SEEN BUT NOT HEARD: CONSTITUTIONAL QUESTIONS SURROUNDING SOCIAL MEDIA POLICIES AFFECTING STUDENT-ATHLETES

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> College athletes choose to participate in university-structured programs where grades and conduct regulations are heightened. They are far from "free" to do as they choose, like their classmates who opt out of, or are otherwise unsuited for, college athletics. Such participation is a privilege, not a right. This privilege is heavily regulated by every major university, every national conference, and the NCAA.[1]

[1] Mary Margaret Penrose, *Free Speech Versus Free Education: First Amendment Considerations in Limited Student Athletes' Use of Social Media*, 1 MISS. SPORTS L. REV. 71, 91 (2011).

I. Introduction

"I live In club LIV so I get the tenant rate. bottles comin like its a giveaway."[sic][2] This tweet was sent by former University of North Carolina ("UNC") defensive tackle Marvin Austin from a Miami nightclub at 3:07 a.m. and was one of several that sparked a National Collegiate Athletic Association ("NCAA") investigation that led to UNC suspending him for his senior season.[3] Before his account was shut down, Austin posted more than 2,400 updates that detailed gifts, such as a watch for his little sister, free meals, and sunglasses.[4] Ultimately, UNC received a Notice of Allegations from the NCAA on July 21, 2011, detailing a variety of allegations, including the receipt of improper benefits.[5] The charge itself is not noteworthy, as improper benefits to talented college athletes seem to be part and parcel of high-stake collegiate sports. Rather, it is noteworthy the NCAA included in its allegation: "In February through June 2010, [UNC] did not adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program, which delayed the institution's discovery and compounded the provision of impermissible benefits."[6]

Ultimately, the NCAA Committee on Infractions refused "to impose a blanket duty on institutions to monitor social networking sites."[7] The Committee went on to clarify that "such sites should be part of the monitoring effort if the institution becomes aware of an issue that might be resolved in some part by reviewing information on a site."[8] Britton Banowsky, the chair of the Committee, went so far as to say, "[t]o expect the university to monitor social networking sites of all their student-athletes is too much."[9] This has not stopped individual schools from imposing their own guidelines on student-athletes as a prerequisite for participation.

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[2] *Twenty Tweets Heard 'Round the World*, SI VAULT, *available at* http://sportsillustrated.cnn.com/multimedia/photo_gallery/1107/tweets-heard-round-the-world/content.16.html (last visited Apr. 12, 2012).

[3] *Id.*

[4] *UNC Tweaks Twitter, Facebook Policies*, NEWSOBSERVER.COM (Aug. 30, 2010), *available at* http://www.newsobserver.com/2010/08/30/655873/unc-tweaks-twitter-facebook-policies.html.

[5] NAT'L COLLEGIATE ATHLETIC ASS'N (NCAA), NOTICE OF ALLEGATIONS TO THE CHANCELLOR OF UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL (June 21, 2011), *available at* http://grfx.cstv.com/photos/schools/unc/sports/m-footbl/auto_pdf/NCAA_NOA_062111-1.pdf [hereinafter *UNC Notice of Allegations*].

[6] *Id.*

[7] NCAA, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL PUBLIC INFRACTIONS REPORT 11, (March 12, 2012), *available at* http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2012/university+of+north+carolina%2C+chapel+hill+public+infractions+report+march+12%2C+2012 [hereinafter *UNC Public Infractions Report*]. (website not found; author needs to fix)

[8] *Id.*

[9] Kelly Whiteside, *North Carolina, NCAA Address Monitoring Social Media*, CAMPUS RIVALRY (Mar. 12, 2012, 6:44 PM), *available at* http://content.usatoday.com/communities/campusrivalry/post/2012/03/north-carolina-ncaa-address-monitoring-social-media/1#.T4m56e3o6zR.

As more schools have enacted rules concerning the use of social media, public commentary on this issue focuses on the constitutional rights of student-athletes and the invasion of privacy potentially caused by these policies. While control over student-athlete's postings certainly raises serious privacy issues, this paper focuses on the constitutional implications of universities enacting social media policies. Part II discusses types of social media, focusing on Facebook and Twitter, which are the most popular media outlets among college athletes. Part III explores existing social media policies from the NCAA and professional sports leagues, while defining the two methods used by universities: social media monitoring and social media bans. Part IV analyzes the implications of social media policies on the First Amendment, Fourth Amendment, and Fourteenth Amendment, concluding that universities and the NCAA have the right to impose social media policies under existing Supreme Court precedent.

II. What is Social Media?

Social media, a generic term used to define the Internet's various social networking sites, is defined as the "activities, practices, and behaviors among communities of people who gather online to share information, knowledge, and opinions using conversational media."[10] Presently, the two most popular networks in the United States are Facebook and Twitter.[11] While their communication modes differ, both provide student-athletes "with a high profile, stream-of-consciousness 'press conference' without any scripts, restraints, or intermediary interference" every time a tweet is posted or a status is updated.[12]

a. Facebook

Facebook launched at Harvard University in February 2004 as a way to connect students to each other in the university setting.[13] Within two years, Facebook spread from the Ivy League to all universities in the United States, from colleges to high schools, and from students to the general population.[14] At the end of December 2013, Facebook had over 1 billion active users worldwide.[15]

Once an individual joins Facebook, he creates a profile that includes basic information such as name, hometown, and university affiliation. Once a user has created a profile, he can "friend" people he knows, or enter into virtual friendships with other users. In addition to

[10] Michelle R. Hull, *Sports Leagues' New Social Media Policies: Enforcement Under Copyright Law and State Law*, 34 COLUM. J. L. & ARTS 457, 458-59 (2011).
[11] *Top 15 Most Popular Social Networking Sites – April 2012*, EBIZMBA, (Apr. 20, 2012), *available at* http://www.ebizmba.com/articles/social-networking-websites.
[12] John T. Wendt & Peter C. Young, *Reputational Risk and Social Media*, 1 MISS. SPORTS L. REV. 97, 99 (2012).
[13] Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (July 24, 2007, 3:45 PM), *available at* http://www.guardian.co.uk/technology/2007/jul/25/media.newmedia.
[14] *Id.*
[15] *Newsroom: Company Info*, FACEBOOK, https://newsroom.fb.com/company-info/ (last visited Apr. 23, 2014).

general information required to start an account, users can post status updates detailing day-to-day happenings, share photographs and interact with other users. The default privacy setting for all posts is "public," meaning that any Facebook user may access all user posts.[16] Users are afforded the opportunity to limit who can view their posts to all "Friends" or to a "Custom" group, but that privacy setting must be specifically designated.[17]

b. Twitter

Twitter describes itself as "a real-time information network that connects [users] to the latest stories, opinions and news."[18] It provides a different way to communicate than Facebook's profile-centric model, offering those who have an account the ability to post tweets. A "tweet" is "any message posted to Twitter, and all are 140 characters or less."[19] Twitter users can choose whether their messages are available to the general public or private.[20] Public tweets, the default account setting, are visible to anyone, even if an individual does not have a Twitter account.[21] Private tweets, on the other hand, are only visible to approved Twitter followers.[22] Twitter allows a user to send the same message to all followers at the same time and allows followers to individually reply to a tweet in real time.[23]

