

# THE CONSTITUTIONALITY OF PUBLIC UNIVERSITY BANS OF STUDENT-ATHLETE SPEECH THROUGH SOCIAL MEDIA

## INTRODUCTION

Entering the 2010 college football season, Marvin Austin was a star defensive tackle for the North Carolina Tar Heels.<sup>1</sup> However, before the season, Austin was dismissed from the team for receiving improper benefits in violation of NCAA ethical conduct rules.<sup>2</sup> Austin's dismissal was the result of suspicious revelations on his Twitter feed.<sup>3</sup> In one tweet, Austin lamented about how tired he was of being broke and in another boasted of a lavish shopping spree, supported by images of pricy products.<sup>4</sup> Austin's tweets became the center of media speculation that spurred a broader NCAA investigation into Austin and other Tar Heel football players for receiving improper agent benefits.<sup>5</sup>

Two years later, Austin has a roster spot with the recent Super Bowl Champion New York Giants.<sup>6</sup> Meanwhile, the Tar Heels, as a result of violating multiple NCAA rules, have paid a \$50,000 fine, vacated the 2008–09 seasons, are barred from the 2012 postseason, and must forfeit fifteen athletic scholarships over the next three years.<sup>7</sup> The Tar Heels, in response to the impact of Austin's tweets, have banned football players from using Twitter.<sup>8</sup>

Universities have struggled to deal with student speech posted on social networking sites for several years.<sup>9</sup> When students have a higher

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1. Jonathan Jones, *Marvin Austin Suspended*, DAILYTARHEEL.COM (Sept. 3, 2010, 1:26 AM), [http://www.dailytarheel.com/index.php/article/2010/09/marvin\\_austin\\_suspended](http://www.dailytarheel.com/index.php/article/2010/09/marvin_austin_suspended).

2. Aaron Taube, *Marvin Austin Dismissed, Greg Little and Robert Quinn Ruled Ineligible*, DAILYTARHEEL.COM (Oct. 13, 2010, 1:04 AM), [http://www.dailytarheel.com/index.php/article/2010/10/marvin\\_austin\\_dismissed\\_greg\\_little\\_and\\_robert\\_quinn\\_ruled\\_ineligible](http://www.dailytarheel.com/index.php/article/2010/10/marvin_austin_dismissed_greg_little_and_robert_quinn_ruled_ineligible).

3. Megan Walsh, *Twitter Banned for UNC Football: Team Adopts New Social Media Policy*, DAILYTARHEEL.COM (Oct. 18, 2010, 12:10 AM), [http://www.dailytarheel.com/index.php/article/2010/10/twitter\\_banned\\_for\\_unc\\_football](http://www.dailytarheel.com/index.php/article/2010/10/twitter_banned_for_unc_football).

4. J.P. Giglio, *UNC's Austin Posted More Than 2,400 Twitter Updates*, NEWSOBSERVER.COM (Jul. 21, 2010, 6:31 AM), <http://www.newsobserver.com/2010/07/21/590713/austin-prolific-tweeter.html>.

5. Walsh, *supra* note 3.

6. See Jorge Castillo, *A Giants Rookie Is Shaking Off a Year in Limbo*, N.Y. TIMES, Aug. 3, 2011, <http://www.nytimes.com/2011/08/03/sports/football/giants-after-year-in-limbo-draft-pick-marvin-austin-has-something-to-prove.html> (noting that despite Marvin Austin's dismissal from the North Carolina football program, he still accepted spot with the Giants as a second-round pick).

7. Curtis Eichelberger, *Carolina Tar Heels Football Banned From 2012 Postseason for Academic Fraud*, BLOOMBERG NEWS (March 13, 2012), <http://www.businessweek.com/news/2012-03-12/north-carolina-gets-2012-postseason-football-suspension-for-agents-scandal>.

8. Walsh, *supra* note 3.

9. See generally Darryn Cathryn Beckstrom, *Who's Looking at Your Facebook Profile? The Use of Student Conduct Codes to Censor College Students' Online Speech*, 45 WILLAMETTE L. REV. 261 (2008) (discussing First Amendment implications when universities discipline students for "off-campus" cyber speech).

profile and receive national media attention, such as star football players at major college programs, the situation becomes more complex for both the player and the university. North Carolina is neither the first nor the only public university to institute a social media ban. Boise State, South Carolina, Pittsburgh, Kansas, and Mississippi State are all public universities that have some sort of social media speech ban on student-athletes and more will likely follow.<sup>10</sup> For example, a current ban on the University of Kansas football team prevents the players from even having Twitter accounts.<sup>11</sup> The University of North Carolina women's basketball team instituted a Twitter ban after the team began to struggle in January 2012.<sup>12</sup>

The desire to control student-athlete speech may be a result of the enormous amounts of money at stake. In 2010, the Southeastern Conference alone earned over \$1 billion in athletic receipts.<sup>13</sup> The Big Ten Conference brought in over \$900 million.<sup>14</sup> While paying coaches millions of dollars a year, large college football programs can still profit between \$40 million and \$80 million a year.<sup>15</sup> Aside from the direct monetary advantages, a winning college football or basketball team can also increase the number of student applications a university receives.<sup>16</sup>

These riches walk a razor's edge. The prestige and income that come from a successful athletic program are dependent on unpaid student-

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10. Bill Reiter, *Coaches Should Let Their Players Tweet*, FOX SPORTS ON MSN (Aug. 10, 2011, 8:53 PM), <http://msn.foxsports.com/collegefootball/story/College-coaches-banning-Twitter-is-just-plain-silly-081011>.

11. J. Brady McCollough, *KU Notebook – Gill Bans Twitter*, KANSASCITY.COM (Aug. 4, 2011), <http://www.teramoney.com/twitter-news/ku-notebook-gill-bans-twitter/>. Although current social media bans, such as the ban at Kansas, are the work of individual college teams, the NCAA has taken steps to restrict student speech, though these restrictions concern only speech during games. For example, the NCAA currently bans players from placing messages on their bodies during games. Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY (Oct. 2011), [http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/1/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/1/?single_page=true). The NCAA “promulgated a rule banning symbols and messages in players’ eyblack—reportedly aimed at [Ohio State quarterback] Pryor’s controversial gesture of support for the pro quarterback Michael Vick, and at Bible verses inscribed in the eyblack of the former Florida quarterback Tim Tebow.” *Id.* But the blanket preemptive bans instituted by some public college football and basketball teams restrict much more speech, as they are not limited to school or team related events.

