All a Twitter: Social Networking, College Athletes, and the First Amendment

Davis Walsh
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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.1 This Note examines the extent to which college athletes have First Amendment rights,2 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.3 On the other hand, state universities are government actors and so are subject to the First Amendment.4

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1 For examples, see discussion infra Part I.
2 U.S. CONST. amend. I.
This dichotomy presents a challenge for college athletics. State colleges are subject to the First Amendment, but the governing body for major college athletics, the NCAA, is not a government actor, and therefore is not subject to the First Amendment. 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. 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. But if the college chooses an unconstitutional method to regulate that speech, it can be subjected to lawsuits and constitutional challenges. 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, like one implemented by the University of North Carolina (UNC), 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.

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. 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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5 See supra note 4 and accompanying text.
6 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.”).
7 See supra note 3 and accompanying text.
8 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).
9 See infra notes 31–32 and accompanying text (discussing the UNC players held out or suspended due to this scandal).
10 See, e.g., Derdeyn, 863 P.2d 929.
11 See infra text accompanying note 43.
12 See infra text accompanying note 43.
13 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.
14 See discussion infra Part I.
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 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.

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. If they are tested against that level of scrutiny, they will likely fail constitutional muster. To decide whether strict scrutiny applies, this Note examines whether each restriction is content-neutral or content-based. 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.

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 and Boise State’s policies can provide guidance to the greater high school and college community as social networking becomes more prevalent.

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15 For a definition of the unconstitutional conditions doctrine, see infra note 140.
17 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)).
18 See infra notes 248–57 and accompanying text.
19 For the definition of content-neutral, see infra note 222.
20 For the definition of content-based, see infra note 221.
21 See discussion infra Part IV.B.
22 See infra text accompanying note 43.
23 See infra note 35 and accompanying text.
24 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, HUFFINGTON POST (Jan. 27, 2011, 8:36 AM), http://www.huffingtonpost.com/greg-lukianoff/the-12-worst-colleges-for_free_speech_814706.html#s230527&title=UMass_Amherst_Amherst_Massachusetts.
I. BACKGROUND

On May 29, 2010, UNC defensive lineman and top National Football League (NFL) prospect Marvin Austin allegedly “tweeted” from a party in Miami. The tweet quickly became known as the “tweet heard ’round the college football world.” This capped a spring and summer that included Austin “tweeting” not only about fancy dinners and parties, but also about his financial problems. Following these tweets, the NCAA and the North Carolina Secretary of State independently commenced investigations of Austin and his teammates. This scandal led to thirteen players being...
suspended or kept from playing in UNC’s first football game of the 2010 season. The scandal concluded with Austin being dismissed from the football team, other players being suspended permanently, and later contributed to the firing of UNC Football Coach Butch Davis.

UNC is not the only college football program that has dealt with problems arising from its players’ social networking. Boise State Football Coach Chris Petersen banned his players from using Twitter during the college football season. 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. 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. The bottom line for these coaches was that Twitter proved a distraction for their players.

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. This progress has proven problematic for some college and professional (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.

34 See infra notes 35–38 and accompanying text.
35 Brian Murphy, Murphy: Coach Pete Pulls the Plug on Twitter, IDAHO STATESMAN, Aug. 8, 2010 (on file with author).
37 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.”).
38 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.”).
39 See generally, Giglio, supra note 27 (discussing Marvin Austin’s tweets); TWEETING-
athletes, whose use of social networking has created significant distractions. 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.”

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

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

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

The ultimate question addressed by this Note is whether the UNC monitoring policy53 or the season-long ban by Boise State54 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 ban55 is preferable to UNC’s monitoring policy.56

44 Id. 
45 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. 
46 Murphy, supra note 35. 
47 See infra notes 49–52 and accompanying text. 
48 See CHEMERINSKY, supra note 17, § 11.4.2.2, at 1131. 
53 See supra text accompanying note 43. 
54 See supra notes 13 & 35 and accompanying text. 
55 Id. 
56 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,” and it is this “marketplace” that warrants First Amendment protection. 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.