III. Existing Social Media Policies

a. The NCAA

The NCAA is a "voluntary, unincorporated association of colleges, universities, and other institutions of higher learning."[24] It oversees three athletic divisions and over 450,000 student-athletes each year.[25] In order to be eligible for membership, academic institutions must agree to "administer its athletic programs in accordance with the constitution, bylaws, and other legislation of the Association."[26] The NCAA reserves the right to pass legislation on all "basic

[16] *Basic Privacy Settings & Tools: How does Privacy Work For Things I Share?*, FACEBOOK, *available at* https://www.facebook.com/help/privacy/basic-controls (last visited Apr. 15, 2012).
[17] *Basic Privacy Settings & Tools: Where are My Privacy Settings?*, FACEBOOK, *available at* https://www.facebook.com/help/privacy/basic-controls (last visited Apr. 15, 2012).
[18] *About Twitter*, TWITTER, *available at* https://twitter.com/about (last visited Apr. 14, 2012).
[19] *About Tweets*, TWITTER, *available at* https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/127856-about-tweets-twitter-updates (last visited Apr. 15, 2012).
[20] *About Public and Protected Tweets*, TWITTER, *available at* https://support.twitter.com/articles/14016-about-public-and-protected-accounts (last visited Apr. 15, 2012).
[21] *Id.*
[22] *Id.*
[23] Wendt & Young, *supra* note 12, at 99.
[24] Howard Univ. v. Nat'l Collegiate Athletic Ass'n, 510 F.2d 213, 214 (D.C. Cir. 1975).
[25] *Who We Are*, NCAA, *available at* http://www.ncaa.org/about/who-we-are (last visited Apr. 24, 2014).
[26] NCAA, *Bylaw 3.2.1.2*, 2011-12 NCAA DIVISION I MANUAL 9 (August 2011), *available at* http://www.ncaapublications.com/productdownloads/D112.pdf [hereinafter *Division I Manual*].

athletics issues such as admissions, financial aid, eligibility and recruiting."[27] It also retains the authority to sanction universities for any violations of the Association's mandates.[28] Since the NCAA has no contractual relationship with student-athletes, the Association has no authority over universities or its student-athletes to directly enforce any rules, interpretations, or disciplinary decisions that it makes; its authority is imposed through its membership conditions.[29] Each member institution agrees to conduct its athletics programs in full compliance with all NCAA rules.[30]

To date, the only existing NCAA policy regarding social media concerns its use in the recruitment of college athletes.[31] There has been no bylaw drafted relating to how universities may monitor student-athletes' online presence, despite what was said in the UNC Notice of Allegations. In March 2012, the NCAA Committee on Infractions provided the most definitive statement on what the NCAA expects of its member institutions:

> The committee recognizes that social networking sites are a preferred method of communication in present society, particularly so among college-age individuals. While we do not impose an absolute duty upon member institutions to regularly monitor such sites, the duty to do so may arise as part of an institution's heightened awareness when it has or should have a reasonable suspicion of rules violations.[32]

The NCAA places the onus on its member institutions to "[e]stablish policies for sportsmanship and ethical conduct."[33] This should be read jointly with the "Principle of Sportsmanship and Ethical Conduct" that all member institutions agree to uphold as a condition of being a NCAA member.[34] Universities pledge to "promote the character of participants, to enhance the integrity of higher education and to promote civility in society."[35] These two membership guidelines imply that universities are permitted to control public statements made by student athletes if there is concern that something inappropriate or unsportsmanlike may be -- or has been -- said.

[27] *Id.* at 1.
[28] *Id.* at 319.
[29] *See, e.g.*, Hart v. Nat'l Collegiate Athletic Ass'n, 550 S.E.2d 79 (W. Va. 2001).
[30] *Division I Manual*, *supra* note 28, at 319.
[31] NCAA, *Social Media and Recruiting*, NCAA.ORG, *available at* http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting/Social+Media+and+Recruiting (last visited Apr. 10, 2012).
[32] *UNC Public Infractions Report*, *supra* note 7, at 12.
[33] *Division I Manual*, *supra* note 28, at 4, *Bylaw 2.4.*
[34] *Id.*
[35] *Id.*

b. Individual Universities

Even before the allegations against UNC, universities grappled with how to handle social media posts by their student-athletes. In 2008, NCAA Spokesperson Jennifer Kearns announced, "The NCAA does encourage member institutions to educate student-athletes [on] responsible use of social networking sites, but it is ultimately up to the individual schools to decide what policies to implement for student-athletes and students in general."[36] Since then, multiple players have been disciplined or removed from athletic teams for online actions, including posting a threat in a Facebook status update,[37] making racist comments after the 2008 presidential election,[38] criticizing coaching decisions publicly after a game,[39] and censuring their team's fans.[40]

In 2008, USA Today contacted twenty-seven schools in six different athletic conferences to assess the prevalence of social media policies. The research revealed that five of those schools had specific policies in place, twelve schools had informal policies, two schools were exploring the possibility of imposing some sort of guidelines, and eight had no policy.[41] The number of schools that have social media plans has only increased as Facebook and Twitter have grown in popularity over the last six years. Generally, universities constrain what student-athletes share on

[36] Joseph Duarte, *Longhorn's expulsion shows need for caution on Internet: Egg on his Facebook*, HOUSTON CHRONICLE, (Nov. 11, 2008), *available at* http://www.chron.com/sports/longhorns/article/Longhorn-s-expulsion-shows-need-for-caution-on-1774465.php

[37] Larry Brown, *Luke Caparelli Kicked Off Wake Forest Football for Facebook Comments*, LARRY BROWN SPORTS (Jan. 28, 2008), *available at* http://larrybrownsports.com/college-football/luke-caparelli-kicked-off-wake-forest-football-for-facebook-comments/1259 (Wake Forest University running back Luke Caparelli was dismissed from the team after writing on his Facebook page that he would "blow up campus." He also said that he would have an Uzi submachine gun "locked and loaded in his bag.")

[38] A.J. Daulerio, *Texas Lineman Gets Kicked Off Team for Racist Facebook Message to Barack Obama*, DEADSPIN (Nov. 6, 2008, 1:30 PM), *available at* http://deadspin.com/5078513/texas-lineman-gets-kicked-off-team-for-racist-facebook-message-to-barack-obama (Former University of Texas center Buck Burnette was kicked off the football team after updating his Facebook status to "all the hunters gather up, we have a #$%&er in the whitehouse" following President Barack Obama's election.)

[39] Brandon Marcello, *Stansbury Bans Use of Twitter Among Team*, CLARIONLEDGER.COM (Feb. 3, 2011), *available at* http://blogs.clarionledger.com/msu/2011/02/03/tweet-after-loss-incites-fans-deletion-of-players-accounts/ (Recently retired Mississippi State University basketball coach Rick Stansbury banned Twitter for the members of his team after guard Raverd Johnson posted: "Starting to see why people Transfer you can play the minutes but not getting your talents shown because u watching someone else wit the ball the whole game shooters need to move not watch why other coaches get that do not make sense to me." Scott Stricklin, Mississippi State's athletic director, was supportive of the policy; before Stanbury's ban was effective, Stricklin said, "I told all of our student-athletes in August that I considered public social networking tools a privilege, not a right.")

