

# William & Mary Bill of Rights Journal

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Volume 20 (2011-2012)  
Issue 2

Article 7

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12-1-2011

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# ALL A TWITTER: SOCIAL NETWORKING, COLLEGE ATHLETES, AND THE FIRST AMENDMENT

Davis Walsh\*

## INTRODUCTION

Social networking presents new challenges for college athletic programs as college athletes can more easily divulge information about their personal lives and opinions, information that can cause distractions to the team and can lead to National Collegiate Athletic Association (NCAA) violations and mass suspensions.<sup>1</sup> This Note examines the extent to which college athletes have First Amendment rights,<sup>2</sup> and discusses what avenues are appropriate for colleges and universities to curb the distractions and suspensions caused by social networking.

Underlying this entire discussion is the private-public dichotomy of college sports. Private organizations are not subject to the First Amendment because they are not governmental entities.<sup>3</sup> On the other hand, state universities are government actors and so are subject to the First Amendment.<sup>4</sup>

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\* J.D. candidate, William & Mary School of Law, 2012; B.A., College of William & Mary, 2006. To my wife Kristen, thank you for being my sounding board and editor, without your help this Note would not be where it is today. To my parents, thank you for your support and guidance, and to my dad, thank you for teaching me at an early age that athletes are still humans. To my sister Katie, thank you for encouragement throughout this process. Also, thank you to the staff and editors of the *William & Mary Bill of Rights Journal*. Finally, I must thank Mike Golic and Mike Greenberg of ESPN Radio's *Mike & Mike in the Morning*. The inspiration for this Note came from their discussions on social media and its influence on sports. Ends up that listening to sports talk radio did help me in law school.

<sup>1</sup> For examples, see discussion *infra* Part I.

<sup>2</sup> U.S. CONST. amend. I.

<sup>3</sup> See *id.* ("Congress shall make no law . . . abridging the freedom of speech . . ."); *NCAA v. Tarkanian*, 488 U.S. 179, 197 (1988) ("The NCAA enjoyed no governmental powers . . ."); Brian Lee, Note, *Drug Testing and the Confused Athlete: A Look at Differing Athletic Drug Testing Programs in High School, College, and the Olympics*, 3 FLA. COASTAL L.J. 91, 98 (2001).

<sup>4</sup> See *Healy v. James*, 408 U.S. 169, 180 (1972) ("[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment."); see also *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864–65 (E.D. Mich. 1989); *Morale v. Grigel*, 422 F. Supp. 988, 999 (D.N.H. 1976).

This dichotomy presents a challenge for college athletics. State colleges are subject to the First Amendment,<sup>5</sup> but the governing body for major college athletics, the NCAA, is not a government actor,<sup>6</sup> and therefore is not subject to the First Amendment.<sup>7</sup> A corollary to this dichotomy is that the NCAA can have a requirement, such as drug testing or restrictions on speech, that its members may not be allowed to enforce.<sup>8</sup> College athletic programs are in a difficult position. If a college does not regulate Twitter, Facebook, and other social networking sites, and a player commits an NCAA violation using one of those mediums, the NCAA can suspend the player or declare the player ineligible.<sup>9</sup> But if the college chooses an unconstitutional method to regulate that speech, it can be subjected to lawsuits and constitutional challenges.<sup>10</sup> The goal of this Note is to discuss the different techniques colleges and universities use to regulate social networking and argue that constitutional methods exist. In particular, this Note compares the First Amendment implications of a “monitoring” policy,<sup>11</sup> like one implemented by the University of North Carolina (UNC),<sup>12</sup> with the implications of a season-long ban on certain types of social networking, similar to the ban implemented by Boise State University’s (Boise State) Football Coach, Chris Petersen.<sup>13</sup>

Before discussing these particular policies, Part I of this Note describes the background from which this issue arose, specifically the “tweeting” of UNC football player Marvin Austin.<sup>14</sup> As part of this background, this Note discusses how social networking increases the First Amendment complications for public schools and college athletes.

In Part II, this Note discusses whether the type of speech—Internet speech—or the speaker—a college athlete—is protected by the First Amendment. Part II also

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<sup>5</sup> See *supra* note 4 and accompanying text.

<sup>6</sup> See *Tarkanian*, 488 U.S. at 197 (“The NCAA enjoyed no governmental powers . . .”); *Arlosoroff v. NCAA*, 746 F.2d 1019, 1020 (4th Cir. 1984) (“The National Collegiate Athletic Association is a voluntary, unincorporated association of nearly one thousand four-year colleges and universities.”).

<sup>7</sup> See *supra* note 3 and accompanying text.

<sup>8</sup> See *Lee, supra* note 3, at 102 (“Although the drugs tested are the same for both the NCAA and the state university system, the methods must be different for the programs to satisfy constitutional scrutiny.”); see, e.g., *Univ. of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993).

<sup>9</sup> See *infra* notes 31–32 and accompanying text (discussing the UNC players held out or suspended due to this scandal).

<sup>10</sup> See, e.g., *Derdeyn*, 863 P.2d 929.

<sup>11</sup> See *infra* text accompanying note 43.

<sup>12</sup> See *infra* text accompanying note 43.

<sup>13</sup> The outright ban that will be analyzed in this Note is Coach Chris Petersen’s verbal order to his team that players are not to use Twitter during the college football season. See *infra* note 35 and accompanying text. To the author’s knowledge there is no written policy by Boise State, only a verbal order given by Coach Petersen.

<sup>14</sup> See discussion *infra* Part I.

describes the author's broad view of the First Amendment and how such a view supports protecting social networking.

Part III defines the constitutional rights of the college athlete. It starts with the broad issue of what types of speech colleges and universities can restrict with regard to all students, and then looks specifically at the substantive constitutional rights of college athletes. Part III concludes by arguing that student athletes hold substantive constitutional rights that are protected by the First Amendment. Additionally, Part III examines whether the unconstitutional conditions doctrine<sup>15</sup> applies in this case, and finds that it does apply. The result of applying the doctrine is that strict scrutiny attaches when the government implements an unconstitutional condition.<sup>16</sup>

After examining the major background issues, this Note compares and contrasts the policies of UNC and Boise State. Part IV looks at each policy to see whether the policies are susceptible to strict scrutiny requirements.<sup>17</sup> If they are tested against that level of scrutiny, they will likely fail constitutional muster.<sup>18</sup> To decide whether strict scrutiny applies, this Note examines whether each restriction is content-neutral<sup>19</sup> or content-based.<sup>20</sup> Additionally, Part IV looks at other First Amendment jurisprudence issues including vagueness and "time, place, and manner restrictions" for each policy. Ultimately, Part IV concludes that Boise State's season-long ban is less likely to be subjected to strict scrutiny and is a better approach for public schools.<sup>21</sup>

Finally, in Part V, this Note looks at the policy implications of social networking in the school setting. In the sports world, this problem may be unique to high school and public college athletic programs, but the constitutional implications of UNC's<sup>22</sup> and Boise State's<sup>23</sup> policies can provide guidance to the greater high school and college community as social networking becomes more prevalent.<sup>24</sup>

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<sup>15</sup> For a definition of the unconstitutional conditions doctrine, see *infra* note 140.

<sup>16</sup> See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1506 (1989).

<sup>17</sup> Strict scrutiny will uphold a law "if it is proved necessary to achieve a compelling government purpose." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 9.1, at 671 (3d ed. 2006) (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

<sup>18</sup> See *infra* notes 248–57 and accompanying text.

<sup>19</sup> For the definition of content-neutral, see *infra* note 222.

<sup>20</sup> For the definition of content-based, see *infra* note 221.

<sup>21</sup> See discussion *infra* Part IV.B.

<sup>22</sup> See *infra* text accompanying note 43.

<sup>23</sup> See *infra* note 35 and accompanying text.

<sup>24</sup> Some colleges and universities have had a difficult time determining how to handle this new type of speech for students. For examples, see Greg Lukianoff, *The 12 Worst Colleges for Free Speech*, HUFFINGTONPOST (Jan. 27, 2011, 8:36 AM), [http://www.huffingtonpost.com/greg-lukianoff/the-12-worst-colleges-for\\_b\\_814706.html#s230527&title=UMass\\_Amherst\\_Amherst\\_Massachusetts](http://www.huffingtonpost.com/greg-lukianoff/the-12-worst-colleges-for_b_814706.html#s230527&title=UMass_Amherst_Amherst_Massachusetts).

## I. BACKGROUND

On May 29, 2010, UNC defensive lineman and top National Football League (NFL) prospect<sup>25</sup> Marvin Austin allegedly “tweeted”<sup>26</sup> from a party in Miami.<sup>27</sup> The tweet quickly became known as the “tweet heard ’round the college football world.”<sup>28</sup> This capped a spring and summer that included Austin “tweeting” not only about fancy dinners and parties, but also about his financial problems.<sup>29</sup> Following these tweets, the NCAA and the North Carolina Secretary of State independently commenced investigations of Austin and his teammates.<sup>30</sup> This scandal led to thirteen players being

<sup>25</sup> Ultimately, the New York Giants chose Austin in the second round of the 2011 NFL Draft. *See* NFL DRAFT TRACKER, <http://www.nfl.com/draft/2011/tracker#dt-tabs:dt-by-name> (last visited Nov. 21, 2011). On October 6, 2010, ESPN NFL draft expert Mel Kiper listed Austin as the twenty-fifth top draft prospect going into the 2011 draft, even though Austin had not played in the 2010 season. *See* Mel Kiper, Jr., *A.J. Green Belongs on Big Board*, ESPN.COM (Oct. 6, 2010, 1:07 PM), <http://insider.espn.go.com/nfl/draft2011/insider/news/story?id=5654260&action=login&appRedirect=http%3a%2f%2finsider.espn.go.com%2f%2fdraft2011%2finsider%2fnews%2fstory%3fid%3d5654260=5654260>.

<sup>26</sup> According to its web page, “Twitter is a real-time information network powered by people all around the world that lets you share and discover what’s happening now.” *About Twitter*, TWITTER, <https://twitter.com/about> (last visited Nov. 21, 2011). As a social networking program, Twitter allows users to send “tweets” or messages of up to 140 characters to the world or “twitterverse” from a variety of media. *See id.* The “twitterverse” is what the collective group of Twitter users has become known as in pop culture. *See generally* Andy Carvin, *Welcome to the Twitterverse*, NATIONAL PUBLIC RADIO (Feb. 28, 2009), <http://www.npr.org/templates/story/story.php?storyId=101265831>; Gavin O’Malley, *See the Twitterverse Through Fresh Eyes*, TECHCRUNCH (Sept. 27, 2010, 8:05 AM), [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=136418](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=136418). Any user can send a message to the “twitterverse” from a mobile phone just like a text message. *See About Twitter supra*. Twitter has changed drastically how people can communicate, particularly for celebrities of all types. Now, celebrities need only a mobile phone to reach their fans. *Id.* This includes the ability to immediately post to Twitter photos, videos, and links to other websites. *Id.*

<sup>27</sup> It is no longer clear that Austin was at the party when the “tweet” was sent, but instead it is believed that he was just retweeting a rap lyric. The now infamous tweet mirrors a rap lyric from the song “Sweet Life” by Rick Ross. *See* J.P. Giglio, *Austin’s Twitter Account Sheds Light on UNC Player*, NEWS & OBSERVER (Raleigh, N.C.), July 20, 2010, <http://www.newsobserver.com/2010/07/20/v-print/589864/austins-twitter-account-sheds.html>; *see also*, Doc, *Austin’s Twitter Feed Casts Doubt on Club Liv Tweet*, TARHEELFANBLOG (July 26, 2010), <http://www.tarheelfanblog.com/2010/07/austins-twitter-feed-casts-doubt-on-club-liv-tweet/>. Where the tweet was sent from was not a focus of the investigations.

