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Time to *Tinker*: A New Standard for Protecting the First Amendment Rights of College Athletes

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I. Introduction

As winter gave way to spring and summer in 2021, longstanding practices in the relations between college athletes and their respective institutions yielded to the shifting winds of dramatic, even historic, change. In April of 2021, the National Collegiate Athletic Association (NCAA) approved a rule change that enables athletes in all sports who have not yet transferred from one institution to another to do so once in a college career and be immediately eligible to play at the new institution.[1] The new rule took effect at the start of the 2021-22 academic year.[2]

On the heels of the new transfer rule came a decision of the Supreme Court of the United States, *NCAA v. Alston*,[3] which affirmed a ruling by the

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[1] *See NCAA 1-Time Transfer Rule Clears Last Step, Starts with 2021-22 Academic Year*, ESPN (Apr. 28, 2021), https://www.espn.com/espn/print?id=31353578 [https://perma.cc/G9LM-L998]. The so-called one-time exception had previously been available to some college athletes, but not those who compete in football, men's and women's basketball, and men's ice hockey, to whom the exception now applies.

[2] *See id.* Athletes who have already transferred once and seek to do so again, and to be immediately eligible to play for the new institution, may be able to obtain a waiver allowing such immediate eligibility, but the waiver criteria are likely to be more stringent than they have previously been. *See* Ross Dellenger, *'It's Going to Change the Landscape': The NCAA's Transfer Revolution Is Here, and Its Impact Will Be Felt Far and Wide*, Sports Illustrated (Apr. 14, 2021), https://www.si.com/college/2021/04/14/ncaa-transfers-rule-change-football-basketball [https://perma.cc/F8QU-UQNY].

[3] 141 S. Ct. 2141 (2021).

United States Court of Appeals for the Ninth Circuit. The appeals court had held that the NCAA and its members were violating Section I of the Sherman Antitrust Act by capping the expenses institutions can incur on behalf of athletes for "academic-related costs," such as internships, computers, and study abroad programs.[4] In affirming that decision, the Supreme Court rejected the NCAA's traditional argument that its important interest in keeping college sports distinct from professional sports means that courts should give only a "quick look" to antitrust claims lodged against NCAA rules.[5] *Alston* will likely cause the NCAA to think twice about imposing new rules with economic implications because it can no longer expect such rules to receive judicial deference.[6]

Another big change to college sports in 2021 was a recognition, thus far by state law and NCAA acquiescence, of college athletes' right to earn income from the commercial use of their names, images, and likenesses (NIL), such as by signing autographs, endorsing products, and posting social media videos for a fee.[7] As of late May 2022, twenty-seven states had enacted statutes that, in general, prohibit institutions in those states from denying to their athletes opportunities to sign endorsement or sponsorship contracts with companies seeking the athletes' services. Such laws took effect in six states on July 1, 2021, with the remainder slated to follow by 2023.[8]

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[4] Michael McCann, *Supreme Court Rules Unanimously Against NCAA in Alston Case*, SPORTICO (June 21, 2021, 10:29 AM), https://www.sportico.com/law/analysis/2021/supreme-court-rules-unanimously-against-ncaa-in-alston-case-12346321821 [https://perma.cc/YV67-A96R].

[5] *Id.*

[6] *See id. See also* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021), which may also affect college sports in the future. The *Mahanoy* Court held that a school district violated the First Amendment when it punished a high school cheerleader for posting on a social media site a profane message that she sent from an off-campus location on a weekend. If courts apply this decision to the college context, they could enhance considerably the First Amendment rights of college athletes, which are the focus of this article.

[7] *See* Eben Novy-Williams & Emily Caron, *NIL Deals Arrive Quickly* as *NCAA Athletes Flex New Financial Freedom*, SPORTICO (July 1, 2021, 11:00 AM), https://www.sportico.com/leagues/college-sports/2021/nil-deal-examples-1234633234/ [https://perma.cc/JE36-NEQR].

[8] *See Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, https://www.businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ [https://perma.cc/P5X5-H4D4] (last updated May 29, 2022). Instead of adopting its own NIL rule, the NCAA has settled for a "uniform interim policy suspending name, image and likeness rules for all incoming and current athletes in all sports." Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://

A common theme underlies the recent changes in the transfer policy and the NIL policy: the NCAA and its member institutions will treat athletes like their nonathlete classmates, who have long been free to transfer if they wished and to earn income from their talents if so inclined. Still, many institutions treat athletes far more restrictively than their nonathlete classmates regarding the exercise of First Amendment rights. For example, coaches gave the following instructions to football players at Old Dominion University in Virginia: "Don't use Twitter—ever. Don't use Facebook unless you 'friend' the athletic department, so administrators can read what you are saying. Don't write anything that might reflect poorly on the university."[9]

Because ordinary college students are not subject to such restrictions on their speech, Professor Frank LoMonte asks: "Is there something so unique about the college/athlete relationship that it justifies discarding well-established constitutional principles?"[10]

This article will answer with a firm no; athletes are not so different from other college students as to warrant severe restrictions on their social media use or the policing of their social-media accounts by third-party vendors serving as monitors.[11] Neither are athletes so different from other students that coaches or administrators can require them to stand (or kneel)

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perma.cc/RC69-3USL]. The reason for the "interim" policy is that the NCAA awaits enactment by Congress of a uniform NIL law. NCAA president Mark Emmert has said, "We very much want, and frankly need, a preemption bill that would say that there's going to be a rule for the country, not 50." Haley Yamada, *NCAA Adopts Policy That Allows Athletes to Profit off Name, Image and Likeness*, ABC NEWS (June 30, 2021, 6:05 PM), https://abcnews.go.com/Sports/ncaa-vote-policy-allowing-athletes-profit-off-image/story?id=78582491 [https://perma.cc/XFL4-WWJ5].

[9] Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 2 (2014) [hereinafter LoMonte, *Fouling the First Amendment*]. *See also* Harry Minium, *ODU Football Twitter Ban Among Most Restrictive in U.S.*, VIRGINIAN-PILOT (Sept. 15, 2012), https://www.pilotonline.com/sports/college/old-dominion/article_a0fcc378-fef6-56cd-8128-3936d1f85b5e.html [https://perma.cc/T7XB-VV3A].

[10] LoMonte, *Fouling the First Amendment, supra* note 9, at 3.

[11] Several third-party vendors, such as UDiligence, Varsity Monitor, and Centrix Social, contract with institutions to monitor the social media accounts of athletes. *See* John Browning, *Universities Monitoring Social Media Accounts of Student Athletes*, 75 TEX. B.J. 840, 842 (2012).

before a game in support of a particular group or issue position[12] or to sing a school song linked to a history of racism.[13]

This article will contend that college athletes deserve the same treatment as their nonathlete classmates regarding not only transfer rules and compensation for NIL use, but also free-speech rights. Athletes should be free to speak or not speak, as they wish, subject only to limited restrictions. To advance these ideas, Part II will survey current First Amendment jurisprudence pertaining to student speech. Part III will examine this jurisprudence in the context of protest speech by college athletes, while Part IV will conduct the same examination for social-media speech. Part V will present a plan for protecting athletes' free-speech rights without sacrificing team cohesion or player confidentiality. Part VI will conclude that under this plan, athletes will have the same opportunity as their nonathlete classmates to hone the skills necessary to participate effectively in a democratic society. Unlike their athletic skills, the democratic-participation skills facilitated by freedom of speech will last a lifetime.

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[12] Former Virginia Tech women's soccer player Kiersten Hening has sued her former coach, alleging that after she refused to join teammates before games in kneeling in support of "Black Lives Matter," the coach engaged in a "campaign of abuse and retaliation" against her that caused her to leave the team. Mike Barber, *Former Virginia Tech Soccer Player Sues Coach, Claiming She Was Forced off Team for Refusing to Kneel Before Games*, RICHMOND TIMES- DISPATCH, (Apr. 19, 2021), https://richmond.com/sports/college/former-virginia-tech-soccer-player-sues-coach-claiming-she-was-forced-off-team-for-refusing/article_50b30056-bdb4-5418-9e27-abd18a761dc3.html [https://perma.cc/CA3U-XQ45].

[13] At the University of Texas at Austin, Black football players have refused to participate in the postgame ritual of singing "The Eyes of Texas Are Upon You," the institution's official alma mater song and an unofficial fight song, because of its history of being sung in minstrel shows in which white performers appeared in blackface. The University has declined the requests of Black athletes and others to drop the song and, in response to backlash from fans after players left the field during its singing in 2020, the athletic director ordered the players to remain standing on the field while the song is sung. Joe Levin, *The Damning History Behind UT's 'The Eyes of Texas' Song*, TEX. MONTHLY (June 17, 2020), https://www.texasmonthly.com/arts-entertainment/ut-austin-eyes-of-texas-song-racist [https://perma.cc/Y245-EQ7T]. *See also* Jim Vertuno, *Conflict Raging over 'The Eyes of Texas' School Song*, ASSOCIATED PRESS (Oct. 23, 2020), https://apnews.com/article/eyes-of-texas-controversy-school-song-ced5a2c90f2f847fb58be59971d7a494 [https://perma.cc/C8XW-G87B].

II. Student Speech Under the First Amendment

A. Forum Analysis and the Tinker Standard

Ordinarily, when considering a First Amendment issue, the initial step is to conduct a forum analysis. The aim of this inquiry is to determine whether the speech at issue has occurred or will occur in a traditional public forum, a limited public forum, or a nonpublic forum. That determination will dictate the level of scrutiny a court would apply to regulation of the speech.[14] The Supreme Court has explained that in the traditional public forum, which includes public streets, sidewalks, and parks, government may not restrict speech based on its content without a compelling state interest and a narrowly tailored regulation.[15] Nevertheless, government may impose content-neutral time, place, or manner restrictions, such as banning the use of bullhorns after a certain hour of the day.[16]

A limited public forum is defined by public property that government has opened for use by the public as the site of expressive activity, such as a state university campus, a municipal theater, or a school board's meeting room.[17] When a limited public forum is open—to university-sponsored student organizations, for example—the same jurisprudence that applies to a traditional public forum applies to the limited public forum. Absent a compelling state interest and a narrowly tailored regulation, content neutrality is required.[18]

The nonpublic forum is defined as public property that has not traditionally been a site for expressive activity nor has government designated it as a site for such activity. In this setting, government enjoys expanded regulatory authority, but its rules governing speech must, nevertheless, be reasonable and not merely reflect opposition to the speaker's viewpoint.[19] That is, the rules must be content (viewpoint) neutral.[20] Thus, under the forum

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[14] *See* Eric Bentley, *Unnecessary Roughness: Why Athletic Departments Need to Rethink Whether to Aggressively Respond to the Use of Social Media by Athletes*, 75 Tex. B.J. 834, 836 (2012) [hereinafter Bentley, *Unnecessary Roughness*].

[15] Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

[16] *See* Frank D. LoMonte, *The Key Word Is Student:* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 First Amend. L. Rev. 305, 312 (2013) [hereinafter LoMonte, *The Key Word Is Student*].

[17] *See id. See also* John Ryan Behrmann, Comment, *Speak Your Mind and Ride the Pine: Examining the Constitutionality of University-Imposed Social Media Bans on Student-Athletes*, 25 Jeffrey S. Moorad Sports L.J. 51 (2018).

[18] *See* Behrmann, *supra* note 17, at 54.

[19] *See id.* at 57.

[20] *See id.* at 55.

doctrine, although government property belongs to the public, not all government property is equally suitable for expressive activity. Therefore, different regulations apply to different types of public forums.[21]

Forum analysis applies to an act of student protest. Regulatory standards would vary, as noted above, depending on whether, for example, a student delivered a speech opposing a tuition increase, a campus statue of a Confederate general, or the institution's fight song in a public park, on the campus quadrangle, or in a French literature class in which the student's topic was not on the agenda. Courts analyze student speech on social media differently; such expression is "off-campus speech," not subject to location-based variations in regulation.[22] Instead, a court would uphold an institution's punishment of social-media speech only if the institution could show that the speech was a material disruption to institutional activities or fit into another category of unprotected speech.[23] Traditional categories of speech that the first Amendment leaves unprotected include: (1) fighting words or a "true threat"; (2) defamatory statements; (3) obscenity, such as the posting of a link to a hardcore pornographic website; (4) a violation of criminal law, such as a student posting a picture of himself committing a crime; (5) a violation by an athlete of reasonable team or NCAA rules (*e.g.*, violating curfew or accepting a gift from a team booster); and (6) harassing speech, such as a tweet that features sexually harassing conduct directed at another student.[24]

The "material disruption" standard noted above derives from the Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District*,[25] in which the Court recognized, for the first time, that students (and teachers) in public schools are entitled, under the First and Fourteenth Amendments, to assert their freedom of speech in the classroom, in the cafeteria, on the athletic field, indeed anywhere on school grounds during school hours.[26] In *Tinker*, three Iowa schoolchildren wore black armbands to school in December 1965 to protest the Vietnam War and to express support for a truce. School authorities suspended them from attending classes until they returned without the armbands, which they did when the

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[21] *See* LoMonte, *The Key Word is Student*, *supra* note 16, at 312.

