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**PICKING UP THE FLAG? THE UNIVERSITY OF MISSOURI
FOOTBALL TEAM AND WHETHER INTERCOLLEGIATE
STUDENT-ATHLETES MAY BE PENALIZED FOR
EXERCISING THEIR FIRST AMENDMENT RIGHTS**

*James Hefferan**

I. INTRODUCTION

In the fall of 2015, tensions were starting to rise at the University of Missouri after several racially charged incidents occurred at the school's overwhelmingly white main campus in Columbia. In September 2015, the African-American president of the Missouri Student Association reported that he had been subjected to racial slurs from white students as he walked on campus.¹ In October 2015, a student yelled a racial slur at members of the Legion of Black Collegians as they were rehearsing for a play in a campus plaza.² Later that month, someone smeared feces in the shape of a swastika on a dormitory restroom wall.³ The failure of the school administration to timely and adequately respond to these incidents only exacerbated the situation and led to a series of student protests.⁴ In the midst of this, an African-American graduate student, Jonathan Butler, began a hunger strike in which he refused to eat until the University Presi-

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¹ Matt Ferner, *Mizzou Football Coach On Backing Player Boycott: 'I Did The Right Thing And I Would Do It Again'*, HUFFINGTON POST, (Nov. 10, 2015), http://www.huffingtonpost.com/entry/mizzou-gary-pinkel-football-boycott_us_56412a8ee4b0307f2caeb178; Brett McMurphy, *Missouri player says many on team don't support practice boycott*, ESPN, Nov. 9, 2015, http://espn.go.com/college-football/story/_/id/14087454/missouri-tigers-player-says-team-not-united-practice-boycott.

² McMurphy, *supra* note 1.

³ *Id.*; Morgan Winsor, *Mizzou Coach Backs Protesting Players*, INT'L BUS. TIMES NEWS, Nov. 9, 2015, available at 2015 WLNR 33302221.

⁴ McMurphy, *supra* note 1; Winsor, *supra* note 3.

dent, Timothy M. Wolfe, resigned.⁵ Seven days into his hunger strike, Butler expressed a willingness to die if Wolfe was not removed,⁶ but the situation had failed to receive significant media attention. That would soon change.

On Saturday evening, November 7, 2015, while most college sports fans concerned themselves with the results of that night's prime time football games, Anthony Sherrills, a sophomore defensive back on the University of Missouri football team, posted a photo of thirty-one Missouri football players on Twitter, along with the following statement:

The athletes of color on the University of Missouri football team truly believe 'Injustice Anywhere is a threat to Justice Everywhere.' We will no longer participate in any football related activities until President Tim Wolfe resigns or is removed due to his negligence toward marginalized students' experiences. WE ARE UNITED!!!!!!⁷

As a result of the players' boycott, the team's Sunday scheduled practice was cancelled and doubts arose as to whether the school would field a team for its three remaining games.⁸ Later that day, during a meeting with athletic department officials, the players again made it clear that they did not intend to return to practice until Butler began eating.⁹

The players' actions soon produced the desired effect. A media firestorm ensued, and by Monday, November 9, 2015, Wolfe had announced his resignation.¹⁰ Following Wolfe's announcement, Butler ended his hunger strike, the players lifted their boycott, and the team returned to practice the next day in preparation for their upcoming game that Saturday night against Brigham Young University

⁵ Winsor, *supra* note 3; Ferner, *supra* note 1.

⁶ Rick Maese & Kent Babb, *Missouri players threaten boycott of football games*, WASH. POST (Nov. 8, 2015), https://www.washingtonpost.com/sports/missouri-football-players-threaten-to-boycott-season-amid-racial-tension/2015/11/08/5c11c456-8641-11e5-9a07-453018f9a0ec_story.html.

⁷ Maese & Babb, *supra* note 6; *see also* Winsor, *supra* note 3.

⁸ Maese & Babb, *supra* note 6.

⁹ *Id.*

¹⁰ Ferner, *supra* note 1; Dave Matter, *Pinkel relates his view of protest*, ST. LOUIS POST-DISPATCH (Nov. 10, 2015), http://www.stltoday.com/sports/college/mizzou/pinkel-says-the-focus-was-on-saving-a-man-s/article_27a636c7-63d4-5a18-a9eb-4b78ec82df0b.html.