<sup>28</sup> *See, e.g.*, Doc, *supra* note 27.

<sup>29</sup> *See* Giglio, *supra* note 27 (describing the wide variety of tweets sent by Austin including “pictures of a watch for his younger sister, a bag from an upscale sunglass store in Miami and a \$143 bill from The Cheesecake Factory in Washington, D.C.” and noting that Austin also tweeted, “Im [sic] so tired of being broke . . . somebody make it rain”).

<sup>30</sup> *See id.* (discussing the NCAA’s investigation); Kelly Naqi, *UNC’s Marvin Austin Giving Testimony*, ESPN.COM (Sept. 17, 2010), <http://sports.espn.go.com/ncf/news/story?id=5583074>

suspended or kept from playing in UNC's first football game of the 2010 season.<sup>31</sup> The scandal concluded with Austin being dismissed from the football team, other players being suspended permanently,<sup>32</sup> and later contributed to the firing of UNC Football Coach Butch Davis.<sup>33</sup>

UNC is not the only college football program that has dealt with problems arising from its players' social networking.<sup>34</sup> Boise State Football Coach Chris Petersen banned his players from using Twitter during the college football season.<sup>35</sup> Then—University of Miami Football Coach Randy Shannon banned his team from using Twitter after the team's loss to Ohio State in September 2010, in reaction to the players' tweeting in the hours leading up to kickoff of the game.<sup>36</sup> Ironically, demonstrating the power of Twitter, Miami's athletic department chose to announce the coach's decision via a tweet on the department's Twitter account.<sup>37</sup> The bottom line for these coaches was that Twitter proved a distraction for their players.<sup>38</sup>

The impact Twitter has had on all levels of sports is significant. In both college and professional sports, sports stars have taken to Twitter to communicate with their fan base.<sup>39</sup> This progress has proven problematic for some college and professional

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(describing Marvin Austin cooperating with the North Carolina Secretary of State's investigation that centers around possible violations of the North Carolina Uniform Athlete Agent Act). The investigations focused on whether professional sports agents had improper contact with Austin, his teammates, and other college football players, and whether agents paid for those players to travel and attend parties. See Giglio, *supra* note 27.

<sup>31</sup> See Greg Barnes, *No New Players Cleared for Carolina*, INSIDECAROLINA.COM (Sept. 16, 2010), <http://www.wralsportsfan.com/unc/story/8304268/>.

<sup>32</sup> See Aaron Taube, *Marvin Austin Dismissed, Greg Little and Robert Quinn Ruled Ineligible*, THE DAILY TAR HEEL, Oct. 13, 2010, [http://www.dailytarheel.com/index.php/article/2010/10/marvin\\_austin\\_dismissed\\_greg\\_little\\_and\\_robert\\_quinn\\_ruled\\_ineligible](http://www.dailytarheel.com/index.php/article/2010/10/marvin_austin_dismissed_greg_little_and_robert_quinn_ruled_ineligible).

<sup>33</sup> See Ken Tysiac, *UNC Fires Football Coach Butch Davis*, NEWS & OBSERVER (Raleigh, N.C.), July 28, 2011, <http://www.newsobserver.com/2011/07/27/1373741/unc-trustees-meeting-on-football.html>.

<sup>34</sup> See *infra* notes 35–38 and accompanying text.

<sup>35</sup> Brian Murphy, *Murphy: Coach Pete Pulls the Plug on Twitter*, IDAHO STATESMAN, Aug. 8, 2010 (on file with author).

<sup>36</sup> Manny Navarro & Susan Miller Degnan, *Miami Hurricanes Player Ordered to Shut Down Twitter Accounts*, MIAMI HERALD, Sept. 15, 2010, <http://www.gableshomepage.com/news/2010/09/15/miami-hurricanes-players-ordered-shut-down-twitter-accounts> (describing, for example, that starting quarterback, Jacory Harris, tweeted two hours before kickoff, “[m]iddle fingers everywhere. This is why you play college football.”).

<sup>37</sup> Official Twitter of the University of Miami Athletic Dept., Posting of HurricaneSports, TWITTER (Sept. 14, 2010, 2:33 PM), <http://twitter.com/#!/hurricanesports/status/24499153399> (“Football program has asked players to shut down Twitter accounts. Goal is to limit distractions & focus. Bigger goals than TWEETING.”).

<sup>38</sup> See, e.g., *id.*; Murphy, *supra* note 35 (quoting Boise State Coach Chris Petersen, “It’s just a distraction that we just don’t really need to have right now. There’s plenty of time in their lifetime for Twitter.”).

<sup>39</sup> See generally, Giglio, *supra* note 27 (discussing Marvin Austin’s tweets); TWEETING-

athletes, whose use of social networking has created significant distractions.<sup>40</sup> These numerous incidents led the producers of *Mike and Mike in the Morning* on ESPN Radio to parody the popular Carrie Underwood song “Before He Cheats” and replace the lyrics “maybe next time he’ll think before he cheats” with “maybe next time he’ll think before he Tweets.”<sup>41</sup>

#### *A. The Policies Defined*

The first approach analyzed by this Note is the idea of a “monitoring policy.” In September 2010, UNC’s athletic department amended its social networking policy, which encompasses social networking websites like Twitter, Facebook, and MySpace.<sup>42</sup> According to The News and Observer,

UNC has updated its 2010–11 Student Athlete Handbook to stipulate that “each team must identify at least one coach or administrator who is responsible for having access to and regularly monitor the content of team members’ social networking sites and postings.” The athletics department also reserves the right to have other staff members monitor athletes’ posts; and if any of an athlete’s online content violates the law or NCAA, University or athletic department policies, sanctions could range from removal of the posting to dismissal from the team.<sup>43</sup>

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ATHLETES.COM, <http://www.tweeting-athletes.com/index.cfm> (last visited Nov. 21, 2011); *Verified MLB Players on Twitter*, MLB PRO BLOG (Oct. 9, 2010, 10:00 AM), <http://twitter.mlblogs.com/> (listing every confirmed Twitter account of a Major League Baseball (MLB) player).

<sup>40</sup> See, e.g., *Skiles to Villanueva: No Halftime Tweets*, ESPN.com (Mar. 18, 2009, 3:48 PM), <http://sports.espn.go.com/nba/news/story?id=3990853> (detailing how Charlie Villanueva of the National Basketball Association’s (NBA) Milwaukee Bucks “tweeted” during halftime of a game he was playing in); Murphy, *supra* note 35 (describing distractions from Twitter on the Boise State Football team); Navarro & Degnan, *supra* note 36 (describing problems with Twitter on the Miami Hurricane college football team).

<sup>41</sup> *Mike & Mike in the Morning Telecast* (ESPN2 television broadcast July 20, 2011), available at <http://www.youtube.com/watch?v=ALQ6q5Astp8>; see also Quinnd, *ESPN2’s Canidate a Mike & Mike “Idol” with Wednesday’s Winning Performance*, ESPNMEDIAZONE (July 20, 2011), [http://www.espnmediazone3.com/us/2011/07/20/canidate\\_radio\\_idol/](http://www.espnmediazone3.com/us/2011/07/20/canidate_radio_idol/) (describing the parody song).

<sup>42</sup> *UNC Tweaks Twitter, Facebook Policies*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 30, 2010, <http://www.newsobserver.com/2010/08/30/655873/unc-tweaks-twitter-facebook-policies.html>.

<sup>43</sup> *Id.*

Officials at UNC denied that the new policy was in reaction to the Austin investigation.<sup>44</sup>

The second specific approach this Note examines is Boise State's season-long ban on social networking.<sup>45</sup> The policy was simple: players were prohibited from using Twitter until Boise State's college football season was over.<sup>46</sup>

The Boise State ban is similar to restrictions placed on Twitter use by professional sports leagues and teams.<sup>47</sup> These leagues and teams have more finite time limitations but, similar to Boise State, the policies place "time, place, and manner restrictions"<sup>48</sup> on the players' use of social media. In the NFL, players are banned from tweeting starting ninety minutes before each game, and tweeting must wait until the traditional post-game media interviews are over.<sup>49</sup> The National Basketball Association's (NBA) ban begins forty-five minutes before game time and concludes once the player finishes his post-game responsibilities.<sup>50</sup> Some teams have gone further, including the Miami Heat of the NBA. The Heat placed a total ban on tweeting when players are in the team's complex.<sup>51</sup> Tennis's U.S. Open even banned players from tweeting about themselves or their opponents, out of fear of violating gambling laws.<sup>52</sup>

The ultimate question addressed by this Note is whether the UNC monitoring policy<sup>53</sup> or the season-long ban by Boise State<sup>54</sup> represents an unconstitutional restriction on the free speech of college athletes. As discussed prior, this Note takes the position that Boise State's season-long ban<sup>55</sup> is preferable to UNC's monitoring policy.<sup>56</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> See Murphy, *supra* note 35 ("[Coach Chris] Petersen has banned his players—nearly a dozen of them were regulars on Twitter—from interacting on the social media site during this season."); *supra* note 13 and accompanying text. Boise State's policy will be examined because it is a public university.

<sup>46</sup> Murphy, *supra* note 35.

<sup>47</sup> See *infra* notes 49–52 and accompanying text.

<sup>48</sup> See CHEMERINSKY, *supra* note 17, § 11.4.2.2, at 1131.

<sup>49</sup> *League Announces Policy on Social Media for Before and After Games*, NFL.COM (Aug. 31, 2009, 6:53 PM), <http://www.nfl.com/news/story?id=09000d5d8124976d&template=without-video-with-comments&confirm=true>.

<sup>50</sup> Marc Stein, *NBA Social Media Guidelines Out*, ESPN.COM (Sept. 30, 2009), <http://sports.espn.go.com/nba/news/story?id=4520907>.

<sup>51</sup> *Heat Ban Twitter During 'Office Hours,'* ESPN.COM (Sept. 28, 2009), <http://sports.espn.go.com/nba/news/story?id=4512300>.

<sup>52</sup> Russell Goldman, *New Rules of the Game: Watch What You Tweet*, ABCNEWS.COM (Sept. 1, 2009), <http://abcnews.go.com/Technology/story?id=8457223>.

<sup>53</sup> See *supra* text accompanying note 43.

<sup>54</sup> See *supra* notes 13 & 35 and accompanying text.

<sup>55</sup> *Id.*

<sup>56</sup> See *supra* text accompanying note 43.



## II. SOCIAL NETWORKING SPEECH AND THE FIRST AMENDMENT

The first issue this Note examines is how general social networking and other Internet speech fits into the First Amendment. It is important to determine whether it matters that this speech comes from a social networking medium rather than a traditional avenue.

