohio State, Rutgers, Oklahoma State, Nebraska, and Florida State all escape the assessment of authors writing in this area? Why has society not fully vetted and analyzed these quid-pro-quo agreements that essentially require students to waive their First Amendment rights in exchange for participating in intercollegiate athletics? If these athletes truly have a First Amendment right to use social media, then universities cannot cavalierly revoke or ambiguously restrict this right as most are doing. In short, regulations threatening punishment if a student-athlete's post violates some unclear and ill-defined norm of inappropriate and offensive behavior, or presents a

137. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) ("Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.").

138. *Cf.* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 601 (1967) ("The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism."). One can only surmise that universities provide as much latitude as possible to ensure there is a tool for obnoxious misbehavior that can be, conveniently, enveloped in the Student-Athlete Codes of Conduct or Handbooks. The Social Media Policies simply add another layer of ill-defined proscriptions affording the universities far more protection than their student-athletes.

negative reflection of the university, are inconsistent with the First Amendment.

The question under First Amendment analysis is not one of mere access but also one of consequences. Coach Mack Brown demonstrated his limited understanding of the First Amendment when he spoke of how he recognized and supported the First Amendment rights of his players to use social media while simultaneously suspending an athlete who posted a racial comment on Facebook.[139] If a school supports robust First Amendment rights, it must also tolerate those forms of speech that are not inherently unlawful, including language many find ugly such as racial slurs, profanity and other offensive phrases.[140] However, if schools do limit the content of student-athletes' speech on social media, what is the qualitative distinction between curtailing speech by limiting social media usage during the season versus imposing penalties after the fact? The limited social media bans carry protection and certainty in limiting the communication by time, while the content-based proscriptions are far more broad, elastic and unpredictable, creating an inherent chilling effect on student-athlete expression.

There is an important distinction between these front-end regulations and after-the-fact punishments. Limiting speech on the front end furthers the goal of athletics by avoiding needless distractions and bolstering team unity.[141] State regulation of protected speech (such as a racial slur or offensive comment) based on content must be justified by an important or compelling governmental interest.[142] Contrast the governmental interest of placing in-season limitations on social media with the governmental interest of penalizing distasteful speech after the fact. The first serves the interest of allowing athletes to focus on sport and team rather than creating potential distractions. The second appears grounded in the impermissible interest of

139. THE FLAGSHIP, http://texas.247sports.com/Board/21/Contents/Mack-Brown-Doubles-Down-24513631 (last visited Apr. 3, 2015) ("But just like fans have a first amendment right so, too, do players and coaches. A 17–18 year old kid has just as much a right to express his opinion as do fans. Let's not forget that."); Martin Hinton, *Texas lineman Burnette Booted for Racist Obama Facebook Rant*, YAHOO (Nov. 6, 2008), http://sports.yahoo.com/ncaa/football/blog/dr_saturday /post/Texas-lineman-Burnette-booted-for-racist-Obama-F?urn=ncaaf,120197.

140. *See, e.g.*, *NAACP*, 371 U.S. at 444–45 ("For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."); *Cf. Keyishian*, 385 U.S. at 601.

141. *See* Healy v. James, 408 U.S. 169, 192 (1972) ("Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected").

142. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

reputational value. Unlike the state interest in protecting against negative reflections on the athletic department, many coaches impose in-season restrictions on social media to limit distractions and emphasize strong team performance.[143] These latter interests seem far more important, perhaps even compelling, than a university's concern about post-hoc reputational ramifications caused by careless social media postings. After all, the goal of athletics is winning, not speech and expression.