[22] *See* Bentley, *Unnecessary Roughness*, *supra* note 14, at 836.

[23] *See id.*

[24] *Id.* at 837-838.

[25] 393 U.S. 503 (1969).

[26] *See id.* at 512-513. *See also* Diane Heckman, *Does Being a Student-Athlete Mean Having to Say You're Sorry? First Amendment Freedom of Speech, Apologies, and Interscholastic Athletic Programs*, 293 EDUC. L. REP. 549, 556 (2013).

new year began.[27] Finding for the students, the Court explained that "First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students."[28] "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[29]

It was significant that, in this instance, the students' wearing of black armbands did not interrupt the work of the school or intrude on the rights of other students.[30] It was, in the words of Justice Fortas's majority opinion, "closely akin to pure speech."[31] For the State to justify prohibiting expression by students at school, "it 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."[32] "Certainly," Justice Fortas continued, "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[33] And a student's free-speech rights are not confined to the classroom. Justice Fortas explained,

> When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others."[34]

B. Exceptions to Tinker

But if, as one commentator has observed, the Court constructed "the bulwark of free speech rights for students"[35] in *Tinker*, it has since chipped away at that bulwark in three later cases: *Bethel School District v. Fraser*,[36] *Hazelwood School District v. Kuhlmeier*,[37] and *Morse v. Frederick.*[38] In *Fraser*, a

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[27] *See* 393 U.S. at 504.
[28] *Id.* at 506.
[29] *Id.*
[30] *See id.* at 508.
[31] *Id.* at 505.
[32] *Id.* at 509.
[33] *Id.* (quoting *Burnside v. Byers*, 363 F.2d 744, 749 (5th Cir. 1966)).
[34] *Id.* at 513, (quoting 363 F.2d at 749).
[35] Heckman, *supra* note 26, at 561.
[36] 478 U.S. 675 (1986).
[37] 484 U.S. 260 (1988).

high school student delivered a speech nominating a fellow student for a class officer position during a high school assembly at which many attendees were as young as fourteen years old. Throughout the speech, the speaker "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."[39] In so doing, he violated a school rule against "obscene, profane language or gestures," whereupon he was suspended from classes for three days and removed from a list of candidates for graduation speaker.[40] The trial court held that these sanctions violated the First Amendment, and the Ninth Circuit Court of Appeals affirmed.[41]

The Supreme Court reversed, distinguishing this case from *Tinker* because "the penalties imposed [here] were unrelated to any political viewpoint."[42] "A high school assembly," the Court observed, "is no place for a sexually explicit message directed towards an unsuspecting audience of teenage students."[43] Moreover, "[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by [the speaker]."[44] Thus, the *Fraser* Court created an exception to the *Tinker* standard for "lewd, indecent, or offensive" student speech.[45]

The Court addressed student speech again two years later in *Hazelwood School District v. Kuhlmeier*, in which the issue was the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.[46] Three alumni—former editors of a high school newspaper—alleged that school officials violated their First Amendment rights by deleting two pages worth of articles from a particular issue of the newspaper.[47] The principal had objected to two articles scheduled to appear in the paper; one article described three students' experiences with pregnancy, and the other discussed the impact of divorce on students at the school.[48] In the principal's view, the pregnancy article's references to sex and birth control were inappropriate for younger students at the high school, and the divorce article's identification

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[38] 551 U.S. 393 (2007).
[39] Bethel Sch. Dist. v. Fraser, 478 U.S. at 677-678.
[40] *Id.* at 678.
[41] *See id.*
[42] *Id.* at 685.
[43] *Id.*
[44] *Id.* at 683.
[45] *See id.*
[46] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).
[47] *Id.*
[48] *Id.* at 263.

by name of a student of divorced parents, accompanied by criticisms of her father, violated the parents' privacy, especially because the student journalists had not interviewed the parents.[49]

The trial court found that no First Amendment violation had occurred, but the Eighth Circuit Court of Appeals reversed, reasoning that, under *Tinker*, school authorities could only suppress the articles upon a reasonable forecast of disruption of school activities if the articles were printed, and they could make no such forecast here.[50] The Supreme Court reversed the Court of Appeals, noting that *Tinker* did not govern because the school newspaper was not a "public forum," as the appellate court had viewed it, but rather, "a supervised learning experience for journalism students."[51] Therefore, school officials could regulate the newspaper's contents "in any reasonable manner," just as they could regulate the contents of the classes they offered.[52] In other words, *Tinker* was about whether a school had to *tolerate* particular student speech, but *Hazelwood* was about whether a school had to *promote* particular student speech; the school enjoys greater discretion in the latter circumstances.[53]

Thus, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[54] In this instance, considering the privacy concerns of the pregnant students and of the divorced parents of another student, and the principal's view that insufficient time existed to complete the necessary textual changes and still meet the printing schedule, the Court concluded that the principal had acted reasonably in omitting the pregnancy and divorce articles "so that students would not be deprived of the newspaper altogether."[55]

Almost two decades later, student speech again reached the Supreme Court in *Morse v. Frederick*.[56] As the Olympic Torch Relay passed through Juneau, Alaska in 2002 on its way to Salt Lake City, it passed by Juneau-Douglas High School, where the principal let students leave class to observe the event from either side of the street.[57] As the relay reached the school,

[49] *Id.* at 265.
[50] *Id.*
[51] *Id.* at 270.
[52] *Id.* at 270–71.
[53] *See id.*
[54] *Id.* at 273.
[55] *See id.* at 275–76.
[56] 551 U.S. 393 (2007).
[57] *See id.* at 397.

Joseph Frederick, a senior, joined his friends in unfurling a fourteen-foot banner that proclaimed, "BONG HITS 4 Jesus," resulting in his suspension from classes for ten days.[58] After exhausting his administrative appeals without success, Frederick sued the principal, Morse, but the trial court granted summary judgment for Morse. The Ninth Circuit reversed, however, reasoning that the school had failed to show, as *Tinker* requires, that Frederick's speech created a substantial risk of disrupting school activities.[59]

Chief Justice Roberts, writing for the Court and citing *Fraser* for support, wrote that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"[60] and that "the mode of analysis set forth in *Tinker* is not absolute."[61] For Roberts, the key fact in the case was that "Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one."[62] "The concern here," Chief Justice Roberts continued, "is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use," an activity to be deterred because "[d]rug abuse can cause severe and permanent damage to the health and well-being of young people. . .."[63] Thus, the Court added speech advocating the use of illegal drugs to the list of exceptions to the *Tinker* "material disruption" standard for regulating student speech.

Taken together, *Fraser*, *Hazelwood*, and *Morse* establish that students' free-speech rights "are not automatically coextensive with the rights of adults in other settings."[64] Indeed, students' free-speech rights are subject to restrictions because of the characteristics of the school environment, and school authorities need not tolerate student speech that threatens to "undermine the school's basic educational mission."[65] Still, as Professor Johnson has noted, despite the erosion in *Tinker's* bulwark of protection for student speech, *Tinker* "remains good and controlling law for the majority of student

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[58] *See id.* at 397–98.

[59] *See id*. at 398–99.

[60] *Id.* at 404–05 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S 675, 682 (1986)).

[61] *Id.* at 405.

[62] *Id.* at 401.

[63] *Id.* at 407–09.

[64] *Id*. at 409–10.

[65] Rebecca L. Zeidel, Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. REV. 303, 306 (2012).

speech cases"[66] and its "material-disruption" standard still governs cases involving college athletes' speech.[67]

C. Alternative Free-Speech Standards in the College Setting

1. The *Hazelwood* Standard

That situation could change, though, absent a Supreme Court decision that specifically addresses the speech of college students generally or college athletes specifically, because some courts have rejected the *Tinker* standard in favor of the *Hazelwood* standard, even in the college setting. *Hazelwood* carved out an exception to *Tinker* for "curricular" speech—specifically, speech promoted by the school through its student newspaper—which is subject to regulation by school authorities.[68] Professor LoMonte has characterized the justifications for such regulation as (1) the "maturity" rationale, meaning that vulnerable listeners and readers need protection from speech on certain adult topics, and (2) the "disassociation rationale," meaning that schools should be free to separate themselves from speech that would align them with controversial political views or that sets a poor educational example. [69] Instead of the highly speech-protective *Tinker* standard, which requires the government to show a "material and substantial disruption" of regular school activities to warrant suppressing speech, the *Hazelwood* Court held that school authorities could suppress "school-sponsored expressive activities" merely by showing that "their actions are reasonably related to legitimate pedagogical concerns."[70] The Court did not specify in *Hazelwood*, though, whether its new standard should apply to college students.[71]

Nevertheless, several federal appellate courts have extended the *Hazelwood* standard to the college setting. In *Axson-Flynn v. Johnson*, the court concluded that speech used in college acting classes, as part of the curricu-

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[66] Noel Johnson, Tinker *Takes the Field: Do Student Athletes Shed Their Constitutional Rights at the Locker Room Gate?*, 21 Marq. Sports L. Rev. 293, 295 (2010).

[67] *See id.* at 306.

[68] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988).

[69] *See* LoMonte, *The Key Word Is Student*, *supra* note 16, at 306.

[70] *Id.* at 317 (citing *Hazelwood*, 484 U.S. at 273).

[71] *See id. at* 319. In *Hazelwood*, a footnote stated: "A number of lower federal courts have similarly recognized that editors' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. 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." *Hazelwood*, 484 U.S. at 273–74, n.7 (citations omitted).

lum, supervised by faculty members and designed to impart knowledge or skills, was school-sponsored speech governed by *Hazelwood* and subject to regulation "in any reasonable manner."[72] A genuine issue of material fact existed as to whether university officials' requirement that an acting student use certain profane words prohibited by her Mormon faith was reasonable pedagogy or a pretext for religious discrimination.[73] Similarly, in *Hosty v. Carter*,[74] the court held that "*Hazelwood's* framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."[75] The defendant Dean of Students was entitled to qualified immunity from damages in a suit arising from the refusal by student editors of a college newspaper to submit to prepublication review by the defendant.[76] And in *Ward v. Polite*,[77] the court observed that "[n]othing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one."[78] The court reversed a grant of summary judgment for the defendant and held that a reasonable jury could find (1) a professional counseling association's code of ethics did not bar the plaintiff graduate student's request for the transfer of a gay client to another counselor because of the plaintiff's religious opposition to homosexuality and (2) the university had used the request as a pretext for silencing the plaintiff by expelling her from the graduate program.[79] At either level, then, according to the *Hosty* court, public educators may limit student speech in school-sponsored expressive activities as long as their actions are "reasonably related to legitimate pedagogical concerns."[80]

Professor LoMonte has argued that the *Hazelwood* standard should not govern in the college setting because neither its maturity rationale nor its disassociation rationale is appropriate there.[81] The former is inappropriate because, in the college context, both the speakers and the listeners are old enough that neither need protection from "unsuitable" material.[82] The latter is also inappropriate because no reasonable listener would mistake the message of an individual college student for that of the student's institu-

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[72] *See* Axson-Flynn v. Johnson, 356 F.3d. 1277, 1284–85 (10th Cir. 2004) (citing *Hazelwood*, 484 U.S. at 270).
[73] *Id.* at 1293.
[74] 412 F.3d 731 (7th Cir. 2005)
[75] *Id.* at 735.
[76] *See id.* at 739.
[77] 67 F.3d 727 (6th Cir. 2012).
[78] *Id.* at 733–34.
[79] *See id*. at 735.
[80] *Id.* at 733 (citing *Hazelwood*, 484 U.S. at 273).
[81] *See* LoMonte, *The Key Word Is Student*, *supra* note 16, at 341–43.
[82] *See id.* at 341.

tion.[83] Thus, "[b]ecause the listening audience on a college campus is capable of handling mature subject matter and is not physically constrained to endure unwelcome speech, colleges have no need for the *Hazelwood* level of control over what their students say and write."[84]

According to this view, the *Tinker* and *Hazelwood* standards are separate and distinct because they concern fundamentally different varieties of speech. As suggested above, the *Tinker* standard concerns "speech that the government is asked to tolerate," whereas the *Hazelwood* standard concerns "speech that the government is asked to affirmatively promote."[85] Naturally, government should have more discretion to regulate speech it seeks to promote than speech it merely needs to tolerate. Thus, according to the above commentary, "courts that rely on *Hazelwood* to ratify the punishment of college students who question institutional policies are obliterating this distinction."[86]