A. The “Robust, Egalitarian First Amendment”

Scholars argue that Internet speech provides an avenue for more people to be part of the public discourse. 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, called for a “robust, egalitarian First Amendment.” 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. Today, because of Internet speech, the public can bypass the mass media and Professor Barron’s view of the First Amendment is possible.

In his 1967 article, Professor Barron wrote, “if ever there were a self-operating marketplace of ideas, it has long ceased to exist.” But the Internet may make that marketplace possible. 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

58 See infra notes 65–71 and accompanying text.
59 See infra Part II.B.
62 Netanel, supra note 60, at 953.
63 Id.
64 Id.
65 Barron, supra note 61, at 1641.
66 See Netanel, supra note 60, at 953.
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.” 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. In 2011, the world saw the importance of social networking during the uprising in Egypt and the subsequent government shutdown of the Internet. 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. In the short existence of the Internet, Congress has enacted various statutes on the use of and protections for the Internet, and in doing so has demonstrated that it believes the Internet is best left to self-regulation, rather than extensive government regulation. For example, two pieces of legislation that have become law—the Communications Decency Act (CDA) and

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67 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))).

68 Netanel, supra note 60, at 955.


71 See infra notes 72–94 and accompanying text.


73 See Bluestone, supra note 67, at 578 (examining the CDA and DMCA).

74 CDA § 230.
the Digital Millennium Copyright Act (DMCA)\textsuperscript{75}—protect Internet service providers from defamation suits and copyright liability for something a user does through the providers’ services.\textsuperscript{76} Social networking sites adapted to the legislation and in doing so protected themselves from liability.\textsuperscript{77} 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.”\textsuperscript{78} 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.”\textsuperscript{79} The CDA and similar legislation demonstrate Congress’s intent not to extensively regulate Internet speech.\textsuperscript{80}

This congressional intent is important because it demonstrates an initial distrust by Congress of government regulation of the Internet.\textsuperscript{81} 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.”\textsuperscript{82} In \textit{Zeran v. American Online}, the Fourth Circuit used the phrase “a chilling effect on the freedom of Internet speech”\textsuperscript{83} when discussing the implications of placing liability on Internet service providers.\textsuperscript{84}

It is telling that courts, in particular the conservative Fourth Circuit,\textsuperscript{85} would immediately jump to the language of “chilling effect,”\textsuperscript{86} since that language is often tied to the idea of “overbreadth” in First Amendment jurisprudence.\textsuperscript{87} Although \textit{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.\textsuperscript{88}

\begin{itemize}
  \item \textsuperscript{75} DMCA §§ 201–03.
  \item \textsuperscript{76} See CDA § 230; DMCA §§ 201–02.
  \item \textsuperscript{77} Bluestone, \textit{supra} note 67, at 589.
  \item \textsuperscript{78} CDA § 230(b)(2) (emphasis added).
  \item \textsuperscript{79} Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).
  \item \textsuperscript{80} See Bluestone, \textit{supra} note 67, at 578.
  \item \textsuperscript{81} See id. (examining CDA, § 230).
  \item \textsuperscript{82} 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 \textit{Zeran}, 129 F.3d at 333)).
  \item \textsuperscript{83} \textit{Zeran}, 129 F.3d at 333.
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} See, e.g., Neil A. Lewis, \textit{A Court Becomes a Model of Conservative Pursuits}, N.Y. TIMES, May 24, 1999, at A22.
  \item \textsuperscript{86} Zeran, 129 F.3d at 333.
  \item \textsuperscript{87} See, e.g., CHEMERINSKY, \textit{supra} note 17, § 11.2, at 945–48; Richard Fallen, Jr., \textit{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.”).
  \item \textsuperscript{88} See \textit{Zeran}, 129 F.3d at 331 (“Congress considered the weight of the speech interests implicated . . . .”).
\end{itemize}
With this understanding, the CDA and similar legislation focus on the protection of the Internet as an avenue of speech.89 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,”90 makes clear that Congress recognizes the importance and the potential for Internet speech.91 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.”92 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,93 but Internet speech provides opportunities for people to play a role in public discourse, and these possibilities require the First Amendment protection.94 Through its conscious decision to guard against liability-causing regulations of the Internet, Congress appears to agree that Internet speech should be protected.95 In April 2010, Marvin Austin used Twitter to tell the world about a steak he ate,96 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.”97 Congress’s own words98 echo Professor Barron’s hope for the First Amendment to protect a “self-operating marketplace of ideas.”99 Similarly, the Supreme Court recently embraced a broad view of the First Amendment when it wrote that “[t]he 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.100 Supporting Professor Barron’s “robust, egalitarian First Amendment”101 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 doctrine102 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 District103 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.”104 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.”105