(“BYU”) at Kansas City’s Arrowhead Stadium.¹¹

The situation at Missouri demonstrates the power of intercollegiate student-athletes to affect social and political change by exercising their First Amendment right to freedom of speech. However, the players’ actions were not met with universal acclaim. Some commentators suggested that the boycotting players should have been kicked off the team.¹² A Missouri state legislator even introduced a bill that would require state colleges to revoke the scholarship of any student-athlete who is healthy and refuses to play.¹³ The bill would have also revoked the scholarship of “any athlete who ‘calls, incites, supports or participates in any strike’” and fined coaches who encourage or enable such student protests.¹⁴

Following media backlash, the bill in question was ultimately withdrawn.¹⁵ However, it raises the interesting question of whether intercollegiate student-athletes may lose their scholarships or otherwise be penalized for participating in a political or social movement. In this particular situation, the Missouri athletic department publicly urged the campus to come together and never suggested any punitive measures or other negative impacts on the players involved in the boycott.¹⁶ Yet, in light of the negative reaction to the players’ actions from certain commentators, it is not unimaginable that a university with a less-supportive coaching staff and/or administration might be inclined to attempt to discipline student-athletes who engage in such activity. This Article explores whether intercollegiate student-athletes may be penalized for exercising their First Amendment right to freedom of speech. Part I explores the legal background on this issue. Part II applies those precedents to the situation

¹¹ Matter, *supra* note 10.

¹² Nick Visser, *Fox Host Says He Would Have Replaced Mizzou Football Players*, HUFFINGTON POST (Nov. 10, 2015), http://www.huffingtonpost.com/entry/eric-bolling-mizzou-fox-news-the-five_us_56414557e4b0411d30724f90 (quoting Eric Bolling, co-host of “The Five,” as stating: “I would say ‘Fine, goodbye. We’ll find 25 or 30 new ball players to sit in. We may lose the rest of the season. . . I’ll take anyone on this team, hey I’ll take the basketball team. You want to come play football? Hey, let’s go and see how it works out.”)

¹³ Max Miceli, *Missouri Legislators Back Bill to Strip Striking Student-Athletes of Scholarships*, U.S. NEWS & WORLD REP. (Dec. 15, 2015), available at 2015 WLNR 37307671.

¹⁴ Jim Suhr, *Missouri bid to strip scholarships if athletes strike pulled*, SE. MISSOURIAN (Dec. 16, 2015), <http://www.semissourian.com/story/2260068.html>; see also Miceli, *supra* note 13.

¹⁵ Suhr, *supra* note 14.

¹⁶ Sarah Larimer, *Are Missouri players in danger of losing their scholarships? Not likely*, WASH. POST (Nov. 9, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/11/09/missouri-player-says-many-players-coaches-dont-back-boycott-of-practices/>.

at Missouri, concluding that while intercollegiate student-athletes are subject to greater restrictions of their constitutional rights than ordinary college students, any attempt to penalize the Missouri football players for their actions would not have passed constitutional muster. Finally, Part III discusses the implications of the Missouri situation for the future.

LEGAL BACKGROUND

This Part explores the intersection between the First Amendment and school-sponsored athletics, and is divided between cases arising in the college sports context and cases arising in the high school sports context. Due to the differences between high school athletes and college athletes that will be discussed *infra*, the high school cases are of lesser utility than the college cases. However, due to the relative dearth of case law on the subject, as well as the tendency of some courts to import First Amendment standards from the secondary school context into the collegiate context, they do offer a certain amount of guidance for situations involving the free speech of intercollegiate student-athletes.

A. *Freedom of Speech in the Context of Intercollegiate Athletics*

1. *A Brief Detour into Contract Law*

Before addressing the First Amendment, it must be recognized that many aspects of the relationship between a university and its student-athletes are contractual in nature.¹⁷ Student-athletes who receive scholarships sign a document, commonly referred to as a Statement of Financial Assistance, in which the university agrees to extend financial aid in return for the student-athlete's promise to attend the school and participate in athletics.¹⁸ If a student-athlete boycotts practices and/or games as part of a political or social statement, is he or she in breach of his or her contract with the university?

While the terms of financial aid agreements may differ from school to school,¹⁹ pursuant to NCAA rules, a university may reduce

¹⁷ *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992).

¹⁸ MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 105 (3d ed. 2013).