This Note argues that Internet speech should be protected just like traditional avenues of speech. Internet speech and social networking have the potential to provide society with a true “marketplace of ideas,”<sup>57</sup> and it is this “marketplace” that warrants First Amendment protection.<sup>58</sup> As will be discussed later, Congress and the courts share this Note’s distrust of overregulation of the Internet and the potential curbing of Internet speech.<sup>59</sup>

*A. The “Robust, Egalitarian First Amendment”*

Scholars argue that Internet speech provides an avenue for more people to be part of the public discourse.<sup>60</sup> Professor Neil Netanel wrote that Professor Jerome Barron, in his well-known 1967 law review article *Access To The Press—A New First Amendment Right*,<sup>61</sup> called for a “robust, egalitarian First Amendment.”<sup>62</sup> In Professor Barron’s opinion, this was a view of the First Amendment that was not possible in 1967 because the mass media controlled the avenues of public discourse.<sup>63</sup> Today, because of Internet speech, the public can bypass the mass media and Professor Barron’s view of the First Amendment is possible.<sup>64</sup>

In his 1967 article, Professor Barron wrote, “if ever there were a self-operating marketplace of ideas, it has long ceased to exist.”<sup>65</sup> But the Internet may make that marketplace possible.<sup>66</sup> The nature of Internet speech is different than other types of speech, particularly traditional written speech: the cost of using the Internet is lower than traditional forms of media, the Internet affords an easy way to speak to a large audience, and the Internet provides tremendous social networking tools that are helpful

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<sup>57</sup> See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>58</sup> See *infra* notes 65–71 and accompanying text.

<sup>59</sup> See *infra* Part II.B.

<sup>60</sup> See, e.g., Neil Weinstock Netanel, *New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 953 (2008).

<sup>61</sup> Jerome A. Barron, *Access To The Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

<sup>62</sup> Netanel, *supra* note 60, at 953.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Barron, *supra* note 61, at 1641.

<sup>66</sup> See Netanel, *supra* note 60, at 953.

in a wide range of areas.<sup>67</sup> The openness, low cost and easy access of the Internet are important issues to consider from a speech protection perspective.

Professor Netanel notes, “Barron cogently argued that the First Amendment requires real, effective, and widespread opportunities for dissident speakers to communicate their message to an audience, not merely a right to be free from government censorship.”<sup>68</sup> This free and unobstructed communication is one purpose of Internet speech, including social networking sites. For example, Twitter served as an important avenue of communication in the dissident uprising in Iran in 2009.<sup>69</sup> In 2011, the world saw the importance of social networking during the uprising in Egypt and the subsequent government shutdown of the Internet.<sup>70</sup> The openness and ease of Internet speech, as seen through these examples, demonstrates that this type of speech is vitally important and should be afforded the full protections of the First Amendment.

#### *B. Congress and the Courts’ Laissez-Faire View of Internet Regulation*

Congress and the courts appear to agree that Internet speech should be afforded the same protections as traditional avenues of speech.<sup>71</sup> In the short existence of the Internet, Congress has enacted various statutes on the use of and protections for the Internet,<sup>72</sup> and in doing so has demonstrated that it believes the Internet is best left to self-regulation, rather than extensive government regulation.<sup>73</sup> For example, two pieces of legislation that have become law—the Communications Decency Act (CDA)<sup>74</sup> and

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<sup>67</sup> See Jillian Bluestone, Comment, *La Russa’s Loophole: Trademark Infringement Lawsuits and Social Networks*, 17 VILL. SPORTS & ENT. L.J. 573, 578 (2010) (examining, for example, a Federal District Court’s finding that the Internet provides an easy and inexpensive “way for a speaker to reach a large audience” (quoting *ACLU v. Reno*, 929 F. Supp. 824, 843 (E.D. Pa. 1996))).

<sup>68</sup> Netanel, *supra* note 60, at 955.

<sup>69</sup> See, e.g., Lev Grossman, *Iran Protests: Twitter, the Medium of the Movement*, TIME, June 17, 2009, <http://www.time.com/time/world/article/0,8599,1905125,00.html>.

<sup>70</sup> See, e.g., Cecilia Kang, *Egypt Restores Internet as Turmoil Escalates*, WASH. POST TECH BLOG, (Feb. 2, 2011, 10:16 AM), [http://voices.washingtonpost.com/posttech/2011/02/egypt\\_restores\\_internet\\_report.html](http://voices.washingtonpost.com/posttech/2011/02/egypt_restores_internet_report.html) (discussing the government’s decision to restore internet access after a one week blackout); Cecilia Kang & Ian Shapira, *Facebook Treads Carefully After its Vital Role in Egypt’s Anti-Mubarak Protests*, WASH. POST, Feb. 2, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/02/AR2011020206107.html> (discussing Facebook and other social networking sites’ quiet work to empower anti-Mubarak protesters).

<sup>71</sup> See *infra* notes 72–94 and accompanying text.

<sup>72</sup> See, e.g., Anticybersquatting Protection Act, 15 U.S.C. § 1125(d) (2006) [hereinafter ACPA]; Digital Millennium Copyright Act, 17 U.S.C. § 200 (2006) [hereinafter DMCA]; Communications Decency Act, 47 U.S.C. § 230 (2006) [hereinafter CDA].

<sup>73</sup> See Bluestone, *supra* note 67, at 578 (examining the CDA and DMCA).

<sup>74</sup> CDA § 230.

the Digital Millennium Copyright Act (DMCA)<sup>75</sup>—protect Internet service providers from defamation suits and copyright liability for something a user does through the providers' services.<sup>76</sup> Social networking sites adapted to the legislation and in doing so protected themselves from liability.<sup>77</sup> Congress stated in the CDA, "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or *State* regulation."<sup>78</sup> As the Fourth Circuit noted, "Congress recognized the threat that tort-based lawsuits pose to freedom of speech . . . [and the CDA] was enacted, in part . . . to keep government interference in the medium to a minimum."<sup>79</sup> The CDA and similar legislation demonstrate Congress's intent not to extensively regulate Internet speech.<sup>80</sup>

This congressional intent is important because it demonstrates an initial distrust by Congress of government regulation of the Internet.<sup>81</sup> Congress's decision not to regulate something does not make a regulation unconstitutional, but in the specific case of protecting Internet service providers from liability, the courts have invoked constitutional terminology, like "chilling effect."<sup>82</sup> In *Zeran v. American Online*, the Fourth Circuit used the phrase "a *chilling effect* on the freedom of Internet speech"<sup>83</sup> when discussing the implications of placing liability on Internet service providers.<sup>84</sup>

It is telling that courts, in particular the conservative Fourth Circuit,<sup>85</sup> would immediately jump to the language of "chilling effect,"<sup>86</sup> since that language is often tied to the idea of "overbreadth" in First Amendment jurisprudence.<sup>87</sup> Although *Zeran* was not a First Amendment case, the Fourth Circuit's use of First Amendment terminology in the context of Internet speech demonstrates courts' and Congress's understanding that this type of regulation, even though it is tort-focused, is really about upholding the rights of individuals with regards to Internet speech.<sup>88</sup>

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<sup>75</sup> DMCA §§ 201–03.

<sup>76</sup> See CDA § 230; DMCA §§ 201–02.

<sup>77</sup> Bluestone, *supra* note 67, at 589.

<sup>78</sup> CDA § 230(b)(2) (emphasis added).

<sup>79</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>80</sup> See Bluestone, *supra* note 67, at 578.

<sup>81</sup> See *id.* (examining CDA, § 230).

<sup>82</sup> See *id.* at 582 ("Therefore, the court determined that creating liability upon notice would have 'a chilling effect on the freedom of Internet speech.'" (quoting *Zeran*, 129 F.3d at 333)).

<sup>83</sup> *Zeran*, 129 F.3d at 333.

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A22.

<sup>86</sup> *Zeran*, 129 F.3d at 333.

<sup>87</sup> See, e.g., CHEMERINSKY, *supra* note 17, § 11.2, at 945–48; Richard Fallen, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 858 (1991) ("[T]he statute . . . was 'overbroad' because it also prohibited constitutionally protected conduct that might be engaged in by others.").

<sup>88</sup> See *Zeran*, 129 F.3d at 331 ("Congress considered the weight of the speech interests implicated . . .").

With this understanding, the CDA and similar legislation focus on the protection of the Internet as an avenue of speech.<sup>89</sup> Congress's policy statement, "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or *State* regulation,"<sup>90</sup> makes clear that Congress recognizes the importance and the potential for Internet speech.<sup>91</sup> Similarly, the Supreme Court recently wrote that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."<sup>92</sup> Both Congress's and the Court's statements demonstrate the intent and importance of protecting speech, regardless of the medium.

### *C. Social Networking as Important Speech*

Social networking, blogging and Internet speech may do very little original reporting,<sup>93</sup> but Internet speech provides opportunities for people to play a role in public discourse, and these possibilities require the First Amendment protection.<sup>94</sup> Through its conscious decision to guard against liability-causing regulations of the Internet, Congress appears to agree that Internet speech should be protected.<sup>95</sup>

In April 2010, Marvin Austin used Twitter to tell the world about a steak he ate,<sup>96</sup> but that is not to say that at some point Austin would not have taken to Twitter to advocate for an issue or a candidate. This flexibility and potential demonstrates how Internet speech allows for a "self-operating marketplace of ideas."<sup>97</sup> Congress's own words<sup>98</sup> echo Professor Barron's hope for the First Amendment to protect a "self-operating marketplace of ideas."<sup>99</sup> Similarly, the Supreme Court recently embraced a broad view of the First Amendment when it wrote that "[t]he Free Speech

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<sup>89</sup> See CDA, 47 U.S.C. § 230(b)(2) (2006); *Zeran*, 129 F.3d at 327.

<sup>90</sup> CDA § 230(b)(2) (emphasis added).

<sup>91</sup> See *supra* notes 72–92 and accompanying text.

<sup>92</sup> *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)) (explaining the application of First Amendment jurisprudence to violent video games).

<sup>93</sup> See Netanel, *supra* note 60, at 965.

<sup>94</sup> See, e.g., *ACLU v. Reno*, 929 F. Supp. 824, 855 (E.D. Pa. 1996), *aff'd* 521 U.S. 844 (1997) (applying the First Amendment to Internet speech). But see Netanel, *supra* note 60, at 958 (describing his view that Internet speech can run counter to First Amendment goals). It is important to note that Professor Netanel is not arguing the speech should not be protected but is arguing that Internet speech somewhat conflicts with First Amendment goals. *Id.*

<sup>95</sup> See CDA § 230.

<sup>96</sup> See Giglio, *supra* note 27.

<sup>97</sup> Barron, *supra* note 61, at 1641.

<sup>98</sup> CDA § 230(b)(2); see *supra* note 80 and accompanying text.

<sup>99</sup> Barron, *supra* note 61, at 1641; see Netanel, *supra* note 60, at 955 (describing Professor Barron's goals for the First Amendment, including protecting dissenting voices and allowing those ideas to be communicated to an audience).

Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”<sup>100</sup> Supporting Professor Barron’s “robust, egalitarian First Amendment”<sup>101</sup> is why Twitter and other social networking speech should be protected.