2. The *Pickering/Connick/Garcetti* Standard

Whatever its benefits or burdens, though, *Hazelwood* is not the only alternative to the *Tinker* standard for governing the free-speech rights of college students. The speech rights of college students who participate in extracurricular activities, including athletics, are sometimes analogized to public employees' speech rights on the theory that, like public employees who represent the governments for which they work, students who participate in extracurricular activities represent their respective institutions.[87] Under this theory, a court could apply reasoning akin to that used by the Supreme Court in *Garcetti v. Ceballos*[88] to college athletes. The Court held in that case that a public employee whose speech results from his official job duties (i.e., a deputy district attorney whose office memorandum challenges alleged inaccuracies in a search warrant affidavit) lacks First Amendment protection for that speech. But when that same public employee speaks, as a private citizen, about a matter of public concern (i.e., whether state court judges should be elected or appointed), the employee's comments may enjoy First Amendment protection, unless the public employer has adequate justification for treating the employee differently from other members of the

[83] *See id.* at 343–45.
[84] *Id.* at 358.
[85] *Id.* at 360.
[86] *Id.*
[87] *See* Zeidel, *supra* note 65, at 308.
[88] 547 U.S. 410 (2006).

public.[89] If a court applied the public-employee framework to college athletes, it could hold that an athlete who speaks as a private citizen about a matter of public concern, such as by engaging in a public protest on campus after practice, enjoys First Amendment protection.[90] Yet, the same court could hold that for an athlete who speaks as an athlete, such as by boycotting practices or games, no such protection is available.[91]

Professor Meg Penrose contends that the public-employee theory of *Garcetti* is more appropriate to college athletes than *Tinker's* material-disruption standard. In her view, "[c]ollege athletes are constitutionally unique" because they "regularly agree to rules and regulations that are not imposed on ordinary college students, including policies relating to grooming, gambling, drinking, pornography, taunting, cursing and even tobacco use."[92] "Simply put," she states, "college athletes are considered to be special and different, particularly when it comes to speech and expressive rights."[93] "This choice to voluntarily participate in athletics," she continues, "operates, at least partially, as a waiver of speech and expressive rights."[94] Accordingly, the appropriate standard under which to evaluate the speech of college athletes is that which courts apply to public employees who, like the athletes, surrender some of their speech rights in return for enjoying the benefits of their association with public entities.

The Supreme Court first addressed the free-speech rights of public employees in *Pickering v. Board of Education*,[95] holding that speech by government employees must pass a balancing test that weighs the public employee's right, as a citizen, to speak about "matters of public concern" against the right of the government, as employer, to conduct its business, which can necessitate restricting employee speech.[96] Therefore, unless the school board could show that the plaintiff, a teacher, had knowingly or recklessly made false statements in his letter to a local newspaper criticizing the board, the board could not fire him for his exercise of free speech.[97] Later, in

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[89] *See id.* at 418; Eric D. Bentley, *Fair Play?*, INSIDE HIGHER ED (Feb. 4, 2016), https://www.insidehighered.com/views/2016/02/04/do-college-athletes-have-first-amendment-right-strike-essay [https://perma.cc/65ZG-JVBV] [hereinafter Bentley, *Fair Play?*].

[90] *See* Bentley, *Fair Play?*, *supra* note 89.

[91] *See id.*

[92] Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. MARSHALL REV. INTELL. PROP. L. 509, 510-11 (2013) [hereinafter Penrose, *Outspoken*].

[93] *Id.*

[94] *Id.* at 526.

[95] 391 U.S. 563 (1968).

[96] Heckman, *supra* note 26, at 562-63.

[97] *See* 391 U.S. at 574-75.

Connick v. Meyers,[98] the Court defined "matters of public concern" as "any matter of political, social, or other concern to the community."[99] It upheld the firing of a deputy district attorney for circulating a questionnaire among fellow employees concerning the district attorney's policy for transferring employees, among other internal issues, which the Court determined were not matters of public concern.[100]

More recently, in *Garcetti*, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[101] Accordingly, the Justices upheld the punishment of another deputy district attorney, who wrote a memorandum to his superiors questioning the grounds for issuance of a search warrant and testified in favor of a defense motion challenging that warrant.[102]

According to Professor Penrose, although the *Pickering/Connick/Garcetti* framework "may not be ideal" for college athletes, it is "far superior" to *Tinker* because the former "appreciates the student-athlete's unique relation to a state [university's] athletic department as qualitatively distinct from a high school student's desire to attend class, [therefore] requir[ing] greater deference [to the institution] than the *Tinker* framework offers."[103] "If participating in college athletics" she writes, "means [athletes] receive a watered-down version of First Amendment rights, so be it. The experiences gained on and off the field or court [are] well worth this limited sacrifice."[104]

Applying the public-employee standard to the speech of college athletes, though, is problematic. The foundation of that standard is that "when the government is acting as employer, it should have the power to restrict speech that interferes with the proper and efficient function of the workplace."[105] But college athletes are not now, and have never been, "employees" of their institutions; rather, they are "students," even if subject to more regulation than their nonathlete classmates. Therefore, the *Pickering/Connick/Garcetti* standard is "a poor fit" for a college campus; whereas the prosecu-

[98] 461 U.S. 138 (1983).
[99] *Id.* at 146-47.
[100] *See id.* at 154.
[101] 547 U.S. at 421.
[102] *See id.* at 414-17.
[103] Penrose, *Outspoken*, *supra* note 92, at 543.
[104] *Id.* at 550.
[105] Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1853 (2017).

tors' offices in *Connick* and *Garcetti* were not intended to be marketplaces for the exchange of ideas, the college campus surely is.[106]

D. The Supreme Court and College-Student Speech

Courts have often observed that the free speech rights of college students exceed those of students in the high-school setting.[107] Indeed, the Supreme Court has regularly invalidated colleges' attempts to regulate the content of student speech, whether by disciplining students,[108] not recognizing student organizations,[109] or withholding funds from student publications.[110]

In *Healy v. James*, a state college president refused to grant official recognition to a local chapter of the Students for a Democratic Society (SDS).[111] The students who sought official recognition brought a First Amendment claim in federal court. The district court ordered the college president to conduct a due process hearing on the matter, which resulted in another denial of the students' request; thereafter, the district court dismissed the case, and the Second Circuit affirmed.[112] The Supreme Court noted that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[113] Therefore, although "a college has a legitimate interest in preventing disruption on the campus" that could justify restraints on speech, "a 'heavy burden' rests on

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[106] *See id.*

[107] *See* Marcus Hauer, Note, *The Constitutionality of Public University Bans of Student-Athlete Speech Through Social Media*, 37 VT. L. REV. 413, 422 (2012).

[108] *See* Papish v. Board of Curators of Univ. of Mo., 410 U.S. 667 (1973).

[109] *See* Healy v. Jones, 408 U.S. 169 (1972).

[110] *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

[111] *See* 408 U.S. at 170. The SDS was a radical political organization during the 1960s best known for its opposition to the Vietnam War, which it opposed with sit-ins, demonstrations, and marches. An SDS splinter group, the Weathermen (later known as the Weather Underground) was notorious for bombing government and corporate targets in the early 1970s. The activities of the Weather Underground may have persuaded the college president in *Healy* not to recognize an SDS chapter on his campus. *See* Todd Gitlin, *What Was the Protest Group Students for a Democratic Society? Five Questions Answered*, THE CONVERSATION (May 4, 2017), https://www.smithsonianmag.com/history/what-was-protest-group-students-democratic-society-five-questions-answered-180963138/ [https://perma.cc/AYG6-Q4DN].

[112] *See* 408 U.S. at 179.

[113] *Id.* at 180-81.

the college to demonstrate the appropriateness of that action."[114] Under that standard, the mere disagreement of a college president with a particular group's philosophy "affords no reason to deny it recognition."[115]

Still, a college would be justified in denying official recognition "to any group that reserves the right to violate any valid campus rules with which it disagrees."[116] In this instance, the record did not show whether the SDS was "willing to abide by reasonable rules and regulations," so the Court remanded the matter for reconsideration.[117]

Healy reflects the breadth of First Amendment prohibitions on the prior restraint of speech because the college's denial of official recognition to the SDS meant that the group was prevented from demonstrating, meeting, or even advertising its meetings, on campus or by means of institutional property, employees, or facilities. Although the students could meet or promote their group off campus, *Healy* showed that "even a regulation with only a secondary effect of burdening student speech can still be an unlawful restraint if its effect is to cut off the speaker from opportunities to be heard."[118]

In *Papish v. Board of Curators of the University of Missouri*, the defendant Board expelled a graduate student in journalism for distributing on campus a newspaper "containing forms of indecent speech" in violation of one of the Board's bylaws.[119] The newspaper featured a political cartoon that depicted the police raping the Statue of Liberty and an article titled "M-f Acquitted," which discussed the acquittal of a New York City youth who belonged to an organization called "Up Against the Wall, M-f."[120] The student brought a free speech claim against the Board, but the trial court denied relief and the Eighth Circuit affirmed.[121]

In a *per curiam* opinion, the Court explained that, as is clear from *Healy*, "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name of 'conventions of decency.'"[122] The Court acknowledged that speech can be subject to time, place, or manner restrictions, but in *Papish*, "petitioner was expelled because

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[114] *Id.* at 184.
[115] *Id.* at 187.
[116] *Id.* at 193-94.
[117] *Id.* at 194.
[118] Frank D. LoMonte & Virginia Hamrick, *Running the Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights to Speak to the News Media*, 99 Neb. L. Rev. 86, 115 (2020).
[119] *Papish*, 410 U.S. at 667.
[120] *Id.* at 667-68.
[121] *See id.* at 669.
[122] *Id.* at 670.

of the disapproved content of the newspaper rather than the time, place, or manner of its distribution."[123] Thus, the Court reversed and remanded, directing the trial court to require the University to reinstate the student unless valid academic reasons barred her reinstatement.[124]

In *Rosenberger v. Rector and Visitors of University of Virginia*, the University withheld authorization to the petitioners for payment of their printing costs because their student newspaper "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality."[125] A Christian group, which had earlier been approved for payment of its printing costs from the Student Activities Fund, sought such payment but was rejected because of its religious status.[126] After exhausting its administrative remedies within the University, the group brought free speech and free exercise claims. The trial court granted summary judgment for the University. The Fourth Circuit affirmed, despite finding discrimination based on the newspaper's content, because such discrimination was necessary for the separation of church and state.[127]

The Supreme Court noted that the University's payment policy did not prohibit reimbursement for the printing of publications that discussed religion as a subject matter, but rather, only for "those student journalistic efforts with religious editorial viewpoints."[128] Such viewpoint discrimination, the Court observed, is especially dangerous in a university, "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[129] When the institution, by its regulations, disapproves of certain student viewpoints, the Court continued, it "risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."[130] Thus, the Court reversed, holding that the payment regulation denied the petitioners' freedom of speech.[131]

Rosenberger was reminiscent of an earlier Supreme Court decision, *Widmar v. Vincent*,[132] although *Widmar* involved access to university facilities, rather than university funds, for a religious group. In 1977, the Univer-

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[123] *Id.*
[124] *See id.* at 671.
[125] *Rosenberger*, 515 U.S. at 822-23.
[126] *See id.* at 827.
[127] *See id.* at 828.
[128] *Id.* at 831.
[129] *Id.* at 835.
[130] *Id.* at 836.
[131] *See id.* at 837.
[132] 454 U.S. 263 (1981).

sity of Missouri-Kansas City (UMKC) informed a religious student group called Cornerstone that it could no longer meet in UMKC facilities because of a 1972 regulation that prohibited the use of UMKC buildings for worship or religious teaching.[133] Eleven members of Cornerstone sued to challenge that regulation, alleging violations of the Free Speech and Free Exercise Clauses of the First Amendment and of the Fourteenth Amendment's Equal Protection Clause.[134] The trial court upheld the regulation under the Establishment Clause of the First Amendment,[135] but the Eighth Circuit reversed, reasoning that the regulation was content-based discrimination against religious speech.[136]

The Supreme Court used "forum analysis" as its doctrinal framework in *Widmar*, noting that a State cannot constitutionally "enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."[137] In this instance, because UMKC had accommodated meetings of student groups in its facilities in the past, it had created a forum generally open for student use, thereby "assum[ing] an obligation to justify its discriminations and exclusions under applicable constitutional norms."[138] Specifically, UMKC had to show that its regulation was "necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."[139]

In the Court's view, UMKC failed to meet this requirement; the Court expressly rejected UMKC's claim that opening its facilities to religious groups would have the primary effect of advancing religion, thereby violating the Establishment Clause under the first prong of the well-established *Lemon* test.[140] On the contrary, the Court instructed, an open forum at a State university does not confer State approval on religious groups or prac-

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[133] *See id.* at 265.
[134] *See id.* at 266.
[135] *See id.*
[136] *See id.* at 267.
[137] *Id.* at 267-68.
[138] *Id.* at 267.
[139] *Id.* at 270.
[140] *See id.* at 272. The *Lemon* test derives from Lemon v. Kurtzman, 403 U.S. 602 (1971), which concerned state financial assistance to private, religious schools. Under the test, a state program that aids religious institutions is constitutional only when: (1) the program has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. Using this test, the *Lemon* Court struck down programs in two states that augmented with state funds the salaries of teachers in religious schools.

tices.[141] Besides, UMKC had more than 100 student groups, and the provision of benefits to such a broad array of groups "is an important indicator of a secular effect."[142] Thus, the primary effect of opening the forum to this wide spectrum of groups would not be to advance religion.[143] "In this constitutional context," the Court concluded, "we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against [Cornerstone's] religious speech."[144] Put simply, because UMKC's regulation discriminated on the basis of viewpoint in a forum broadly available to students, it could not stand.