¹⁹ Larimer, *supra* note 16.

or cancel a scholarship during its term if the student-athlete “[v]oluntarily (on his or her own initiative) withdraws from a sport at any time for personal reasons.”²⁰ Thus, “students who receive college football scholarships have an affirmative duty to play football,”²¹ and failure to participate will be considered a breach of the scholarship agreement, permitting the university to cancel the scholarship during its term.²²

The seminal case on this subject is *Taylor v. Wake Forest University*.²³ There, plaintiff had received a scholarship from Wake Forest to play football.²⁴ At the end of his first semester, plaintiff’s grade point average was below the minimum required by the school, so he did not participate in spring practice (nor was he eligible to) in order to improve his grades.²⁵ Following plaintiff’s second semester, his grade point average exceeded the minimum required by the school and he was eligible to participate on the football team.²⁶ However, plaintiff refused to participate on the football team during his sophomore year in order to continue to focus on his studies.²⁷ At the end of plaintiff’s sophomore year, Wake Forest decided not to renew his scholarship due to his failure to participate in the football program.²⁸ After completing his junior and senior years at Wake Forest and receiving his degree, plaintiff sued the school for the expenses he incurred during those years in the absence of a scholarship.²⁹

The court rejected plaintiff’s claim. It noted that, in exchange for

²⁰ NCAA, 2015-16 NCAA DIVISION I MANUAL § 15.3.4.2(d), at 196 (2015) [hereinafter 2015-16 NCAA DIVISION I MANUAL]; see also Mitten, *supra* note 18, at 105 (“A student-athlete’s right to continue to receive financial assistance is contingent on the athlete . . . participating in his or her sport.”); Adam Hoeflich, Note, *The Taxation of Athletic Scholarships: A Problem of Consistency*, 1991 U. ILL. L. REV. 581, 595 (1991) (“[A] school may cancel institutional financial aid during the period of the award if the recipient . . . voluntarily withdraws from a sport for personal reasons.”); Derek Quinn Johnson, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 105 n.47 (1985) (observing that “the current rules permit a school to terminate a student’s scholarship should he cease to participate in the sport(s) for which the scholarship was awarded”).

²¹ Otis B. Grant, *African American College Football Players and the Dilemma of Exploitation, Racism and Education: A Socio-Economic Analysis of Sports Law*, 24 WHITTIER L. REV. 645, 648 (2003).

²² Daniel Nestel, Note, *Athletic Scholarships: An Imbalance of Power Between the University and the Student-Athlete*, 53 OHIO ST. L.J. 1401, 1413 (1992).

²³ 191 S.E.2d 379 (N.C. App. 1972).

²⁴ *Id.* at 380.

²⁵ *Id.* at 381.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Taylor*, 191 S.E.2d at 381–82.

the scholarship, plaintiff had agreed to maintain his athletic eligibility, “both physically and scholastically.”³⁰ As long as his grade point average exceeded school requirements and he was academically eligible, “[p]articipation in and attendance at practice were required.”³¹ Wake Forest had complied with its contractual obligations by awarding plaintiff financial aid during his sophomore year; however, plaintiff had breached his contractual obligations to the school by refusing to participate and attend practice in the absence of injury or any other excuse other than to devote time to his studies.³²

As *Taylor* demonstrates, even though schools retain a “wide scope of power” to terminate a student-athlete’s scholarship during its term for voluntary withdrawal from a sport,³³ most schools will continue to provide financial assistance for the remainder of the school year, and then simply elect not to renew the scholarship for another year.³⁴ Since, at least historically, athletic scholarships were only guaranteed for a one-year term, subject to renewal, and schools are given wide discretion when deciding whether to renew a scholarship, this still leaves student-athletes “easily expendable should conflict arise.”³⁵ Assuming that schools pursue the route of continuing to provide financial aid to the student-athlete for the remainder of the year, while removing him or her from the team as a result of exercising his or her First Amendment rights, and then electing not to renew the scholarship at the end of the school year, the analysis turns to whether such actions will survive constitutional scrutiny.

2. *The First Amendment and Intercollegiate Athletics*

a. *The Unique Situation of Student-Athletes*

Any analysis of the First Amendment rights of intercollegiate stu-

³⁰ *Id.* at 382.

³¹ *Id.*

³² *Id.*; see also Johnson, *supra* note 20, at 103 (“Taylor’s refusal to participate thus amounted to a breach of his contractual obligation.”).