IV. Placing Sport in Perspective: The True Goal of Athletics

> *This Social Media Policy establishes guidelines for the use of social media accounts created by OSU student-athletes in order to further the mission of the Department of Athletics—to foster a culture that provides the opportunity to develop student-athletes through success in academics and competition to achieve excellence in life. The University believes that posting negative comments about teammates or coaches undermines that culture and can have a very divisive effect on team chemistry . . . .*[144]

The goal of college athletics is simple: achieving the highest level of athletic success while competing fairly and together as a unit.[145] Athletics involve team, honor, commitment, sacrifice, physically rigorous training, loyalty, discipline and, hopefully, winning. Interference with these components of sport compromises the goal and lessons of athletics and is, therefore, of interest to not only coaches, but often to athletic departments as well. Even coaches in smaller Division I schools are often relieved of their duties if they are unable to maintain team chemistry, keep students well trained or conditioned, or fail to win a sufficient number of games or conference championships. A successful athletic program is actually good for the entire school, not just the athletes and teams.[146] Not only do alumni, regents, and current students flourish when their teams are winning, but applications to institutions and even national rankings often rise in proportion to athletic suc-

143. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1190 (6th Cir. 1995) ("Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline, [the role of coach] is to train his student athletes how to win on the court").

144. Ohio State Standards of Conduct, *supra* note 97.

145. *See, e.g.*, Arizona Student-Athlete Handbook, *supra* note 82, at 13. ("[i]t is the goal of every coach and student-athlete to compete for Pacific-10 and NCAA championships. . . . [W]e want and expect to compete for championships at the University of Arizona.").

146. Matthew Denhart et al., *The Academics Athletics Trade-off*, Ctr. for Coll. Affordability & Productivity 6 (2009), *available at* http://www.centerforcollegeaffordability.org/uploads/athletics.pdf.

cess.[147] Thus, it may come as little surprise that the football and men's basketball coaches at state universities are often the highest paid individuals in the state.[148]

Should coaches do whatever is ethically and lawfully necessary to accomplish athletic success and team unity when the goals are teamwork, physical training, and winning recognizing that athletic success generates stronger student applications? Under a content-neutral time, place, and manner analysis, are team unity, chemistry, and teamwork important government interests sufficient to limit speech and expression rights of students? After all, coaches are expected to do everything in their power to focus the team's energy to unite the team so it can perform at its highest level. This is the social media quandary. *This* is the context under which any legal assessment of college athletics should begin.[149]

If teamwork and athletic success matter, rules and regulations need to focus on behaviors that impact these attributes. For example, student athletes that are of legal age and capable of drinking alcohol are forced to choose between drinking and participating in athletics solely because they are student-athletes.[150] Likewise, the NCAA prohibits athletes from using any form of tobacco, including smokeless tobacco.[151] Why are scholars not lining up to challenge these regulations as violations of the rights of student-athletes? While the state has a strong interest in the physical well-being of student-athletes, which is why regulations allow for random drug testing, that same interest does not necessarily support regulations over alcohol and tobacco.

In addition to these health regulations, coaches and athletic departments can require student-athletes to carry higher minimum grade point averages than those mandated of students in the general university community.[152] Universities also regularly mandate hours in study hall.[153] Assistant coaches and other employees of the athletic department monitor class attendance of student-athletes. Failure to attend class can lead to suspension or expulsion from

147. *Id.*

148. *See Infographic: Is Your State's Highest Paid Employee A Coach (Probably)*, DEADSPIN (May 9, 2013), http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228.

149. Penrose, *supra* note 133 (manuscript at 18).

150. CLEMSON STUDENT-ATHLETE HANDBOOK, *supra* note 28; VIRGINIA TECH STUDENT-ATHLETE HANDBOOK, *supra* note 26, at 2; OHIO STATE STUDENT-ATHLETE HANDBOOK, *supra* note 64.

151. *Id.*

152. *See* NCAA, GET THE GRADES, http://blog.ncaa.org/GetTheGrades/#gpa (last visited Apr. 4, 2015).