[40] Brad Stephens, *WKU Running Back Andrews Suspended Following Twitter Rant*, WKUHERALD.COM (Oct. 12, 2011, 7:20 PM), *available at* http://wkuherald.com/sports/article_82e88dbc-f37e-11e0-8dca-0019bb30f31a.html (Western Kentucky University running back Antonio Andrews was not allowed to play one game after tweeting statements as "One thing I can say bout #UKfans is they loyal. No matter how sorry they team is they always support them. Can't say that bout #WKUfans smh" and "Same ppl who say we suck and will never win a game are the same mf trying part with us and saying we knew y'all could do it! #FallBack.").

[41] Kyle Oppenhuizen, *Schools Creating New Rules for Social Networking Policies*, USA TODAY (July 28, 2008), *available at* http://usatoday30.usatoday.com/sports/college/2008-07-27-social-networks_N.htm.

social networking sites in two ways: by monitoring programs and by prohibiting the use of social media.

i. Schools with Monitoring Programs

Schools that choose to monitor student-athlete social media usage generally adopt policies similar to UNC's, which was updated following the start of the Austin investigation. The UNC policy requires that "[e]ach team must identify at least one coach or administrator who is responsible for having access to and regularly monitors the content of team members' social networking sites and postings."[42] Student-athletes may be sanctioned if "online content violates the law or NCAA, University, or athletic department policies;" sanctions range from being required to remove a post to being dismissed from a team.[43] While UNC explicitly "recognizes and supports its student-athletes' rights to freedoms of speech, expression, and association," the school reminds student-athletes that "playing and competing for the University of North Carolina is a privilege, not a right."[44]

Commercial services such as UDiligence, Fieldhouse Media, and Varsity Monitor have been created to help universities monitor student accounts. Each company promises to catch potentially damaging posts by student-athletes at a low cost to an athletic department. These commercial services have garnered criticism for the potential invasions of privacy their software causes[45] but that has not stopped various universities from using their services.

Varsity Monitor offers a variety of services, allowing its clients to customize their social media monitoring programs.[46] It offers real-time monitoring of student-athletes' social media accounts, universal web monitoring for mentions of student-athletes by third parties, and training on social media guidelines and education.[47] It does not collect or request passwords from student-athletes;[48] instead, it requires student-athletes to add Varsity Monitor as a Facebook

[42] *UNC Tweaks Twitter, Facebook Policies*, NEWSOBSERVER.COM (Aug. 30, 2010, 7:20 PM), *available at* http://www.newsobserver.com/2010/08/30/655873/unc-tweaks-twitter-facebook-policies.html.
[43] *Id.*
[44] *Policy on Student-Athlete Social Networking and Media Use*, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL DEP'T OF ATHLETICS, *available at* http://grfx.cstv.com/photos/schools/unc/genrel/auto_pdf/2011-12/misc_non_event/SocialNetworkingPolicy.pdf (last visited Apr. 18, 2012).
[45] *See, e.g.*, Bradley Shear, *Schools May Need a Search Warrant to Access Their Student-Athletes' Personal Password Protected Electronic Accounts*, SHEAR ON SOCIAL MEDIA LAW (Mar. 26, 2012), *available at* http://www.shearsocialmedia.com/2012/03/schools-may-need-search-warrant-to.html; Bradley Shear, *NCAA: Schools Have No Blanket Duty To Monitor Social Networking Sites of Student-Athletes*, SHEAR ON SOCIAL MEDIA LAW (Mar. 12, 2012), *available at* http://www.shearsocialmedia.com/2012/03/ncaa-schools-have-no-blanket-duty-to.html.
[46] *SM Monitoring*, VARSITY MONITOR, *available at* http://varsitymonitor.com/?page_id=152 (last visited Apr. 21, 2012).
[47] *Id.*
[48] *Varsity Monitor*, VARSITY MONITOR, http://varsitymonitor.com (last visited Apr. 21, 2012).

friend or a Twitter follower.[49] Varsity Monitor clients include University of Oklahoma, University of Texas football, University of North Carolina, University of Nebraska, and Villanova University.[50]

Fieldhouse Media operates with a simple purpose: "to educate…student-athletes and staff about social media use, from the risks involved to how [to] leverage it in a way that benefits both player and program."[51] It provides athletic departments with social media education that teaches student-athletes how to preserve reputation, how to create a positive image, and how to build a post-college future.[52] Additionally, it provides access to "FieldTrack," which "monitors social networks in real-time, scanning for keywords that could negatively impact the image of your players, coaches and program."[53] Fieldhouse Media purports to monitor in a way that respects the privacy of student-athletes because it does not access or collect private information, including private information available on Facebook.[54]

UDiligence claims to monitor 7,000 student-athletes,[55] Kevin Long, UDiligence's founder, says the service does not ask for usernames or passwords; instead, it requires student-athletes to agree to UDiligence's terms of use and to install an application on each social media account.[56] Long argues that a student-athlete's rights are not violated because the program can only be used after a student-athlete consents. "[A]t the point they have given that consent, from our perspective, there's no privacy violation at all."[57]

Since the NCAA declined "to impose a blanket duty on institutions to monitor social networking sites," it will be interesting to see whether the monitoring programs continue.[58] Likely, universities will continue to monitor, simply because the NCAA indicated that schools would be liable for any information disclosed through social media communications,, directly stating that "such sites should be part of the monitoring effort if the institution becomes aware of an issue that might be resolved in some part by reviewing information on a site."[59]

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[49] Judy Weightman, *Villanova Athletes Monitored Online*, METRO – PHILADELPHIA, (Jan. 30, 2012), *available at* http://www.metro.us/philadelphia/lifestyle/2012/01/30/villanova-athletes-monitored-online/.
[50] *Student-Athletes and Social Media Monitoring: A Conversation with Varsity Monitor*, FOURTH AND 140 (Mar. 21, 2012), *available at* http://fourthand140.com/2012/03/21/student-athletes-and-social-media-monitoring-a-conversation-with-varsity-monitor/.
[51] *About Us*, FIELDHOUSE MEDIA, *available at* http://www.fieldhousemedia.net/about/ (last visited Apr. 21, 2012).
[52] *Services*, FIELDHOUSE MEDIA, *available at* http://www.fieldhousemedia.net/services/ (last visited Apr. 21, 2012).
[53] *Id.*
[54] *Id.*
[55] Catherine Ho, *Keeping Tabs on College Athletes*, WASH. POST, Oct. 17, 2011, at A16, *available at* http://www.washingtonpost.com/business/capitalbusiness/companies-tracking-college-athletes-tweets-facebook-posts-go-after-local-universities/2011/10/10/gIQAyHZ9oL_story.html.
[56] *Id.*
[57] *Id.*
[58] *UNC Public Infractions Report*, *supra* note 7, at 11.
[59] *Id.*

ii. Schools with Social Media Bans

Former Boise State University football coach Chris Petersen was one of the first Division I coaches to ban the use of social media sites during the football season.[60] Petersen specifically banned Twitter – not Facebook – justifying his decision using student-athlete exceptionalism:

> It's just a distraction that we really don't need to have right now. There's plenty of time in their lifetime for Twitter. 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.[61]

Boise State's ban was only in effect for the duration of the season.[62] Other schools have followed Boise State's lead, including Mississippi State University,[63] the University of South Carolina,[64] Florida State University,[65] Kansas University,[66] New Mexico State University,[67] and Towson University.[68] St. John's University Men's Basketball coach, Steve Lavin, stated that he