E. Athletes and the Marketplace of Ideas

Taken together, *Healy*, *Papish*, *Rosenberger*, and *Widmar* reflect what one commentator has termed "the traditional role of the university as the quintessential marketplace of ideas," providing a forum for controversial, even offensive, speech without necessarily endorsing the viewpoints expressed.[145] Therefore, "[a]llowing universities to silence speakers who engage in speech other people find 'offensive' seems particularly incongruous with the university setting."[146] Indeed, a public university ordinarily cannot penalize students for their speech or prohibit them from using social media based on a concern about reputational harm to the institution or the students.[147] Yet, coaches have done both to college athletes.[148] The coaches' actions raise the question whether something in the relationship between college athletes and their institutions "is so unique as to override established constitutional principles."[149] Is that "something" the status of athletics as a privilege, not a

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[141] *See id.* at 274.

[142] *Id.*

[143] *See id.* at 275.

[144] *Id.* at 276.

[145] Papandrea, *supra* note 105, at 1803.

[146] *Id.* at 1825.

[147] *See* Frank LoMonte, *College Sports and Social Media: Leave Your Rights in the Locker Room?,* AM. BAR ASS'N: LITIG. GROUP (Apr. 21, 2014), https://www.americanbar.org/groups/litigation/committees/civil-rights/articles/2014/college-sports-and-social-media-leave-your-rights-in-the-locker-room/ [https://perma.cc/U8SH-ND6Z] [hereinafter LoMonte, *College Sports and Social Media*].

[148] *See* Jason Scott, *Do Social Media Bans Violate the First Amendment?,* ATHLETIC BUS. (Sept. 3, 2015), http://www.athleticbusiness.com/web-social/do-social-media-bans-violate-the-first-amendment.html [https://perma.cc/A8S5-3NCE]; Ken Paulson, *College Athlete Tweet Ban? Free Speech Sacks That Idea*, USA TODAY (Apr. 16, 2012), https://www.pressreader.com/usa/usa-today-us-edition/20120416/281779921113718 [https://perma.cc/7J95-LXMU].

[149] LoMonte, *College Sports and Social Media*, *supra* note 147.

right, or is it the scholarship agreements by which athletes accept greater institutional control than other students face? Alternatively, is the elusive "something" the similarity between college sports and employment, where the employer can limit the speech rights of a public employee?[150] Parts III and IV, which follow, will address these questions with respect to athlete protest and social-media use, respectively, concluding in both instances that public colleges and universities should treat all their students—athletes and non-athletes—identically for First Amendment purposes.

III. College Athletes' Right to Protest

A. *Unsuccessful Litigation*

Under the existing *Tinker* standard, when college athletes participate in a protest or demonstration, their First Amendment rights must be considered relative to their institution's interest in maintaining order and discipline in its athletic programs.[151] An athlete's protest that disrupts an athletic program would merit no more First Amendment protection than any other student protest that similarly disrupted institutional functions in a material way.[152]

College athletes have had only limited success, under this standard, in litigation related to their protest activities. The earliest case followed the announcement by Black football players to their coach at the University of Wyoming in 1969 that they planned to wear black armbands on their uniform jerseys at the next day's home game against Brigham Young University (BYU) to protest alleged racist policies by the Mormon Church, with which BYU is affiliated.[153] The players never had a chance to conduct the

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[150] *See id.*

[151] *See* William A. Kaplan & Barbara A. Lee, The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making § 11.4.3 (5th ed. 2013).

[152] *See id.*

[153] *See* Bentley, *Fair Play?*, *supra* note 89. The Black players at Wyoming wanted to protest the Mormon Church's prohibition on African Americans becoming Mormon clergy and the racial slurs they claimed they had heard from the BYU players the previous year during a game at BYU. The "Black 14" may have lost the "battle" in 1969, but they arguably won the "war" in 1970, when BYU integrated its football roster, and in 1978, when the Mormon Church began to accept African Americans into its clergy. Sean Keeler, *We Were Villains: How Wyoming's Black 14 Blazed the Trail for Missouri Protests,* The Guardian (Nov. 11, 2015), https://www.theguardian.com/sport/2015/nov/11/we-were-villains-how-wyomings-black-14-blazed-the-trail-for-missouri-protests [https://perma.cc/GF74-RSQJ].

protest. As soon as they announced their plans to Head Coach Lloyd Eaton, who had established a rule prohibiting his players from participating in protests, which the players knew about, he dismissed them from the team.[154] The fourteen dismissed players sued. The case, which had four iterations in federal court, was dismissed in the District of Wyoming for failure to state a claim for which relief could be granted.[155] The United States Court of Appeals for the Tenth Circuit, initially reversed and remanded[156] but later affirmed.[157]

When it first considered the case, the appellate court concluded that "[i]n light of the principles of the *Tinker* case, we cannot say that the complaint fails to state a claim on which relief could be granted or that summary judgment was proper."[158] But after a remand and a trial, it endorsed the trial court's conclusion that both the United States and Wyoming Constitutions required complete neutrality on matters of church and state, which the players' armband display would have violated by using state facilities to express—in public—opposition to the practices of the Mormon Church.[159]

Williams v. Eaton is unusual, if not unique, among cases of athlete protest; although it relied on *Tinker*, it "mix[ed] considerations of free speech and freedom of religion."[160] In the Tenth Circuit's view, both federal and state law provided "strong support for a policy restricting hostile expressions against religious beliefs of others by representatives of a state or its agencies."[161] The court stated, "We feel that the Trustees' decision [to uphold the coach's dismissal of the players] was a proper means of respecting the rights of others in their beliefs, in accordance with this policy of religious neutrality."[162] Notably, the appellate court held that "the Trustees' decision was lawful within the limitations of the *Tinker* case itself,"[163] but it did not find that the athletes' protest was likely to be disruptive; instead, it relied solely on the seldom-used 'interference with the rights of others' branch of the *Tinker* case."[164]

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[154] *See* Keeler, *supra* note 153.

[155] *See* Williams v. Eaton, 310 F. Supp. 1342 (D. Wyo. 1970); Williams v. Eaton, 333 F. Supp. 107 (D. Wyo. 1971).

[156] 443 F.2d 422 (10th Cir. 1971).

[157] 468 F.2d 1079 (10th Cir. 1972).

[158] 443 F.2d at 431.

[159] *See* 468 F.2d at 1080.

[160] KAPLAN & LEE, *supra* note 151, at § 11.4.3.

[161] 468 F.2d at 1083.

[162] *Id.* at 1083-84.

[163] *Id.* at 1084.

[164] KAPLAN & LEE, *supra* note 151, at § 11.4.3.

Almost a decade later, the Tenth Circuit again rejected a First Amendment claim by college athletes, this time women's basketball players at the University of Oklahoma. In *Marcum v. Dahl*, the plaintiffs were athletic scholarship recipients who had enrolled at Oklahoma as freshmen in the autumn of 1977.[165] During the 1977-78 season, a rift developed on the women's basketball team, with the scholarship players on one side and the nonscholarship players on the other. The scholarship players thought the assistant coach was more competent than the head coach but was being marginalized, with adverse consequences for the team's performance.[166] The nonscholarship players supported the head coach.[167]

In January 1978, the scholarship players met with the overall Athletic Director and the Athletic Director for Women's Sports, who told the players that the administrators would consider the players' claims.[168] In mid-March, after the season had ended, the scholarship players told the press that if the head coach were rehired for the next season, they would not play.[169] Three weeks later, the two athletic administrators informed the scholarship players that their scholarships would not be renewed for the next academic year "because of their attitudes and behavior."[170] Soon thereafter, following a hearing that the plaintiffs chose not to attend, a committee of Oklahoma's Athletic Council approved the nonrenewal decision.[171]

The plaintiffs then filed suit in federal court, alleging that the nonrenewal of their athletic scholarships had violated their freedom of speech.[172] After a trial, a jury rendered a verdict for each plaintiff in the amount of $5,100, which was the value of each athletic scholarship for three additional years of school.[173] Nevertheless, the trial court granted the defendants' motion for judgment notwithstanding the verdict and dismissed the plaintiffs' case.[174]

On appeal, the Tenth Circuit affirmed, using the *Pickering* standard (*Connick* and *Garcetti* had not yet been litigated) that analogized the plaintiff athletes to public employees.[175] Drawing on that analogy, the appellate court reasoned that the plaintiffs could not rely on their "postseason ultima-

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[165] *See* 658 F.2d 731, 733 (10th Cir. 1981).
[166] *See id.*
[167] *See id.*
[168] *See id.*
[169] *See id.*
[170] *Id.*
[171] *See id.* at 734.
[172] *See id.* at 733.
[173] *See id.*
[174] *See id.*
[175] *See id.* at 734.

tum" to protect them against being discharged for their behavior during the basketball season.[176] It noted that the controversy during the season about who should be the head coach "resulted in disharmony among the players and disrupted the effective administration of the basketball program."[177] The plaintiffs' participation in the controversy during the season therefore "provided a sufficient basis for the nonrenewal of their scholarships."[178] Moreover, "the comments of the plaintiffs to the press did not involve matters of public concern."[179] Instead, they involved "internal problems with which the defendants were required to deal in their official capacities."[180] Those problems were "not of general public concern and the plaintiffs' comments to the press did not invoke First Amendment protection."[181] Accordingly, the institution had not violated the plaintiffs' First Amendment rights when it revoked their scholarships.

More recently, in *Green v. Sandy*, the plaintiff, who had been dismissed from the women's soccer team at Eastern Kentucky University (EKU), failed in her claim brought under 42 U.S.C. § 1983 against the University and several of its officials.[182] The trial court dismissed her amended complaint, which alleged, among other things, that EKU officials had removed her from the women's soccer team in retaliation for her exercise of free speech in expressing her concerns about her coach's handling of internal team matters.[183]

The plaintiff played soccer at EKU in 2007-08 and 2008-09, respectively.[184] Late in 2009, she became concerned about her coach's management of the team because of attrition among the players. She met with the coach but felt the coach denied her a fair hearing. Later, she presented her concerns to the athletic director, who assured the plaintiff that her discussion with him was confidential and that he would investigate her concerns.[185] But no such investigation occurred until the late spring of 2010, when the president of EKU, at the request of the plaintiff's father, appointed an investigator. Near the end of June, the investigator contacted the plaintiff to schedule a second meeting with her. On that same day, though, the athletic

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[176] *Id.* at 734-35.
[177] *Id.* at 734.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *See* Civil Action No. 5:10-cv-367-JMH, 2011 U.S. Dist. LEXIS 114718, at *1 (E.D. Ky. Oct. 3, 2011).
[183] *See id.* at *5.
[184] *See id.* at *1.
[185] *See id.*

director told the plaintiff she was dismissed from the team. He did not give her any reason for the dismissal.[186]

The trial court, in granting the defendants' motion to dismiss, appeared to lean on the *Tinker* "material disruption" standard, although it did not mention *Tinker* by name. Instead, the court explained that "[the plaintiff] has failed to identify a violation of any federal constitutional right" because the coach and the athletic director "could reasonably have forecast the Plaintiff's criticism of [the coach's] methods and decisions would disrupt the team, and they were well within their rights to dismiss Plaintiff from the team."[187] Because the defendants had not violated any of the plaintiff's constitutional rights, the doctrine of sovereign immunity barred her claims against the defendants in their individual capacities.[188]

In concluding that no constitutional right was violated, the *Green* court relied primarily on *Lowery v. Euverard*,[189] which addressed a protest by football players at a Tennessee high school. Eighteen players at the school signed a one-sentence petition saying they did not want to play for the defendant, who was their team's head coach. Another player revealed the existence of the petition.[190] The coach then tried to interview three of the plaintiffs individually, but they refused individual interviews, whereupon he dismissed them from the team. The dismissal of the fourth plaintiff occurred the next day.[191] Players who had signed the petition but later apologized to the coach and told him they wanted to play for him were permitted to remain on the team.[192] In the trial court, the defendants sought summary judgment based on sovereign immunity, which the court denied, explaining that an issue of fact remained about whether the petition had disrupted the team.[193]

On appeal, the defendants argued that their dismissal of the plaintiffs from the football team was permissible under *Tinker* because of the forecast of material disruption if the protest were permitted to proceed. The plaintiffs countered that their petition was protected speech in protest of alleged

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[186] *See id.* at *2.