153. *See* NCAA DIVISION I ACADEMIC PROGRESS RATE IMPROVEMENT PLANS 1–2, *available at* https://www.ncaa.org/sites/default/files/Addressing%2Bthe%2BMost%2BCommon%2BEligibility%2Band%2BRetention%2BIssues.pdf (last visited Apr. 3, 2015).

the team.[154] Student-athletes are not merely students or athletes. As a hybrid category, student-athletes are unique individuals who merit a new constitutional test that appreciates the distinctions between the typical college student and the prize recruit that may increase the institution's national attention through their athletic success.[155]

Authors who write and strive to solve the free speech question unrealistically rely on a line of First Amendment cases related to whether a student's speech caused a material disruption to the school.[156] But this paradigm, first presented in *Tinker v. Des Moines*, applied to the classroom setting and not the playing field.[157] The question in *Tinker* was one of a positive learning environment, not the need for teamwork, sacrifice, discipline, and athletic success.[158] Those relying on *Tinker* have lost sight of the overriding goals of sport. In the most literal sense, these authors have "taken their eyes off the ball." Such a myopic view fails to appreciate the unique nature of a locker room, team bus, and field of play. Currently, there is no clear analogy to consider when assessing the First Amendment rights of student-athletes at public universities to use social media. The *Tinker* line of cases, usually reserved for kindergarten through high school, seems particularly inapt because the reason coaches limit social media has little to do with education and everything to do with sport. *Tinker* assesses whether a particular activity or expression might substantially disrupt the school setting or the classroom.[159] But a classroom is not a locker room.[160] An auditorium speech made by a student vying for student council is unrelated to athlete seeking to claim a conference or individual championship in a 20,000seat gym or a 100,000seat stadium.[161]

The time, place, and manner cases are more appropriate to evaluate content-neutral speech restrictions.[162] *Tinker* and its progeny exhibit a narrow function that focuses on classroom disruption and the educational process.[163]

154. *Id.* at 5.

155. *See, e.g.*, Hill, v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 658 (Cal. 1994) (underscoring that unlike traditional college students, student athletes subject themselves to "special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests . . . not shared by other students or the population at large").

156. *See, e.g.*, Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1969).

157. *See id.* at 506.

158. *Id.* at 508.

159. *Id.* at 506.

160. Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1190 (1995).

161. Wildman v. Marshalltown Sch. Dist., 249 F.3d 768, 772 (8th Cir. 2001).

162. *See* Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 640 (1981).

163. *Tinker*, 393 U.S. at 507.

The locker room chalkboard is dramatically different from the classroom chalkboard. The study of statistics as a discipline is entirely distinct from the evaluation of an individual's game statistics. Unlike *Tinker*, which covers a very narrow setting, analysis under time, place, and manner is trans-substantive. The time, place and manner test focuses on content-neutrality and the government's limited right to regulate speech in any setting, including traditionally protected public forums.[164] This analysis considers an individual's individual speech rights (which always merit some level of protection) in light of the broader community needs.[165]

And, unlike *Tinker* and its progeny, time, place, and manner cases have a rich history of application in a variety of settings. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions."[166] The starting place for time, place, or manner restrictions is whether the regulation is content-neutral.[167] In other words, the state must demonstrate that its desire to regulate or limit speech is disconnected from any "disagreement with the message presented."[168] "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has

164. McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) ("The principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events . . . and it satisfies the requirement that time, place, or manner regulations be content neutral"); Clark v. Cmty. for Creative Non-Violence, et al., 468 U.S. 288, 299 (1984) ("We have difficulty, therefore, in understanding why the prohibition against camping, with its ban on sleeping overnight, is not a reasonable time, place, or manner regulation that withstands constitutional scrutiny"); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) ("The State's interest in maintaining the orderly movement of the crowd at fair is sufficient to satisfy the requirement that a time, place, or manner restriction must serve a significant governmental interest."); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) ("If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets.").

165. *Ward*, 491 U.S. at 796.

166. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

167. *See id.* at 295.