[60] *Report: Boise State Coach Chris Petersen Bans Twitter Postings by Players*, ESPN (Aug. 8, 2010, 7:48 PM), *available at* http://sports.espn.go.com/ncf/news/story?id=5447726.
[61] *Chris Petersen Bans Twitter at Boise State*, FOOTBALL SCOOP, (Apr. 21, 2012), *available at* http://www.footballscoop.com/news/2156-chris-petersen-bans-twitter-at-boise-state.
[62] *Report: Boise State Coach Bans Twitter*, ESPN (Aug. 8, 2010, 7:48 PM), *available at* http://sports.espn.go.com/ncf/news/story?id=5447726.
[63] *See* Marcello, *supra* note 41.
[64] Gregg Doyel, *Coaches' Twitter Ban Isn't Stunting Players, It's Protecting Them,* CBSSPORTS.COM (Aug. 9, 2011), *available at* http://www.cbssports.com/columns/story/15416882 (University of South Carolina football coach Steve Spurrier banned Twitter among his players after linebacker Corey Miller mistakenly tweeted that receiver Alshon Jeffery was involved in a fight and then arrested. Even though Jeffery was not in a fight or arrested, the misinformation rapidly spread on the Internet.)
[65] Kenna McHugh, *Florida State Players Vote to Ban Social Media,* SOCIALTIMES (Oct. 12, 2011, 3:00 PM), *available at* http://socialtimes.com/florida-state-players-vote-to-ban-social-media_b80892 (Florida State football coach Jimbo Fisher did not personally enact the ban of social media during the season. Rather, his players voted and decided to enact the policy. The vote was preceded by an occasion where several members of the team were publicly criticized on their Twitter feeds after the Seminoles lost a game.)
[66] David Ebben, *One More Coach Draws the Line on Twitter*, ESPN (Aug. 5, 2011, 9:00 AM), *available at* http://espn.go.com/blog/big12/post/_/id/31347/one-more-coach-draws-the-line-on-twitter (Kansas football coach Turner Gill established a team policy that forbade the use of Twitter during the season. Like other coaches, Gill cited the distraction factor as the reason for the ban: "[t]he reason we decided to not allow our players to have a Twitter account is we feel like it will prevent us from being able to prepare our football program to move forward. Simple as that." He was the first coach in the Big-12 Conference to enact such a policy.)
[67] *No Twitter for Aggies Players, Staff*, ESPN (Aug. 12, 2010, 6:20 PM), *available at* http://sports.espn.go.com/ncf/news/story?id=5459210 (New Mexico State football coach DeWayne Walker applied an in-season Twitter ban to both his football team and all of the staff. Walker was sure to point out that "[i]t's not a matter of not trusting guys. Guys may say things and do things that can affect not only our football team but our university and not even mean it.")
[68] Chris Korman, *Towson Twitter Ban Comes as Legislators Move to Protect Student Freedoms*, BALT. SUN, (Feb. 13, 2012), *available at* http://articles.baltimoresun.com/2012-02-13/sports/bs-sp-towson-twitter-ban-0214-

eliminated social media posts during the season because "it can be a real distraction" to student-athletes. He believes that "part of your responsibility as a student-athlete is to be focused on your academics, your team's goals and objectives. Off-season is one thing, but while we're working together as a team during the year we want to shut down the social media."[69]

Often, a particular coach enacts the ban over his or her team, as opposed to a blanket policy over all athletic teams that are affiliated with a university. In that regard, it is not a university policy, but rather a condition for team membership similar to mandatory practices and minimum grade point averages. Additionally, most of the schools that have enacted a ban have only applied it during the course of the season, rather than throughout the academic year. Scholarship offers to student-athletes frequently require adherence to a code of conduct, which could include a ban on social media use during the season.

c. Professional Sports Leagues

i. Major League Baseball

Until March 2012, Major League Baseball ("MLB") did not have a social media policy in place for players.[70] Instead, there was a policy that governed social media use by MLB personnel, while the players were only subject to rules regarding the use of electronic equipment in the clubhouse and on the field.[71] MLB's newest collective bargaining agreement ("CBA"), signed in November 2011, included the imposition of a social media policy for players, but the policy was not defined for several months.[72] Upon the release of its policy, MLB stressed that it was not meant to be a "blanket deterrent to engaging in social media."[73] Instead, there are prohibitions on what content may be posted.[74] Additionally, the CBA bans any type of posting

20120213_1_social-media-bradley-shear-towson-coach-rob-ambrose (Towson football coach Rob Ambrose monitored the use of Twitter by his team during the offseason, and after seeing some of their posts, "quickly decided to ban it until he felt his players had been properly educated on using it.")

[69] Gavin Keefe, *Social Networks are an Education to all*, THE DAY (New Haven, CT), (Jan. 21, 2011), *available at* http://www.theday.com/article/20110121/SPORT08/301219862/-1/SPORT.

[70] Craig Calcaterra, *Major League Baseball releases its social media policy — and it's pretty good*, NBC (March, 14, 2012), *available at* http://hardballtalk.nbcsports.com/2012/03/14/major-league-baseball-releases-its-social-media-policy-and-its-pretty-good/.

[71] Maria Burns Ortiz, *Guide to Leagues' Social Media Policies*, ESPN (Sept. 27, 2011), *available at* http://espn.go.com/espn/page2/story/_/id/7026246/examining-sports-leagues-social-media-policies-offenders.

[72] Calcaterra, *supra* note 72.

[73] *Id.*

[74] *Id.* Players cannot make official club or league statements without permission; players cannot use copyrighted logos without permission; players cannot tweet confidential or private information regarding teams, players, or players families; players cannot link to an official MLB social platform without permission; players cannot post condoning (or appearing to condone) the use of substances on MLB's banned drug list; players cannot comment on officiating personnel; players cannot make offensive comments, including those are racist, sexist, or homophobic; players cannot post threats of violence; players cannot post anything that is sexually explicit; and players cannot post anything that would otherwise be illegal.

during the period thirty minutes before the start of a game until ten minutes after a game.[75] A player who violates the policy is subject to discipline by the MLB Commissioner.[76] To date, no players have been penalized under the new policy. Before it was enacted against MLB players, Chicago White Sox manager Ozzie Guillen was fined $20,000 and suspended for two games based on tweets he posted.[77]

ii. The National Basketball Association

The National Basketball Association ("NBA") instituted its social media policy on September 30, 2009.[78] The NBA forbids use of social media by its coaches, players, and other team officials during games.[79] Specifically, there can be no use of a cell phone or other communication device from forty-five minutes prior to the start of a game until players have finished their post-game responsibilities; obviously, this includes halftime.[80] In this sense, it is stricter than a social media ban because it prohibits any sort of outside communication around game time. In its policy, the NBA does not mandate specific penalties or punishments for violating this rule.[81] Additionally, the Association permits individual teams to implement their own policies for practices or other team events.[82] NBA Commissioner David Stern has used the power of his office to sanction tweets both for their timing[83] and for their content.[84]

iii. The National Football League

The National Football League ("NFL"), which has had a social media policy in place since August 2009, was the first professional sports league to outline a formal policy on social