12. Michael Lananna, *Sylvia Hatchell Bans UNC Women’s Basketball Team’s Twitter Use*, DAILYTARHEEL.COM (Jan. 27, 2012, 12:07 AM), [http://www.dailytarheel.com/index.php/article/2012/01/sylvia\\_hatchell\\_bans\\_womens\\_teams\\_twitter\\_use](http://www.dailytarheel.com/index.php/article/2012/01/sylvia_hatchell_bans_womens_teams_twitter_use). The team’s coach said she instituted the ban because communication through Twitter “was a major distraction.” *Id.*

13. Branch, *supra* note 11.

14. *Id.*

15. *Id.*

16. Jeanna Bryner, *March Madness Boosts Student Applications*, LIVE SCIENCE (Mar. 23, 2008, 8:00 PM), <http://www.livescience.com/2387-march-madness-boosts-student-applications.html>.

athletes. As Marvin Austin found at North Carolina, modern technology in the hands of a college student-athlete, combined with a moment's poor judgment, can lead to negative consequences for the player, the team, and the university. Simply investigating and defending potential NCAA violations can cost a university tens or even hundreds of thousands of dollars. As of July, 2012, the University of North Carolina has spent nearly \$500,000 dollars on outside legal fees relating to the NCAA investigation of the football program.<sup>17</sup> A recent investigation by Ohio State University, concerning possible impermissible benefits received by members of the football team, cost the school over \$800,000.<sup>18</sup> The reputation of the institution itself can also be at stake.<sup>19</sup> With so much money dependent on the behavior of young athletes, perhaps it is understandable that a school or coach would try to control student-athletes' communication options, especially after the Marvin Austin incident showed how damaging an ill-advised tweet can be.

College conferences have yet to weigh in on student-athlete social media bans, leaving universities to decide for themselves what kind of action to take.<sup>20</sup> Most universities do not restrict student-athlete social media use in any way.<sup>21</sup> However, some college coaches restrict social media speech for student-athletes. Some describe the medium as "pointless and distracting," while others want to "avoid any issues in the future."<sup>22</sup> Still, details on the social media restrictions on college athletes are elusive as scant scholarly research is available.<sup>23</sup>

Although student-athlete and team-specific bans at public universities raise possible equal protection issues, this Note will focus on the free speech infringements that these bans may create. This Note argues that preemptive bans of social media by public universities are unconstitutional infringements of student-athlete speech. Part I examines the current social

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17. Elizabeth Johnson, *UNC Has Spent Nearly Half a Million Dollars on Legal Fees since June 2010*, DAILY TARHEEL.COM (August 19, 2012, 11:57 PM) <http://www.dailytarheel.com/article/2012/07/500050ac7403e>. "UNC has spent \$467,406.49 on outside legal fees since June 2010, when the NCAA began investigating the University's football program." *Id.*

18. Rusty Miller, *College Football OSU AD Says NCAA Probe Has Cost \$800K*, NEWS-HERALD, Aug. 10, 2011, <http://www.news-herald.com/articles/2011/08/10/sports/doc4e42dd0bd1156061892404.prt>.

19. *E.g.*, John T. Wendt & Peter C. Young, *Reputational Risk and Social Media*, 1 MISS. SPORTS L. REV. 97-98 (2012) ("One of the interesting and problematic aspects in assessing the impact of social media is the possibility of damage to individual and institutional reputations.").

20. Stephanie Oden, *From Policies to Punishments: The Atlantic Coast Conference and Social Networking*, 2 ELON J. UNDERGRAD. RES. COMMUNICATIONS 58, 62 (2011) (noting that the Atlantic Coast Conference has not provided guidance relative to social media bans for student-athletes).

21. *Id.*

22. *Id.* at 60.

23. *Id.* at 58.

media speech bans, the rationale for these bans, and the value and risks that social media speech may have to student-athletes. Part II analyzes the Supreme Court's current jurisprudence on student speech and applies this jurisprudence to the current preemptive student-athlete Twitter bans, concluding that preemptive bans of social media are unconstitutional. Part II will also look at how lower court decisions have applied these standards while wrestling with the issue of whether social media speech is on-campus speech, even when produced entirely off-campus, as social media often is. Part III offers suggestions other than bans that better balance the interests of the student-athlete, the coach, and the school, while also avoiding constitutional violations.

I. CURRENT STUDENT-ATHLETE SOCIAL MEDIA BANS: THE WHO, HOW,  
AND WHY

*A. Why Some College Coaches Are Banning Student-Athlete Use of  
Social Media*

Some college football coaches have spoken about their motivations for banning players from using Twitter. Turner Gill, former head football coach for the Kansas Jayhawks, explained: "The reason we decided to not allow our players to have a Twitter account is we feel like it will prevent us from being able to prepare our football program to move forward. Simple as that."<sup>24</sup> Steve Spurrier, head football coach for the South Carolina Gamecocks, had a more specific motivation for banning Twitter. A former South Carolina football player tweeted that a star receiver was arrested following a fight, and though both claims were false, the information spread quickly through the Internet.<sup>25</sup> Although this high profile incident brought the issue to the forefront, Spurrier had already grown tired of reading questionable posts by players, some of which "included racial, sexual or vulgar terms."<sup>26</sup> Coach Spurrier explained his decision to ban his players from using Twitter, by saying: "Well, we have some dumb, immature players that put crap on their Twitter, and we don't need that. So the best thing to do is just ban it."<sup>27</sup>

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24. McCollough, *supra* note 11.

25. *Steve Spurrier Bans His Team from Using Twitter*, SPORTINGNEWS (Aug. 4, 2011, 3:46 PM), <http://aol.sportingnews.com/ncaa-football/story/2011-08-04/steve-spurrier-bans-south-carolina-gamecocks-from-using-twitter>.

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

27. *Id.*

The Mississippi State basketball team has also banned its players from using Twitter.<sup>28</sup> Following a loss to Alabama on January 14, 2011, a Mississippi State player tweeted his frustrations, complaining about his level of involvement in the team's offense.<sup>29</sup> Head coach Rick Stansbury responded by banning team members from using Twitter.<sup>30</sup> Stansbury stated that "some young men just don't understand once they put something out there for everyone to see, there is no taking it back."<sup>31</sup> A team-wide Twitter ban is now in place, and the player's Twitter account has been deleted.<sup>32</sup>

Although college football Twitter bans have received the greatest amount of attention, the bans have applied to other student-athletes and addressed other social networking sites, such as Facebook. As far back as 2006, John Planek, Loyola's athletics director, ordered athletes off of Facebook "to protect them from gamblers, agents or sexual predators who could learn about them, or contact them, through their profiles."<sup>33</sup> As discussed later, this assertion—that social media bans protect student-athlete safety—may be the strongest argument public universities have if the constitutionality of these bans is challenged in court.<sup>34</sup> Furthermore, the argument that social media bans are in the best interest of the student-athletes themselves may have merit. Marvin Austin, projected as a top ten draft pick before his Twitter scandal at North Carolina, was not drafted until the second round, due largely to missing his senior season and "concerns about his character."<sup>35</sup>

The money a student-athlete may lose due to a lower NFL draft position is not the only reason coaches may successfully justify the bans. Florida State instituted a Twitter ban on its football team as of October 10, 2011, after the team suffered a third-straight defeat.<sup>36</sup> The ban was justified in part by reports "that players were tweeting in the locker room before the game Saturday, and that some were dealing with 'hate tweets' from fans

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28. *Mississippi State Coach Bans Twitter*, ESPN (Feb. 4, 2011), <http://sports.espn.go.com/ncb/news/story?id=6087765>.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Erik Brady & Daniel Libit, *Alarms Sound over Athletes' Facebook Time*, USA TODAY (Mar. 9, 2006, 1:03 AM), [http://www.usatoday.com/tech/news/internetprivacy/2006-03-08-athletes-websites\\_x.htm](http://www.usatoday.com/tech/news/internetprivacy/2006-03-08-athletes-websites_x.htm).