168. *Id.*

adopted a regulation of speech because of disagreement with the message it conveys."[169]

Under a limited season-long ban or game day prohibition against using social media, where *all* social media communications are prohibited, the student-athlete cannot assert that the regulation is content-based.[170] In contrast to the numerous content-based restrictions contained in student-athlete speech codes discussed above, athletic departments that forbid all social media during a discrete period appropriately steer clear from delving into which specific words are more palatable to the school or acceptable to outside audiences. The Supreme Court generally strikes down prohibitions of speech based on message content, similar to the no display of weapons social-media policy in place at Utah State.[171] "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[172]

As a result, time limitations and situational prohibitions on student-athletes using social media avoids any questions relating to restrictions based on message or content of speech.[173] And, as the Supreme Court has explained, "reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid."[174] College athletic departments that impose social media bans are not doing so to control particular words, phrases, or even messages sent by their student-athletes. Instead, coaches and athletic departments that bar social media usage during the playing season, or at other specific times during the year, are trying to control distractions. In-season social media bans operate regardless of the message or communication's content and, thus, meet the first requirement under a time, place and manner assessment of content-neutrality.[175]

Similar to the volume and noise complaints at issue in *Ward v. Rock Against Racism*, a rationale of avoiding distractions to focus on winning has "'nothing to do with content,' . . . and it satisfies the requirement that time,

169. *Ward*, 491 U.S. at 791; *see also Heffron*, 452 U.S. at 648.

170. *See Clark*, 468 U.S. at 293–95.

171. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

172. *Id.*

173. *See, e.g., id.*

174. *Clark*, 468 U.S. at 294.

175. *See, e.g.*, Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (upholding a speech ordinance on the basis that "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral—indeed it is silent—concerning any speaker's point of view.").

place, or manner regulations be content neutral."[176] Much like the City of Los Angeles banning the posting of all signs on public utility poles, athletic departments do "no more than [is necessary to] eliminate the exact source of the evil"; they seek to remedy distraction caused by social media.[177] Since the purpose is to avoid distractions that undermine athletic performance, season-long bans of social media usage are likely valid under the first step, content-neutrality, in a time, place, and manner review.

After a state regulation is deemed content neutral, courts will evaluate whether the regulation is "narrowly tailored to serve a significant governmental interest," and whether ample alternative channels of communication remain open.[178] Each of the time, place, and manner restrictions are conjunctive requirements, and each restriction is valid if the restriction is content neutral, narrowly tailored, and other channels remain open.[179] It is not enough to simply claim content neutrality, as the courts will assess the restriction's purpose and alternative speech opportunities.[180] A state actor must take steps to regulate narrowly and to ensure its restrictions on speech are no broader "than necessary to protect the [state] interest."[181]

An important issue to consider is how courts assess the narrowly tailored requirement. Essentially, narrowly tailored is a question of fit. It is critical to note, in this instance, that individuals appreciate that narrowly tailored under time, place and manner is not identical to narrowly tailored under strict scrutiny review. Time, place, and manner restrictions are far closer to intermediate review, in constitutional parlance, than strict scrutiny. In fact, courts reviewing speech restrictions with regard to time, place, and manner need not assess whether the restriction is the "least intrusive means of furthering [a] legitimate governmental interest."[182] Rather, courts will look for some demonstrated effort to properly constrain the restriction so as to not overly impact speech and expression.[183]

In college athletics, the governmental interest of successful athletic performance is pursued by ensuring that the team and its individual players are focused on the sport and team, rather than social media and the individual. Another way of framing the government's interest is that athletic departments and their coaches seek to enhance athletic performance by minimizing

176. *See* Ward v. Rock Against Racism, 491 U.S. 781, 789–90 (1989).

177. *Taxpayers for Vincent*, 466 U.S. at 80.

178. *Clark*, 468 U.S. at 293.

179. *Id.*

180. *See, e.g.*, *Taxpayers for Vincent*, 466 U.S. at 815 (finding a Los Angeles ordinance constitutional after considering content neutrality *and* the availability of alternative channels of communication.).

181. *Id.* at 808.