### III. THE RIGHTS OF A COLLEGE ATHLETE

This Part explores the rights guaranteed to college athletes. It starts by examining the rights that exist in a college setting generally. This Note then focuses on the rights of college athletes—particularly, whether an athlete gives up substantive constitutional rights in exchange for being a college athlete. Finally, this Part examines how the unconstitutional conditions doctrine<sup>102</sup> could impact what actions a college may take.

#### *A. History of Fundamental Rights in a College Setting*

The famed decision of *Tinker v. Des Moines Independent Community School District*<sup>103</sup> set down the often quoted statement, “[I]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>104</sup> For the purposes of this Note, the Court in *Tinker* made a very important observation when it said, “[Students] may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”<sup>105</sup>

Although *Tinker* addresses a fundamental rights question in the grade school context,<sup>106</sup> courts have held that college students, at a minimum, have similar substantive constitutional rights as grade school students.<sup>107</sup> The United States District Court for the District of New Hampshire in *Morale v. Grigel* held that “[a] college cannot, in this day and age, protect students under the aegis of *in loco parentis* authority from the rigors of society’s rules and laws, just as it cannot, under the same aegis, deprive students of their constitutional rights.”<sup>108</sup> A university cannot realistically

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<sup>100</sup> *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2733 (2011).

<sup>101</sup> Netanel, *supra* note 60, at 953.

<sup>102</sup> For the definition of the unconstitutional conditions doctrine, see *infra* note 142.

<sup>103</sup> 393 U.S. 503 (1969).

<sup>104</sup> *Id.* at 506.

<sup>105</sup> *Id.* at 511.

<sup>106</sup> *Id.*

<sup>107</sup> See, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *Morale v. Grigel*, 422 F. Supp. 988 (D.N.H. 1976); *Univ. of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993).

<sup>108</sup> *Morale*, 422 F. Supp. at 997 (citations omitted).

attempt to protect its students from the realities of the world by banning their voices from the world.<sup>109</sup>

It is without argument that colleges and universities can monitor and regulate illegal speech, unlawful action, and other things that could endanger or disrupt the college community.<sup>110</sup> The Supreme Court ruled that in a college setting, “the power of the government to prohibit ‘lawless action’ is not limited to acts of a criminal nature.”<sup>111</sup> The Court, however, limited the reach of colleges to “actions which ‘materially and substantially disrupt the work and discipline of the school.’”<sup>112</sup> In *Healy v. James*, the Court applied that standard to the right of association<sup>113</sup> and deemed that associational activities could be regulated when “they infringe [on] reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.”<sup>114</sup> Undoubtedly, colleges can make a policy forbidding speech that impacts the educational environment or is illegal,<sup>115</sup> but going beyond that by forbidding content or substance is impermissible.<sup>116</sup>

Although the Supreme Court has not defined free speech rights for college students,<sup>117</sup> it did note in a case regarding faculty speech rights, “Our Nation is deeply committed to safeguarding academic freedom . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”<sup>118</sup> The Court continued, “The classroom is peculiarly the ‘marketplace of ideas.’”<sup>119</sup> This statement appears to be, and should be, a guiding principle for free speech on college campuses.

The lower courts have delved into speech rights with a greater focus on how a university can regulate student speech.<sup>120</sup> One of the most pertinent of those decisions

<sup>109</sup> See *id.* (discussing that a college cannot attempt to take a parental role in protecting students from the world by not letting students be part of the world).

<sup>110</sup> *Healy*, 408 U.S. at 189 (discussing past precedent and the latitude given to schools to regulate speech). Also for note, the First Amendment does not include protections for speech that incites illegal activity, or speech that constitutes fighting words or obscenity. See, e.g., CHEMERINSKY, *supra* note 17, §§ 11.3.1–11.3.4, at 986–1044.

<sup>111</sup> *Healy*, 408 U.S. at 189.

<sup>112</sup> *Id.* (citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

<sup>113</sup> U.S. CONST. amend. I (“Congress shall make no law respecting . . . the right of the people peaceably to assemble . . .”).

<sup>114</sup> *Healy*, 408 U.S. at 189.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 187.

<sup>117</sup> In 2006 the Supreme Court declined to hear *Hosty v. Carter*, which would have addressed free speech rights for college students. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), *cert. denied*, 546 U.S. 1169 (2006).

<sup>118</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

<sup>119</sup> *Id.*

<sup>120</sup> See, e.g., *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *Morale v. Grigel*, 422 F. Supp. 988 (D.N.H. 1976).

is *Doe v. University of Michigan*<sup>121</sup> from the Eastern District of Michigan. In *Doe*, the University reacted to horrific acts of racism on its campus<sup>122</sup> by instituting a policy that governed speech throughout campus.<sup>123</sup> The plaintiff was a psychology graduate student and his research dealt with potentially controversial theories that could be viewed as “sexist” or “racist.”<sup>124</sup> He argued that the policy—specifically the classroom policy<sup>125</sup>—unconstitutionally chilled his discussion of these theories.<sup>126</sup> The classroom policy directly regulated speech that “stigmatize[d] or victimize[d]” persons based on their “race, ethnicity, religion” or numerous other factors.<sup>127</sup> The court found “that the drafters of th[is] policy intended that speech need only be offensive to be sanctionable.”<sup>128</sup> Following the Supreme Court’s guidance, the *Doe* court ruled that “statutes punishing speech or conduct solely on the grounds that they are unseemly or offensive are unconstitutionally overbroad.”<sup>129</sup>

Applying *Doe*, it is clear that the regulation of simply “offensive” material on a college campus is “unconstitutionally overbroad.”<sup>130</sup> Clearly something more is required for a college or university to regulate speech. The Supreme Court’s principle from *Healy* extends colleges’ ability to regulate speech only to those areas that cause a disruption in the classroom or are illegal.<sup>131</sup> What *Doe* and *Healy* represent for the typical college student is that colleges cannot regulate speech or conduct based on content, unless it harms the classroom or is in some way illegal.<sup>132</sup> To do so either means that the college’s regulation is overbroad per *Doe*<sup>133</sup> or goes beyond the boundaries set in *Healy*.<sup>134</sup> These principles provide parameters for what speech a college can regulate as far as the general student body, but the question that remains is whether the rights of a college athlete are different than those of a normal college student.

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<sup>121</sup> 721 F. Supp. 852.

<sup>122</sup> *Id.* at 854 (“[U]nknown persons distributed a flier declaring ‘open season’ on blacks . . . . [A] student disc jockey at an on-campus radio station allowed racist jokes to be broadcast. At a demonstration protesting these incidents, a Ku Klux Klan uniform was displayed from a dormitory window.”).

<sup>123</sup> *Id.* at 856.

<sup>124</sup> *Id.* at 858.

<sup>125</sup> The University created three tiers of regulations within the policy. *See id.* at 856. Within the “education and academic centers” individuals were subject to discipline for “[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that . . . [c]reates an intimidating, hostile, or demeaning environment . . . .” *Id.*

<sup>126</sup> *Id.* at 858–59.

<sup>127</sup> *Id.* at 856.

<sup>128</sup> *Id.* at 860.

<sup>129</sup> *Id.* at 864.

<sup>130</sup> *Id.*

<sup>131</sup> *See, e.g., Healy v. James*, 408 U.S. 169, 189 (1972).

<sup>132</sup> *See id.; Doe*, 721 F. Supp. at 864.

<sup>133</sup> *Doe*, 721 F. Supp. at 864.

<sup>134</sup> *Healy*, 408 U.S. at 189.

*B. The Constitutional Rights of a College Athlete*

Although student athletes receive opportunities not available to the general student body, they also make sacrifices.<sup>135</sup> Within college sports, it is believed that players sometimes have to give up their voices for the privilege of being on a college team.<sup>136</sup> Boise State Football Coach Chris Petersen best summed up the coaches' perspective on the reality of being a college football player when he said, "We tell them long before they come here, there's a price to play on the blue turf. You're not a normal person, you're not a normal college student . . . There are a lot of things you can't do that those normal people get to do."<sup>137</sup> Petersen's statement reflects a reality that Boise State player Jeron Johnson agreed with when he said, "You sacrifice a lot, but it's all for the better . . . So far every sacrifice I've made has been worth it."<sup>138</sup>

College athletes make tremendous sacrifices, and for those sacrifices they receive opportunities the normal college student does not.<sup>139</sup> But this belief that a college athlete must give up rights in order to be a college athlete may not comport with the constitutional guarantees afforded to a person, even if that person is also a college athlete.

This Part delves into two issues: first, the fundamental rights a college athlete possesses, and second, the unconstitutional conditions doctrine<sup>140</sup> and its effect on what sacrifices a college athlete can be forced to make. In the following two subsections, this Note identifies three lines of reasoning that could be applied by the courts in a potential college athlete–First Amendment case. The first two come from state supreme courts in student athlete drug testing cases, and the final idea treats college athletes as government employees.

1. Dueling State Supreme Courts' Positions on Suspicionless Drug Tests

One analogous situation to college athletes' free speech rights is the fundamental rights of student athletes when dealing with suspicionless drug tests.<sup>141</sup> Similar to a First Amendment case, drug test cases also deal with a fundamental constitutional right:

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<sup>135</sup> See *infra* notes 137–40 and accompanying text.

<sup>136</sup> See *infra* notes 137–40 and accompanying text.

<sup>137</sup> Murphy, *supra* note 35. Famously, Boise State football is known for its blue turf. Boise State is home to the only blue Astroturf football field in the world. BRONCOSPORTS.COM, [http://www.broncosports.com/ViewArticle.dbml?DB\\_OEM\\_ID=9900&ATCLID=530470](http://www.broncosports.com/ViewArticle.dbml?DB_OEM_ID=9900&ATCLID=530470) (last visited Nov. 21, 2011).

<sup>138</sup> Murphy, *supra* note 35.

<sup>139</sup> See *supra* notes 137–40 and accompanying text.

<sup>140</sup> The unconstitutional conditions doctrine generally holds that the government cannot require a person to give up a constitutional right in exchange for governmental benefits. See CHERMERINSKY, *supra* note 17, § 11.2.4.4, at 980; Sullivan, *supra* note 16, at 1415.

<sup>141</sup> See Autumn K. Leslie, Note & Comment, *Online Social Networks and Restrictions on College Athletes: Student Censorship?*, 5 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 19, 25–26 (2008).



privacy.<sup>142</sup> The issue of drug testing presents two diametrically opposed holdings from courts as to whether college athletes, because they are in fact college athletes, give up some level of their substantive constitutional rights.<sup>143</sup>

In *University of Colorado v. Derdeyn*, the Colorado Supreme Court took the position that college athletes are just like other college students and do not give up their substantive constitutional rights.<sup>144</sup> The case was a class-action suit brought by various student athletes, who objected to mandated, suspicionless drug tests.<sup>145</sup> The university argued that because student athletes “submit to extensive regulation of their on- and off-campus behavior,” the athletes’ expectations of privacy were diminished.<sup>146</sup> The court rejected this argument, in part, because it concluded the types of regulations on the student athletes did not include a reduction in the athletes’ Fourth Amendment rights.<sup>147</sup>

Most importantly, in adopting a line of cases starting with *Morale v. Grigel*,<sup>148</sup> the court in *Derdeyn* equated college athletes’ rights to those of college students, and held that college students do not hold fewer constitutional rights just because they are college students.<sup>149</sup> As the court analyzed this case under the constitutional protections for a college student, it follows that the court decided student athletes have substantially the same rights as college students.<sup>150</sup> Therefore, if a college student does not forgo a right, neither does a college athlete.