Although Tinker addresses a fundamental rights question in the grade school context,106 courts have held that college students, at a minimum, have similar substantive constitutional rights as grade school students.107 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.”108 A university cannot realistically

101 Netanel, supra note 60, at 953.
102 For the definition of the unconstitutional conditions doctrine, see infra note 142.
104 Id. at 506.
105 Id. at 511.
106 Id.
108 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.  

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. 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.” In Healy v. James, the Court applied that standard to the right of association 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.” Undoubtedly, colleges can make a policy forbidding speech that impacts the educational environment or is illegal, but going beyond that by forbidding content or substance is impermissible.

Although the Supreme Court has not defined free speech rights for college students, 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.” The Court continued, “The classroom is peculiarly the ‘marketplace of ideas.’” 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. One of the most pertinent of those decisions

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109 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).

110 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.

111 Healy, 408 U.S. at 189.

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

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

114 Healy, 408 U.S. at 189.

115 Id.

116 Id. at 187.

117 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).


119 Id.

is Doe v. University of Michigan from the Eastern District of Michigan. In Doe, the University reacted to horrific acts of racism on its campus by instituting a policy that governed speech throughout campus. The plaintiff was a psychology graduate student and his research dealt with potentially controversial theories that could be viewed as “sexist” or “racist.” He argued that the policy—specifically the classroom policy—unconstitutionally chilled his discussion of these theories. The classroom policy directly regulated speech that “stigmatize[d] or victimize[d]” persons based on their “race, ethnicity, religion” or numerous other factors. The court found “that the drafters of th[is] policy intended that speech need only be offensive to be sanctionable.” 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.”

Applying Doe, it is clear that the regulation of simply “offensive” material on a college campus is “unconstitutionally overbroad.” 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. 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. To do so either means that the college’s regulation is overbroad per Doe or goes beyond the boundaries set in Healy. 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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121 721 F. Supp. 852.
122 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.”).
123 Id. at 856.
124 Id. at 858.
125 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 de-meaning environment . . . .” Id.
126 Id. at 858–59.
127 Id. at 856.
128 Id. at 860.
129 Id. at 864.
130 Id.
132 See id.; Doe, 721 F. Supp. at 864.
133 Doe, 721 F. Supp. at 864.
134 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. Within college sports, it is believed that players sometimes have to give up their voices for the privilege of being on a college team. 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.” 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.”

College athletes make tremendous sacrifices, and for those sacrifices they receive opportunities the normal college student does not. 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 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. Similar to a First Amendment case, drug test cases also deal with a fundamental constitutional right:

135 See infra notes 137–40 and accompanying text.
136 See infra notes 137–40 and accompanying text.
137 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. BRONCOSPORT.COM, http://www.broncosports.com/ViewArticle.dbml?DB_OEM_ID=9900&ATCLID=530470 (last visited Nov. 21, 2011).
138 Murphy, supra note 35.
139 See supra notes 137–40 and accompanying text.
140 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 CHEMERINSKY, supra note 17, § 11.2.4.4, at 980; Sullivan, supra note 16, at 1415.
privacy.¹⁴² 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.¹⁴³

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.¹⁴⁴ The case was a class-action suit brought by various student athletes, who objected to mandated, suspicionless drug tests.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷

Most importantly, in adopting a line of cases starting with Morale v. Grigel,¹⁴⁸ 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.¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹ In Hill v. NCAA, the court held that student athletes were different from the general student body.¹⁵² 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.¹⁵³ The Hill court focused on a number of intrusions into a college athlete’s life to demonstrate the diminished right to privacy.¹⁵⁴ For

¹⁴² See CHEMERINSKY, supra note 17, § 10.1.1, at 792 (discussing those rights the Supreme Court has deemed “fundamental rights”).
¹⁴³ See infra text accompanying notes 144–65.
¹⁴⁴ 863 P.2d 929 (Colo. 1993).
¹⁴⁵ Id. at 932–33.
¹⁴⁶ Id. at 940.
¹⁴⁷ Id. at 935, 941.
¹⁴⁹ Derdeyn, 863 P.2d at 938.
¹⁵⁰ See id.
¹⁵¹ Hill v. NCAA, 865 P.2d 633 (Cal. 1994).
¹⁵² Id. at 637.
¹⁵³ 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.”).
¹⁵⁴ 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.\textsuperscript{155} It followed that a drug test was no more invasive than the activities listed above.\textsuperscript{156} 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.\textsuperscript{157} 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.\textsuperscript{158}

The issue of a student athlete’s First Amendment rights has not been taken up by courts,\textsuperscript{159} 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.\textsuperscript{160} Courts could treat athletes like general college students.\textsuperscript{161} In that situation, courts would likely look to Healy, and possibly Doe, to establish what rights a student athlete possesses.\textsuperscript{162} On the other hand, courts could treat athletes differently than the general student body and hold that athletes possess a diminished speech right.\textsuperscript{163}

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

\textsuperscript{155}Id. at 658.

\textsuperscript{156}Id. at 658–59.

\textsuperscript{157}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.

\textsuperscript{158}Id. at 659.

\textsuperscript{159}Leslie, supra note 141, at 35.

\textsuperscript{160}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.

\textsuperscript{161}See supra text accompanying notes 146–52.

\textsuperscript{162}See discussion supra Part III.A (discussing the rights of a college student).

\textsuperscript{163}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.164

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.”165 In Connick v. Myers,166 the Supreme Court held that matters of purely private concern were not protected by the First Amendment in public employee cases.167 In examining two public employee blogging cases—City of San Diego v. Roe168 and Richerson v. Beckon169—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.170

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.171 The Bork idea of only protecting political speech is analogous to the idea of only protecting speech on “matter[s] of public concern.”172

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.”173 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


167 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.”).


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

170 Secunda, supra note 165, at 691.

171 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.

172 See Connick, 461 U.S. at 146.

173 Id.
speech, unless the speech is political or on a matter of public concern. 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.”

But the public employee application and the Bork view are unlikely to prevail. Although the status of college athletes has been hotly debated, they are not public employees, even if the athlete receives a scholarship. Further, as discussed, some courts equate the rights of college athletes with the substantive rights of regular college students, 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.

From a policy standpoint, the reasoning presented by both the Bork view and the public employee speech cases would be a poor choice for the courts. These models abandon the recognition that college athletes are also college students. Also, some athletes receive scholarships and some do not. 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. 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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174 See id.; see also Bork, supra note 171, at 29.

175 Secunda, supra note 165, at 688.

176 See supra notes 165–77 and accompanying text; see also infra notes 180–89 and accompanying text.

177 See Bork, supra note 171.


179 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).

180 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)).

181 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.”).