182. Ward v. Rock Against Racism, 491 U.S. 781, 789–90, 797 (1989).

183. *See id.* at 789.

distractions. All the ingredients necessary for successful athletic performance, including team work, sacrifice of self for team, and discipline, are the governmental interests that are at stake. While some scholars might question the value of these interests, the varied benefits of a successful collegiate athletic program, for both individual athletes and institutions, are beyond dispute.[184] The benefits of a successful athletic program are far more important, and transformative, than merely securing a conference championship. Instead, success on the court (or field) leads to an enhanced academic reputation and greater alumni support, which generally raises a university's overall profile.[185] The lessons learned in athletics regarding teamwork, which includes getting along with various types of people, selflessness, discipline, reliability, being on time, working hard, accepting failure, learning to deal with success, and physical well-being are lessons that stay with the athlete. The unique lessons learned from participation in collegiate athletics are broader than, and different from, those imparted in an academic classroom.

New York City in *Ward* advanced the governmental interest of noise control in and around Central Park.[186] If volume control and the aesthetics of music are deemed adequately strong governmental interests, constitutionally speaking, one would think that the secondary benefits and educational value transcending academics flowing from the billion-dollar industry of collegiate athletics are also sufficiently important governmental interests.[187] Additionally, if a City can ban the eyesores of public utility poles with placards and signs for purely aesthetic reasons, then an athletic department should have the right to ask their athletes to temporarily forgo posting on social media for team unity reasons. Postings on social media, which are potentially viewed by millions of people, are every bit as distracting as signs or placards on public utility poles.[188]

Athletic programs, particularly successful athletic programs, increase the state's interest in education and teach lessons of confidence and teamwork that are unique to athletes.[189] It is hard to argue that lessons of team-

184. *See* Michael L. Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables*, 3–18 (NBER Working Paper, No. 18196, June 2012), *available at* http://www.nber.org/papers/w18196 (explaining that for more prominent colleges, particularly the FBS schools, winning increases athletic donations, improves school reputation, raises entering students' test scores, and increases student applications.).

185. *See id.* at 18.

186. *Ward*, 491 U.S. at 796.

187. *See id.* at 796–97 ("[T]he city's interest in ensuring the sufficiency of sound amplification at bandshell events is a substantial one.").

188. *See* Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984).

189. *See* Anderson, *supra* note 184, at 3.

work, sacrifice, and discipline, an improvement of educational opportunities, and the prioritization of the physical well-being of student-athletes at state universities are anything but significant governmental interests. Sport is not primarily about speech or individuality, but is instead about structure, sacrifice, teamwork, and, ultimately, successful performance.

After a strong governmental interest is demonstrated, courts will then consider whether the interest "would be achieved less effectively absent the regulation."[190] As Justice Kennedy stated in *Ward*:

> [T]his standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.[191]

In the athletic context, courts generally give latitude to state athletic departments.[192] Coaches, not courts, are in a better position to assess what distractions impact their student-athletes and which team rules actually ensure athletic success. Some teams will require greater regulation than others. Temporary bans of certain social media usage will be deemed constitutional, provided the state is not regulating more speech than is necessary. The burden falls on the state to demonstrate that it is curtailing no more speech than is necessary.[193] As a result, the narrowly tailored element requires a conscious attempt to limit no more speech and expressive activity than is necessary to ensure team unity and successful athletic performance. The primary consideration becomes whether the regulation "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[194]

Here, the "evil" targeted in the collegiate athletics environment is the high level of distraction and team disruption that results from social media. For example, one study indicated that student athletes reported checking their respective social media accounts "frequently throughout the day, ranging

190. *Ward*, 491 U.S. at 799.

191. *Id.* at 799–800.

192. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653–57 (1995) ("First and Fourteenth Amendment rights are different in public schools than elsewhere" because the schools' custodial and tutelary responsibility for children cannot be disregarded.).

193. *See* Frisby v. Schultz, 487 U.S. 474, 485–86 (1988).

194. *Id.* at 485.

from twenty to hundreds of times each day."[195] The time each athlete spent checking his or her social media accounts is time that students could, and should, focus on sport and team activities. State university regulations, through coaches or athletic department bans on social media, certainly further the state interest of keeping athletes focused on their sport and team performance rather than on self-promotion. Absent these bans, coaches will find themselves competing for their athletes' attention and reacting to social media distractions.