On the other hand, the California Supreme Court took the opposite view and found that college athletes do forgo some substantive rights.<sup>151</sup> In *Hill v. NCAA*, the court held that student athletes were different from the general student body.<sup>152</sup> The court found that because of the sacrifices athletes make, they have “diminished expectations of privacy,” and student athletes exchange the right to full privacy for the benefits of being a student athlete.<sup>153</sup> The *Hill* court focused on a number of intrusions into a college athlete’s life to demonstrate the diminished right to privacy.<sup>154</sup> For

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<sup>142</sup> See CHEMERINSKY, *supra* note 17, § 10.1.1, at 792 (discussing those rights the Supreme Court has deemed “fundamental rights”).

<sup>143</sup> See *infra* text accompanying notes 144–65.

<sup>144</sup> 863 P.2d 929 (Colo. 1993).

<sup>145</sup> *Id.* at 932–33.

<sup>146</sup> *Id.* at 940.

<sup>147</sup> *Id.* at 935, 941.

<sup>148</sup> 422 F. Supp 988 (D.N.H. 1976).

<sup>149</sup> *Derdeyn*, 863 P.2d at 938.

<sup>150</sup> See *id.*

<sup>151</sup> *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994).

<sup>152</sup> *Id.* at 637.

<sup>153</sup> *Id.* (“Unlike the general population, student athletes undergo frequent physical examinations, reveal their bodily and medical conditions to coaches and trainers, and often dress and undress in same-sex locker rooms. In so doing, they normally and reasonably forgo a measure of their privacy in exchange for the personal and professional benefits of extracurricular athletics.”).

<sup>154</sup> *Id.*

example, the fact that college athletes submit to physical examinations, physical therapy, preventive trainer care, and are often subject to group showering, were all reasons the *Hill* court held that an athlete had a diminished right to privacy.<sup>155</sup> It followed that a drug test was no more invasive than the activities listed above.<sup>156</sup> The California Supreme Court concluded, without directly saying it, that a person can be required to accept diminished constitutional rights in exchange for being part of a college team.<sup>157</sup> The California Supreme Court's principle for the purpose of this Note is clear: college athletes forgo some substantive constitutional rights because they are college athletes.<sup>158</sup>

The issue of a student athlete's First Amendment rights has not been taken up by courts,<sup>159</sup> but the opposing views of the Colorado and California Supreme Courts on the issue of student athletes' Fourth Amendment rights provide some insight into how courts may approach the issue, as both privacy and speech are fundamental rights.<sup>160</sup> Courts could treat athletes like general college students.<sup>161</sup> In that situation, courts would likely look to *Healy*, and possibly *Doe*, to establish what rights a student athlete possesses.<sup>162</sup> On the other hand, courts could treat athletes differently than the general student body and hold that athletes possess a diminished speech right.<sup>163</sup>

## 2. College Athletes as Public Employees

Another theory for examining the speech rights of a college athlete is to look at the athlete as a government employee. It has been argued that college athletes

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<sup>155</sup> *Id.* at 658.

<sup>156</sup> *Id.* at 658–59.

<sup>157</sup> *See id.* at 659 (“[A]n athlete who refuses consent to drug testing is disqualified from NCAA competition. But this consequence does not render the athlete’s consent to testing involuntary in any meaningful legal sense.”). It is important to note that the court was not addressing a federal constitutional question, but instead it was addressing a state constitution that applies the right to privacy to freedom from action by a private entity. *Id.* at 641–42.

<sup>158</sup> *Id.* at 659.

<sup>159</sup> Leslie, *supra* note 141, at 35.

<sup>160</sup> *See* CHEMERINSKY, *supra* note 17, § 10.1.1, at 792 (discussing the similarities of fundamental rights). To note, similar to the court in *Hill*, Autumn Leslie argues that college athletes do give up some First Amendment protections because they are voluntarily part of the team. Leslie, *supra* note 141, at 36. This argument rests on the idea that it is the voluntary membership that erases the right. *Id.* at 36–37. This could be another line of reasoning used by the courts, but at this point the courts have not adopted such a line of reasoning. *Id.* (citing the potential for the court to adopt this theory). Since the courts have not utilized this line of reasoning, this Note does not discuss it in more detail.

<sup>161</sup> *See supra* text accompanying notes 146–52.

<sup>162</sup> *See* discussion *supra* Part III.A (discussing the rights of a college student).

<sup>163</sup> *See Hill*, 865 P.2d at 659 (applying that logic to student athlete drug tests).

should be paid in addition to his or her scholarship and, therefore, treated like a college's employees.<sup>164</sup>

The courts have held that in order to be afforded the protection of the First Amendment, a public employee's speech must be on "a 'matter of public concern' because it is only this type of speech that is at the core of the First Amendment's protections."<sup>165</sup> In *Connick v. Myers*,<sup>166</sup> the Supreme Court held that matters of purely private concern were not protected by the First Amendment in public employee cases.<sup>167</sup> In examining two public employee blogging cases—*City of San Diego v. Roe*<sup>168</sup> and *Richerson v. Beckon*<sup>169</sup>—Professor Paul Secunda concluded that, because personal blog posts are typically considered to be of a personal nature and not of public concern, it is very difficult for public employees to get First Amendment protections for their blogs.<sup>170</sup>

Some scholars, most notably Robert Bork, echo the idea that political speech is the only speech at the "core of the First Amendment[']s protection]" and therefore argue it is the only speech protected by the First Amendment in general.<sup>171</sup> The Bork idea of only protecting political speech is analogous to the idea of only protecting speech on "matter[s] of public concern."<sup>172</sup>

What the public employee blogging cases and Bork's similar view demonstrate is a line of reasoning that limits the First Amendment to political speech or "matters of public concern."<sup>173</sup> If courts decide to apply a *Myers*, or Bork-like, rule to college athletes' speech cases, they will clearly find that colleges can restrict personal Internet

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<sup>164</sup> See, e.g., Rod Gilmore, *College Football Players Deserve Pay for Play*, ESPN.COM (Jan. 17, 2007, 2:59 PM), [http://sports.espn.go.com/ncf/columns/story?columnist=gilmore\\_rod&id=2733624](http://sports.espn.go.com/ncf/columns/story?columnist=gilmore_rod&id=2733624).

<sup>165</sup> See Paul M. Secunda, *Blogging While (Publicly) Employed: Some First Amendment Implications*, 47 U. LOUISVILLE L. REV. 679, 688 (2009) (discussing the Supreme Court's jurisprudence with cases like *Connick v. Myers*, 461 U.S. 138 (1983)).

<sup>166</sup> 461 U.S. 138 (1983).

<sup>167</sup> *Id.* at 147 ("We hold only that when a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.").

<sup>168</sup> 543 U.S. 77 (2004).

<sup>169</sup> No. C07-5590 JKA, 2008 WL 833076 (W.D. Wash. Mar. 27, 2008), *aff'd*, 337 F. App'x 637 (9th Cir. 2009).

<sup>170</sup> Secunda, *supra* note 165, at 691.

<sup>171</sup> See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971). Bork notes that the protection of non-political speech relies on the "enlightenment of society and its elected representatives." *Id.* at 28. This echoes the words of Professor Secunda in that for public employees the First Amendment only protects speech as "a 'matter of public concern' because it is only this type of speech that is at the core of the First Amendment's protections." Secunda, *supra* note 165, at 688.

<sup>172</sup> See *Connick*, 461 U.S. at 146.

<sup>173</sup> *Id.*

speech, unless the speech is political or on a matter of public concern.<sup>174</sup> As Professor Secunda noted, personal social networking often does not deal with issues of public importance, and therefore fails to be a “matter of public concern.”<sup>175</sup>

But the public employee application<sup>176</sup> and the Bork view<sup>177</sup> are unlikely to prevail. Although the status of college athletes has been hotly debated,<sup>178</sup> they are not public employees, even if the athlete receives a scholarship.<sup>179</sup> Further, as discussed, some courts equate the rights of college athletes with the substantive rights of regular college students,<sup>180</sup> and to separate out student athletes means that they will not be treated like other students. Finally, the Supreme Court has not subscribed to the Bork view.<sup>181</sup>

From a policy standpoint, the reasoning presented by both the Bork view<sup>182</sup> and the public employee speech cases<sup>183</sup> would be a poor choice for the courts. These models abandon the recognition that college athletes are also college students.<sup>184</sup> Also, some athletes receive scholarships and some do not.<sup>185</sup> If the courts decided to treat athletes as employees and equated a scholarship to the compensation an employee receives, then only some athletes would qualify as “employees” because only some athletes receive compensation in terms of a scholarship.<sup>186</sup> If that were the case, the restrictions would only apply to those athletes receiving compensation in the form of a scholarship. This creates two classes of rights within the population of college athletes. Finally, tying employment law to college athletics could open

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<sup>174</sup> See *id.*; see also Bork, *supra* note 171, at 29.

<sup>175</sup> Secunda, *supra* note 165, at 688.

<sup>176</sup> See *supra* notes 165–77 and accompanying text; see also *infra* notes 180–89 and accompanying text.

<sup>177</sup> See Bork, *supra* note 171.

<sup>178</sup> Compare, e.g., Gilmore, *supra* note 164, with Jason Whitlock, *College Athletes Already Paid in Full*, ESPN.com (Jan. 17, 2007), <http://espn.go.com/page2/s/whitlock/020919.html>.

<sup>179</sup> See, e.g., Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 273–74 (1994) (discussing the current model of college athletics and how the players are unpaid amateurs).

<sup>180</sup> See *supra* text accompanying notes 146–52 (discussing the Colorado Supreme Court decision in *Univ. of Colo. v. Derdeyn*, 863 P.2d 939 (Colo. 1993)).

<sup>181</sup> CHEMERINSKY, *supra* note 17, at 926; see also *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (“The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”).

<sup>182</sup> Bork, *supra* note 171.

<sup>183</sup> See *supra* notes 165–78 and accompanying text.

<sup>184</sup> See *supra* notes 146–65 and accompanying text.

<sup>185</sup> See, e.g., *U.S. District Court Rules NCAA Policy Governing Scholarship Limit Should Go to Trial*, PR NEWSWIRE (Sept. 16, 2004), <http://www.prnewswire.com/news-releases/us-district-court-rules-ncaa-policy-governing-scholarship-limit-should-go-to-trial-55013257.html> (discussing non-scholarship football players’ suit against the NCAA for limiting the number of scholarships).

<sup>186</sup> *Id.*

a floodgate to additional policy and legal issues, specifically in terms of labor law and taxation issues.<sup>187</sup>

### 3. How Best to Secure College Athletes' Substantive Rights

From this Note's perspective, the *Derdeyn* view is preferred. The *Derdeyn* court's view places college students and college athletes on the same level as far as constitutional rights are concerned.<sup>188</sup> The other approaches treat athletes differently than students.<sup>189</sup> Clearly, there are times when athletes are not the same as non-athlete students, but saying that the Constitution treats athletes differently than students goes too far.