182 Bork, supra note 171.

183 See supra notes 165–78 and accompanying text.

184 See supra notes 146–65 and accompanying text.


186 Id.
a floodgate to additional policy and legal issues, specifically in terms of labor law and taxation issues.187

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.188 The other approaches treat athletes differently than students.189 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,190 strict scrutiny may not allow for such leverage.191

C. The Unconstitutional Conditions Doctrine Protects College Athletes

The unconstitutional conditions doctrine192 holds that “government may not deny a benefit to a person because he exercises a constitutional right.”193 Neither the Supreme Court in general unconstitutional conditions cases,194 nor the lower courts in cases of student athletes’ fundamental rights and unconstitutional conditions,195 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.196 If strict scrutiny applies, then the court recognizes that for

187 See Davis, supra note 179, at 323–24 (discussing the labor and tax law implications of making college athletes employees).
188 See Univ. of Colo. v. Derdeyn, 863 P.2d 929, 938 (Colo. 1993).
189 See text accompanying notes 153–60.
190 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).
191 See Chemerinsky, supra note 17, § 9.1, at 671 (discussing the requirements of strict scrutiny).
192 For the definition of the unconstitutional conditions doctrine see supra note 140 and accompanying text.
194 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)).
196 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.197

1. The Three Approaches

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

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

The second test for an unconstitutional condition is Professor Sullivan’s own development and is rather straightforward.203 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.”204

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

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,207 the benefit offered by the government is a scholarship, which the government is not required to

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197 See, e.g., CHEMERINSKY, supra note 17, § 9.1, at 671.
198 See infra notes 202–08 and accompanying text.
199 Sullivan, supra note 16, at 1422.
200 Id.
201 Id. at 1426. This approach will be referenced as the “traditional” approach by the courts.
202 Id. at 1428 (citations omitted).
203 See id. at 1499–1500.
204 Id.
206 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).
207 See supra notes 201–04 and accompanying text.
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, the government is conditioning athletic scholarships on athletes giving up their rights to free speech or, in UNC’s case, submitting to monitoring. 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,” 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.

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.” As the Supreme Court said in Tinker, “[Students] may not be confined to the expression of those sentiments that are officially approved.” 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 should apply and require that a school satisfy the strict scrutiny test of requiring regulations to be “necessary to achieve a compelling [governmental] purpose.”

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. As a private entity, the NCAA can suspend players that violate its rules, even if the player was exercising his or her constitutional rights. UNC’s reaction to this problem by

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208 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.

209 See supra text accompanying notes 203–06.

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

211 Sullivan, supra note 16, at 1499–1500.

212 Meloch, supra note 205, at 849.


215 See supra note 140.

216 See, e.g., CHEMERINSKY, supra note 17, § 9.1, at 671.

217 See supra Introduction.

218 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\textsuperscript{219} and UNC\textsuperscript{220} 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\textsuperscript{221} or content-neutral.\textsuperscript{222} 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.”\textsuperscript{223} This determination of whether a restriction is content-based or content-neutral, along with the unconstitutional conditions doctrine,\textsuperscript{224} will determine whether strict scrutiny is appropriate.

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

\textsuperscript{219} See supra notes 13, 35.

\textsuperscript{220} See supra text accompanying note 43.

\textsuperscript{221} 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.” \textit{Id}.

\textsuperscript{222} \textit{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)). \textit{But see supra} note 221 (discussing the elements of a content-based law).


\textsuperscript{224} See supra note 140.

\textsuperscript{225} See supra note 221.

\textsuperscript{226} 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)).

\textsuperscript{227} See supra note 222.

\textsuperscript{228} 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)).

\textsuperscript{229} \textit{R.A.V.}, 505 U.S. at 382.
Whether the UNC policy requiring coaches or administrators to monitor student athletes’ social networking\(^{230}\) 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.*,\(^{231}\) the law only restricted the viewing of adult entertainment.\(^{232}\) Similarly, in *Ashcroft v. ACLU*,\(^{233}\) the law in question regulated only websites of a sexual nature.\(^{234}\) 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\(^{235}\) 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 . . . .”\(^{236}\) Through those words, it appears to only regulate speech that violates prescribed rules.\(^{237}\) 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 . . . .”\(^{238}\) Also under the policy, Quinton Coples of the UNC football team was asked to take down a tweet that was homophobic.\(^{239}\) 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.\(^{240}\) This policing of only what the school finds offensive regulates the “topic of the speech” and should be considered content-based.\(^{241}\)

Based on the use of an unconstitutional condition\(^{242}\) and content-based restriction,\(^{243}\) it follows that the UNC speech monitoring policy would be subject to strict scrutiny.\(^{244}\)

\(^{230}\) See supra text accompanying note 43.