A season-long ban effectively eliminates the "evils" resulting from social media distractions while remaining sufficiently narrow to pass legal scrutiny. Depending on the sport, season-long social media bans span only a few months while also ensuring the elimination of one, rather consuming, distraction. A social media-based controversy can engulf athletes, distract teams, and derail entire seasons. A simple, season-long social media ban is a limited regulation targeted at the source of these "evils." Courts will likely find such limited social media bans sufficiently narrowly tailored.

The final requirement under a time, place and manner assessment is that alternative channels of communication must remain open.[196] In every athletic ban publically described thus far, the target is social media, particularly Facebook and Twitter, not communication generally. Coaches have not banned Instagram or other quickly developing social media outlets. Facebook and Twitter are two common, but interchangeable, outlets for communicating with friends, fans, and family members. The state is not regulating generic attempts to communicate with individuals or prohibiting any individual communication *or* message. Instead, through coaches and athletic departments, the state seeks to minimize the high level of distraction that these two particular mediums pose.

Coaches and athletic departments seeking to cabin their athletes' distractions on social media must still ensure that other viable forms of communication remain open.[197] In our highly mobile and technological society, this is an easy task. Smart phones permit student athletes to phone, text, email, Facetime, Viber, Skype, and otherwise communicate with a multitude of individuals. Thus, a student athlete can still communicate with fans, but he or she will do so in a much more narrow and targeted fashion. Rather than simply sending a message into the Twitterverse, the student athlete will only communicate directly with those whose personal information he or she has. This precludes student athletes from constantly checking how many more virtual "friends" and "followers" have accumulated. With the distraction eliminated, the athletes' eyes and attention are now firmly on their sport.

195. Blair Browning & Jimmy Sanderson, *The Positives and Negatives of Twitter: Exploring How Student Athletes Use Twitter And Respond to Critical Tweets*, 5 INT'L J. SPORTS COMM. 503, 509 (2002).

196. *Frisby*, 487 U.S. at 481.

197. *Id.*

Critically, banning Twitter, Facebook, or similar social media platforms does absolutely nothing to limit "the more general dissemination of a message."[198] Student-athletes can still say whatever they want to say to whomever they want to say it. They can still call their friends, attend press conferences, send emails and text-messages, or even hold up a placard in protest. The limited social media bans temporarily foreclose the student-athlete from using a particular communication outlet, not from communicating generally, representing a critical and constitutionally significant difference.[199]

Fans decry these limited social-media ban because they potentially minimize a student athlete's communication with unknown individuals. Such limitations protect the athlete and athletic program but disappoint fans who relish raw social media communications. These individuals are not truly "friends" but are often "followers." In this regard, there is the added benefit of advancing student welfare by protecting student athletes from unknown individuals (who are only familiar with the student because of the team he or she represents) possibly seeking to harm, harangue, or distract the student-athlete from winning.

The inability to know with whom you are communicating is one of the greatest risks of social media. At any time and for any reason, an individual can assume a false identity. This aspect of social media poses particular dangers to high profile individuals, especially vulnerable student-athletes whose egos and confidence may wane with each athletic contest. Coaches seeking to shield their players from hecklers and predators may see a need to limit social media contacts. Limiting student-athletes' access to particular mediums of communication poses no constitutional impediment if coaches do not ban the general dissemination of student-athletes' messages or interfere with their general ability to communicate. Regulations on reasonable time, place and manner have long withstood constitutional scrutiny and should be applied to assess the constitutional propriety of limited season-long social media bans.

V. Like, Follow, or Play: The Choice Can Constitutionally Be Imposed

Social media provides a unique opportunity to individuals. At any time, any person—without training or experience—can espouse ideas about absolutely anything and communicate those ideas, informed or not, to the entire world. While this freedom of communication and expression seems positive, such omnipresent expression, combined with a drive to "like" or gain "friends" and "followers," may foster a strain of narcissism that leads to greater emphasis on the individual rather than the team. Such self-involved expression is antithetical to team and possibly detrimental to sport. Thus, as individuals discuss the larger issue of whether a college coach or athletic

198. *Id.* at 483.