34. *See infra* pp. 14–16.

35. Castillo, *supra* note 6.

36. Ben Kercheval, *Twitter Ban in Effect for FSU After Loss to Wake*, NBCSPORTS.COM (Oct. 10, 2011), <http://collegefootballtalk.nbcsports.com/2011/10/10/twitter-ban-reportedly-in-effect-for-fsu-after-loss-to-wake>.

after the loss.<sup>37</sup> This statement touches on some of the motivations for these preemptive social media bans for student-athletes. First, the statement suggests that some coaches feel that Twitter and Facebook are distracting and can diminish the quality of both an individual player's and the team's performance.<sup>38</sup> Second, though a coach may never admit it publicly, the bans may in fact be punishment for sub-par team play. It may not be a coincidence that Florida State's Twitter ban came after the team suffered a third straight disappointing loss. Third, as discussed later, is the assertion that the ban is actually meant to protect these young, high-profile student-athletes from abusive messages, such as those allegedly received by the Florida State football players. This final argument—that the bans exist to protect player safety and wellbeing—is the most persuasive argument universities can make in support of the constitutionality of the bans.

*B. Social Media Use by Professional Athletes, League and Team Restrictions, and Its Influence on College Student-Athletes*

Although the First Amendment applies only to government restrictions,<sup>39</sup> a look at social media use in professional sports gives a window into why its use may be important to student-athletes, how it can be harmful, and how it can be managed. Social media speech plays a large role in professional sports culture, which has no doubt increased the popularity of social media speech by athletes in the college ranks. Retired NBA star Shaquille O'Neal has over 6.4 million followers on Twitter.<sup>40</sup> NFL star Chad Johnson has over 3.7 million.<sup>41</sup> Just as in college, professional-athlete speech can be free publicity for the team and the player, or it can create public relations issues.<sup>42</sup> During the 2010 NBA free agency period, high-profile-player tweets drew huge attention from the national media and fans.<sup>43</sup> NBA player Dwayne Wade spoke about the importance of the outlet that social media provides for professional athletes, in relation to recent restrictions placed on the players by the National Basketball Association

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37. *Id.*

38. Lananna, *supra* note 12. After the University of North Carolina women's basketball team's performance faltered, the head coach instituted a Twitter ban, saying that "[w]e just need to focus more on what they need to do with the team," adding that "[a] lot of the communication . . . was a major distraction." *Id.*

39. "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

40. Shaquille O'Neil, TWITTER, <http://twitter.com/shaq> (last visited Nov. 19, 2012).

41. Chad Johnson, TWITTER, <http://twitter.com/ochocinco> (last visited Nov. 19, 2012).

42. Lauren McCoy, *140 Characters or Less: Maintaining Privacy and Publicity in the Age of Social Networking*, 21 MARQ. SPORTS L. REV. 203, 203 (2010).

43. *Id.* at 203–04.

(NBA) and his team in particular.<sup>44</sup> Wade, speaking in support of the new restrictions added, “I think it’s very good to have communications with your fans personally.”<sup>45</sup> As of November, 2012, Dwayne Wade had over 3.8 million Twitter followers.<sup>46</sup>

Unlike the restrictions imposed by some public universities, no professional sports league in the United States has totally banned athletes from using social media during non-team related activities, though some restrictions have been put into place. In 2009, the NBA banned players from entering social media updates “during games,” which spans from forty-five minutes before tipoff until the players fulfill their post-game media obligations.<sup>47</sup> The NBA has punished social media speech that it found detrimental to the league. Mark Cuban, the owner of the Dallas Mavericks, was fined \$25,000 in 2009 because he complained on his Twitter account about a referee decision that hurt his team.<sup>48</sup>

Specific NBA teams, including the Miami Heat, Toronto Raptors, Milwaukee Bucks, and Los Angeles Clippers have taken stronger stances, banning social networking speech during “team time.”<sup>49</sup> Miami Heat coach Erik Spoelstra supported the ban, saying: “Social media, we will not accept that in our building during office hours. That’s the way we’ll look at it when we’re coming to practice, to shootarounds and to games. We’re coming to work and we’re coming to get a job done. That’s not time for social media.”<sup>50</sup> Los Angeles Clippers coach Mike Dunleavy had a similar response, saying: “The minute you’re on our property, there’s no tweeting . . . . They can do it, but they’ll be fined.”<sup>51</sup>

Like the NBA, the National Football League (NFL) has also found it necessary to restrict player use of social media. The NFL has a ban that becomes effective ninety minutes before a game begins and ends after postgame interviews are complete.<sup>52</sup> Perhaps the league felt such a ban was necessary due to previous controversies involving NFL players and social

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44. Marc Stein, *NBA Social Media Guidelines Out*, ESPN, (Sept. 30, 2009, 9:51 PM), <http://sports.espn.go.com/nba/news/story?id=4520907> (“The Miami Heat . . . are among the teams . . . that have already announced a stricter ban on social networking than the league’s rules, essentially forbidding it on anything regarded as ‘team time.’”).

45. *Id.*

46. Dwayne Wade, TWITTER, <http://twitter.com/dwyanewade> (last visited Nov. 19, 2012).

47. Stein, *supra* note 44.

48. *Id.*

49. *Id.* Miami Heat head coach Erik Spoelstra appears to define “team time” as “in our building during office hours,” including during practice, shootarounds, and games. *Heat Ban Twitter During ‘Office Hours,’* ESPN (Sept. 28, 2009, 4:40 PM), <http://sports.espn.go.com/nba/news/story?id=4512300>.

50. Stein, *supra* note 44.

51. *Id.*

52. *Id.*

media use. One such scandal involved Larry Johnson, at the time a running back with the Kansas City Chiefs, who posted derogatory comments about his coach on Twitter and used a homophobic slur towards a fan.<sup>53</sup> Johnson was suspended for the comments and was later released by the team.<sup>54</sup>

The attention some professional athletes receive from tweeting is surely noticed in the world of college athletics. However, the attention does not come without danger. As discussed above, even a professional football player—who is likely older and more experienced than a college student-athlete, with the benefit of PR experts around him—still managed to get into trouble with social media speech. Thus, it is understandable why some college coaches wish to avoid the mess altogether and simply institute preemptive bans.