[75] Erica Smith, *MLB Adopts Social Media Policy*, STLTODAY.COM (Mar. 14, 2012, 5:09 PM), *available at* http://www.stltoday.com/sports/baseball/professional/mlb-adopts-social-media-policy/article_8963dd4e-6e22-11e1-b936-0019bb30f31a.html.
[76] Calcaterra, *supra* note 72.
[77] *Ozzie Guillen Suspended Two Games*, ESPNCHICAGO (Apr. 30, 2011, 4:05 PM), *available at* http://sports.espn.go.com/chicago/mlb/news/story?id=6450727 (MLB did not penalize him for the content of the Tweets, which were posted after he was ejected from a game, but rather for the timing of his posts in relation to the end of the ball game.).
[78] *NBA Issues Policy on Twitter Use Before, After Games*, NBA.COM (Sept. 30, 2009, 11:28 PM), *available at* http://www.nba.com/2009/news/09/30/nba.twitter.rules.ap/index.html.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Jennings Fined for Timing of Twitter Post*, ESPN (Dec. 18, 2009, 10:49 PM), *available at* http://sports.espn.go.com/nba/news/story?id=4754931 (The NBA fined Milwaukee Bucks' guard Brandon Jennings $7500 for a Tweet posted before he had concluded his post-game media obligations.)
[84] *Cuban Fined $25K for Ref Comments*, ESPN (Mar. 29, 2009, 5:40 PM), *available at* http://sports.espn.go.com/nba/news/story?id=4025741 (The NBA fined Dallas Mavericks owner Mark Cuban $25,000 for complaining on Twitter about officiating.); *NBA Fines Magic's Gilbert Arenas*, ESPN, (June 9, 2011, 5:07 PM), *available at* http://sports.espn.go.com/nba/news/story?id=6642524 (When guard Gilbert Arenas was with the Orlando Magic, the NBA fined him an undisclosed amount for multiple Tweets.)

media use.[85] The NFL prohibits players and football operations personnel from using social media during the period ninety minutes before kickoff until after traditional media interviews following a game.[86] The use of social media is prohibited at all times by game officials and other officiating personnel.[87] Additionally, the NFL, which has always barred play-by-play accounts of games, extended this ban to social media platforms.[88] The NFL's reasoning behind the policy is simple: "We're in essence asking our players, coaches and football operations personnel to focus on the game. Tweet before. Tweet after."[89]

Players' speech is also governed by the NFL General Conduct Policy, which requires players "to avoid 'conduct detrimental to the integrity of, and public confidence in, the National Football League.'"[90] Upon signing a contract with the NFL, players and other personnel agree to be held to a higher standard than the general population; these individuals are "expected to conduct [them]sel[ves] in a way that is responsible, promotes the values upon which the League is based, and is lawful."[91] By breaking either the specific social media policy or the General Conduct Policy, players subject themselves to discipline by the league or their individual teams.[92] Players, including former Cincinnati Bengals' wide receiver Chad Ochocinco,[93] Arizona Cardinals defensive tackle Darnell Dockett,[94] and former San Diego Chargers cornerback Antonio Cromartie,[95] have faced discipline over their online behavior.

iv. The National Hockey League

The National Hockey League ("NHL") adopted its social media policy, which affects both players and members of the hockey operations staff, on September 15, 2011.[96] It was collectively bargained for with the National Hockey League Players' Association as part of the most recent CBA.[97] Under this policy, there is a "blackout period" for social media

[85] *League Announces Policy on Social Media for Before and After Games*, NFL (Aug. 31, 2009), *available at* http://www.nfl.com/news/story?id=09000d5d8124976d&template=without-video-with-comments&confirm=true.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] Ryan Corazza, *NFL Leaves Room to Tweet Around Games*, ESPN (Sept. 3, 2009, 3:00 PM), *available at* http://sports.espn.go.com/espn/thelife/news/story?id=4438405.
[90] Nat'l Football League (NFL), *Personal Conduct Policy*, *available at* http://sports.espn.go.com/nfl/news/story?id=2798214 (last visited Apr. 21, 2012).
[91] *Id.*
[92] *Id.*
[93] *Chad Ochocinco Fined $25K*, ESPN (Aug. 25, 2010, 5:01 PM), *available at* http://sports.espn.go.com/nfl/trainingcamp10/news/story?id=5493157.
[94] *Darnell Dockett Fined $5k for Tweet*, ESPN (Sept. 17, 2010, 5:27 PM), *available at* http://sports.espn.go.com/nfl/news/story?id=5584747.
[95] *Cromartie Tweets Food, then Gets Fined*, ESPN (Aug. 4, 2009, 11:23 PM), *available at* http://sports.espn.go.com/nfl/trainingcamp09/news/story?id=4376876
[96] *NHL Institutes New Social Media Policy*, NHL (Sept. 15, 2011, 12:00 PM), *available at* http://www.nhl.com/ice/news.htm?id=588534.
[97] *Id.*

communications on all game days.[98] For players, this period starts two hours before opening face-off and lasts until all post-game media obligations are completed; for hockey operations staff, the suggested blackout period begins at 11:00 AM on game days.[99] Players and club personnel "will be held responsible for the social communications in the same manner in which they are held responsible for other forms of public communications."[100] To that end, discipline is permitted for: (1) any statements that have prejudicial effects on the welfare of the League, the game of hockey, or a member club; (2) any statement that intends to have a prejudicial effect; or (3) any statement that is critical of the officiating staff.[101] To date, no NHL player has been sanctioned under its social media policy.

IV. The Constitutional Implications of Social Media Policies

Critics have claimed that universities' social media policies violate or infringe upon constitutionally protected rights of student-athletes, specifically the First Amendment, the Fourth Amendment, and the Fourteenth Amendment. Debate and criticism surround these policies, but it appears that they are valid given the relationship between student-athletes and their schools. Students are not forced to participate in athletics at the collegiate level, nor are they required to accept athletic scholarships. Student-athletes voluntarily consent to more stringent policies, which are dictated by both NCAA rules and university guidelines. Additionally, the NCAA and many of its member institutions are afforded immunity from constitutional challenges because they are private organizations not acting under the color of state law.

a. The State Actor Requirement

The Fourteenth Amendment prohibits state actors, unlike private groups or organizations, from infringing upon individuals' personal freedoms enumerated in the Bill of Rights.[102] The Supreme Court held that the NCAA is not a state actor; therefore courts will likely dismiss an infringement of constitutional rights claim against the NCAA.[103] The question presented in *Tarkanian* was whether a state university's "actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."[104] The Court concluded that "[n]either [the university]'s decision to adopt the NCAA's standards nor its minor role in their

[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *See, e.g.*, Elkins v. United States, 364 U.S. 206, 213 (1960) ("[T]he Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers."); Chaplinsky v. State of New Hampshire, 315 U.S. 568, 570-71 (1942) ("It is now clear that 'Freedom of the speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.'").
[103] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 193 (1988).
[104] *Id.*

formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance."[105]

Although the NCAA itself is not a state actor, its rules and regulations may constitute state action if a state university adopts them. Most notably, the Supreme Court has held that a "state university without question is a state actor."[106] Private colleges and universities have traditionally been immune from constitutional challenges, even though many of these institutions receive public funding.[107] However, courts will extend the protection of personal freedoms to infringement by private actors when there is "such a close nexus between the State and the challenged action that seemingly private behavior may be treated as that of the State itself."[108] The Supreme Court has developed a two-step process to determine when private conduct can be attributed to the state. The challenged action

> must be caused by the exercise of [a] right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . [and] second, the party charged with the deprivation of rights must be a person who may fairly be said to be a state action . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.[109]

Courts have held that a private institution's receipt of state or federal funds is not enough to constitute state action for constitutional purposes.[110] Under this test, it is unlikely that a private college or university would be subject to the state actor requirement because rarely would an employee's conduct be otherwise chargeable to the state.