\(^{231}\) 529 U.S. 803 (2000).

\(^{232}\) Id.

\(^{233}\) 542 U.S. 656 (2004).

\(^{234}\) Id. at 659 (describing the Child Online Protection Act (COPA), 47 U.S.C. § 231 (2010)).

\(^{235}\) See supra text accompanying note 43.

\(^{236}\) See supra note 43.

\(^{237}\) See supra text accompanying note 43.

\(^{238}\) 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. It is important to note that Coach Butch Davis alluded to other issues with Ramsey that may have contributed to this suspension. Id.


\(^{240}\) See, e.g., Healy v. James, 408 U.S. 169, 189 (1972).

\(^{241}\) See supra note 221.

\(^{242}\) See supra note 140 and Part III.C (arguing the unconstitutional conditions doctrine applies in this situation).

\(^{243}\) See supra note 221 and Part IV.A (arguing the rule is content-based).

\(^{244}\) 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.245

1. Strict Scrutiny and College Athletics

The strict scrutiny standard requires that the regulation be “necessary to achieve a compelling government purpose.”246 It is argued that strict scrutiny almost always guarantees that the law in question will fail constitutional muster.247 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.248 In the context of drug tests, these reasons were deemed not to be compelling.249

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,250 but that also fails to rise to the level of a compelling governmental interest.251

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.252 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.253

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.254 If the health and safety of college athletes or the campus community are not compelling interests, then the college’s

245 Univ. of Colo. v. Derdeyn, 863 P.2d 929, 938 (Colo. 1993).
246 See, e.g., CHEMERINSKY, supra note 17, § 9.1, at 671.
247 See id.
248 See Derdeyn, 863 P.2d at 945.
249 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).
250 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).
251 Id. (discussing why in loco parentis is not a sufficient justification).
252 See Barnes, supra note 31 (discussing UNC’s inability to field players because of potential NCAA violations).
253 See id.
254 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. Without a “compelling government purpose,” the policy must fail strict scrutiny.

2. UNC’s PolicyViolates 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. In Doe, the district court held that the University’s policy regarding speech only required that speech be offensive to be punishable. Citing the Supreme Court’s decision in Broadrick v. Oklahoma, the court’s opinion noted that “[a] statute is unconstitutionally vague when ‘men of common intelligence must necessarily guess at its meaning,’” and held that the University’s policy was unconstitutionally vague.

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.” 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. But the UNC policy fails the Court’s rule because speech monitoring “encourages arbitrary and discriminatory enforcement.” 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. There are no clear guidelines for uniform application. Players clearly know where the policy starts—with speech that violates state or federal law—but the limits of the policy are unclear. As applied with Quinton Coples’s and Devon Ramsey’s tweets, the policy in action

255 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.”).
256 See CHEMERINSKY, supra note 17, § 9.1, at 671.
258 Id. at 856 (describing the University’s policy).
259 Id. at 860.
261 Doe, 721 F. Supp. 866 (quoting Broadrick, 413 U.S. at 607).
262 Id. at 866–67.
264 See supra text accompanying note 43.
265 Kolender, 461 U.S. at 357.
266 See supra text accompanying note 43.
267 See supra text accompanying note 43.
268 See supra notes 238–42.
not only regulates illegal speech, but it also includes types of offensive speech.\textsuperscript{269} 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.”\textsuperscript{270} 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 Coples tweet, the policy includes homophobic tweets,\textsuperscript{271} but what else would the UNC monitors find offensive? This demonstrates how the policy is vague and promotes “arbitrary and discriminatory enforcement.”\textsuperscript{272}

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.