### *C. Why It May Be Difficult to Find a Plaintiff to Challenge These Bans*

When North Carolina banned Twitter for the 2011 season, T.J. Yates, the team's quarterback, sent a final tweet that said: "To tweet or to play football???? That's an easy decision . . . Bye Bye twitter I am really gonna miss you guys . . . see you in about 3 months."<sup>55</sup> The majority of college student-athletes would likely share this sentiment—if forced to choose between their sport and free speech rights, the speech rights lose. Student-athletes, under most circumstances, have only four years to compete.<sup>56</sup> Of those college seniors who play football at an NCAA institution, only one in fifty will get drafted to play in the NFL.<sup>57</sup> This means that for the vast majority of college football players, their NCAA career is their final opportunity to compete in the sport they love. Risking that opportunity—along with the risks of alienating teammates, coaches, and fans—by bringing a lawsuit against the university over speech restrictions, is an extremely difficult choice. Add to this the slow pace of free speech litigation, and win or lose, the player's career will likely be over before the

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53. *Latest News and Rumors*, NBCSPORTS (Oct. 26, 2009, 10:34AM), <http://profootballtalk.nbcsports.com/2009/10/26/larry-johnson-continues-twitter-meltdown>.

54. *How Tweeting Can Get You Fired*, FASTCOMPANY (Nov. 21, 2011), <http://www.fastcompany.com/magazine/161/celebrities-fired-because-of-twitter>.

55. Walsh, *supra* note 3.

56. *Remaining Eligible*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Eligibility/Remaining+Eligible> (last visited Oct. 1, 2012) (stating that student-athletes in Divisions I, II, and III have four or possibly five years of eligibility if their academic success meets their respective Division's requirements).

57. *See Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, NCAA.ORG <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting/Probability+of+Going+Pro> (last visited Oct. 1, 2012) (noting that only 255 of the 15,086 NCAA senior student-athletes who play football are drafted).

suit is decided.<sup>58</sup> Thus, regardless of the harm these bans may place upon student-athletes or the constitutional legitimacy of the bans, it is unlikely that universities will face a legal challenge.

II. THESE BANS ARE UNCONSTITUTIONAL DUE TO THE BROAD SPEECH FREEDOM HISTORICALLY GRANTED TO COLLEGE STUDENTS AND BECAUSE THE BANS RESTRICT OFF-CAMPUS SPEECH

*A. Tinker and the Current Supreme Court Jurisprudence of Public School Restrictions on Student Speech*

The Supreme Court's basic view of student speech rights emerged in 1969, when the Court decided *Tinker v. Des Moines Independent Community School District*.<sup>59</sup> In *Tinker*, high school students were banned from wearing black armbands to school in protest of the Vietnam War.<sup>60</sup> While ruling in favor of the students, the Court discussed two important concepts that must be carefully balanced when considering public school restrictions on student speech. First, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>61</sup> And second, states have the authority "to prescribe and control conduct in the schools."<sup>62</sup> The Court asserted that students enjoy free speech protection while attending public school, so long as the speech does not substantially interfere with the learning environment.<sup>63</sup> Elaborating on these principles, the *Tinker* Court stated that "to justify prohibition of a particular expression of opinion, [the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>64</sup> To uphold the speech restriction, the Court must be convinced that school authorities had reason to anticipate that the speech "would substantially interfere with the work of the school or impinge upon the rights of other students."<sup>65</sup> In *Tinker*, the Court found no such evidence and ruled in favor of the students.<sup>66</sup>

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58. See e.g., *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (litigating this recent free speech case took roughly five years to reach its conclusion in the United States Supreme Court).

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

60. *Id.* at 504.

61. *Id.* at 506.

62. *Id.* at 507.

63. *Id.* at 509.

64. *Id.*

65. *Id.*

66. *Id.* at 509, 514.

Based on the *Tinker* test alone, the Court would likely strike preemptive<sup>67</sup> social media speech bans covering an entire team at a public university. Though social media speech certainly *could* “substantially interfere with the work of the school,” depending on the nature of the speech itself, the simple fact that a *form* of speech alone could interfere with the work of the school would create an unworkable test. This test, taken literally, would mean that talking, writing, or any other form of speech would be granted no speech protection at all, as any form of speech *could* interfere with the work of the school. However, the *Tinker* test alone most likely will not be determinative in these cases. There are several key aspects of the current preemptive bans that must be analyzed, as each will play an important role in determining the constitutionality of the public school bans. These include: (1) the level of constitutional speech protection that college students receive compared to high school students; (2) whether student-athletes forfeit some level of constitutional protection when they participate in school-sponsored sports; and (3) whether social media use is deemed on-campus or off-campus speech.

*B. College Students Are Likely Granted Greater Speech Protection Than High School Students*

Like *Tinker*, most of the cases discussed below involve high school students, while the social media bans in question involve college students. This distinction is important because the Court has historically granted college students greater speech protection than high school students.<sup>68</sup> The Court has gone so far as to state that on-campus college speech deserves protection rivaling that of off-campus speech. In *Healy v. James*, a state college denied the official recognition of a local chapter of the Students for a Democratic Society.<sup>69</sup> The Court found for the students, stating that “the precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large.”<sup>70</sup> However, the *Healy* decision tempers this

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67. Because these are preemptive bans that forbid the use of a method of speech, not the content of the speech, they are viewpoint neutral. Viewpoint neutral speech restrictions are more likely to be upheld. The Supreme Court has held that “[v]iewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 46 (1983)).

68. Katharine Anne Weber, *Recent Decision*, *Hazelwood School District v. Kuhlmeier: Increased Regulation of the University Press?*, 40 ALA. L. REV. 267, 279 (1988).

69. *Healy v. James*, 408 U.S. 169, 170 (1972).

70. *Id.*

assertion by also stating that “where state-operated educational institutions are involved, this Court has long recognized ‘the need for . . . safeguards, to prescribe and control conduct in the schools.’”<sup>71</sup> These statements suggest that, on a sliding scale, the speech restrictions allowed by universities fall somewhere between the stricter restrictions allowed by high schools and the significantly lighter restrictions allowed on the community at large.

Further evidence that college students enjoy greater speech protection than high school students can be found by comparing *Papish v. Board of Curators* to *Hazelwood School District v. Kuhlmeier*.<sup>72</sup> In *Papish*, the Court held that a graduate student’s free speech rights were unconstitutionally violated when she was expelled for distributing a newspaper on campus that contained the word “motherfucker” and included a cartoon that depicted the Statue of Liberty being raped.<sup>73</sup> Fifteen years later, the Court held in *Kuhlmeier* that removing student-written articles from a school paper did not violate high school students’ constitutional rights where the principal found the articles’ discussion of student pregnancy and the impact of divorce on students to be inappropriate.<sup>74</sup> Though *Kuhlmeier* involved a paper sponsored by the high school and *Papish* involved an “underground” paper simply disseminated on a college campus, the Court again showed its implied allowance for greater speech restrictions in high school than in college.<sup>75</sup>

### *C. Student-Athletes May Receive Less Constitutional Protection than Non-Athletes*

The Supreme Court has allowed state actions against student-athletes to stand even when those same actions would be unconstitutional if applied to non-student-athletes.<sup>76</sup> This willingness was apparent in *Vernonia School District v. Acton*, a case concerning the Fourth Amendment.<sup>77</sup> Though *Vernonia* addressed the issue of unreasonable search and seizure, not speech, the case still provides insight into the Court’s willingness to consider student-athletes in a different context than non-student-athletes.