199. *See id.* at 481–83.

director can place restrictions on social media usage, it is imperative to keep the underlying team notion of sport clearly in the equation.

Social media has undoubtedly altered our collective existence. Many Americans now have a Facebook or Twitter account, or even multiple accounts.[200] One cannot travel anywhere without seeing people "checking" their phones for messages and social media updates. Americans fervently like "posting" their whereabouts ("Leaving DFW for the Nation's Capital!"), meals (think back to the last time you checked your Facebook page, surely you recall someone posting pictures of their most recent meal), workouts ("Made it through a 5-mile run in horrible heat and humidity! July in Texas is soooooo brutal!"), and everything in between. Using social media, many Americans live their lives out loud to entire communities of known and unknown followers. Perhaps the most accurate assessment is that social media provides individuals with the opportunity and tools to direct and star in their own live-streaming reality network.

This constant live-streaming is not typical in sports where team practices, meetings, and meals are often closed to the public or entirely private. Although some public showings occur, (midnight practices, team camps, press conferences, etc.) coaches and staff carefully orchestrate these events to conceal strategic details and maintain team chemistry. Further, outside communicating with cell phones or other electronic devices during team events is contrary to the notion that time spent together as a team is usually dedicated to some form of training, practice, or bonding. The distracted athlete is probably not a good teammate or performer. Moreover, at the heart of athletics is the expectation that an individual sacrifices his or her time and energy for the good of the team and love of the sport, and social media interferes with this core tenet.

Despite all the rhetoric about purported free speech rights of student-athletes, college athletes live regimented lives, often abiding by schedules and structures dictated by their coaches and university athletic department. One of the primary goals of coaching is to limit, to the extent possible, the number of distractions facing a team as the team prepares for competition. Coaches limit access to the players, the individuals who travel with the team, and they even limit players' access to meals while traveling. Separate rules and schedules, far more demanding than those imposed on the average college student, bind athletes and their teammates. Serious athletes make many sacrifices and devote their entire lives to sport.

Any author who might intimate that athletes are indistinguishable from traditional college students does not appreciate the lives of modern college athletes. The higher profile teams often stay in local hotels the night before a game to ensure that athletes focus on the upcoming game rather than fraternity parties or other college festivities. Even small Division I or successful

200. *See generally Social Networking Fact Sheet*, PEW RESEARCH CENTER, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Apr. 3, 2015).

Division II programs seek to isolate athletes' attention before games, either through team meals or through pregame meetings. A life dedicated to sport teaches athletes to focus. Any argument suggesting twenty-first century student-athletes are incapable of living without various forms of social media, even for limited periods, belies the focal ability of the true athlete—even in the era of Facebook, Twitter and Instagram. Athletes *must* focus and they *must* concentrate. Experience trains athletes to block out hundreds, even thousands, of voices taunting them while lining up for a game-winning field goal, a critical free-kick, or a pivotal free throw. Competitive sports train athletes' minds to see the world differently and to focus on very precise tasks while the rest of the world seeks to distract them.

Some commentators may be tempted to suggest that coaches cannot control their athletes' social media because athletes will just make up fake accounts and defy the coach's rules regardless of the consequences. Such an assertion is hard to accept if the thesis is that an individual who has sacrificed years of training and practice to gain a spot on Ohio State's football team or Florida State's basketball team would risk all that success and notoriety simply to post social media comments. Such rhetoric, and the correlative viewpoint, does not consider the important influence of collegiate athletic training. Also, this rhetoric is probably colored by participation in a profession dependent on social media or perspective devoid of college athletic training. Speaking from experience, signing a National Letter of Intent to participate in college athletics is the pinnacle of success for most athletes. Participating on a team and wearing a school's uniform is a hard earned privilege, not something to be recklessly cast aside, even for Facebook and Twitter. The sacrifice and the years of mental and physical training likely explain why no college athlete has filed suit challenging the few social media bans in existence.