In terms of state universities, though, it is possible for the NCAA to impose a standard that a member institution may not be able to enforce.

[105] *Id.* at 195.
[106] *Id.* at 192.
[107] *See, e.g.*, Cory A. DeCresenza, *Re-Thinking the Effect of Public Funding on the State-Actor Status of Private Schools in First Amendment Freedom of Speech Actions*, 59 SYRACUSE L. REV. 471 (2009).
[108] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).
[109] Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).
[110] *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (holding that a private school's receipt of state funds was not sufficient to qualify the school as a state actor, even though this receipt required compliance with state regulations); Mentavlos v. Anderson, 249 F.3d 301, 319 (4th Cir. 2001), *cert. denied*, 534 U.S. 9952 (2001) ("Of course, we cannot fairly view the unauthorized actions of private students to be state action merely because they attend a state-supported college and receive the benefit of public funds.").

> If a college does not regulate Twitter, Facebook, and other social networking sites and a player commits a 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 . . . constitutional challenges.[111]

However, given the realities of student-athletes' roles at state universities, it is unlikely that a constitutional challenge would survive a motion for summary judgment. Recourse is limited because athletes voluntarily submit themselves to a higher level of regulation and agree to comport with team regulations as a condition of participation, which courts have found is a privilege and not a right.

b. The First Amendment

The First Amendment guarantees, *inter alia*, that there shall be no law "abridging the freedom of speech."[112] The Supreme Court has not yet considered the extension of First Amendment rights to social media postings, but it has acknowledged multiple times that the protection should extend to new technologies as they develop.[113] The Court has specifically recognized that "'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."[114] Additionally, various federal courts have implicitly acknowledged that speech on social networks is deserving of constitutional protection for the general public.[115] However, this protection may be different for student-athletes, and students in general, due to the lessened protections afforded to those who attend public school.

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[111] Davis Walsh, *All A Twitter: Social Networking, College Athletes, and the First Amendment*, 20 WM. & MARY BILL RTS. J. 619, 620 (2011).
[112] U.S. CONST., amend. I.
[113] *See, e.g.*, Brown v. Entm't Merchants Ass'n, 131 S.Ct. 2729 (2011) (holding that video games qualify for First Amendment protection); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (holding that motion pictures are protected by the First Amendment because they are a "significant medium for the communication of ideas"); Winters v. New York, 333 U.S. 507, 510 (1948) (holding that indecent magazines deserve "the protection of free speech as the best of literature").
[114] *Brown*, 131 S.Ct at 2733.
[115] *See, e.g.*, Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 220-21 (3d Cir. 2011) (noting that "wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools"); Doe v. Jindal, 2012 WL 540100, at 7 (M.D. La. 2012) (holding that Louisiana's Unlawful Use or Access of Social Media Law violated the First Amendment by imposing "severe and unwarranted restraints on constitutionally protected speech"); T.V. *ex rel*. B.V. v. Smith-Green Cmty. Sch. Corp., 807 F.Supp.2d 767, 771 (N.D. Ind. 2011) (noting that suspending high school students for posting inappropriate pictures online implicates the First Amendment and "poses timely questions about the limits school officials can place on out of school speech by students in the information age where Twitter, Facebook, MySpace, texts, and the like rule the day").

The Court has held "First Amendment rights, applied in light of the special circumstances of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[116] However, the Court recognized that the rights of public school students "are not automatically coextensive with the rights of adults in other settings."[117] In the first case on this issue, *Tinker v. Des Moines Independent Community School District*, the Court held that a school may restrict students' First Amendment rights when the speech materially and substantially disrupts school operation.[118]

As it these rights apply to high school students, the Court has further clarified its decision.[119] In *Bethel School District No. 403 v. Fraser*, the Court held that a school could lawfully discipline a student for lewd conduct, "including the use of obscene, profane language or gestures."[120] The school's rule prohibiting vulgar speech was found to be highly appropriate in a public school setting.[121] In *Hazelwood School District v. Kuhlmeier*, the Court drew a distinction between speech made within the school environment (in this case, published in a school newspaper) and speech made outside of school: a "school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."[122] The Court stated that the proper party to determine whether or not speech is appropriate in the school setting is the schools themselves, not the court system.[123] In *Morse v. Frederick*, the Court held that a school was permitted to discipline a student for displaying a banner reading "BONG HiTS 4 JESUS" at a sporting event, even though it did not substantially interfere with the school's operations as prescribed by *Tinker*.[124] The Court found that the serious nature of drug use among American youth was sufficient justification for the school's restriction.[125]

Colleges and universities also have the right to limit student speech on their campuses. The Court recognized that colleges and universities have the right to prohibit activity that "materially and substantially disrupt[s] the work and discipline of the school."[126] This activity includes speech that "infringe[s] reasonable campus rules, interrupt[s] classes, or substantially

[116] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
[117] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).
[118] *Tinker*, 393 U.S. at 513-14.
[119] *See, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); *Fraser*, 478 U.S. 675.
[120] 478 U.S. at 678-79.
[121] *Id.* at 683.
[122] 484 U.S. at 266 (*quoting Fraser*, 478 U.S. at 685).
[123] *Id.* at 267.
[124] 551 U.S at 396-400.
[125] *Id.* at 410.
[126] Healy v. James, 408 U.S. 169, 189 (1972) (*citing* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

interfere[s] with the opportunity of other students to obtain an education."[127] In *Healy v. James*, the Court endorsed the Eighth Circuit's view that "a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has the power appropriately to protect itself and its property; and that it may expect its students [to] adhere to generally accepted standards of conduct."[128] It held that universities are able to impose requirements "that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law."[129]

In *Christian Legal Society Chapter of the University of California v. Martinez*, the Court assessed a law school's content-neutral policy[130] regarding official school recognition of organizations.[131] They held that a mandatory "all-comers" policy for all recognized university groups did not violate First Amendment rights because the school was not forbidding the formation of an organization. Rather, the university was not allowing the benefits of official recognition, including funding, use of school facilities, and use of the university logo, to those organizations that had limited membership.[132] Following this decision, student organizations have a choice to either accept a school's non-discrimination policy or to not receive formal recognition. *Martinez* provides guidance to various university athletic departments because the decision recognized that college students "can be forced into choosing between unlimited First Amendment rights and official school recognition, such as playing for the university's intercollegiate teams."[133]

Using *Healy* and *Martinez* as a guide, it is hard to imagine a situation where an athletic department's social media policy would be found in violation of the First Amendment. *Healy* explicitly recognizes that schools have the right to limit activities that "infringe[] upon reasonable campus rules."[134] In that case, the Court held that "regulations with respect to the time, the place, and the manner" of student speech are reasonable.[135] Therefore, so long as a social media policy is reasonable in either timing of speech or restriction on the manner of speech, a school has the right to limit the speech of student-athletes. In *Martinez*, the Court held that it was permissible for a school to condition participation in a school-sanctioned organization on limited First Amendment rights.[136] Given that all athletic departments are school-sanctioned

[127] *Id.* at 189.
[128] *Id.* at 192 (*quoting* Esteban v. Cent. Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970)).
[129] *Id.* at 193.
[130] 130 S.Ct at 2978 (The policy in question required an organization seeking recognition by the law school to permit open eligibility of all students for both membership and leadership.).
[131] *Id.*
[132] *Id.*
[133] Penrose, *supra* note 1, at 91.
[134] 408 U.S. at 189.
[135] *Id.* at 192-93.
[136] 130 S.Ct. at 2978.

entities, it follows that this holding would apply to a university's social media policy or any other policy that limits the speech of student-athletes.

c. The Fourth Amendment

The Fourth Amendment mandates that the government, including state actors, cannot limit "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[137] The Supreme Court has developed a two-step standard for Fourth Amendment searches: "First, that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[138] For Fourth Amendment examination of social media policies, there are two considerations: (1) whether information posted online is deserving of Fourth Amendment protection against unreasonable searches and seizures at all, and (2) whether student-athletes have a reasonable expectation of privacy in social media disclosures.