In *Vernonia*, the Vernonia School District instituted a policy where high school student-athletes were subject to random urinalysis drug

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71. *Id.* (quoting *Tinker*, 393 U.S. at 507).

72. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973).

73. *Papish*, 410 U.S. at 667, 670.

74. *Kuhlmeier*, 484 U.S. at 273.

75. *Id.* at 274 n.7 (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”).

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

77. *Id.*

testing.<sup>78</sup> The school district instituted the testing because of an increase in drug use among students and a finding that athletes were the leaders of the drug culture.<sup>79</sup> The school district further argued that drug use by student-athletes was of particular concern because of the increased risks of sports-related injury.<sup>80</sup> When a seventh grade student was not allowed to play football, due to his parents' refusal to sign a form consenting to the random drug testing program, the parents sued the school.<sup>81</sup> The parents claimed that the policy violated the Fourth Amendment protection against unreasonable searches and seizures.<sup>82</sup> The Court found for the school district, relying heavily on the unique characteristics of being involved in school athletics.<sup>83</sup>

In the *Vernonia* decision, the Court stated that: "By choosing to 'go out for the team,' [student-athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."<sup>84</sup> The Court cited requirements such as maintaining good grades, attending practices, and complying with rules of conduct.<sup>85</sup> This led the Court to conclude: "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."<sup>86</sup>

This rationale, applied to preemptive-speech bans on student-athletes, suggests that the Supreme Court may find the bans constitutional. By "voluntarily" participating in college athletics, a student-athlete has "reason to expect intrusions upon normal rights," such as a restriction of free speech rights through social media bans. Though this reasoning is one route that the Court may follow, there are some key differences between the speech bans and the *Vernonia* case.

First, the safety concerns of illegal drug users participating in athletics greatly influenced the Court in *Vernonia*.<sup>87</sup> Though safety concerns will no doubt be a stated motivation by universities (remember the Florida State "hate tweets"), the safety argument for banning social media would likely be considered much weaker than that in *Vernonia*. Any dangers brought

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78. *Id.* at 648.

79. *Id.* at 649.

80. *Id.*

81. *Id.* at 651.

82. *Id.*

83. *Id.* at 657, 665.

84. *Id.* at 657.

85. *Id.*

86. *Id.*

87. *Id.* at 649.

about by social media use, such as stalking or personal threats, can be greatly reduced by carefully limiting the information that is made available through the student-athlete's social media activity and by restricting who can send the student messages. However, illegal drug use is not only dangerous to the drug user, but also can increase the danger to the user's opponent.<sup>88</sup> The possibility of receiving threatening electronic messages is likely less dangerous than, for example, a wrestler competing while high on cocaine.

Second, the Vernonia School District testing program covered all sports, while most social media bans apply only to the football or men's basketball team. It would be difficult to argue that safety is the school's concern when the ban only covers a small percentage of student-athletes. If student-athletes need to be protected from the dangers of social media, why not make the bans cover all student-athletes? Also, players using social media privacy controls can prevent outsiders from sending them messages, as well as limit those who can directly follow their tweets and status updates.<sup>89</sup> However, because of the high-profile nature of certain college football and basketball programs, perhaps a university could still persuade the Court that such a narrow ban was proper and constitutional under those unique circumstances.

Third, the *Vernonia* Court was heavily influenced by the severity of the drug problem in Vernonia's school district, the effect it was having on student behavior, and the school's attempts to address the issue before resorting to random testing.<sup>90</sup> A university would have difficulty drawing comparisons between the illicit drug-related problems in *Vernonia* and those problems caused by student-athletes having access to the same social media that millions of other college students use every day. The *Vernonia* Court found that student-athletes were the leaders of the school's drug culture, which had led to students becoming increasingly rude during class, noting that "outbursts of profane language became common."<sup>91</sup> No such issues have been linked to student-athlete use of social media. Student-athletes' use of social media has not been cited as causing substantial disruption at universities; rather, the universities appear to be concerned about players embarrassing their teams or being distracted before games.

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88. *See id.* at 662 ("[T]his program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.").

89. *About Public and Protected Tweets*, TWITTER (Sept. 10, 2012, 9:24 PM), <http://support.twitter.com/articles/14016-about-public-and-protected-accounts>.

90. *Vernonia Sch. Dist. 47J*, 515 U.S. at 549, 662.

91. *Id.*

But, perhaps a university could persuasively argue that student-athletes are often role models for children, and because some play a prominent role in the image of the university, that the crevasse between the state interest in *Vernonia* and these bans is not so deep after all.

Also, in *Vernonia*, a player and his or her parents had to sign a drug test authorization form *before* becoming a member of a team.<sup>92</sup> The current social media bans are imposed on student-athletes who chose their school unaware that speech restrictions would be put in place. In extreme cases, like the Florida State ban, the ban on social media speech was issued *during* the season.<sup>93</sup>

Especially in cases of highly recruited college football and basketball players, students shop for the school and team that will be the best fit. If a player knew when he or she chose a school that such a ban would be instituted, a court would likely find that the ban is a more reasonable measure, as the facts would more closely match those in *Vernonia*. However, in the case of the current college bans, which are placed upon student-athletes that have already committed to a school without any notice of such a ban, the situation feels much less fair. This may give a court an opportunity to distinguish *Vernonia* if it so chose.

Additionally, the lack of notice of such bans for current players swings the pendulum in favor of college student-athletes. A court may be sympathetic to a student-athlete because the bans effectively force players to risk not only their athletic career, but also their opportunity for higher education.<sup>94</sup> Athletic scholarships are only good for one year, and a coach may decline to renew the scholarship at the end of the year for any reason.<sup>95</sup> Should a court find that the preemptive bans are constitutional, players midway through a college career may be forced to abandon social media as an outlet for speech. To do otherwise, they would risk losing their athletic scholarship and perhaps the opportunity to earn a college degree.

The *Vernonia* Court made it clear that student-athletes may be treated differently than non-athletes when restricting their constitutional rights. Student-athletes' rights are subject to a greater degree of restriction due to the

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92. *Id.* at 650.

93. *FSU Coach Fisher Bans Twitter*, NCAA.COM (July 27, 2012, 2:50 GMT) <http://www.ncaa.com/news/football/article/2012-07-27/fsu-coach-fisher-bans-twitter>.