³³ Nestel, *supra* note 22, at 1413 n.77.

³⁴ See, e.g., *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 947 (D. Kan. 1987); *Taylor*, 191 S.E.2d at 381.

³⁵ Maxwell Strachan, *Why the Mizzou Protests Are A Watershed Moment in Sports Activism*, HUFFINGTON POST (Nov. 10, 2015), http://www.huffingtonpost.com/entry/missouri-protests-coach_us_564244a9e4b0307f2caf3cf2. Beginning in 2012, the NCAA authorized universities to award multi-year scholarships of up to five years if they so choose. See also Mitten, *supra* note 18, at 111.

dent-athletes must begin with an acknowledgment that student-athletes are “special and different” from ordinary college students, and, therefore, are subjected to different regulations of their speech than the student body at large.³⁶ Speech by student-athletes is subject to greater regulation and scrutiny than ordinary college students.³⁷ This is so for two main reasons: “(1) student athletes are highly regulated both on and off the field or court, and (2) team unity outweighs any unfettered right to free expression.”³⁸

“[S]tudent athletes are subject to more restrictions than the student body at large.”³⁹ Indeed, “[c]ollege athletes are generally the most regulated students on campus.”⁴⁰ By voluntarily agreeing to participate in a sport, student-athletes subject themselves to a myriad of regulations.⁴¹ Many of these regulations are physical in nature:

[P]articipation in intercollegiate athletics, particularly in highly competitive postseason championship events, involves close regulation and scrutiny of the physical condition and bodily condition of student athletes. Required physical examinations (including urinalysis), and special regulation of sleep habits, diet, fitness, and other activities that intrude significantly on privacy interests are routine aspects of a college athlete’s life not shared by other students or the population at large.⁴²

Beyond physical regulation, college athletes “are required to report to campus long before classes begin . . . and often must maintain a particular grade point average to remain on the team. They must attend study hall, have unique access to tutors and tutoring, and find

³⁶ Meg Penrose, *Tinkering with Success: College Athletes, Social Media and the First Amendment*, 35 PACE L. REV. 30, 46 (2014) [hereinafter *Tinkering with Success*]; Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. MARSHALL REV. INTELL. PROP. L. 509, 512 (2013) [hereinafter *Outspoken*].

³⁷ *Outspoken*, *supra* note 36, at 513.

³⁸ *Id.* at 546.

³⁹ *Lowery v. Euverard*, 497 F.3d 584, 589 (6th Cir. 2007); *Green v. Sandy*, No. 5:10-cv-367-JMH, 2011 U.S. Dist. LEXIS 114718, at *5 (E.D. Ky. Oct. 3, 2011); *see also* *Tinkering with Success*, *supra* note 36, at 35 (“For those schooled in constitutional rights, it should be clear that student-athletes are far more regulated than their traditional college counterparts.”).

⁴⁰ *Tinkering with Success*, *supra* note 36, at 43.

⁴¹ *Id.* at 44; *Outspoken*, *supra* note 36, at 513.

⁴² *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 658 (Cal. 1994).

themselves traveling the country, if not the world, in pursuit of athletic competition.”⁴³ As Professor Meg Penrose, herself a former Division I college athlete, explains:

College athletes are often required to submit attendance reports to coaches or tutors while their more traditional college roommate sleeps the day away. College athletes are often required to attend team meetings, study film and avoid classes that conflict with their practice or game schedules. Their majors may be impacted by their sport and their sport’s travel schedule. College athletes may be expected to take summer school and winter intercession classes to open up their academic schedule for more early morning workouts or game-related travel. The schedules of college athletes are not theirs to choose. Rather, that schedule is influenced, if not chosen, by someone else whose focus is on the unique demands of college studies on the student-athlete.⁴⁴

Furthermore, the NCAA requires that student-athletes “maintain a continued level of progress toward a degree.”⁴⁵ Conference rules may mandate “good sportsmanship,” impose penalties for excessive celebration or taunting during athletic contests, and enforce policies regulating the use of social media.⁴⁶

As if they were not already subjected to a tremendous amount of regulation, college athletes are also likely to be subject to an athletic code of conduct imposed by their university’s athletic department, as well as various “team rules” imposed by their coach that regulate behavior and conduct both on and off campus.⁴⁷ These regulations are often very restrictive of speech.⁴⁸ Team rules may include “class attendance and study hall requirements, bans on tobacco use, prohibiting younger players from speaking to the press, random drug testing, gambling prohibitions such as playing fantasy football, grooming restrictions, proscribing derogatory language to describe teammates or

⁴³ Tinkering with Success, *supra* note 36, at 43 (internal footnotes omitted).