In *Katz v. United States*, the Court stated:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[139]

The Supreme Court found that electronic surveillance of a phone call made in a public telephone booth violated the Fourth Amendment guarantee to be free from unreasonable searches.[140] This decision was the first to suggest that Fourth Amendment analysis should consider both the possibility that technology would permit increasing intrusiveness into traditionally "private" communications and that social communications evolve as technology does.[141] The Court noted

[137] U.S. CONST., amend. IV.
[138] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
[139] *Id.* at 351-52.
[140] *Id.* at 352.

> What he sought to exclude when he entered the booth was not the intruding eye-it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

[141] Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614, 629 (2011); *see also Katz*, 389 U.S. at 352 ("To read the Constitution more narrowly is to ignore the vital role the public telephone has come to play in private communication.").

that what one "seeks to preserve as private, even in an area accessible to the public may be constitutionally protected."[142]

In addition, the Court has repeatedly held that a person's voluntary turnover of information may destroy any expectation of privacy in that material, regardless of whether the turnover took place privately or publicly.[143] In *United States v. Miller*, the Court found that there was no reasonable expectation of privacy in an individual's bank records: "[a]ll of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."[144] Further, the Court noted that a person who reveals information to a third party assumes the risk that information could be conveyed to the government.[145] In *Smith v. Maryland*, the Court held that there was no subjective expectation of Fourth Amendment protection for a pen register, a device installed by the telephone company to track the numbers of all outgoing phone calls.[146] An expectation of privacy was not reasonable because this information had to be turned over to the phone company for legitimate billing purposes.[147] Following the decisions in *Smith* and *Miller*, Congress specifically limited the scope of the holdings and required that warrants be obtained for documents like bank records[148] and pen registers.[149] This Congressional action implies a public interest in an expansive expectation of privacy in some information that is turned over to third parties.

This third-party doctrine of information turnover presents an interesting conundrum regarding digitally-conveyed information. Given the nature of the internet, can there be any Fourth Amendment protection of this information where a digital intermediary necessarily possesses copies of information turned over by an individual? Pushed to its outer limits, the holdings in *Smith* and *Miller* stand for two propositions: (1) By sharing information with a third party, an individual relinquishes any right to privacy in that information, and (2) the individual, through his or her third-party disclosure, assumes the risk that a third party may disclose the information to the government. These prepositions are contrary to the holding in *Katz*, which implies that communications intended to be private will be protected, regardless of the location of the disclosure.

While there has not been a holding addressing internet communications, the Supreme Court has decided two cases regarding the effects of new technology on Fourth Amendment

[142] *See, e.g., Katz*, 389 U.S. at 351; *see also* Rios v. United States, 364 U.S. 253 (1960); *Ex parte* Jackson, 96 U.S. 727 (1877).
[143] *See, e.g.*, Smith v. Maryland, 442 U.S. 735 (1979); United States v. Miller, 425 U.S. 435 (1976).
[144] 425 U.S. at 442.
[145] *Id.* at 443.
[146] 442 U.S. at 736, 742.
[147] *Id.* at 741-42.
[148] 12 U.S.C. § 3405 (2006).
[149] 18 U.S.C. § 3121 (2006).

search and seizure law.[150] In *Kyllo v. United States*, the Court, asking "what limits there are upon [the] power of technology to shrink the realm of guaranteed privacy," found that its role is to preserve the privacy rights historically relied upon by American citizens.[151] The Court held that the use of a thermal-imaging device was the equivalent of physical intrusion into a constitutionally protected area—the home.[152] The Court sought to draw a line that was "not only firm but also bright" from technological searches by government entities.[153]

In *City of Ontario v. Quon*, the Court considered whether the Fourth Amendment protects a police officer's private text messages on a government issued phone from search by his employer.[154] The Court avoided deciding whether the officer had a reasonable expectation of privacy in the message by focusing the holding on the office policies regarding the government-issued communication device.[155] However, the Court noted the importance of this technology in modern life: "[C]ell phone and text message communications are so persuasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification . . . [which] might strengthen the case for an expectation of privacy."[156] Tellingly, the Court did not implicate the third-party doctrine, established in *Smith* and *Miller*, in this case.[157] It has been argued that the Court's failure to dismiss the case immediately under the third-party doctrine could show that the Court is "likely to hold that the mere fact of digital intermediation does not remove all expectation of privacy, at least in some important social contexts."[158]

Since there is no controlling decision regarding the privacy rights of social media posts, just hints that the Court will not apply the third party doctrine to internet communications, it is unclear whether information posted on social media sites will be entitled to protection from unreasonable searches by government entities. Even if information posted online in "private" accounts is protectable under the Fourth Amendment, there is no guarantee that student-athletes will be able to protect their own Facebook or Twitter accounts from warrantless searches. The Court has explicitly concluded that "legitimate privacy expectations are even less with regard to student athletes."[159]

[150] City of Ontario v. Quon, 130 S.Ct. 2619 (2010); Kyllo v. United States, 533 U.S. 27 (2001).
[151] 533 U.S. at 34.
[152] *Id.* at 34.
[153] *Id.* at 40.
[154] 130 S.Ct. at 2624-26.
[155] *Id.* at 2624-25, 2632-33.
[156] *Id.* at 2629-30.
[157] *Id.* at 2619.
[158] Strandburg, *supra* note 143, at 618.
[159] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995).

The Court considered the standards for Fourth Amendment searches in public schools in *Vernonia School District 47J v. Acton*.[160] While that case dealt with public high school education, it is analogous to the university setting. In *Vernonia*, the Court established several factors to be applied when considering the validity of Fourth Amendment searches in a school environment. First, a court should consider "the nature of the privacy interest upon which the search . . . intrudes."[161] The Fourth Amendment is not intended to protect all "subjective expectations of privacy," but rather those "that society recognizes as 'legitimate.'"[162] Second, a court should look at "the character of the intrusion that is complained of" by a plaintiff.[163] Third, a court should "consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it."[164] The Court further clarified this as "an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."[165]

In *Vernonia*, the Court found that suspicionless drug testing of student-athletes was valid because of the special status that student-athletes held within the student body and the compelling interest of the government search. Comparatively, a search by a public university of information that a student-athlete voluntarily posts on a website like Facebook or Twitter is much less intrusive. There are no bodily functions implicated. Accessing information that someone posts about himself on the Internet does not inadvertently divulge "secret" information regarding health or similarly private information.