\textit{B. Boise State’s Policy}

Although both the UNC policy\textsuperscript{273} and the Boise State approach\textsuperscript{274} implicate players’ substantive rights of speech, they do so in very different ways.\textsuperscript{275} Those differences lead to very different constitutional outcomes. From the standpoint of content neutrality, it is clear that Boise State’s policy\textsuperscript{276} banning the use of Twitter for a period of time is a content-neutral regulation.\textsuperscript{277} 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.\textsuperscript{278}

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.\textsuperscript{279} This does not have the same effect on speech as the UNC policy\textsuperscript{280} because the player need not be afraid of repercussions based

\begin{footnotesize}
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\item \textsuperscript{269} See supra text accompanying notes 238–42.
\item \textsuperscript{271} See Friedlander, supra note 239. The tweet included the words “stop the gayness.” Id.
\item \textsuperscript{272} Kolender v. Lawson, 461 U.S. 352, 357 (1983).
\item \textsuperscript{273} See supra text accompanying note 43.
\item \textsuperscript{274} See supra notes 13, 35 and accompanying text.
\item \textsuperscript{275} See supra Part III.
\item \textsuperscript{276} See supra notes 13, 35 and accompanying text.
\item \textsuperscript{277} CHEMERINSKY, supra note 17, § 9.1, at 671 (explaining the definition of content-neutral).
\item \textsuperscript{278} See Murphy, supra note 35 and accompanying text.
\item \textsuperscript{279} See supra notes 13, 35 and accompanying text.
\item \textsuperscript{280} See supra text accompanying note 43.
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\end{footnotesize}
on the content of that speech. A ban on Twitter does not restrict the speech, only the method.\textsuperscript{281} This demonstrates that Boise State’s approach is content-neutral, and therefore it is not subject to strict scrutiny on those grounds.\textsuperscript{282}

The fact that Boise State’s policy\textsuperscript{283} is content-neutral demonstrates why Boise State’s ban\textsuperscript{284} is less likely to stir a constitutional challenge than the speech-monitoring policy of UNC,\textsuperscript{285} 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,”\textsuperscript{286} and based on past precedent, such restrictions can be constitutional.\textsuperscript{287} As the Supreme Court reaffirmed in \textit{Ward v. Rock Against Racism},\textsuperscript{288} “a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests . . . .”\textsuperscript{289} Additionally, the Supreme Court has recognized that “time, place, or manner” restrictions can be appropriate on college campuses.\textsuperscript{290}

Under the Supreme Court’s rule in \textit{Ward},\textsuperscript{291} because the college’s interest is content-neutral,\textsuperscript{292} the remaining questions are whether the restriction is “narrowly tailored” and whether the government’s interest is “legitimate.”\textsuperscript{293} Coach Petersen did narrowly tailor his rule to one type of communication that was problematic: Twitter.\textsuperscript{294} 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,\textsuperscript{295} 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

\textsuperscript{281} See supra notes 13, 35 and accompanying text.
\textsuperscript{282} See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); see also supra notes 221–32 and accompanying text.
\textsuperscript{283} See supra notes 13, 35 and accompanying text.
\textsuperscript{284} See id.
\textsuperscript{285} See supra text accompanying note 43.
\textsuperscript{286} 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.
\textsuperscript{287} See Papish v. Bd. of Curators, 410 U.S. 667, 670 (1973); CHEMERINSKY, supra note 17, § 11.4.2.2, at 1131.
\textsuperscript{288} 491 U.S. 781 (1989).
\textsuperscript{289} Id. at 798.
\textsuperscript{290} Papish, 410 U.S. at 670.
\textsuperscript{291} 491 U.S. at 782.
\textsuperscript{292} CHEMERINSKY, supra note 17, § 11.2.1, at 932.
\textsuperscript{293} Ward, 491 U.S. at 798.
\textsuperscript{294} See supra notes 13, 35 and accompanying text.
\textsuperscript{295} See CHEMERINSKY, supra note 17, § 6.5, at 540–41.
policy is content-neutral and is only a “time, place, [or] manner restriction[,]” it appears that Coach Petersen devised a method that at least does not have to stand up to strict scrutiny. It provides further evidence that from a constitutional perspective, the outright but limited ban of Boise State is preferable to UNC’s policy of speech monitoring.