These divergent theories unveil an important question: Can universities use a scholarship or membership on the team as leverage to deprive an athlete of a fundamental right? If there is a substantive constitutional right at stake, then under the unconstitutional conditions doctrine,<sup>190</sup> strict scrutiny may not allow for such leverage.<sup>191</sup>

#### *C. The Unconstitutional Conditions Doctrine Protects College Athletes*

The unconstitutional conditions doctrine<sup>192</sup> holds that the "government may not deny a benefit to a person because he exercises a constitutional right."<sup>193</sup> Neither the Supreme Court in general unconstitutional conditions cases,<sup>194</sup> nor the lower courts in cases of student athletes' fundamental rights and unconstitutional conditions,<sup>195</sup> have applied this doctrine uniformly. What is important about the unconstitutional conditions doctrine is that if there is an unconstitutional condition, strict scrutiny is the appropriate standard.<sup>196</sup> If strict scrutiny applies, then the court recognizes that for

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<sup>187</sup> See Davis, *supra* note 179, at 323–24 (discussing the labor and tax law implications of making college athletes employees).

<sup>188</sup> See *Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 938 (Colo. 1993).

<sup>189</sup> See text accompanying notes 153–60.

<sup>190</sup> See *Derdeyn*, 863 P.2d at 948 (applying unconstitutional conditions doctrine to a college drug testing case); see also *supra* note 140 (defining unconstitutional conditions doctrine).

<sup>191</sup> See CHEMERINSKY, *supra* note 17, § 9.1, at 671 (discussing the requirements of strict scrutiny).

<sup>192</sup> For the definition of the unconstitutional conditions doctrine see *supra* note 140 and accompanying text.

<sup>193</sup> *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

<sup>194</sup> See Sullivan, *supra* note 16, at 1415; CHEMERINSKY, *supra* note 17, § 11.2.4.4, at 981 (discussing the Court's decision in *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984)).

<sup>195</sup> Compare *Derdeyn*, 863 P.2d at 948–50, with *Hill v. NCAA*, 865 P.2d 633, 659 (Cal. 1994).

<sup>196</sup> See Sullivan, *supra* note 16, at 1506.

a college to abridge a student athlete's right to speak, the court must find a "compelling government purpose" for regulating the speech.<sup>197</sup>

### 1. The Three Approaches

The literature on the unconditional conditions doctrine presents three main tests for whether an unconstitutional condition exists.<sup>198</sup>

The traditional view of the courts was derived by Professor Kathleen Sullivan from a number of cases.<sup>199</sup> Under this view, an unconstitutional condition exists when there is a "benefit[ ] that government is permitted but not compelled to provide,"<sup>200</sup> and government coercion impacts "some sort of exercise of autonomous choice by the rightholder, such as individual rights to speech . . . ."<sup>201</sup> Courts typically find constitutional problems with these conditions "when they 'pass the point at which pressure turns into compulsion.'"<sup>202</sup>

The second test for an unconstitutional condition is Professor Sullivan's own development and is rather straightforward.<sup>203</sup> Simply put, the "test would subject to strict review any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government."<sup>204</sup>

The third view comes from Sally Lynn Meloch.<sup>205</sup> She theorizes that courts ask only one question before moving to strict scrutiny: whether there is a punishment involved.<sup>206</sup>

No matter which of the three tests is applied, there is clearly an unconstitutional condition present in the case of monitoring student athletes' use of social networking tools and regulating their speech. Under the courts' traditional view,<sup>207</sup> the benefit offered by the government is a scholarship, which the government is not required to

<sup>197</sup> See, e.g., CHEMERINSKY, *supra* note 17, § 9.1, at 671.

<sup>198</sup> See *infra* notes 202–08 and accompanying text.

<sup>199</sup> Sullivan, *supra* note 16, at 1422.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1426. This approach will be referenced as the "traditional" approach by the courts.

<sup>202</sup> *Id.* at 1428 (citations omitted).

<sup>203</sup> See *id.* at 1499–1500.

<sup>204</sup> *Id.*

<sup>205</sup> Sally Lynn Meloch, Note, *An Analysis of Public College Athlete Drug Test Programs Through the Unconstitutional Condition Doctrine and the Fourth Amendment*, 60 S. CAL. L. REV. 815, 819 (1987).

<sup>206</sup> *Id.* at 834–35 (discussing the Supreme Court's distinction between cases like *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) and *North Carolina v. Pearce*, 395 U.S. 711 (1969), particularly how criminal defendants cannot be punished for exercising their right to appeal, but that there is no punishment if the defendant refuses a plea deal and is sentenced to a higher amount).

<sup>207</sup> See *supra* notes 201–04 and accompanying text.

give.<sup>208</sup> The government is using the scholarship or membership on a team to coerce the athlete into curbing his or her voice. Similarly, under Professor Sullivan's standard,<sup>209</sup> the government is conditioning athletic scholarships on athletes giving up their rights to free speech or, in UNC's case, submitting to monitoring.<sup>210</sup> As Professor Sullivan puts it, the "primary . . . effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government,"<sup>211</sup> and, in this case, that preferred governmental direction is for the athletes to give up their free speech rights. Finally, using Meloch's test, there is a penalty for an athlete not giving up his or her speech right: the potential loss of a scholarship.<sup>212</sup>

This Part demonstrates that if a college athlete has a fundamental right to speak, a college cannot use a scholarship or membership on a team as leverage to make a player speak in the "direction favored by government."<sup>213</sup> As the Supreme Court said in *Tinker*, "[Students] may not be confined to the expression of those sentiments that are officially approved."<sup>214</sup> In the situation of college sports and social networking, the unconstitutional conditions doctrine should protect athletes from schools restricting the athletes' speech to what is approved or condoned. If a school is using a scholarship as leverage to get the athlete to give up a fundamental right, such as speech, the unconstitutional conditions doctrine<sup>215</sup> should apply and require that a school satisfy the strict scrutiny test of requiring regulations to be "necessary to achieve a compelling [governmental] purpose."<sup>216</sup>

#### IV. THE POLICIES

After establishing that college athletes do have fundamental rights, this Note turns to the question of whether the method of restriction is constitutional. As discussed in the Introduction, the relationship between state universities and the NCAA complicates how colleges can address student athletes' constitutional rights.<sup>217</sup> As a private entity, the NCAA can suspend players that violate its rules, even if the player was exercising his or her constitutional rights.<sup>218</sup> UNC's reaction to this problem by

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<sup>208</sup> See, e.g., *U.S. District Court Rules NCAA Policy Governing Scholarship Limit Should Go to Trial*, *supra* note 187 (discussing non-scholarship football players' suit against the NCAA for limiting the number of scholarships); *supra* note 192.

<sup>209</sup> See *supra* text accompanying notes 203–06.

<sup>210</sup> See *infra* notes 238–42 and accompanying text (discussing the tweets and subsequent punishment of two football players).

<sup>211</sup> Sullivan, *supra* note 16, at 1499–1500.

<sup>212</sup> Meloch, *supra* note 205, at 849.

<sup>213</sup> Sullivan, *supra* note 16, at 1499–1500.

<sup>214</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

<sup>215</sup> See *supra* note 140.

<sup>216</sup> See, e.g., CHEMERINSKY, *supra* note 17, § 9.1, at 671.

<sup>217</sup> See *supra* Introduction.

<sup>218</sup> See *supra* notes 6–8, 30–32 and accompanying text.

monitoring social networking speech is not surprising. If the university can keep its players from using social networking to break the NCAA's rules, it follows that the players can remain eligible for competition.

This Part compares the competing policies of Boise State<sup>219</sup> and UNC<sup>220</sup> through the lens of traditional First Amendment doctrine. This Note looks at both policies in terms of whether they are content-based or content-neutral and examines other free speech issues that impact each policy.

#### *A. UNC's Monitoring Policy*

The first major area to examine for either policy is whether the policy is content-based<sup>221</sup> or content-neutral.<sup>222</sup> The Supreme Court wrote, "[A]s a general matter . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,' [but] [t]here are of course exceptions.'"<sup>223</sup> This determination of whether a restriction is content-based or content-neutral, along with the unconstitutional conditions doctrine,<sup>224</sup> will determine whether strict scrutiny is appropriate.

The Supreme Court has held that laws or regulations that are content-based<sup>225</sup> are subject to strict scrutiny,<sup>226</sup> but that content-neutral standards<sup>227</sup> are viewed under an intermediate level of scrutiny.<sup>228</sup> The Court has gone so far as to decide that "[c]ontent-based regulations are presumptively invalid."<sup>229</sup>

<sup>219</sup> See *supra* notes 13, 35.

<sup>220</sup> See *supra* text accompanying note 43.

<sup>221</sup> Content-based laws are ones that are either not "viewpoint neutral" or are not "subject matter neutral." CHEMERINSKY, *supra* note 17, § 11.2, at 934. Viewpoint neutral requires the law not regulate the "ideology of the message," and subject matter neutral requires that laws not regulate the "topic of the speech." *Id.*

<sup>222</sup> *Id.* § 11.2.4.4, at 932 ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.") (quoting the Supreme Court's decision in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972)). But see *supra* note 221 (discussing the elements of a content-based law).

<sup>223</sup> *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)) (citations omitted).

<sup>224</sup> See *supra* note 140.

<sup>225</sup> See *supra* note 221.

<sup>226</sup> CHEMERINSKY, *supra* note 17, § 11.2.4.4, at 981 (discussing the Court's decisions in *United States v. Playboy Entm't Grp., Inc.*, 539 U.S. 803 (2000) and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 641 (1992)).

<sup>227</sup> See *supra* note 222.

<sup>228</sup> Intermediate scrutiny is defined generally as "a law is upheld if it is substantially related to an important government purpose." CHEMERINSKY, *supra* note 17, § 9.1, at 671 (citing *Lehr v. Robertson*, 463 U.S. 248, 266 (1983) and *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

<sup>229</sup> *R.A.V.*, 505 U.S. at 382.



Whether the UNC policy requiring coaches or administrators to monitor student athletes' social networking<sup>230</sup> is content-neutral is a difficult question. In two of the seminal cases on the issue, the challenged law, regulation, or rule focused on a singular type of speech. For example, in *United States v. Playboy Entertainment Group, Inc.*,<sup>231</sup> the law only restricted the viewing of adult entertainment.<sup>232</sup> Similarly, in *Ashcroft v. ACLU*,<sup>233</sup> the law in question regulated only websites of a sexual nature.<sup>234</sup> Both of these cases dealt with a law that explicitly or implicitly regulated only one type of expression or speech, providing a clear line of non-neutrality.

The UNC policy<sup>235</sup> is not as clear-cut as these examples, but it nevertheless falls into the category of a content-based regulation. The policy aims to regulate speech that "violates the law or NCAA, University or athletic department policies . . . ."<sup>236</sup> Through those words, it appears to only regulate speech that violates prescribed rules.<sup>237</sup> But it is the results of the policy, not its goals, that demonstrate that the policy is content-based. For example, UNC football player Devon Ramsey was suspended after he tweeted, "My whole team gettin [sic] money I just call it gang green . . . ."<sup>238</sup> Also under the policy, Quinton Copes of the UNC football team was asked to take down a tweet that was homophobic.<sup>239</sup> Neither of these tweets was clearly illegal, although both were offensive. These examples demonstrate that the UNC policy targets specific content that the school finds offensive, going beyond speech that purely disrupts the school.<sup>240</sup> This policing of only what the school finds offensive regulates the "topic of the speech" and should be considered content-based.<sup>241</sup>

Based on the use of an unconstitutional condition<sup>242</sup> and content-based restriction,<sup>243</sup> it follows that the UNC speech monitoring policy would be subject to strict scrutiny.<sup>244</sup>

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<sup>230</sup> See *supra* text accompanying note 43.