94. Branch, *supra* note 11. Stuart Paynter, a lawyer who represented a college player whose scholarship had been revoked stated that when it comes to such players “[p]lenty of them don’t stay in school” and that “[t]hey’re just gone. You might as well shoot them in the head.” *Id.*

95. *Id.* (discussing one example, Joseph Agnew, who was “cut from the football team and had his scholarship revoked by Rice before his senior year, meaning that he faced at least \$35,000 in tuition and other bills if he wanted to complete his degree in sociology . . . . After the coach who had recruited Agnew had moved on to Tulsa, the new Rice coach switched Agnew’s scholarship to a recruit of his own.”). “[National College Players Association] scholarship data on players from top Division I basketball teams, [] showed that 22 percent were not renewed from 2008 to 2009 . . . .” *Id.*

voluntary nature of the activity and the special safety concerns associated with it. However, the safety concerns—and therefore the state interest—associated with social media are significantly less than those associated with illegal drug use. Furthermore, the high school students in *Vernonia* simply lost the ability to compete in school-sponsored sports, while a college student-athlete may lose the opportunity for a college education entirely. Thus the burden on college student-athletes is greater than that on high school athletes, all while protecting a lesser state interest. Consequently, even if a court found that college student-athletes may receive less speech protection than other students, the diminished protection would most likely not displace the *Tinker* test. Thus, preemptive social media bans on student-athletes still appear to be an unconstitutional restriction on players' speech.

*D. Social Media Posts Are Not On-Campus Speech When Made Off School Grounds by Students Not Participating in School-Related Activities*

Aside from the “athlete v. non-athlete” issue discussed above, another issue is whether these social media bans would be classified as “on-campus” or “off-campus” restrictions on speech. Schools have greater authority to regulate on-campus speech.<sup>96</sup> School regulation of off-campus student speech is one of the most controversial legal issues involving student speech restrictions.<sup>97</sup> However, the debate thus far has focused on punishment for “hostile” off-campus speech towards school officials.<sup>98</sup> The Supreme Court has not directly addressed whether schools may restrict other types of off-campus speech.<sup>99</sup> This issue is of great importance because, as discussed below, whether these preemptive bans are on-campus or off-campus may be determinative in the decision of whether the preemptive bans on social media speech are constitutional.<sup>100</sup> This is because the Supreme Court has never plainly stated that schools have any authority to prohibit speech that is exclusively off-campus.

The Supreme Court referenced school restriction of off-campus speech in *Hazelwood School District v. Kuhlmeier*.<sup>101</sup> In *Hazelwood*, the Court

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96. See *Morse v. Frederick*, 551 U.S. 393, 405–06 (2007) (noting that speech found unprotected in the school setting may be protected in a public forum outside of that context).

97. Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL RTS. J. 591, 591 (2011).

98. *Id.* at 592.

99. *Id.* at 617–18.

100. See *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 864 (2002) (finding the threshold question to be whether the location of the speech, either on- or off-campus, implicates constitutional issues).

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

discussed protected speech that could be restricted in the school setting “even though the government could not censor similar speech outside the school.”<sup>102</sup> If speech can be restricted on-campus that would otherwise be protected off-campus, it seems clear that a school’s ability to restrict speech decreases when that speech is expressed off campus. However, one must be careful in extrapolating too much from this holding. Not only is the holding somewhat ambiguous, but it was issued in 1988, well before technology such as Twitter and Facebook could have been on the minds of the Supreme Court justices.<sup>103</sup> Before the Internet, determining whether speech was on-campus or off-campus was a much simpler question, and speech that was off-campus was less likely to find its way onto campus after it was out of the original student-speaker’s hands.<sup>104</sup>

Though the Supreme Court has never directly asserted it, the wording in the *Hazelwood* case, along with the general rule that speech can only be restricted if it is detrimental to the learning environment, suggests that a school may only restrict on-campus speech. As discussed below, courts have struggled to define on-campus speech, as the Supreme Court has not yet given guidance on how to determine what is and is not on-campus speech in the current digital landscape.<sup>105</sup>

Though the Supreme Court has not addressed school restrictions of Internet-based speech, state courts have decided such cases. In *J.S. v. Bethlehem Area School District*, the Supreme Court of Pennsylvania encountered some of the difficult issues that modern technology presents when defining “on-campus speech.”<sup>106</sup> In *Bethlehem*, a middle school student’s website, entitled “Teacher Sux,” contained “derogatory, profane, offensive, and threatening comments” about both the school’s algebra teacher and principal.<sup>107</sup> The court held that the website was on-campus speech and applied the *Tinker* test.<sup>108</sup> The court found it was on-campus speech despite the fact that the website was created off-campus.<sup>109</sup> The court held that regardless of where the speech is created, “where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”<sup>110</sup>

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102. *Id.*

103. Waldman, *supra* note 97, at 618.

104. *Id.* at 619.

105. *Bethlehem Area Sch. Dist.*, 807 A.2d at 863–864.

106. *Id.*

107. *Id.* at 851.

108. *Id.* at 869.

109. *Id.* at 865.

110. *Id.*

The court found the fact that the student accessed the website at school to be a “strong factor” in concluding that the speech was on-campus.<sup>111</sup> However, it added that “we do not discount that one who posts school-targeted material in a manner known to be freely accessible from school grounds may run the risk of being deemed to have engaged in on-campus speech, where actual accessing by others in fact occurs, depending upon the totality of the circumstances involved.”<sup>112</sup> This 2002 decision came before the widespread prevalence of “smartphones,” which allow both the “speaker” (the person tweeting or updating their Facebook page) and the “reader” to access social media sites from virtually anywhere.<sup>113</sup>

Based on this holding, social media speech of any kind accessed on campus would likely be found to be on-campus speech in Pennsylvania, though the qualifier the court uses—“depending on the totality of the circumstances involved”—appears to leave some flexibility for future interpretation.<sup>114</sup> However, the rest of the Pennsylvania court’s test would place social media, in the majority of circumstances, within on-campus speech. Players who tweet or update their Facebook page numerous times a day, as many do, would undoubtedly do so from campus at least occasionally. Also, the “accessing by others in fact” would also occur in almost all situations, as the nature of social networking is to allow large numbers of people to access one’s content. College students undoubtedly access social media sites of players while on campus.

Even if student-athletes limit the availability of their posts and tweets, it would only take a single individual (not denied access by privacy settings) to take a screen shot of the social media speech and then place it on a website to make it available to the world. However, the key phrase in the Pennsylvania court’s holding, in regard to preemptive bans on social media speech, may be “school-targeted material.”<sup>115</sup> The Pennsylvania Supreme Court’s dicta stated that it would only consider off-campus speech to be on-campus if it was

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111. *Id.* at 865 n.12.

112. *Id.*

113. Smartphones “allow a user to be connected to email and the internet.” Laura E. Gomez-Martin, Note, *Smartphone Usage and the Need for Consumer Privacy Laws*, PITT. 12 J. TECH. L. & POL’Y 1, 1–2 (2012). As of 2011, it was estimated that roughly one-third of American cell phone users had a smartphone. *See id.* at 2 (“It is estimated that thirty percent of American mobile users have a smartphone, as opposed to a traditional cell phone.”) (citing Amy Gahran, *Report: 90% of Americans Own a Computerized Gadget*, CNN (Feb. 03, 2011), [http://articles.cnn.com/2011-02-03/tech/texting.photos.gahran\\_1\\_cell-phone-landline-tech-gadget?\\_s=PM:TECH](http://articles.cnn.com/2011-02-03/tech/texting.photos.gahran_1_cell-phone-landline-tech-gadget?_s=PM:TECH))).