The Court further acknowledged, "There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."[166] The regulations the Court referenced included preseason physical examination, maintenance of a minimum grade point average, and compliance with "rules of conduct, dress, training hours, and related matters as may be established for each sport by the head coach and athletic director."[167] The Court analogized students who "voluntarily participate in school athletics" to adults who participate in "closely regulated industr[ies]," and thus have "reason to expect intrusions upon normal rights and privileges."[168]

[160] *Id.* at 646.
[161] *Id.* at 654.
[162] *Id.* (*quoting* New Jersey v. T.L.O., 469 U.S. 325, 338 (1985)).
[163] *Id.* at 658.
[164] *Id.* at 660.
[165] *Id.* at 661.
[166] *Id.* at 657.
[167] *Id.*
[168] *Id.*; *see also* Skinner v. Ry. Labor Execs' Ass'n, 489 U.S. 602, 627 (1989); United States v. Biswell, 406 U.S. 311, 316 (1972).

Following the *Vernonia* reasoning, it appears clear that a court would not sustain a Fourth Amendment challenge by a student-athlete concerning a social media policy. The Court's argument hinges on the fact that athletes voluntarily consent to a higher level of intrusion on their lives. This is especially true in collegiate athletics, where student-athletes have to abide by NCAA rules, conference rules, and individual team rules. If any of those three entities decide to impose a social media policy, it will likely be permissible so long as it is reasonable under the circumstances of team membership. In that respect, both season-long bans and social media monitoring would likely be acceptable, while a year-round ban on social media use may be found unduly restrictive.

Additionally, one of the exceptions to Fourth Amendment protection is consent to search a protected area.[169] Consent is implicit in any agreement to social media monitoring because a student-athlete has to provide access to the account. This provision of access may qualify as consent to a search. Once someone accts a friend or follower request or an account is created for the general public, a level of consent is present; the purpose of posting on social media websites is to spread news to select followers. Once one accepts a follower, he may have lost the chance to protect any thoughts broadcast to them through social media.

d. The Fourteenth Amendment

The Fourteenth Amendment guarantees:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[170]

In its first interpretation of this law, the Supreme Court held that "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[171] The Court later clarified this decision and "affirmed the essential dichotomy set forth in that Amendment between deprivation by the state, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the

[169] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is equally well-settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").
[170] U.S. CONST., amend. XIV.
[171] The Civil Rights Cases, 109 U.S. 3, 11 (1883).

Fourteenth Amendment offers no shield."[172] Again, while the NCAA and private universities are immune from these challenges, state universities may be vulnerable.

The due process clause of the Fourteenth Amendment is intended to protect fundamental aspects of life, liberty, and property, not lesser interests or expectations.[173] In order to establish a property interest, a plaintiff must show a legitimate claim of entitlement to the benefit he or she is attempting to protect.[174] The Court has stated that "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[175]

Generally, there is no protected property right to an education in the United States. The Court has determined that "education is not among the rights afforded explicit or implicit protection in the Constitution."[176] Additionally, the privilege of participating in interscholastic athletics is not an established protected property interest;[177] it "is an important part of the educational process. Nonetheless, education has not been deemed a fundamental right under the Fourteenth Amendment."[178] In terms of the Fourteenth Amendment, sports participation falls outside the scope of due process because it "amounts to a mere expectation rather than a constitutionally protected claim of entitlement."[179] Additionally, "courts [have] recognize[d] a student-athlete's property interest in the economic value of his or her athletic scholarship, which constitutes a one-year contract with his or her university. However, an athletic scholarship itself does not create a constitutionally protected property right to participate in intercollegiate sports."[180]

In addition to participation, college athletes have leveled charges against the NCAA alleging that their bylaws and disciplinary rulings violate "fundamental rights to prepare for and pursue the vocation of their choosing."[181] The United States District Court for the Central District of Illinois rejected this argument, holding that "future professional careers are mere

[172] Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974) *(quoting* Shelley v. Kramer, 334 U.S. 1, 13 (1948)).
[173] *See, e.g.,* Board of Regents v. Roth, 408 U.S. 564, 677 (1972).
[174] *See, e.g.,* Palmer v. Merluzzi, 689 F.Supp. 400 (N.J. 1988), *aff'd*, 868 F.2d 90 (3d Cir. 1989).
[175] *Roth*, 408 U.S. at 577.
[176] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29-39 (1972).
[177] *See, e.g.*, Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), *aff'd on other grounds,* 460 U.S. 719 (1983); Hamilton v. Tenn. Secondary Sch. Athletic Ass'n, 552 F.2d 681 (6th Cir. 1976); Mitchell v. La. High Sch. Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970; Farver v. Bd. of Educ. of Carroll Cty., 40 F.Supp.2d 323 (D. Md. 1999).
[178] *In re* U.S. *ex rel*. Mo. State High Sch. Activities Ass'n, 682 F.2d 147, 151 (8th Cir. 1982) *(citing* Rodriguez, 411 U.S. at 29-39).
[179] Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152, 159 (5th Cir. 1980).
[180] Matthew J. Mitten and Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L. J. 71, 125 (2008).
[181] Hawkins v. Nat'l Collegiate Athletic Ass'n, 652 F.Supp. 602, 605 (C. D. Ill. 1987).

expectations, far too speculative to command constitutional due process protection."[182] Similarly, courts have considered whether releasing a scholarship student-athlete from a team due to medical reasons is breach of the duty owed to that student-athlete.[183] The United States District Court for the Northern District of Illinois found that the loss of a scholarship does not "establish a substantial economic interest that affects his ability to earn a livelihood."[184] The court elaborated that even though "a college degree enhances one's ability to earn a livelihood, the lack of a scholarship does not prohibit a person from pursuing a college degree."[185]

The Fourteenth Amendment cannot be applied to a potential case for lack of equal protection under the laws because there is no protected right infringed by the imposition of a social media policy. Participation in college athletics is considered a privilege, as is the pursuit of a college education and the receipt of a college scholarship. Unless the policy also implicates a law such as Title IX or the Americans with Disabilities Act, there ~~can~~ be no redress in cases of this kind.

V. Conclusion

If a coach or a university athletic department chooses to require a social media policy that is within the bounds of NCAA regulations as a condition of playing on a team, an athlete will have little constitutional recourse. Given the special place of a student-athlete within the student body and the limited rights afforded to students in general, the First Amendment and the Fourth Amendment are inapplicable in this instance. Further, there can be no claims for lack of equal protection under the law because participation in athletics is regarded as a privilege, not a right. For those students who want the freedom to post whatever, or whenever, they want on Facebook and Twitter, their best recourse will be to either pursue a claim under privacy laws or forgoing the opportunity to play on a collegiate team.

[182] *Id.* at 611; *see also* Parish v. Nat'l Collegiate Athletic Ass'n, 506 F.2d 1028, 1034 n.17 (5th Cir. 1975) ("Both injury and the career are far too speculative to establish a property interest."); Colorado Seminary v. Nat'l Collegiate Athletic Ass'n, 417 F.Supp. 885, 895 (D. Co. 1976) ("The interest of future professional careers must nevertheless be considered speculative and not of constitutional dimension.").

[183] Knapp v. Nw. University, 95 C 6454, 1996 WL 495559 (N.D. Ill. Aug. 28, 1996).

[184] *Id.* at 2.

[185] *Id.*