<sup>231</sup> 529 U.S. 803 (2000).

<sup>232</sup> *Id.*

<sup>233</sup> 542 U.S. 656 (2004).

<sup>234</sup> *Id.* at 659 (describing the Child Online Protection Act (COPA), 47 U.S.C. § 231 (2010)).

<sup>235</sup> See *supra* text accompanying note 43.

<sup>236</sup> See *supra* note 42.

<sup>237</sup> See *supra* text accompanying note 43.

<sup>238</sup> Megan Walsh, *Twitter Banned for UNC Football*, THE DAILY TAR HEEL (Oct. 18, 2010), [http://www.dailytarheel.com/index.php/article/2010/10/twitter\\_banned\\_for\\_unc\\_football](http://www.dailytarheel.com/index.php/article/2010/10/twitter_banned_for_unc_football). It is important to note that Coach Butch Davis alluded to other issues with Ramsey that may have contributed to this suspension. *Id.*

<sup>239</sup> Brett Friedlander, *Tweet, Tweet . . . UNC Players Just Don't Seem to Learn*, STARNEWSONLINE (Oct. 15, 2010, 12:43 PM), <http://acc.blogs.starnewsonline.com/16813/tweet-tweet-unc-players-just-don-t-seem-to-learn/>. The tweet included the words "stop the gayness." *Id.*

<sup>240</sup> See, e.g., *Healy v. James*, 408 U.S. 169, 189 (1972).

<sup>241</sup> See *supra* note 221.

<sup>242</sup> See *supra* note 140 and Part III.C (arguing the unconstitutional conditions doctrine applies in this situation).

<sup>243</sup> See *supra* note 221 and Part IV.A (arguing the rule is content-based).

<sup>244</sup> See *supra* notes 192–200, 225–31 and accompanying text.

This finding is supported by the *Derdeyn* court's use of strict scrutiny in deciding an analogous suspicionless drug test case.<sup>245</sup>

### 1. Strict Scrutiny and College Athletics

The strict scrutiny standard requires that the regulation be "necessary to achieve a compelling government purpose."<sup>246</sup> It is argued that strict scrutiny almost always guarantees that the law in question will fail constitutional muster.<sup>247</sup> This should be the case for policies of college athletic departments. The goals of an athletic department are limited.

In *Derdeyn*, the goals cited by the athletic department for suspicionless drug testing were the health and safety of the players and the college community in general.<sup>248</sup> In the context of drug tests, these reasons were deemed not to be compelling.<sup>249</sup>

An athletic department in a First Amendment case could attempt to cite health and safety as goals, but if these reasons are not compelling for drug testing, these reasons will not constitute compelling reasons for First Amendment cases. The athletic department could also argue the reason for the policy is the protection of students from their own immaturity,<sup>250</sup> but that also fails to rise to the level of a compelling governmental interest.<sup>251</sup>

Even if the school cites one of the aforementioned interests, the real reasons for UNC's policy are competitiveness and the ability to keep a team on the field.<sup>252</sup> UNC is a great example of this problem because the inappropriate use of Twitter resulted in thirteen players being ineligible to play in the football team's opening game.<sup>253</sup>

Competitiveness should not be considered a compelling interest. It does not rise to the level of importance of other governmental reasons already found not to reach the threshold of compelling government interest.<sup>254</sup> If the health and safety of college athletes or the campus community are not compelling interests, then the college's

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<sup>245</sup> Univ. of Colo. v. *Derdeyn*, 863 P.2d 929, 938 (Colo. 1993).

<sup>246</sup> See, e.g., CHEMERINSKY, *supra* note 17, § 9.1, at 671.

<sup>247</sup> See *id.*

<sup>248</sup> See *Derdeyn*, 863 P.2d at 945.

<sup>249</sup> See *id.* (describing the interest of protecting the health and safety of the student athletes and the student body as "unquestionably significant," but holding that it failed to pass the strict scrutiny requirements).

<sup>250</sup> See *Morale v. Grigel*, 422 F. Supp. 988, 997 (D.N.H. 1976) (arguing that colleges cannot attempt to protect their students by invoking the term *in loco parentis*).

<sup>251</sup> *Id.* (discussing why *in loco parentis* is not a sufficient justification).

<sup>252</sup> See *Barnes*, *supra* note 31 (discussing UNC's inability to field players because of potential NCAA violations).

<sup>253</sup> See *id.*

<sup>254</sup> Other reasons include health and safety of the college athletes and community, *Derdeyn*, 863 P.2d at 945, and a school protecting its students and the college community, *Morale*, 422 F. Supp. at 997.

ability to field a football team cannot be compelling.<sup>255</sup> Without a “compelling government purpose,” the policy must fail strict scrutiny.<sup>256</sup>

## 2. UNC’s Policy Violates the Void for Vagueness Doctrine

In addition to the issue of content-based regulation, the outcomes of UNC’s monitoring policy in action are eerily similar to the worries expressed by the court in *Doe v. University of Michigan*.<sup>257</sup> In *Doe*, the district court held that the University’s policy regarding speech<sup>258</sup> only required that speech be offensive to be punishable.<sup>259</sup> Citing the Supreme Court’s decision in *Broadrick v. Oklahoma*,<sup>260</sup> the court’s opinion noted that “[a] statute is unconstitutionally vague when ‘men of common intelligence must necessarily guess at its meaning,’”<sup>261</sup> and held that the University’s policy was unconstitutionally vague.<sup>262</sup>

The void for vagueness doctrine, in the Supreme Court’s words, means that regulations or statutes must have “sufficient definiteness [so] that ordinary people can understand what conduct is prohibited and [be of] a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>263</sup> On its face, the UNC policy might seem to provide some level of definiteness by stating that the school will be monitoring for speech that violates the law, NCAA or University policy.<sup>264</sup> But the UNC policy fails the Court’s rule because speech monitoring “encourage[s] arbitrary and discriminatory enforcement.”<sup>265</sup> The policy requires that a university official, either a coach or an administrator, survey players’ social networking sites and decide if something a player says violates the law, or NCAA or university regulations.<sup>266</sup> There are no clear guidelines for uniform application. Players clearly know where the policy starts—with speech that violates state or federal law<sup>267</sup>—but the limits of the policy are unclear. As applied with Quinton Coples’s and Devon Ramsey’s tweets,<sup>268</sup> the policy in action

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<sup>255</sup> See, e.g., *Derdeyn*, 863 P.2d at 945 (“[A]lthough the integrity of its athletic program is, like all the other interests asserted by CU, a valid and commendable one, it does not seem to be very significant for Fourth Amendment purposes.”).

<sup>256</sup> See CHEMERINSKY, *supra* note 17, § 9.1, at 671.

<sup>257</sup> 721 F. Supp. 852 (E.D. Mich. 1989).

<sup>258</sup> *Id.* at 856 (describing the University’s policy).

<sup>259</sup> *Id.* at 860.

<sup>260</sup> 413 U.S. 601, 607 (1973).

<sup>261</sup> *Doe*, 721 F. Supp. 866 (quoting *Broadrick*, 413 U.S. at 607).

<sup>262</sup> *Id.* at 866–67.

<sup>263</sup> *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

<sup>264</sup> See *supra* text accompanying note 43.

<sup>265</sup> *Kolender*, 461 U.S. at 357.

<sup>266</sup> See *supra* text accompanying note 43.

<sup>267</sup> See *supra* text accompanying note 43.

<sup>268</sup> See *supra* notes 238–42.

not only regulates illegal speech, but it also includes types of offensive speech.<sup>269</sup> The question then becomes: What is “offensive?”

The *Doe* court, which held that purely offensive speech does not fall into the category of what a college could regulate, found that “[s]tudents of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable under the Policy.”<sup>270</sup> Similar to the *Doe* case, student athletes under this policy can only guess at what officials monitoring the athletes’ social networking will find offensive. Clearly, per the Copley tweet, the policy includes homophobic tweets,<sup>271</sup> but what else would the UNC monitors find offensive? This demonstrates how the policy is vague and promotes “arbitrary and discriminatory enforcement.”<sup>272</sup>

The issues with the UNC monitoring policy are clear. It is content-based, as seen in its application, and it is vague because it lacks clarity and promotes arbitrary enforcement.

#### *B. Boise State’s Policy*

Although both the UNC policy<sup>273</sup> and the Boise State approach<sup>274</sup> implicate players’ substantive rights of speech, they do so in very different ways.<sup>275</sup> Those differences lead to very different constitutional outcomes. From the standpoint of content neutrality, it is clear that Boise State’s policy<sup>276</sup> banning the use of Twitter for a period of time is a content-neutral regulation.<sup>277</sup> It blocks all speech conducted through the medium of social networking and does not focus on the content of speech. Further, the policy does not stem from the government agent—in this case Coach Chris Petersen—attempting to regulate any specific content, but instead its purpose is to stop the distractions that Twitter caused for his team.<sup>278</sup>

The Boise State policy of a season-long Twitter ban does not require that a player restrict his or her speech to certain topics; it allows an athlete to say whatever he or she wants, just not on Twitter.<sup>279</sup> This does not have the same effect on speech as the UNC policy<sup>280</sup> because the player need not be afraid of repercussions based

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<sup>269</sup> See *supra* text accompanying notes 238–42.

<sup>270</sup> *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989).

<sup>271</sup> See Friedlander, *supra* note 239. The tweet included the words “stop the gayness.” *Id.*

<sup>272</sup> *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

<sup>273</sup> See *supra* text accompanying note 43.

<sup>274</sup> See *supra* notes 13, 35 and accompanying text.

<sup>275</sup> See *supra* Part III.

<sup>276</sup> See *supra* notes 13, 35 and accompanying text.

<sup>277</sup> CHEMERINSKY, *supra* note 17, § 9.1, at 671 (explaining the definition of content-neutral).

<sup>278</sup> See Murphy, *supra* note 35 and accompanying text.

<sup>279</sup> See *supra* notes 13, 35 and accompanying text.

<sup>280</sup> See *supra* text accompanying note 43.

on the content of that speech. A ban on Twitter does not restrict the speech, only the method.<sup>281</sup> This demonstrates that Boise State's approach is content-neutral, and therefore it is not subject to strict scrutiny on those grounds.<sup>282</sup>

The fact that Boise State's policy<sup>283</sup> is content-neutral demonstrates why Boise State's ban<sup>284</sup> is less likely to stir a constitutional challenge than the speech-monitoring policy of UNC,<sup>285</sup> but the limited nature of the regulation further demonstrates why Boise State's method is preferable.