⁴⁴ *Id.* at 45 (internal footnotes omitted).

⁴⁵ *Id.* at 44.

⁴⁶ Outspoken, *supra* note 36, at 523.

⁴⁷ *Id.* at 513.

⁴⁸ *Id.* at 513–14.

opponents, [and] nightly curfews [*sic*] requirements to avoid strip clubs and hiring strippers.”⁴⁹ On top of all this, college athletes are often seen as role models, which require them to take on “a heightened sense of responsibility and exposure that traditional college students never face.”⁵⁰ In sum, by voluntarily participating in a heavily structured and regulated activity, college athletes subject themselves to greater restrictions on their conduct and speech than ordinary students, and the constitutional analysis should reflect this.⁵¹

Moreover, notwithstanding the degree of regulation to which student-athletes subject themselves, the very nature of athletic competition is inimical to unfettered freedom of speech. The playing field is very different from the classroom:

One of the purposes of education is to train students to fulfill their role in a free society. Thus, it is appropriate for students to learn to express and evaluate competing viewpoints. The goal of an athletic team is much narrower. . . . [T]he immediate goal of an athletic team is to win the game, and the coach determines how best to obtain that goal.⁵²

Since the goal of sports is victory, not freedom, athletic competition places a higher ideal on the team than the individual.⁵³ “Team unity, discipline, and onfield success are foremost among the goals of participating in student-athletics. Putting the rights of the individual before these athletic goals violates the underlying value of a team and allows the proverbial tail to wag the much more important dog.”⁵⁴ Surely a basketball coach whose team is down by one point in the final seconds and who is attempting to draw up a game-winning play in the huddle should not be subjected to his players exercising their First Amendment rights to debate the merits of his strategy. Distrac-

⁴⁹ *Id.* at 524; *see also* *Tinkering with Success*, *supra* note 36, at 43–44.

⁵⁰ *Outspoken*, *supra* note 36, at 524–25.

⁵¹ *Tinkering with Success*, *supra* note 36, at 45; Marcus Hauer, Note, *The Constitutionality of Public University Bans of Student-Athlete Speech through Social Media*, 37 VT. L. REV. 413, 424, 426–27 (2012).

⁵² *Lowery v. Euverard*, 497 F.3d 584, 589 (6th Cir. 2007); *see also* *Outspoken*, *supra* note 36, at 544–45.

⁵³ *Outspoken*, *supra* note 36, at 524.

⁵⁴ *Id.* at 539; *see also* *Lowery*, 497 F.3d at 591 (“A high school athletic team could not function smoothly with an authority structure based on the will of the players.”).

tions must be kept to a minimum, and since they run counter to the goal of successful athletic performance, courts will provide coaches with far greater latitude than professors in restricting the free speech rights of their students.⁵⁵

To summarize, the circumstances discussed above reflect the constitutional reality that courts will tolerate far greater restrictions on speech by college athletes than on speech by ordinary college students.⁵⁶ Courts “ha[ve] allowed state actions against student-athletes to stand even when those same actions would be unconstitutional if applied to non-student-athletes.”⁵⁷ Indeed, “[t]he overriding message from the case law is that the student-athlete who speaks out about his or her problem may not be protected by the First Amendment and therefore must be willing to suffer the consequences, which can include the loss or curtailment of athletic participation or loss of an athlete [*sic*] scholarship.”⁵⁸

All of this is not to say, however, that the greater restrictions imposed upon college athletes completely immunizes state schools from First Amendment scrutiny of their policies relating to speech and expression.⁵⁹ Deference to coaches and administrators does not mean abdication, and there are situations where, even taking into consideration the highly regulated nature of athletics, school officials overstep their constitutional bounds.⁶⁰ If this is the case, then the proper analytical framework for making such a determination must be established.

b. The Tinker Standard

The leading Supreme Court case on the regulation of student speech in the school setting is *Tinker v. Des Moines Independent Community School District*.⁶¹ In *Tinker*, several junior and senior high school students were suspended for wearing black armbands to

⁵⁵ Outspoken, *supra* note 36, at 524; Tinkering with Success, *supra* note 36, at 48–49.