[187] *Id.* at *6.

[188] *Id.* The court had previously noted that the Eleventh Amendment barred the plaintiff's claims against EKU. It also explained that to avoid the sovereign immunity bar, the plaintiff needed to show that (a) she had suffered the violation of a constitutional right, and (b) the right was clearly established when the defendants violated it. Here, the plaintiff failed part (a) because she could not show the defendants violated her right to free speech. *Id.* at *5.

[189] 497 F.3d 584 (6th Cir. 2007).

[190] *See id.* at 586.

[191] *See id.*

[192] *See id.*

[193] *See id.*

misconduct by Coach Euverard, including striking a player on the helmet, throwing away recruiting letters from colleges to players Euverard disfavored, humiliating individual players, using inappropriate language, and requiring a year-round physical conditioning program in violation of state rules for high school teams.[194]

The Sixth Circuit agreed with the defendants, noting that the players' petition "constituted a direct challenge to Coach Euverard's authority."[195] It presented an untenable situation, in the appellate court's view, because "[a] high school athletic team could not function smoothly with an authority structure based on the will of the players."[196] The appellate court added that the team's "plays and strategies are seldom up for debate" and that "[e]xecution of the coach's will is paramount."[197]

Besides, the appellate court continued, "*Tinker* does not require certainty, only that the forecast of substantial disruption be reasonable."[198] Therefore, in any case, the court "must evaluate the circumstances to determine if Defendants' forecast of substantial disruption was reasonable."[199] In determining reasonableness, the court continued, "restrictions that would be inappropriate for the student body at large may be appropriate in the context of voluntary athletic programs."[200] Perceiving an analogy between "the greater restrictions on student athletes" and "the greater restrictions on government employees," the court reasoned that "legal principles from the government employment context [we]re relevant to the [*Lowery*] case."[201] Using the *Pickering/Connick* standard to evaluate a forecast of "material disruption" under *Tinker*, the appellate court concluded that "[i]t was reasonable for Defendants to forecast that Plaintiffs' petition would undermine [Coach] Euverard's authority and sow disunity on the football team."[202] Accordingly, the appellate court concluded that the players' dismissal from the team was consistent with the First Amendment.[203]

A concurring opinion took issue with two aspects of the majority's reasoning. First, the concurrence criticized the majority for "grafting the public-concern requirement of *Connick v. Myers*, 461 U.S. 138 (1983) onto

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[194] *See id.* at 585.
[195] *Id.* at 591.
[196] *Id.*
[197] *Id.* (quoting Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1190 (6th Cir. 1995)).
[198] *Id.* at 592.
[199] *Id.* at 593.
[200] *Id.* at 597.
[201] *Id.*
[202] *Id.* at 600-01.
[203] *See id.*

the *Tinker* test, an approach never before taken in student-speech cases by either the Supreme Court or any other federal court of appeals to consider the issue."[204] The concurring judge saw no reason for the grafting experiment "in the absence of Supreme Court case law instructing us to do so."[205] Second, the majority opinion failed to assert facts necessary "to support its forecast of substantial disruption."[206] "At most," the concurrence observed, "the defendants have asserted a generalized fear of disruption to team unity based on the students' critical opinion of Euverard's ability as a coach," which did not satisfy *Tinker's* "substantial disruption" standard.[207] Noting that "[n]o disturbance happened until Euverard found out about the petition and retaliated against the leaders," the concurrence concluded that the plaintiffs' First Amendment rights under *Tinker* were violated.[208]

Still, the concurrence reasoned that the plaintiff's free-speech right was not clear enough in the school-sports setting to have put Coach Euverard on notice at the time of the protest that his response violated the First Amendment. Besides, no case law existed in the Sixth Circuit at the time that applied the *Tinker* standard to athletes and identified the scope of their First Amendment rights.[209] Thus, the appellate court reversed the trial court's denial of the defendants' motion for summary judgment. Although it arose in the high-school context, *Lowery* will figure prominently in this article's subsequent discussion of an appropriate standard for protecting the First Amendment rights of college athletes.

Taken together, *Williams*, *Marcum*, *Green*, and *Lowery* show courts treating the speech of (mostly) college athletes as unprotected, whether it pertained to team management, as in *Marcum* and *Green*, or to larger, public issues, such as racial discrimination or coach misconduct, as in *Williams* and *Lowery.* A later section of this article will advocate for a modified *Tinker* standard that offers greater protection to the athlete speech featured in *Williams* and *Lowery* than that present in *Marcum* and *Green*, respectively.

F. Successful Litigation

College athletes' most noteworthy success in First Amendment litigation was *Hysaw v. Washburn University*, in which the plaintiffs were Black former football players who complained that coaches and administrators at

[204] *Id.* at 601.
[205] *Id.*
[206] *Id.* at 603.
[207] *See id.*
[208] *See id.* at 605.
[209] *See id.*

the defendant institution were discriminating against them based on race.[210] As a result of the alleged discrimination, the plaintiffs boycotted practice sessions; the administration responded by removing them from the team.[211] The institution then sought an apology from the players; when the players refused to apologize, the institution prohibited them from returning to the team.[212]

The plaintiffs' First Amendment argument was that they were dismissed from the football team after protesting racial mistreatment.[213] The institution countered that the plaintiffs were dismissed for missing practice without a valid excuse, not for challenging racially biased behavior by coaches and administrators.[214] But the head coach undercut that argument when, in his deposition testimony, he acknowledged that if a player were to miss practice in protest against racial mistreatment, he would excuse the player's absence.[215] The deposition testimony also blunted the institution's argument that the players' dismissal was a reasonable time, place, or manner restriction on speech. Citing *Tinker*, the institution claimed that "the boycott severely disrupted the football team and infringed upon the rights of others participating in the football program."[216]

But the court was not persuaded. "It stretches the imagination," the court wrote, "to envision how an absence allegedly sanctioned by the coaching staff could be disruptive."[217] Furthermore, the plaintiffs' actions did not infringe on the rights of others. Reading the "rights of others" exception under *Tinker* narrowly, the court stated that it "will not place the interests of participants in a university extracurricular activity above the rights of any citizen to speak out against alleged racial injustice without fear of government retribution."[218] Accordingly, the court denied the institution's motion for summary judgment on the plaintiffs' First Amendment claim.[219]

Thus far, then, college athletes' prospects for success in free-speech litigation have rested precariously on the slender reed that is a coach's support for their protest; only in *Hysaw*, where that support was present, have they

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[210] *See* 690 F. Supp. 940, 942 (D. Kan. 1987).
[211] *See id.*
[212] *See id.* at 943.
[213] *See id.* at 946.
[214] *See id.*
[215] *See id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *See id.*

succeeded. The following section will argue that college athletes should not have to depend on such support to enjoy the freedom of speech.

B. *The Need for a New Standard*

Hysaw could have been a powerful ally for football players at the University of Missouri in 2015 if their protest had resulted in litigation. In November of that year, thirty Missouri football players refused to participate in practice or games until University President Timothy Wolfe resigned or was fired; the players charged that Wolfe had ignored racist behavior directed at Black students on campus.[220] The subtext of the Missouri protest was unlike that in *Hysaw* because Missouri competes in the Football Bowl Subdivision (FBS), where a forfeited game could cost the responsible team a substantial sum of money. Indeed, if the players had boycotted Missouri's next game—against Brigham Young University—the University of Missouri would have lost at least the one million dollars it was guaranteed for playing the game.[221]

Still, had President Wolfe not resigned, ending the threatened boycott, and had the players been penalized—resulting in litigation—they would have found a helpful precedent in *Hysaw*. Like the coach in that case, Missouri Head Coach Gary Pinkel indicated that he would not punish his players for boycotting practice or games in a protest of racist behavior against Black students.[222] Under these circumstances, a court might well have concluded, as the *Hysaw* court did, that so long as the coach would tolerate a boycott, the University could not show that the players' actions had caused a "material disruption" of its football program.[223]

In First Amendment matters, though, college athletes take a considerable risk in resting their hopes on that slender reed of a coach's support, as Black football players at the University of Texas at Austin (UT) have learned. During the summer of 2020, in the wake of nationwide protests over the killing of George Floyd, a Black man, by a Minneapolis police officer, the players learned that the song they were expected to sing after home football games—"The Eyes of Texas Are Upon You"—had a racist history.[224] Two UT students wrote "The Eyes of Texas" at the turn of the Twentieth Century and first performed it at a minstrel show in May 1903.

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[220] *See* Bentley, *Fair Play?*, *supra* note 89.

[221] *See id.*

[222] *See id.*

[223] *Id.*

[224] *See* Kate McGee, *Students Refuse to Work, Man Pulls out Gun as Tensions Rise at UT-Austin over 'The Eyes of Texas'*, HOUSTON CHRON. (May 5, 2021), https://

Minstrel shows were fundraisers organized by students that featured white performers singing and dancing in blackface. The following autumn, a student sang the song during a football game, and it eventually became integrated into student life at the University.[225]

Having learned this history, the football players asked the University administration to replace "The Eyes of Texas" as the *alma mater*; later in 2020, a group of former UT athletes made the same request.[226] University officials denied the requests but told the football players they would not be required to sing the song.[227] The controversy reignited when, after the first two home games of the 2020 season, the football team left the field before the song was sung. The negative reactions of fans prompted the athletic director to state that he expected the players to "stand in unison" during the song.[228] The football coach during the 2020 season—Tom Herman—appeared to side with his players, allowing them to decide for themselves whether to sing the alma mater.[229] But Coach Herman was fired after that season, and his replacement—Steve Sarkisian—emphasized early on that he would require all players to participate in the postgame singing of "The Eyes of Texas." "We're going to sing that song, proudly," he assured Longhorn fans.[230]

This example illustrates that the First Amendment rights of college athletes need a firmer foundation than the support of the current coach; a new standard is necessary for judging student speech in the context of intercollegiate athletics. That standard must appreciate that college athletes are students and must treat them as such, just as recent changes to transfer rules and rules surrounding NILs do. The new standard must also appreciate that institutions are expected to *tolerate, not promote*, athletic protest, which renders the *Hazelwood* standard discussed in Part II inapplicable to intercollegiate athletics. Neither the "maturity rationale" nor the "disassociation rationale," which undergird *Hazelwood*, applies to college students, including athletes.[231] As adults, college students are sufficiently mature to decide

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www.chron.com/news/houston-texas/article/eyes-of-texas-ut-austin-16151018.php [https://perma.cc/N9XC-DM6X].

[225] *See* Levin, *supra* note 13.

[226] *See id.*

[227] *See* Vertuno, *supra* note 13.

[228] *See id.*

[229] *See Group Led by Former University of Texas Athletic Director Weighs in on 'Eyes of Texas' Controversy*, SPORTS LITIG. ALERT (Mar. 26, 2021), https://sportslitigationalert.com/group-led-by-former-university-of-texas-athletic-director-weighs-in-on-eyes-of-texas-controversy/ [https://perma.cc/79MM-Q5JE].

[230] *Id.*

[231] *See* LoMonte, *The Key Word Is Student*, *supra* note 16, at 306.

for themselves what speech to embrace and what speech to reject. Therefore, institutions need not fear that allowing certain speech on campus will necessarily align the institutions with the views of the speaker in the minds of students.[232]

The *Pickering/Connick/Garcetti* theory should not underlie the new standard either. It is designed for a workplace in which the supervisor seeks to shape office communications and the employees understand that limited First Amendment rights are a condition of their employment, particularly regarding intraoffice matters. In contrast, the Supreme Court has long regarded a university campus as "peculiarly the marketplace of ideas,"[233] where circumscribing student speech "risks the suppression of free speech and creative inquiry in one of the vital centers of the Nation's intellectual life . . . ."[234]

Thus, the appropriate standard must derive from the "material disruption" guideline of *Tinker*. It should respect coaches' authority to manage their teams in pursuit of a successful season and recognize the importance of cohesion to team success. At the same time, it should balance those interests with the free-speech rights of a student on a college campus, where athletes deserve the same rights to challenge discrimination or official misconduct that their nonathlete classmates enjoy. Part V presents such an enhanced *Tinker* standard for athletic protest, but first, a discussion of the need for a new standard regarding college athletes' social-media speech is in order. Part IV, which follows, addresses the First Amendment implications of social-media use by college athletes.

IV. College Athletes' Right to Use Social Media

Another First Amendment issue that arises for athletes—indeed, more frequently than the right to protest—is their wish to communicate via various social-media platforms despite coaches' and athletic administrators' desire (and efforts) to restrict such communication. Professor Meg Penrose, who supports some limitation of social-media use by athletes, identifies the constitutional issue involved clearly. She asks the following questions: Can a coach or athletic department at a public university legally restrict a college

[232] *See id.*

[233] Healy v. James, 408 U.S. 169, 180-81 (1972).