114. *Bethlehem Area Sch. Dist.*, 807 A.2d at 865 n.12.

115. *Id.* at 863–64.

“school-targeted.”<sup>116</sup> The current university bans do not punish or forbid players from posting “school-targeted” material; instead, they are preemptive bans that forbid the use of the medium regardless of the content.<sup>117</sup> Therefore, even under *Bethlehem School District*’s broad test for on-campus speech, courts would most likely find that these bans are unconstitutional restrictions on student-athlete speech because they are preemptive.

In *J.S. v. Blue Mountain School District*, the Third Circuit recently addressed the issue of when Internet-based speech is considered on-campus speech.<sup>118</sup> While the court questioned whether off-campus speech can be regulated at all by schools, it declined to answer the question.<sup>119</sup> Instead, the court found that the speech passed the *Tinker* test, because it was unlikely to cause a “substantial disruption.”<sup>120</sup>

In *Blue Mountain*, the school district suspended a student for creating a MySpace profile that mocked the school’s principal.<sup>121</sup> The student created the profile on a weekend on her home computer.<sup>122</sup> The student and her parents sued the school, claiming, among other things, that the school district exceeded its authority by punishing off-campus speech.<sup>123</sup> In an *en banc* decision on appeal, the Third Circuit held that because J.S.’s speech caused no substantial school disruption, and because it was unreasonable for school officials to forecast a disruption, the school district violated J.S.’s free speech rights.<sup>124</sup>

The MySpace profile mocking the principal was initially available to anyone, but was later changed to a “private” page that could only be viewed by accepted “friends.”<sup>125</sup> J.S. and another student accepted roughly twenty-two “friends,” who were also students at the school, with the ability to view the profile.<sup>126</sup> No Blue Mountain student was ever able to view the profile from school because the school’s computers did not allow access to the site.<sup>127</sup> The Principal found out about the profile from another student, and

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116. See *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (2002) (“[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech.”).

117. Waldman, *supra* note 97, at 621.

118. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011) (*en banc*), *cert. denied*, 132 S. Ct. 1097 (2012).

119. *Id.* at 926 n.3.

120. *Id.* at 931.

121. *Id.* at 920.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 921.

126. *Id.*

127. *Id.*

because he could not access the page on his own, had the student print out a screen shot of the page.<sup>128</sup> This printout, brought to school at the principal's request, was the only physical copy of the page to appear on school grounds.<sup>129</sup> The only school "disruption" attributed to the profile was that students discussed the profile at school.<sup>130</sup>

The *Blue Mountain* court acknowledged the difficulty of student speech cases, stating that "[s]ince *Tinker*, courts have struggled to strike a balance between safeguarding students' First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment."<sup>131</sup> However, the court chose not to address whether school restrictions on speech were limited to on-campus speech, an argument J.S. asserted.<sup>132</sup> The court stated that while the argument by J.S. "has some appeal, we need not address it to hold that the School District violated J.S.'s First Amendment free speech rights."<sup>133</sup>

Instead of addressing whether off-campus speech is within the school's control, the court analyzed the case under the *Tinker* standard.<sup>134</sup> As discussed earlier, the *Tinker* test requires that the restricted speech cause a "substantial disruption" at the school, a threshold the court held was not met.<sup>135</sup> The court found that the students' mere discussion of the profile did not meet this standard.<sup>136</sup> It is of note that there have been no reported incidents of student-athlete social media causing a "substantial disruption" to the learning environment at a university.

The court then addressed an exception to *Tinker*, found in *Bethel School District v. Fraser*.<sup>137</sup> In *Fraser*, the Supreme Court drew a distinction between the political speech in *Tinker* and the "vulgar and lewd speech" in *Bethel*.<sup>138</sup> The school district argued "that although J.S.'s speech occurred off campus, it was justified in disciplining her because it was 'lewd, vulgar and offensive [and] had an effect on the school and the educational mission of the District.'"<sup>139</sup> This argument is important in the

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128. *Id.*

129. *Id.*

130. *Id.* at 922–23.

131. *Id.* at 926.

132. *Id.* at 926 n.3.

133. *Id.*

134. *Id.* at 928.

135. *Id.* at 931.

136. *Id.* ("The facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile.")

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

138. *Id.* at 685–86 (1986).

139. *Blue Mountain Sch. Dist.*, 650 F.3d at 932.

analysis of preemptive student-athlete bans. The student-athlete restrictions are not in response to “lewd” or “vulgar” speech, they are instead blanket bans on players who may have never used social media in the first place. It is also important because the *Blue Mountain* court quickly dispatched with this argument: “The School District’s argument fails at the outset because *Fraser* does not apply to off-campus speech.”<sup>140</sup> The court cited *Morse v. Frederick* to support this assertion.<sup>141</sup>

In *Morse*, during a school field trip, Joseph Frederick and other high school students unveiled a 14-foot banner displaying the phrase “BONG HiTS 4 JESUS,” as the 2002 Olympic Torch Relay and a camera crew passed by.<sup>142</sup> Frederick was across the street from the school with the banner, but the Court found that the speech was considered to be “on-campus.”<sup>143</sup> The Court concluded that the field trip was a “school sponsored event” because it included the school band and cheerleaders, administrative officials were present to supervise the students, and the banner itself was aimed at and clearly visible to the students.<sup>144</sup> Once Morse—the school principal—spotted the banner, she “demanded that the banner be taken down,” but Frederick did not comply with the order.<sup>145</sup> Frederick was suspended from school for ten days because Morse interpreted the sign to promote illegal drug use.<sup>146</sup>

The Court found Frederick’s sign to be unprotected speech because it was reasonable to find that the sign promoted illegal drug use in a school setting.<sup>147</sup> When applying the *Morse* decision to the current student-athlete social media bans, of particular importance is that the Court drew distinctions between on-campus and off-campus speech restrictions.<sup>148</sup> The *Blue Mountain* court noted that the *Morse* decision “emphasized that, [h]ad *Fraser* delivered the same speech in a public forum outside the school

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140. *Id.*

141. *Id.* (citing *Morse v. Frederick*, 551 U.S. 393 (2007)).

142. *Morse*, 551 U.S. at 397.

143. *Id.* at 400–01.

144. *Id.*

145. *Id.* at 398.

146. *Id.*

147. *Id.* at 410. The Court explained:

“It was reasonable for [Morse] to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.”

*Id.*

148. *Id.* at 401.

context, it would have been protected.”<sup>149</sup> The *Blue Mountain* court also found it significant that *Morse* cited *Cohen v. California*.<sup>150</sup> The *Blue Mountain* court stated: “The Court’s citation to the *Cohen* decision is noteworthy. The Supreme Court in *Cohen* held, in a non-school setting, that a state may not make a ‘single four-letter expletive a criminal offense.’”<sup>151</sup> Based on this, the *Blue Mountain* court reasoned that: “Chief Justice Roberts’s reliance on the *Cohen* decision reaffirms that a student’s free speech rights outside the school context are coextensive with the rights of an adult.”<sup>152</sup>

If the Third Circuit’s interpretation of *Morse* is correct, the ramifications are significant to the constitutional analysis of social media bans by universities. It would mean that, should a court interpret the preemptive bans on social media to include off-campus speech, then these bans would almost certainly be found unconstitutional. Banning adults from social media use would be on par with banning websites or even newspapers, and would clearly be found to be an unconstitutional restriction on speech. However, as discussed above, it is not clear how the Court would view student-athletes who use social media, as some of the speech will likely take place on campus, during school hours, and at least some of the speech will no doubt be accessed by students and staff on campus. However, because these bans restrict off-campus speech that does not materially interfere with the learning environment, they would likely be found unconstitutional.