⁵⁶ Tinkering with Success, *supra* note 36, at 45; Outspoken, *supra* note 36, at 541–42.

⁵⁷ Hauer, *supra* note 51, at 423.

⁵⁸ Diane Heckman, *Educational Athletes and Freedom of Speech*, 177 EDUC. L. REP. 15, 48 (2003).

⁵⁹ Outspoken, *supra* note 36, at 542.

⁶⁰ *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 764 (9th Cir. 2006) (citing *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001)); Outspoken, *supra* note 36, at 542; *see also* *Lowery v. Euverard*, 497 F.3d 584, 600 (6th Cir. 2007) (“Of course, players do not completely waive their rights when they join a team: a coach could not dismiss a player simply because the player had religious or political views that were unpopular with his teammates.”).

⁶¹ 393 U.S. 503 (1969).

school to protest the Vietnam War, in violation of a district policy.⁶² In striking down the policy, the Court made the oft-quoted statement that “[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.”⁶³ Even so, the Court also recognized “the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”⁶⁴

In order to balance the competing concerns, the Court delineated the following standard for resolving student speech cases in the school context:

A student’s rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . , if he does so without “materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.⁶⁵

In making this determination, “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”⁶⁶ In order to justify the prohibition of a particular opinion, the state “must be able to show its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”⁶⁷ Applying this standard to the case before it, the Court found that wearing the arm-

⁶² *Id.* at 504.

⁶³ *Id.* at 506.

⁶⁴ *Id.* at 507.

⁶⁵ *Id.* at 512–13 (internal citation omitted).

⁶⁶ *Id.* at 508.

⁶⁷ *Tinker*, 393 U.S. at 509.

bands did not cause a substantial interference with the work of the school or infringe on the rights of others; therefore, it constituted protected expression under the First Amendment.⁶⁸

c. Should the Tinker Standard Apply to College Athletes?

It must always be remembered that *Tinker* arose in a primary and secondary educational context. The Supreme Court has never expressly extended *Tinker* to speech occurring on college campuses.⁶⁹ On occasion, the Court has referenced *Tinker* and its progeny for guidance in analyzing certain types of campus speech.⁷⁰ In other cases, however, the Court has indicated that speech restrictions in the college setting should be evaluated differently than speech restrictions in the high school setting.⁷¹ This has caused a certain amount of confusion among lower courts.⁷²

As will be seen *infra*, some of the lower courts faced with litigation regarding the First Amendment rights of college student-athletes have referenced the *Tinker* standard for guidance.⁷³ Other courts addressing the speech rights of ordinary college students have been even more overt in adopting the *Tinker* standard as the proper analytical framework. For instance, in *Tatro v. University of Minnesota*,⁷⁴ the Minnesota Court of Appeals, while acknowledging “that what constitutes a substantial disruption in a primary school may look very

⁶⁸ *Id.* at 509, 514.

⁶⁹ Tinkering with Success, *supra* note 36, at 53–54; Zak Brown, Note, *What’s Said in This Locker Room, Stays in This Locker Room: Restricting the Social Media Use of Collegiate Athletes and the Implications for Their Institutions*, 10 J. TELECOMM. & HIGH TECH. L. 421, 426 (2012); Meggen Lindsay, Note, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students—Tatro v. University of Minnesota*, 38 WM. MITCHELL L. REV. 1470, 1473, 1480 (2012); see also J. Wes Gay, Note, *Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?*, 39 FLA. ST. U. L. REV. 781, 789 (2012) (“The Supreme Court has never explicitly addressed whether a college student’s speech should be protected more, less, or no differently than a high school student’s speech.”).

⁷⁰ Brown, *supra* note 69, at 427, 429; Lindsay, *supra* note 69, at 1480. See, e.g., *Healy v. James*, 408 U.S. 169, 180–81 (1972) (quoting *Tinker* but not applying it in a college speech case).

⁷¹ Brown, *supra* note 69, at 427, 429; Lindsay, *supra* note 69, at 1481. See, e.g., *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring) (“[Our] cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools . . . whose students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education.”).

⁷² See Lindsay, *supra* note 69, at 1480.