[234] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 836 (1995).

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?[235]

These questions are important because, as Professor Penrose notes, "[n]early 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."[236] For example, the Student Athlete Code of Conduct at Virginia Tech states:

> 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. With great privilege comes great responsibility. When you accept the privilege of being a Virginia Tech athletics team member, you also accept the responsibilities of representing the university as a student athlete. In addition to NCAA, ACC, institutional, and department rules, you are expected to follow team rules and practices set forth by your coaches.[237]

Besides such codes of conduct, most NCAA-member institutions have separate social-media policies for athletes that "[p]rohibit negative or offensive content that would be constitutionally suspect if not applied to athletes."[238] For example, under its social-media policy, the University of North Carolina at Chapel Hill reserves the right of "at least one" coach, administrator, or other staff member, or even an outside vendor to "hav[e] access to, regularly monitor[ ] the content of, and/or receiv[e] reports about team members' social networking sites and postings."[239] As the above language suggests, some institutions have hired third-party vendors (*e.g.*,

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[235] *See* Meg Penrose, *Sharing Stupid $h*t With Friends and Followers: The First Amendment Rights of College Athletes to Use Social Media*, 17 SMU SCI. & TECH. L. REV. 449, 451 (2017) [hereinafter Penrose, *Sharing Stupid $h*t with Friends and Followers*].

[236] *Id.* at 458.

[237] This quotation, which is virtually identical to the quotation Professor Penrose cites at p. 458 of her article, is from the 2021-22 edition of the Virginia Tech Student Athlete Handbook. *See 2021-22 Student-Athlete Handbook*, VA. TECH ATHLETICS, https://hokiesports.com/documents/2021/7/29/2021_2022_Student_Athlete_Handbook.pdf [https://perma.cc/9FUY-74YB] (last visited December 16, 2021). The acronym "ACC" refers to the Atlantic Coast Conference, the athletic conference of which Virginia Tech is a member.

[238] Penrose, *Sharing Stupid $h*t with Friends and Followers*, *supra* note 235, at 465.

[239] *Id.* at 466. *See also Department of Athletics Policy on Student-Athlete Social Networking and Media Use*, UNC ATHLETICS, https://goheels.com/documents/2018/8/2/Department_of_Athletics_Policy_on_Student_Athlete_Social_Networking_and_Media_Use.pdf [https://perma.cc/5C3V-6G4N] (last visited December 16, 2021).

UDiligence, Varsity Monitor, and Centrix Social) to monitor athletes' social-media accounts.[240] Under these arrangements, the athletes must "install the software applications on their computers and wireless devices, and the vendor monitors their activities, searching the social networking sites for key words that might point to discussion of drug or alcohol abuse, obscenities, offensive comments, or references to potential NCAA violations like agents or free gifts."[241] Using proprietary technology, the monitoring companies examine athletes' personal accounts for prohibited content and, when they find it, report their findings to the institutional client's athletic department.[242]

Professor Penrose cites two reasons to support her view that restraints on athletes' access to social media "are constitutional content-neutral limitations permitted under reasonable time, place, and manner restrictions" on speech.[243] First, though omitting the word "contract," she notes that college athletes accept increased institutional control over their lives in exchange for valuable benefits, particularly athletic scholarships. She writes:

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[240] *See* Browning, *supra* note 11, at 842.

[241] *Id.*

[242] *See id.*

[243] Meg Penrose, *Tinkering with Success: College Athletes, Social Media, and the First Amendment*, 35 PACE L. REV. 30, 42 (2014) [hereinafter Penrose, *Tinkering with Success*]. Professor Penrose does not cite a right/privilege distinction as a basis for restricting athletes' social-media use, but some universities do. For example, the 2021-22 Student-Athlete Handbook at Virginia Tech states: "It is a privilege, and not a right, to participate in intercollegiate athletics." *See 2021-22 Student-Athlete Handbook*, *supra* note 237. Similarly, the social-media policy of the Department of Athletics at the University of North Carolina at Chapel Hill states that "each student-athlete must remember that playing and competing for the University is a privilege, not a right." *See Department of Athletics Policy on Student-Athlete Social Networking and Media Use*, *supra* note 239. Despite this language, the right/privilege distinction no longer enjoys its former importance in American law. The distinction held that one enjoyed "rights" independently of the state, but that "privileges," such as a public-sector job or a license to operate a business, were creations of the state that the state could take away without violating civil liberties. Accordingly, government could condition receipt of a privilege on the recipient's willingness to surrender or limit the exercise of a constitutional right. As government grew larger and conferred more benefits, the threat to individual rights from the right/privilege distinction became clear, and the Supreme Court repudiated it in *Perry v. Sindermann*, 408 U.S. 593 (1972), articulating instead the doctrine of unconstitutional conditions. Under this doctrine, "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if government may withhold the benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). Thus, the right/privilege distinction is an extremely weak rationale for restricting college athletes' social-media use.

> College athletes voluntarily agree to place themselves in heavily regulated, highly restrictive, and physically demanding environments. This choice to voluntarily participate in athletics operates, at least partially, as a waiver of speech and expressive rights. College athletes literally accept these limitations when they sign on to their governing athletic code of conduct.[244]

Under this contractual rationale, she concludes that "[i]f state-sponsored universities can degrade a student-athlete's privacy in the name of wholesome and safe competition, then so too can they limit a student-athlete's speech in the name of team unity and avoiding distractions."[245]

Second, Professor Penrose equates athletic participation at public universities to employment, noting that athletes are responsible for "furthering the state interest in fielding a successful athletic team on behalf of the university."[246] In this quasi-employment rationale, "[s]ocial media presents a significant distraction from successful athletic performance and a temporary ban during the competitive season provides a constitutionally effective way to curtail the distraction."[247] Accordingly, Professor Penrose supports the *Pickering/Connick/Garcetti* approach to evaluating college athletes' free-speech claims, or at least a variation of it. She argues that *Pickering/Connick/Garcetti* "offers a far superior approach than *Tinker.*" In her view, *Pickering/Connick/Garcetti* "appreciates the student-athlete's unique relation to a state [university] athletic department as qualitatively distinct from a high school student's desire to attend class, [thereby requiring] greater deference [to institutional authority] than the *Tinker* framework offers."[248]

In her view, "season-long bans, which require athletes to sign off their Twitter or Facebook accounts during their competitive season, are content-neutral" time, place, or manner restrictions on speech.[249] She recommends that such restrictions be evaluated according to "intermediate scrutiny," which requires "a demonstration of a narrow tailoring (or fit) to serve a significant governmental interest."[250] In this case, she argues, the significant governmental interest is "encouraging successful athletic performance,"[251] and the seasonal social-media ban satisfies the narrow-tailoring requirement because the governmental interest is more likely to be achieved with the ban

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[244] Meg Penrose, *Outspoken*, *supra* note 92, at 525-26.
[245] *Id.* at 538.
[246] Penrose, *Tinkering with Success*, *supra* note 243, at 61.
[247] *Id.* at 64.
[248] Penrose, *Outspoken*, *supra* note 92, at 543.
[249] Penrose, *Tinkering with Success*, *supra* note 243, at 58.
[250] *Id.* at 61.
[251] *Id.*

than without it.[252] The ban does not discriminate based on the message conveyed, the subject discussed, or the viewpoint expressed, but merely restricts the time (during the season) and the manner (social media platforms) of expression, like a ban on using a sound truck in a residential neighborhood after 8 p.m. Furthermore, the seasonal ban leaves open "alternative channels of communication," the final requirement for a time, place, or manner regulation.[253] Athletes may still communicate by text message, email, or more traditional means if they wish.

But a healthy skepticism prompts the question: "Can a coach at a public college condition participation in [a] sport on a promise not to engage in free speech via Twitter?"[254] The answer is most likely no. Assuming an athlete's financial-aid agreement with an institution is a contract, a constitutional restraint on social-media speech would run the risk of imposing an unconstitutional condition on that contract.[255] The doctrine of unconstitutional conditions holds that government may not deny a benefit to a person because that person exercises a constitutional right.[256] It would presumably apply when a public university conditions the receipt of an athletic scholarship on athletes giving up their right to free speech because the athletes would be "pressured to alter a choice about exercise of a preferred constitutional liberty in the direction the government [in the form of the university] favors."[257] Faced with an unconstitutional condition—restricted speech rights—a court would apply "strict scrutiny," meaning that to justify the restriction, the institution would have to show that it was narrowly tailored to achieve a compelling governmental purpose.[258] Even if the institution could show that the challenged rule was "narrowly tailored," namely, the least restrictive means available to achieve its goal, the rule would fail strict scrutiny if the court concluded that team unity and the avoidance of distractions did not constitute a "compelling" state interest.

A practical consideration would also take the wind out of the contractual argument's sails. Forty-six percent of the athletes at Division I institutions and thirty-nine percent of their counterparts at Division II institutions

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[252] *See id.* at 63.

[253] *See id.* at 66.

[254] Paulson, *supra* note 147.

[255] *See* LoMonte, *College Sports and Social Media*, *supra* note 147.

[256] *See* Davis Walsh, *All a Twitter: Social Networking, College Athletes, and the First Amendment*, 20 Wm. & Mary Bill Rts. J. 619, 638 (2011) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

[257] *Id.* at 640.

[258] *See id.* at 638.

are "walk-ons," who play without benefit of an athletic scholarship.[259] Despite lacking a contractual arrangement with their respective institutions, walk-ons enjoy no greater freedom of expression than their teammates who receive athletic scholarships.[260] The contractual rationale, then, would, at best, justify limiting the social-media access of only fifty-four percent of college athletes, while at worst, dragooning the remaining forty-six percent into compliance if they wished to continue playing their sport. The former would likely be ineffective, while the latter would be unfair. Thus, both constitutional theory and practical considerations counsel against restricting athletes' social-media access based on the contractual rationale. Put simply, Professor Penrose stretches the contractual rationale to the breaking point.

The quasi-employment rationale is also problematic. Despite arguments to the contrary by some commentators,[261] "college athletics is not in any traditional sense 'employment,' and . . . colleges themselves shrink from characterizing their student-athletes as employees."[262] Indeed, although the NCAA has grudgingly accepted athletes' new opportunity to profit from commercial use of their names, images, and likenesses, it remains adamantly opposed to a pay-for-play arrangement in which they would be considered employees.[263] Therefore, courts would likely be skeptical of institutions'

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[259] *See The Five Most Common Walk-On Questions*, SPORTS ENGINE (July 10, 2018), https://www.sportsengine.com/recruiting/five-most-common-college-walk-questions [https://perma.cc/H3S5-F5LE]; Drew Eastland, *Unsung Heroes Still Finding College Athletics Rewarding*, THE DAVIDSONIAN (Nov. 20, 2019), https://www.davidsonian.com/unsungheroes-still-find-college-athletics-rewarding/ [https://perma.cc/K7XC-BRKS].

[260] *See* LoMonte, *College Sports and Social Media*, *supra* note 147.

[261] For arguments that college athletes at Division I institutions are effectively employees because of their athletic scholarships and the coaches' control over their lives, *see* Richard T. Karcher, *Big-Time College Athletes' Status as* Employees, 33 A.B.A. J. LABOR & EMP. L. 31 (2018); Amy C. McCormick and Robert A. McCormick, *The Emperor's New Clothes*: *Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008); Amy C. McCormick and Robert A. McCormick, *The Myth of the Student-Athlete*: *The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006).

[262] LoMonte, *College Sports and Social Media*, *supra* note 147.

[263] The current NCAA Constitution includes Article 2.9, "The Principle of Amateurism," which states as follows: "Student-athletes shall be amateurs in intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2021-22 DIVISION I MANUAL 3 (2021). Similarly, the new NCAA Constitution that the membership approved on January 20, 2022, which took effect on August 1, 2022, states in Article 1, Part B: "Student-athletes may not be compensated by a member institution for participating in a sport but may

claims that they can control the speech of athletes, as "the legal equivalents of employees."[264] Besides, as long as institutions are unwilling to extend the full benefits of employment (*e.g.*, salaries, health insurance, etc.) to athletes, those institutions "should not be allowed to take advantage of employee status for speech-restricting purposes . . . ."[265] In the current environment, featuring rules changes (*e.g.*, transfer rule, NIL rule) designed to make college athletics fairer to the athletes, making them employees solely to restrict their speech rights is both bad law and bad policy. Thus, the quasi-employment rationale is as suspect as the contractual rationale. When applied to the free-speech rights of college athletes, both rationales are playing out of position, like the infielder forced to play the outfield or the offensive player shifted to the defense.