This restriction acts only as a "time, place and manner restriction,"<sup>286</sup> and based on past precedent, such restrictions can be constitutional.<sup>287</sup> As the Supreme Court reaffirmed in *Ward v. Rock Against Racism*,<sup>288</sup> "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests . . . ."<sup>289</sup> Additionally, the Supreme Court has recognized that "time, place, or manner" restrictions can be appropriate on college campuses.<sup>290</sup>

Under the Supreme Court's rule in *Ward*,<sup>291</sup> because the college's interest is content-neutral,<sup>292</sup> the remaining questions are whether the restriction is "narrowly tailored" and whether the government's interest is "legitimate."<sup>293</sup> Coach Petersen did narrowly tailor his rule to one type of communication that was problematic: Twitter.<sup>294</sup> His ban on tweeting only impacted the one medium that was a distraction and he tailored his rule to just that problem. The interest he was serving was avoiding distractions on his team. Whether that interest is "legitimate" could be debated, but this standard is clearly more deferential than strict scrutiny,<sup>295</sup> and therefore it has a greater chance of passing constitutional muster.

What is important is that Coach Petersen tailored his rule so that it fit his program's need of ending the Twitter distraction, and also did not unreasonably interfere with the constitutional rights of his players. In doing so, based on the fact that his

<sup>281</sup> See *supra* notes 13, 35 and accompanying text.

<sup>282</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); see also *supra* notes 221–32 and accompanying text.

<sup>283</sup> See *supra* notes 13, 35 and accompanying text.

<sup>284</sup> See *id.*

<sup>285</sup> See *supra* text accompanying note 43.

<sup>286</sup> This idea is taken from public forum doctrine and deals with whether government can restrict speech in certain public areas like parks, streets, and around school property. See CHEMERINSKY, *supra* note 17, § 11.4.2.1, at 1124–25.

<sup>287</sup> See *Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973); CHEMERINSKY, *supra* note 17, § 11.4.2.2, at 1131.

<sup>288</sup> 491 U.S. 781 (1989).

<sup>289</sup> *Id.* at 798.

<sup>290</sup> *Papish*, 410 U.S. at 670.

<sup>291</sup> 491 U.S. at 782.

<sup>292</sup> CHEMERINSKY, *supra* note 17, § 11.2.1, at 932.

<sup>293</sup> *Ward*, 491 U.S. at 798.

<sup>294</sup> See *supra* notes 13, 35 and accompanying text.

<sup>295</sup> See CHEMERINSKY, *supra* note 17, § 6.5, at 540–41.

policy is content-neutral and is only a “time, place, [or] manner restriction[ ],”<sup>296</sup> it appears that Coach Petersen devised a method that at least does not have to stand up to strict scrutiny.<sup>297</sup> It provides further evidence that from a constitutional perspective, the outright but limited ban of Boise State<sup>298</sup> is preferable to UNC’s policy<sup>299</sup> of speech monitoring.<sup>300</sup>

Ironically, a total ban on a certain type of medium or social networking fits into Professor Barron’s, and this Note’s, view of a “robust, egalitarian First Amendment.”<sup>301</sup> The ban is limited and regulates the method of speaking, but not the speech itself.<sup>302</sup> Professor Barron argued for a “First Amendment [that] requires real, effective, and widespread opportunities for dissident speakers to communicate their message to an audience . . . .”<sup>303</sup> A dissenting voice can still have a place when a narrow group of people, in this case a football team, is limited in the mediums they can use to speak. There is no fear that the player might say something that will cause him to lose his scholarship or be kicked off the team.<sup>304</sup>

#### V. POLICY IMPLICATIONS FOR COLLEGES AND UNIVERSITIES

Social networking issues on a college campus are not restricted just to college athletic departments. Cyberbullying has become a major topic on college campuses.<sup>305</sup> At its worst, it is the story of the student who committed suicide after his roommate and his roommate’s girlfriend posted a sex video of the student online.<sup>306</sup> Geoff Mulvihill and Samantha Henry raise the important point that tragedy and others “illustrate[ ] yet again the Internet’s alarming potential as a means of tormenting others and raises questions whether young people in the age of Twitter and Facebook can even distinguish public from private.”<sup>307</sup> What this demonstrates for the purposes of this Note is that there are times when schools and colleges may need a framework for implementing potential social networking restrictions. The Supreme Court and

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<sup>296</sup> See *id.* § 11.4.2.2, at 1131.

<sup>297</sup> See *id.* § 9.1, at 671.

<sup>298</sup> See *supra* notes 13, 35 and accompanying text.

<sup>299</sup> See *supra* text accompanying note 43.

<sup>300</sup> See *supra* Part IV.A.

<sup>301</sup> See Netanel, *supra* note 60, at 953.

<sup>302</sup> See *supra* note 43 and text accompanying note 279.

<sup>303</sup> See Netanel, *supra* note 60, at 955.

<sup>304</sup> See *supra* text accompanying notes 9–10 (explaining that violations of the UNC policy could result in dismissal from the team).

<sup>305</sup> See, e.g., Jill Laster, 2 *Scholars Examine Cyberbullying Among College Students*, THE CHRONICLE OF HIGHER EDUCATION (June 6, 2010), <http://chronicle.com/article/article-content/65766/>.

<sup>306</sup> See, e.g., Geoff Mulvihill & Samantha Henry, *NJ Student’s Suicide Illustrates Internet Dangers*, WASH. POST, Oct. 1, 2010, [http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100102515\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100102515_pf.html).

<sup>307</sup> *Id.*

lower courts, as discussed throughout this Note, have provided some degree of assistance to schools regarding what is constitutional.<sup>308</sup>

Colleges and universities, in both the general setting and in particular the athletic setting, need to recognize that free speech rights on a college campus are substantially the same as free speech rights among the general public.<sup>309</sup> If colleges focus on content,<sup>310</sup> like UNC does,<sup>311</sup> they will continue to face the courts' insurmountable hurdle of strict scrutiny.<sup>312</sup>

But colleges and universities have alternatives that do not have to satisfy strict scrutiny. The first is the focus of *Healy v. James*.<sup>313</sup> Under that framework, colleges would focus on regulating speech that "infringe[s] [on] reasonable campus rules, interrupt[s] classes, or substantially interfere[s] with the opportunity of other students to obtain an education."<sup>314</sup>

The second approach is to take a page from Boise State Football Coach Chris Petersen's playbook.<sup>315</sup> A college program could place a limited restriction on the mode of communication.<sup>316</sup> This avoids a content-neutral/content-based debate, and focuses on whether the school has "legitimate" goals and has narrowly tailored its restrictions to meet those goals.<sup>317</sup> This also avoids the evils of speech monitoring discussed in this Note, such as vagueness.<sup>318</sup> Instead, such a policy is a simple way to take care of a distraction.<sup>319</sup> It may not be perfect, but it avoids strict scrutiny, which, at a minimum, means that the policy is not presumably dead on arrival at the courts.<sup>320</sup>

Colleges and Internet speech have great potential to further the idea of a "robust, egalitarian First Amendment,"<sup>321</sup> but the continued growth of Internet speech, along

<sup>308</sup> See, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *Morale v. Grigel*, 422 F. Supp. 988 (D.N.H. 1976); *Univ. of Colo. v. Derdeyn*, 863 P.2d 929 (Colo. 1993).

<sup>309</sup> See *Healy*, 408 U.S. at 180; *Morale*, 422 F. Supp. at 997 (arguing that colleges cannot attempt to protect its students by invoking the term *in loco parentis*).

<sup>310</sup> See *Doe*, 721 F. Supp. at 860.

<sup>311</sup> See *supra* text accompanying note 43.

<sup>312</sup> See, e.g., *Derdeyn*, 863 P.2d 929; see also *supra* notes 246–50 and accompanying text.

<sup>313</sup> 408 U.S. 169 (1972).

<sup>314</sup> *Id.* at 189.

<sup>315</sup> See *supra* notes 13, 35 and accompanying text.

<sup>316</sup> See *supra* notes 13, 35 and accompanying text.

<sup>317</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (defining intermediate scrutiny).

<sup>318</sup> See *supra* Part IV.A.2.

<sup>319</sup> See *supra* notes 13, 35 and accompanying text.

<sup>320</sup> See CHEMERINSKY, *supra* note 17, § 9.1.2, at 671 (citing Gerald Gunter, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

<sup>321</sup> Netanel, *supra* note 60, at 953.

with social networking, presents dangers.<sup>322</sup> Colleges should focus on narrowly tailoring their solutions to the real problem.

One final note for those concerned with the impact of such policies on teams' competitiveness. Although it is only a correlation, UNC, with its content-based policy of vagueness and distrust, completed the 2010–2011 football season with eight wins and five losses and finished third in the Atlantic Coast Conference Coastal Division.<sup>323</sup> Boise State, with its content-neutral policy, finished the year with twelve wins and one loss, in turn winning a share of the Western Athletic Conference.<sup>324</sup> It might be only a coincidence, but nonetheless is something to keep in mind.

### CONCLUSION

This inquiry started with two policies created to deal with the rising issue of social networking, UNC's speech monitoring program<sup>325</sup> and Boise State's season-long ban on Twitter.<sup>326</sup> These solutions aimed to fix problems arising from student athletes who used social networking as a speech outlet.

But the fact that these were student athletes using social networking should not change the constitutional protections of the First Amendment. Social networking and Internet speech should be protected by the First Amendment in the same way that traditional avenues of speech are protected. The Internet has the potential to be the "self-operating marketplace of ideas" that Professor Barron envisioned.<sup>327</sup> Additionally, the substantive constitutional rights of the student athlete should be no different than the constitutional rights of a student. In recognizing that student athletes have these protected rights, colleges and universities should be subject to strict scrutiny<sup>328</sup> if they attempt to use a scholarship or membership on a team as leverage to get the student athlete to conform to the schools' wishes, because such acts violate the unconstitutional conditions doctrine.<sup>329</sup>

Finally, the two policies could not be more different from a constitutional standpoint. UNC chose a policy that focuses on content and is arbitrarily enforced.<sup>330</sup> Boise State's policy curbs only the method of speech, not the content.<sup>331</sup> UNC's

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<sup>322</sup> See, e.g., *supra* notes 305–11 and accompanying text.

<sup>323</sup> See *Atlantic Coast Conference Standings—2010*, ESPN.COM, <http://espn.go.com/ncf/conferences/standings?confId=1&year=2010> (last visited Nov. 21, 2011).

<sup>324</sup> See *Western Athletic Conference Standings—2010*, ESPN.COM, <http://espn.go.com/ncf/conferences/standings?confId=16&year=2010> (last visited Nov. 21, 2011).

<sup>325</sup> See *supra* text accompanying note 43.

<sup>326</sup> See *supra* notes 13 & 35 and accompanying text.

<sup>327</sup> Barron, *supra* note 61, at 1641.

<sup>328</sup> See *supra* note 17.

<sup>329</sup> See *supra* note 140 and Part III.C.

<sup>330</sup> See discussion *supra* Part IV.A.

<sup>331</sup> See discussion *supra* Part IV.B.



approach should be avoided by schools as it potentially subjects the school to the rigors of strict scrutiny.<sup>332</sup> On the other hand, Boise State's policy appears to avoid strict scrutiny and be narrowly limited to fix the problem it aimed to fix: the distraction of Twitter to players.<sup>333</sup> Twitter and other social networking avenues may present challenges to colleges and universities, but, as discussed in this Note, there are constitutional ways for the college community to limit the distraction and still embrace the medium.

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<sup>332</sup> See discussion *supra* Part IV.A.

<sup>333</sup> See discussion *supra* Part IV.B.