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.” The ban is limited and regulates the method of speaking, but not the speech itself. Professor Barron argued for a “First Amendment [that] requires real, effective, and widespread opportunities for dissident speakers to communicate their message to an audience . . . .” 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.

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. 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. 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.” 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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296 See id. § 11.4.2.2, at 1131.
297 See id. § 9.1, at 671.
298 See supra notes 13, 35 and accompanying text.
299 See supra text accompanying note 43.
300 See supra Part IV.A.
301 See Netanel, supra note 60, at 953.
302 See supra note 43 and text accompanying note 279.
303 See Netanel, supra note 60, at 955.
304 See supra text accompanying notes 9–10 (explaining that violations of the UNC policy could result in dismissal from the team).
305 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/.
307 Id.
lower courts, as discussed throughout this Note, have provided some degree of assistance to schools regarding what is constitutional.\(^{308}\)

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.\(^{309}\) If colleges focus on content,\(^{310}\) like UNC does,\(^{311}\) they will continue to face the courts’ insurmountable hurdle of strict scrutiny.\(^{312}\)

But colleges and universities have alternatives that do not have to satisfy strict scrutiny. The first is the focus of \textit{Healy v. James}.\(^{313}\) 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.”\(^{314}\)

The second approach is to take a page from Boise State Football Coach Chris Petersen’s playbook.\(^{315}\) A college program could place a limited restriction on the mode of communication.\(^{316}\) 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.\(^{317}\) This also avoids the evils of speech monitoring discussed in this Note, such as vagueness.\(^{318}\) Instead, such a policy is a simple way to take care of a distraction.\(^{319}\) 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.\(^{320}\)

Colleges and Internet speech have great potential to further the idea of a “robust, egalitarian First Amendment,”\(^{321}\) but the continued growth of Internet speech, along


\(^{309}\) See \textit{Healy}, 408 U.S. at 180; \textit{Morale}, 422 F. Supp. at 997 (arguing that colleges cannot attempt to protect its students by invoking the term \textit{in loco parentis}).

\(^{310}\) See \textit{Doe}, 721 F. Supp. at 860.

\(^{311}\) See supra text accompanying note 43.

\(^{312}\) See, e.g., \textit{Derdeyn}, 863 P.2d 929; see also supra notes 246–50 and accompanying text.

\(^{313}\) 408 U.S. 169 (1972).

\(^{314}\) \textit{Id.} at 189.

\(^{315}\) See supra notes 13, 35 and accompanying text.

\(^{316}\) See supra notes 13, 35 and accompanying text.


\(^{318}\) See supra Part IV.A.2.

\(^{319}\) See supra notes 13, 35 and accompanying text.

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

\(^{321}\) Netanel, supra note 60, at 953.
with social networking, presents dangers.\textsuperscript{322} 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.\textsuperscript{323} 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.\textsuperscript{324} It might be only a coincidence, but nonetheless is something to keep in mind.

\textbf{CONCLUSION}

This inquiry started with two policies created to deal with the rising issue of social networking. UNC’s speech monitoring program\textsuperscript{325} and Boise State’s season-long ban on Twitter.\textsuperscript{326} 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.\textsuperscript{327} 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\textsuperscript{328} 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.\textsuperscript{329}

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.\textsuperscript{330} Boise State’s policy curbs only the method of speech, not the content.\textsuperscript{331} UNC’s

\textsuperscript{322} See, e.g., supra notes 305–11 and accompanying text.
\textsuperscript{325} See supra text accompanying note 43.
\textsuperscript{326} See supra notes 13 & 35 and accompanying text.
\textsuperscript{327} Barron, supra note 61, at 1641.
\textsuperscript{328} See supra note 17.
\textsuperscript{329} See supra note 140 and Part III.C.
\textsuperscript{330} See discussion supra Part IV.A.
\textsuperscript{331} See discussion supra Part IV.B.
approach should be avoided by schools as it potentially subjects the school to the rigors of strict scrutiny. 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. 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.

332 See discussion supra Part IV.A.
333 See discussion supra Part IV.B.