While some authors proclaim that any limitations placed upon college athletes' social media usage violates the First Amendment, such bold pronouncements fail to appreciate the unique nature of athletics.[201] Even in a world bound by Constitutional rights, from an early age, competitive athletes face coaches' rules that apply only to the team and athletes. In short, college athletes are special and different, and their First Amendment rights are as unique as the many benefits they receive from voluntarily participating in sport.

Whether the Supreme Court, or even an appellate court, will ever address the issue of college athletes and social media limitations remains an unanswered question. Thus far, athletes at top tier state universities appear willing to forego a little social media privilege for the long-sought opportunity to represent a major institution like Texas A&M, Michigan, or Louis-

201. *See, e.g.*, J. Wes Gay, *Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?*, 39 FLA. ST. U. L. REV. 781, 804–05 (2012) ("The recent bans on social media speech that public universities and college coaches have forced on student-athletes are likely unconstitutional.").

ville. To even bring the question before a court a willing plaintiff actually impacted by the coach's social media restrictions must challenge the policy. This has not yet happened. Instead, athletes appear willing to work with any imposed restrictions and abide by their coaches, conference, and NCAA's regulations relating to speech and expression.

Fully appreciating an athlete's tolerance for limited speech and self-expression requires an understanding and appreciation of the sporting life. By the time an athlete arrives at the college level, he or she is already accustomed to a very structured lifestyle. Most students who have successfully participated in team sports and become collegiate athletes are accustomed to team regulations and league rules. To even qualify for participation, the NCAA requires students to complete certain courses in high school. Colleges generally accept students with high school degrees and certain test scores, but the NCAA requires more, including a minimum GPA and certain test scores.[202]

Before any court rules on the social media limitations, the court and any prospective plaintiffs should peruse the existing sportsmanship policies from every NCAA conference, the omnipresent Student-Athlete Codes of Conduct and Handbooks, and the NCAA's academic qualification requirements. As set forth above, the NCAA, coaches, and college institutions have severely restricted NCAA athletes' First Amendment rights. However, this author is aware of no litigation challenging these restrictions. As shown above, schools and the NCAA currently enforce bans, rules, and policies that limit vulgar or obscene language, preclude derogatory comments about competitors and officials, and forbid media interviews without school approval.

While fans surely desire their favorite athletes to post regular updates about themselves, coaches and universities prefer that athletes keep their eyes (and fingers) on the ball. From the college and coaches' perspective, speech that distracts from the team could be speech that destroys an entire season. But, for each limitation or sacrifice an athlete faces, there are equal benefits to be had. Even for those not receiving some form of scholarship, athletic programs frequently provide free tutoring, school gear, travel, healthcare, physical training, nutrition advice, and countless other sport accouterments. Considering the numerous benefits that flow to the student-athlete, participating in collegiate athletics truly is, and universities proclaim, a privilege. Thus, when considering the constitutionality of limits and regulations imposed on student-athletes, courts must place the issue of student-athletes' social media use in proper context.

For better or worse, college athletics is about successful athletic performance and winning. Courts should allow state universities to place limited bans on their student-athletes' social media usage under a proper time, place, and manner analysis to keep student-athletes distraction to a minimum. As this article demonstrates, speech restrictions already exist for student-ath-

202. *See* NCAA ELIGIBILITY, CENTER QUICK REFERENCE GUIDE, *available at* http://fs.ncaa.org/Docs/eligibility_center/Quick_Reference_Sheet.pdf.

letes. Limiting *when* the student-athlete can enjoy the right to free speech—rather than fixating on content—offers a far more palatable, and arguably constitutional, resolution than the existing policies curtailing speech and expression with false claims of protections. Chances are quite strong that when faced with the question, the Supreme Court will find that the privilege of participating in college athletics does in fact provide universities the right to limit, under valid time, place and manner regulations, their student-athletes' ability to share stupid shit with "friends" and "followers."