### III. A SOLUTION: A UNIVERSITY POLICY THAT FOCUSES ON SOCIAL MEDIA EDUCATION FOR STUDENT-ATHLETES, WHILE RESTRICTING USE TO NON-TEAM EVENTS

Should the preemptive bans be challenged, the major constitutional issue that universities would likely face would be that the bans’ restrictions make no distinction between off-campus and on-campus speech. As discussed in *Blue Mountain*, the Supreme Court has not fully addressed whether a school has the power to restrict off-campus speech, but the decision in *Morse* suggests that such restrictions will face high scrutiny and may be found to fall outside the realm of school regulation.<sup>153</sup>

Therefore, a preferable policy would be to restrict student-athlete use of social media but not ban it entirely. Banning the players from using social

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149. *Blue Mountain Sch. Dist.*, 650 F.3d at 932 (citing *Morse*, 551 U.S. at 405).

150. *Cohen v. California*, 403 U.S. 15 (1971).

151. *Blue Mountain Sch. Dist.*, 650 F.3d at 932 (citing *Cohen*, 403 U.S. at 26).

152. *Id.*

153. *Id.* at 926 n.3.

media while in the locker room, in team meetings, and while traveling with the team would place the universities on firmer constitutional footing and reduce any hardship placed on student-athletes. If challenged, a court would likely find that such a policy restricts only on-campus speech. Additionally, such a ban would address one of the coaches' main concerns—that social media use distracts players during their time with the team.

By avoiding a flat ban on the use of social media, the possible pitfalls of its use can become a teaching tool for coaches, universities, and student-athletes. For those players that attain professional athletic careers, the attention and scrutiny they receive will only increase after college. Receiving guidance now on the possible dangers of inappropriate or irresponsible social media use would be a valuable learning and career building experience. Furthermore, the lessons learned by student-athletes who go on to lower-profile careers may be just as valuable. Inappropriate social media use does not just hurt famous athletes—it can cost almost anyone his or her job.<sup>154</sup> Learning the proper use of social media is something that every college athlete can benefit from, but preemptive bans do not allow for education, instruction, or experience. They will simply delay mistakes until after the student has left school.

Instruction and education would also mitigate the administration's fear that social media may be dangerous for student-athletes, especially those with high profiles whom fans or sports agents may target. With proper instruction and knowledge, players can learn how to block threatening tweets and posts, and to restrict—at least to some extent—who has access to their information.<sup>155</sup> If universities are truly worried about the safety of players social media use, then players can be instructed on what not to post and why certain kinds of posts may compromise their safety. By incorporating real-world examples of the negative consequences of irresponsible social media use, of which there is a growing supply, universities can effectively communicate this point to incoming first-year students and then reinforce it throughout the students' college career.

Universities have begun to address the challenges presented by student-athlete social media use. The North Carolina Tar Heels athletic department has a new social media policy.<sup>156</sup> The policy reminds athletes that

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154. McCoy, *supra* note 42, at 211 (“Many have lost their jobs due to what they posted online.”).

155. See *How to Protect and Unprotect Your Tweets*, TWITTER, <http://support.twitter.com/articles/20169886-how-to-protect-and-unprotect-your-tweets> (last visited Nov. 19, 2012) (describing the three-step process users can take to protect their Tweets).

156. *Coach, Can I Tweet That?: The Athletic Department Needs Consistency in Its Social Media Policy*, DAILYTARHEEL.COM (JAN. 31, 2012, 12:31 AM), [http://www.dailytarheel.com/index.php/article/2012/01/coach\\_can\\_i\\_tweet\\_that](http://www.dailytarheel.com/index.php/article/2012/01/coach_can_i_tweet_that).

“[e]verything you post is public information” and advises them that “[w]hat you post may affect your future.”<sup>157</sup> Clearly and repeatedly communicating this information to student-athletes throughout their college careers will teach them behaviors that will serve them well throughout their lives.<sup>158</sup> However, one would imagine that coaches would emphasize such lessons less where bans are in place. A swim team coach whose athletes are allowed to use Twitter has greater motivation to teach those athletes to use social media responsibly than a football coach whose players are not allowed to use Twitter at all. Therefore, the question has to be asked whether these bans exacerbate the problems they are supposed to solve.

Social media use, especially in the hands of young, high-profile athletes, can bring about negative consequences for universities, teams, and the student-athletes themselves.<sup>159</sup> However, preemptive bans of all social media use are not the most effective way to address these issues. These concerns can be best addressed through guidance, education, and limited restrictions on use that apply only to team activities. This way, the best interests of the student-athlete can coincide with the educational mission of the school, while respecting the student-athlete’s First Amendment right to free speech. As Chief Justice Burger wrote in a dissent supporting a university’s right to *punish* obscene on-campus speech: “[A] university . . . is . . . an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society . . . .”<sup>160</sup> Chief Justice Burger’s argument applies to preemptive social media bans as well, because student-athletes cannot learn to express themselves through social media in “acceptable” ways if they are not allowed to express themselves at all.

#### CONCLUSION

Large college sports programs, especially football teams, can bring in tens of millions of dollars in profit for their universities each year. This financial interest, combined with other considerations, has led some public

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157. *Id.*

158. This policy has faced some criticism. The *Daily Tar Heel* has observed that “[w]ithout more specific guidance, student and coaches are left to make it up as they go along, and the right path isn’t always clear.” *Id.*

159. *See, e.g., id.* (“Disgraced former [UNC] football star Marvin Austin provided a classic social media cautionary tale when he penned an incriminating tweet two summers ago, sparking a lengthy NCAA investigation and leading to his dismissal from the team.”)

160. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 672 (1973) (Burger, C.J., dissenting).

universities to institute team-wide bans on social media use by student-athletes. The preemptive bans on social media use that exist at public universities violate the student-athletes' First Amendment free speech rights under *Tinker*. This is because the bans regulate off-campus speech, and the safety issues cited by coaches are not substantial enough to warrant the bans. The safety concerns are also not enough to warrant a *Vernonia*-type exception for student-athletes. The bans would have a better chance of being found constitutional, in the First Amendment context, if they are applied only to new students who are given notice of the bans before they choose to attend the school. However, even if prior notice is given, courts still might hold that the preemptive bans unconstitutionally restrict student speech. Therefore, the universities' legitimate concerns should be addressed through guidance, education, and limited restrictions on use that apply only to team activities.

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