Another factor also counsels against seasonal (or longer) bans on social-media access for college athletes. Regardless of the underlying rationale used, the argument that a seasonal ban would be a time, place, or manner regulation that could withstand intermediate scrutiny is weak.[266] Admittedly, when courts review time, place, or manner regulations, they need not consider whether the regulations are the "least intrusive means of furthering [a] legitimate governmental interest."[267] And in such circumstances, as Professor Penrose observes, "[c]ourts will look for some demonstrated effort to properly constrain the restriction to not overly affect speech and expression."[268]

Still, the intermediate scrutiny to which time, place, or manner restrictions are subject requires them to be "narrowly tailored to serve a significant governmental interest" and to "leave open ample alternative channels for communication of the information."[269] Using this standard, the Supreme Court has upheld regulations that (1) prohibited demonstrators from sleeping in Lafayette Park and on the National Mall in Washington, D.C.;[270] (2) required performers in New York City's Central Park bandshell to use the

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receive educational and other benefits in accordance with guidelines established by their NCAA division. *See* Nat'l Collegiate Athletic Ass'n, NCAA Constitution (2021), *available at* ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_Constitution121421.pdf [https://perma.cc/U9KQ-9BP3].

[264] LoMonte & Hamrick, *supra* note 118, at 127.

[265] LoMonte, *College Sports and Social Media*, *supra* note 147.

[266] *See* Penrose, *Sharing Stupid $h*t with Friends and Followers*, *supra* note 235, at 480; Penrose, *Tinkering with Success*, *supra* note 243, at 42.

[267] Penrose, *Sharing Stupid $h*t with Friends and Followers*, *supra* note 235, at 480 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 789-90 (1989)).

[268] *Id.*

[269] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[270] *See id.*

City's sound technician to control volume during their performances;[271] and (3) prohibited locating adult movie theaters within one thousand feet of a residential zone, church, park, or school to address the *secondary effects* (crime, reduced property values, etc.) of such theaters on the surrounding community.[272]

Even if social-media bans applied to college athletes are content-neutral because they extend to all speech, regardless of content, they are likely to fail intermediate scrutiny. Institutions will be at pains to show that a unified, focused athletic team is a "substantial governmental interest" and that banning social media is more likely than education or after-the-fact punishment to serve that interest.[273] Institutions may also have difficulty showing that social-media bans leave open ample alternative means of communication because many of them couple such bans with restrictions on athletes' contact with print and broadcast journalists.[274]

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[271] *See Ward*, 491 U.S. 781.

[272] *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986).

[273] Professor Penrose views athletic success at public universities as a substantial governmental interest. She writes that "success on the court or field leads to an enhanced academic reputation and greater alumni support, which generally raises a university's overall profile." Penrose, *Sharing Stupid $h*t with Friends and Followers*, *supra* note 235, at 481. But that statement conflicts with a massive literature on the governance of college sports that documents repeated financial and academic scandals at NCAA Division I institutions, originating in the athletic department, that have tarnished institutional reputations as much as athletic success has enhanced them. The same literature shows that data generally do not support broad claims like that of Professor Penrose that athletic success yields an improved academic reputation and greater alumni support. *See, e.g.*, GERALD GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT (2017); BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS (2003); ALLEN L. SACK AND ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH (1998); JAY M. SMITH AND MARY WILLINGHAM, CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS (2015); MURRAY SPERBER, COLLEGE SPORTS, INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY (1990); JOHN R. THELIN, GAMES COLLEGES PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS (1996); ANDREW ZIMBALIST, WHITHER COLLEGE SPORTS: AMATEURISM, ATHLETE SAFETY, AND ACADEMIC INTEGRITY (2021); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS (1999).

[274] *See* LoMonte & Hamrick, *supra* note 118, at 97-100. A survey by the Brechner Center for Freedom of Information at the University of Florida asked the eighty-four largest state universities in the United States for copies of documents concerning their athletes' interactions with the media. The request yielded fifty-eight sets of documents, fifty-six from responses and two found online. The data showed that fifty institutions had restrictions in place regarding athletes' interactions with the

The answer to Professor Penrose's question whether a coach or athletic department at a public university can legally impose such restrictions is yes, but not to the extent of a seasonal ban, which she recommends. And the answer to her question whether the First Amendment limits the type or length of those restrictions, in turn, is resoundingly yes. Thus, just as athlete protest requires a new, or at least modified, legal standard, so too does athlete access to social media. Part V, which follows, will identify a standard to govern both issues.

V. The *Tinker* Collegiate Standard

A. As Applied to Athlete Protest

Examples abound of athlete protest as a catalyst to constructive change in college sports and beyond. Recall that at the University of Missouri, a threatened boycott of upcoming games and practices by athletes of color on the football team prompted the resignation of President Tim Wolfe, "who had mishandled instances of racial hostility" on the campus.[275] At Penn State, a gymnastics coach resigned after a member of the 2016 women's team told the campus newspaper that the coaching staff belittled and body-shamed athletes, pressuring them to practice despite injuries and to lose weight.[276] And at Grambling State University in Louisiana, football players boycotted a game in 2013 to protest the decrepit condition of their locker room and workout facilities and the firing of their popular head coach.[277] In contrast, an investigative report into the death of University of Maryland football player Jordan McNair in 2018 from heatstroke suffered during a team workout concluded that the team's culture caused problems to fester "because too many players feared speaking out."[278] In particular, the culture of silence allowed the team's strength coach, whom the report concluded had

media. According to LoMonte and Hamrick, the restrictions "categorically prohibited speaking to the news media without approval from a coach or athletic department staff member." *Id.* at 97.

[275] *Id.* at 94.

[276] *See id.* at 96.

[277] *See id.*

[278] Rick Maese & Keith L. Alexander, *Report on Maryland Football Culture Cites Problems but Stops Short of 'Toxic' Label*, Wash. Post (Oct. 25, 2018), washingtonpost.com/sports/2018/10/25/report-maryland-football-culture-cites-problems-stops-short-toxic-label [https://perma.cc/335L-68AY].

"engaged in abusive conduct" toward players "many" times, to be "effectively accountable to no one."[279]

These examples, which underscore the value of speech and the danger of silence, illustrate the need for a *Tinker* collegiate standard that would protect athletes' exercise of their First Amendment rights while maintaining coaches' capacity to direct their teams. The new standard would derive from the foundational *Tinker* premise that institutions cannot prohibit or punish expression by college athletes without showing that the forbidden speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of" their athletic programs.[280] It would also reflect the Supreme Court's decisions recognizing the centrality of free expression in an academic community.[281]

Therefore, the *Tinker* collegiate standard would reject the Sixth Circuit's reasoning in *Lowery v. Euverard*[282] that "[t]he potential disunity and disrespect . . . the coach perceived the petition [some players circulated against him] to be creating was sufficient to satisfy the 'materially or substantially interfere' test articulated in *Tinker*."[283] Recall that the *Lowery* plaintiffs claimed their coach had struck a player on the helmet, thrown away recruiting letters from colleges to players the coach disfavored, humiliated individual players, and required a year-round physical conditioning program contrary to state athletic-association rules.[284] *Lowery* shows why the *Tinker* standard should be modified to protect athletes' freedom to challenge official misconduct or abuse of players by coaches: "the student-athletes' whistleblower conduct could be seen as beneficial to society."[285]

Furthermore, as the concurrence in *Lowery* noted, under *Tinker*, the institution "bears the burden of demonstrating sufficient facts to support its forecast of substantial disruption."[286] The high school in *Lowery* had not done so, instead merely "assert[ing] a generalized fear of disruption to team unity based on the students' critical opinion of Euverard's ability as a coach," which was "simply not enough to meet the 'substantial disruption'

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[279] *Id.*

[280] *Tinker*, 393 U.S. at 509.

[281] *See* Healy v. James, 408 U.S. 169 (1972); Papish v. Bd. of Curators of Univ. of Missouri, 410 U.S. 667 (1973); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).

[282] 497 F.3d 584 (6th Cir. 2007).

[283] Edmund Donnelly, Comment, *What Happens When Student-Athletes are the Ones Blowing the Whistle? How* Lowery v. Euverard *Exposes a Deficiency in the First Amendment Rights of Student-Athletes*, 43 NEW ENG. L. REV. 943, 954 (2009).

[284] *See id.* at 960.

[285] *Id.* at 960.

[286] *Lowery,* 497 F.3d. at 603.

standard of *Tinker*.[287] Indeed, no disturbance had occurred until Coach Euverard learned of the players' petition and punished its organizers.[288]

The *Tinker* collegiate standard would maintain the "material disruption" requirement of the existing *Tinker* standard, but a generalized fear of disunity resulting from athlete dissent would not suffice. Courts would insist that institutions present "particular facts" to demonstrate that the disruption will materially and substantially interfere with "the educational goal of the particular activity (or other students' rights)," instead of relying on a generalized fear of disruption to routine operations.[289] Moreover, even assuming the institution could demonstrate such a material and substantial disruption, an exception would exist for whistleblower conduct designed, for example, to bring unethical or abusive coaching behavior to light.[290] This exception would apply, in a collegiate analogue to *Lowery*, to protect athletes' right to seek removal of a coach whose behavior was unethical or abusive.

Reflecting the tradition of broad free-speech rights for college students, the exception would extend to expressive conduct designed to highlight a particular social issue, such as kneeling on one knee in the locker room or on the field before competition in support of the Black Lives Matter Movement, or refusing to do so, or declining to sing "The Eyes of Texas" after a football game. Any institutional penalties imposed on athletes for whistleblower or other expressive conduct would trigger a judicial determination whether that conduct alone precipitated the punishment. If so, application of the *Tinker* collegiate standard would negate the penalty.[291] If not, then the court must determine whether the institution would have penalized the athlete absent the expressive conduct. If a penalty would have been imposed irrespective of the expressive conduct because the speech was unprotected or because illegal activity occurred, then the First Amendment would not protect the athletes from punishment. The new standard would keep faith with the *Tinker* decision by acknowledging the context in which the expression occurred (i.e., a college campus)[292] and honoring the statement in Justice Fortas's majority opinion that students' free speech rights extend beyond the classroom, to the cafeteria, *the playing field*, and the campus generally.[293]

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[287] *Id.*
[288] *See id.* at 605.
[289] Zeidel, *supra* note 65, at 341.
[290] *See* Donnelly, *supra* note 283, at 964.
[291] *See id.*
[292] *See id.* at 965.
[293] *See Tinker*, 393 U.S. at 513.

Had the threatened boycott by the Missouri football players in 2015 materialized, been punished, and resulted in litigation, the *Tinker* collegiate standard would likely have vindicated the players' free-speech rights. The campus was roiled by protests over administrative inaction regarding harassment of African American students before the football players threatened a boycott, so the University would have struggled to show that the players' action materially disrupted the institution's work. The players acted only after a Black graduate student began a hunger strike over the incidents of harassment on campus.[294] And although nearly half of the players (60 of 124) on Missouri's roster were African American, it is unclear that all Black players would have participated in the boycott; even if they had, the team could still have played its three remaining games, albeit with a reduced roster.[295] Furthermore, the threatened boycott was not only expressive conduct concerning an important social issue—racial discrimination—but also an act of whistleblowing against a university administration that had allegedly failed to respond to incidents of racial intolerance and intimidation on campus. These known facts suggest that under the recommended standard, the players' right to protest would have prevailed.

Nevertheless, the *Tinker* collegiate standard recognizes coaches' authority to design game plans; decide who will play and who will sit on the bench; and, generally, to manage their teams as they see fit. That authority was at issue in *Marcum v. Dahl*; recall that in *Marcum*, a rift within a women's college basketball team led to the nonrenewal of scholarships for players who claimed they would not play the next season if the University

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[294] *See* Marc Tracy & Ashley Southall, *Black Football Players Lend Heft to Protests at Missouri*, N.Y. TIMES (Nov. 8, 2015), nytimes.com/2015/11/09/us/missouri-football-players-boycott-in-protest-of-university-president.html [https://perma.cc/A4RU-B599].

[295] *See id.* The inflated size of college football rosters is a frequent target of critics of big-time college sports. Missouri's 2015 roster was just slightly larger than the average roster size (120) for members of the Football Bowl Subdivision (FBS), the most competitive entity within college football. The critics charge that such roster sizes are unnecessarily large and deprive women's sports and men's nonrevenue sports of much-needed funds. They note that college teams commonly have eighty-five scholarship players and thirty-five walk-ons, whereas National Football League (NFL) teams have a maximum active roster of forty-five players and a maximum inactive roster of eight additional players. Instead, some critics recommend that the number of college football scholarships be reduced from eighty-five to sixty. Considering the smaller rosters and the longer seasons for NFL teams, Missouri could presumably have fielded a team for the last three games of the 2015 season had the Black players carried out a boycott. *See*, *e.g.*, GERALD GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 219 (2017).

rehired the current head coach. The trial court granted the defendants' motion for judgment notwithstanding the verdict, and the Tenth Circuit affirmed, reasoning that the dispute was an internal team issue best resolved by athletic administrators.[296]

The *Tinker* collegiate standard would likely have reached the same result in *Marcum*, but without equating college freshmen to public employees. It would have first considered whether the players' rift materially and substantially disrupted their team during the 1977-78 season. The appellate court's observation that the rift "resulted in disharmony among the players and disrupted the effective administration of the basketball program" contrasts with *Lowery*, in which any disruption that occurred followed actions by a coach, not a player. In this case, the players had created the rift and perpetuated it themselves. Assuming a disruption, then, the recommended standard would have considered whether the plaintiffs were "blowing the whistle" on official misconduct or highlighting an important social issue, such as a form of discrimination. In *Marcum*, they were doing neither; the underlying dispute was about who should be the head coach, which is a matter for athletic administrators—not players or courts—to decide. Therefore, based on the available facts, the athletic administrators did not violate the plaintiffs' First Amendment rights.

Adopting the *Tinker* collegiate standard, then, would not cause athletes' free speech right to supersede coaches' authority to manage their teams in every instance. Athletes would have to show that their protest activity did not materially and substantially disrupt an institutional athletic program or that, if such disruption occurred, the players' right to blow the whistle on misconduct or highlight an important issue effectively negated it. Otherwise, as in *Marcum*, institutional authorities would prevail. Accordingly, this standard would protect athletes' right to protest while respecting coaches' authority and treating college athletes as students.

B. As Applied to Athletes' Social-Media Use

If the *Tinker* collegiate standard were applied to institutional bans on college athletes' use of social media, the bans would not pass constitutional muster. To be sure, private colleges and universities, along with other private entities, such as the National Football League (NFL), Major League Baseball (MLB), and the National Basketball Association (NBA), can establish strict social-media policies or punish an athlete for an indiscrete posting

[296] *See* Marcum v. Dahl, 658 F.2d 731 (10th Cir. 1981).

without being subject to a First Amendment claim.[297] But the decisions made by employees of public colleges and universities are "state action," making them subject to potential First Amendment and other constitutional claims, even though similar actions by employees of private institutions are not.[298] Moreover, courts customarily treat social-media postings as "off-campus speech," only upholding a public college's or university's social-media regulation if the institution can show the speech (1) materially disrupted its work and/or (2) fits within a category of unprotected speech, such as defamation or a true threat.[299]

A clear recent example of distinct treatment for off-campus speech is the Supreme Court's decision in *Mahanoy Area School District v. B.L.*, in which the Court invalidated a high school's suspension of a student from the cheerleading team for producing and transmitting to her friends, via Snapchat, vulgar language and gestures critical of the school and the team.[300] The "off-campus" nature of the speech was key to the Court's decision, as was its occurrence outside of school hours.[301] When speech occurs off campus, the Court reasoned, the customary discretion that schools have to regulate speech, in light of their duty to maintain a safe learning environment, "is diminished."[302] Besides, the student's speech lacked fighting words or obscenity, did not identify the school or target any member of the school community, was communicated via her own cellphone, and reached only a private audience of her Snapchat friends.[303]

The Supreme Court's protection for off-campus speech in a high school setting suggests that courts will find bans on social-media use by college athletes to be unconstitutional. Regrettably, though, as one commentator has noted, "these bans are implemented with little protest because, of all the parties involved, the student-athletes are in the weakest position to refuse

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[297] *See* Eric D. Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J. COLL. & UNIV. L. J. 451, 455 (2012) [hereinafter Bentley, *He Tweeted What?*].

[298] *See id.* at 453.

[299] *See id.* at 457 (citing Evans v. Bayer, 684 F. Supp. 2d 1365, 1372 (S.D. Fla. 2010) (holding that high school student's creation of Facebook group devoted to criticizing a teacher was protected speech because it was published off campus, did not cause a disruption on campus, was not lewd, vulgar, or threatening, and did not advocate illegal or dangerous behavior)).

[300] *See* 141 S. Ct. 2038, 2042-43 (2021).

[301] *See id*. at 2047.

[302] *Id.* at 2046.

[303] *See id.* at 2047.

these constitutional infringements."[304] Most athletic careers end when collegiate eligibility ends, so athletes are loath to jeopardize those careers, and alienate their teammates, by suing their coach or institution over a social-media ban.[305] Besides, even if an athlete sued, by the time the litigation was complete, the athlete's eligibility for competition would likely have ended.[306] Athletes' unwillingness to challenge social-media bans hardly validates the bans, though. Indeed, they fail as time, place, or manner regulations because they limit considerably more speech than is necessary to achieve the purpose that prompted their creation.[307] For example, a social-media ban imposed by a coach

> would ban a golf team from posting a nude team photo, a basketball player from posting insensitive comments about women, or a football player from posting comments on Twitter during the middle of a game, it would also ban a Facebook posting that an athlete and his roommate found a good pizza place, a posting that the athlete wants the president to be reelected, or a posting with his or her view on the war on terrorism."[308]

And it would put a red flag next to enough words that an athlete would think twice about posting news of her friend who was killed by a *drunk* driver[309] or that he planned to run in a 5K race to raise money for fighting *breast* cancer.[310] If challenged in court, such a ban would be vulnerable to a

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[304] J. Wes Gay, Note, *Hands off Twitter: Are NCAA Student-Athlete Social Media Bans Constitutional?*, 39 Fla St. U. L Rev. 781, 802-03 (2012).

[305] Hauer, *supra*, note 107, at 420. NCAA data show the slim odds of being drafted by a professional sports league. Just 4.2 percent of draft-eligible Division I men's basketball players were chosen in the 2019 NBA draft. That number improved to twenty-one percent when other professional leagues (the G-League and international leagues) were included in the calculation. In women's basketball, 2.8 percent of draft-eligible Division I players were chosen in the 2019 WNBA draft, although that number also improved to twenty-one percent when international leagues were added to the calculation. In football, the NCAA estimates that 3.8 percent of draft-eligible Division I players were chosen in the 2019 NFL draft. Opportunities in the Canadian Football League and the XFL were not included in the calculation, so the number of college players who played on professional football teams outside the NFL is unclear. Nevertheless, one can safely say that most college football and basketball players will not have a professional career in their respective sports. *See Estimated Probability of Competing in Professional Athletics*, NCAA (Apr. 8, 2020), ncaa.org/sports/2015/3/6/estimated-probability-of-competing-in-professional-athletics.aspx [https://perma.cc/5KFP-3Q38].

[306] *See id.* at 421.

[307] *See* Bentley, *He Tweeted What? supra* note 297, at 459.

[308] *Id.* at 460.

[309] *See* Browning, *supra* note 11, at 842.

[310] *See* Bentley, *Unnecessary Roughness*, *supra* note 14, at 837.

claim that it was overbroad, burdening more speech than necessary to realize the coach's goals.[311] The ban would also violate *Tinker*, which authorizes institutions to regulate "speech that impedes [them] from functioning in an operational sense, not speech reflecting discredit on the [institution] or its students."[312] Professor LoMonte observes that

> [n]one of the consequences that colleges' speech restrictions seek to avoid—that the college or its athletes might suffer reputational harm, that an athlete might be disqualified from competition, that a coach might feel his authority threatened, that locker-room dissent might result in losing a game—is of any great moment when weighed against the compromise of fundamental freedoms.[313]

Still, coaches and athletic administrators will not be powerless to prevent indiscreet postings if blanket and seasonal bans are lifted. Constitutionally sound alternatives exist. For example, professional sports leagues have adopted what amount to time, place, or manner restrictions that prohibit athletes from posting comments to social media shortly before, during, and immediately after games.[314] Such restrictions are narrowly tailored to prevent players from succumbing to distractions while limiting no more speech than necessary to achieve that goal.[315] Coaches could also make the team locker room, team meetings, and team study halls off-limits to social media for the same reason.[316] And they could prohibit players from posting information concerning injuries and game strategies.[317]

Along with such restrictions should come education of athletes in "what not to post and why certain kinds of posts can compromise their safety."[318] Education, after all, is what colleges and universities do, so they are well-placed to teach unsuspecting athletes about the risks of social-media use. Doing so would be an exercise in enlightened self-interest because an institution could simultaneously protect its brand and its athletes' brands from being tarnished by an ill-advised tweet, while "refraining from invasive, legally dubious conduct."[319] Besides, athletes are more likely to learn how to use social media responsibly—which will help them in their post-

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[311] *See id.*

[312] LoMonte, *Fouling the First Amendment*, *supra* note 9, at 32.

[313] *Id.* at 50.

[314] *See* Gay, *supra* note 304, at 803.

[315] *See* LoMonte, *Fouling the First Amendment*, *supra* note 9, at 48.

[316] *See* Hauer, *supra* note 107, at 433-34. *See also* Bentley, *He Tweeted What?*, *supra* note 297, at 461.

[317] *See* LoMonte & Hamrick, *supra* note 118, at 138.

[318] Hauer, *supra* note 107, at 434.

[319] Browning, *supra* note 11, at 843.

college lives—if institutions teach them how to do so instead of trying to silence them.[320] Thus, even if courts applied the *Tinker* collegiate standard to college athletes' social-media use, coaches could still prevent distractions to athletes and disruptions to teams by adopting narrow restrictions and educating their athletes about the power and the perils of social media.

No court will adopt the *Tinker* collegiate standard, though, until a college athlete challenges a social-media ban in court. In the meantime, in sixteen states, athletes may benefit from a "social media privacy" statute[321] that limits institutions' ability to require current or prospective students to provide login information for their social-media accounts.[322] But these statutes will not help athletes if institutions permit coaches to ask athletes to waive their statutory rights as a condition of athletic participation.[323] Such a request could well be an unconstitutional condition on an athletic scholarship, but no court can answer that question without a lawsuit. Thus, despite weak justifications for social-media bans and strong arguments against them, college athletes must depend on the good faith of coaches and administrators for freedom of expression because of the athletes' understandable reluctance to challenge the bans in court. Put another way, the *Tinker* collegiate standard could change the legal landscape to athletes' benefit regarding both the right of protest and social-media use, but only if athletes begin to challenge institutions in court.

VI. Conclusion

Recently, colleges and universities have begun to treat athletes like other students regarding the rights to transfer freely and to earn income from the commercial use of names, images, and likenesses. But they continue to treat athletes far more restrictively than other students regarding the exercise of free speech. Nothing about the relationship between athletes and institutions is so unique as to warrant disregarding traditional First Amendment principles. Coaches should not be able to require athletes to stand (or kneel) before a game in support of a particular group or viewpoint

[320] *See* Paulson, *supra* note 147.

[321] *See* LoMonte, College Sports and Social Media, supra note 147.

[322] *See id.* Since 2012, twenty-seven states have enacted social-media-privacy statutes that apply to employers, and sixteen states have applied their statutes to educational institutions. *See State Social Media Privacy Laws*, Nat'l Conf. of State Legislatures (Nov. 18, 2021), https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-user names-and-passwords.asp [https://perma.cc/NFG5-V5PP].

[323] *See* LoMonte, *College Sports and Social Media*, *supra* note 147.

or to sing an alma mater associated with a racist past. Neither should coaches be able to impose severe restrictions on athletes' social-media use or employ third-party vendors to monitor that use.

The antidote to such restrictive policies is for courts to modify the longstanding *Tinker* standard for judging the constitutionality of student speech and to apply this new standard—the *Tinker* collegiate standard—to college athletes. This change would honor the Supreme Court's recognition of a college campus as "peculiarly the marketplace of ideas."[324] Under the new standard, an institution could not silence student speech without showing that the speech would materially and substantially interfere with the educational goal of a particular activity or with the rights of other students. Even assuming such a showing, an exception would exist for whistleblower conduct intended to highlight official misconduct, such as abusive coaching behavior.[325] The exception would also cover expressive conduct designed to underscore a particular social issue, such as kneeling in support of the Black Lives Matter Movement. If, however, the dispute is about who should be the head coach, what style of offense or defense to play, or another internal team matter, the First Amendment would not protect the athletes' speech.

Under the *Tinker* collegiate standard, institutional bans on athletes' social-media use fail as time, place, or manner restrictions because they restrict more speech than necessary to achieve their purpose. And they violate even the existing *Tinker* standard, which permits institutions to regulate speech that prevents them from conducting their operations, but not speech that merely embarrasses them or their students.[326] Constitutionally sound alternatives include prohibiting social-media use shortly before, during, and immediately after games; prohibiting the posting of confidential information, such as injury reports and game strategies; and educating athletes about safe social-media use.

Thus, the *Tinker* collegiate standard would increase protections for college athletes' First Amendment rights, while still enabling coaches to conduct team operations without undue interference. It's time for *Tinker* to go to college.

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[324] *Healy*, 408 U.S. at 180 (internal quotation marks omitted).
[325] *See* Donnelly, *supra* note 283, at 964.
[326] *See* LoMonte, *Fouling the First Amendment*, *supra* note 9, at 32.