⁷³ See, e.g., *Williams v. Eaton*, 443 F.2d 422, 430–32 (10th Cir. 1971); *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 946 (D. Kan. 1987).

⁷⁴ 800 N.W.2d 811 (Minn. App. 2011).

different in a university,” found “no practical reason” not to adopt the *Tinker* substantial-disruption standard in the college context, and applied it to determine whether a university had acted properly in disciplining student expression.⁷⁵

Other courts have “consistently recognized a higher level of speech for college students.”⁷⁶ These decisions recognize that “there is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school,” so courts “must proceed with greater caution before imposing speech restrictions on adult students at a college campus.”⁷⁷ Courts and commentators have expounded a multitude of reasons for treating college students differently from high school students in the First Amendment context.

First, the pedagogical missions of colleges and high schools are fundamentally different.⁷⁸ “While both seek to impart knowledge, [a college] encourages inquiry and challenging *a priori* assumptions whereas [a high school] prioritizes the inculcation of societal values. Public universities encourage teachers and students to launch new inquiries into our understanding of the world.”⁷⁹ Moreover, high school educators and administrators act *in loco parentis*⁸⁰ over their students, most of whom are minors, while “[p]ublic university administrators, officials, and professors do not hold the same power over students.”⁸¹ Primary and secondary school students “have widely different levels of emotional maturity and brain develop-

⁷⁵ *Id.* at 821.

⁷⁶ Gay, *supra* note 69, at 789.

⁷⁷ DeJohn v. Temple Univ., 537 F.3d 301, 315, 318 (3d Cir. 2008); *see also* McCauley v. Univ. of V.I., 618 F.3d 232, 242 (3d Cir. 2010).

⁷⁸ *McCauley*, 618 F.3d at 243.

⁷⁹ *Id.*

⁸⁰ *In loco parentis*, literally “in the place of a parent,” is the doctrine pursuant to which an administrative body such as a school acts as a temporary guardian of the children entrusted to its care. BLACK’S LAW DICTIONARY 791 (7th ed. 1999).

⁸¹ *McCauley*, 618 F.3d at 243–44; *see also* DeJohn v. Temple Univ., 537 F.3d 301, 315 (3d Cir. 2008); Lindsay, *supra* note 69, at 1482–83. (“College professors and administrators do not stand in for students’ parents. Therefore, the *in loco parentis* relationship that elementary, middle, and high schools have with students, and that can justify restricting speech that undercuts the values that those schools are trying to indoctrinate, cannot justify such restrictions at the college level.”) (internal footnote omitted); Tracey Wirmani, Note, *Tinker Takes on Tatro: The Minnesota Supreme Court’s Missed Opportunity*, 65 OKLA. L. REV. 769, 793 (2013) (“[T]he *Tinker* standard was formulated with primary and secondary students in mind and is premised on the *in loco parentis* theory; thus, it is not applicable in the university context.”).

ment”⁸² which administrators must take account of when determining what information should be disseminated to them.⁸³ On the other hand, “[c]onsiderations of maturity are not nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults.”⁸⁴ Presumably, the higher maturity level of such students will leave them less impressionable and allow them more freedom than minor students.⁸⁵

Based on the above considerations, many courts and commentators have asserted that college students have broader free speech rights than high school students. Certain speech that may be prohibited to minors in high school may not be prohibited to adult college students.⁸⁶ Discussion by college students should not be restricted “based solely on rationales propounded specifically for the restriction of speech in public elementary and high schools.”⁸⁷ College administrators should have less leeway in regulating student speech than elementary and secondary school administrators.⁸⁸ Indeed, several commentators have argued that *Tinker* should be wholly inapplicable to the college setting.⁸⁹ While no court has gone that far, the Third

⁸² Lindsay, *supra* note 69, at 1481.

⁸³ *McCauley*, 618 F.3d 232, 246 (3d Cir. 2010).

⁸⁴ *Id.*; *see also* Brown, *supra* note 69, at 426 (recognizing that most college students are adults “and free speech is considered a cornerstone of the university experience”); Outspoken, *supra* note 36, at 543 (recognizing that college students are traditionally considered adults); Wirmani, *supra* note 81, at 784 (acknowledging that “most college students are adults and should not be treated as juveniles”).

⁸⁵ Brown, *supra* note 69, at 423; *cf.* Gay, *supra* note 69, at 791 (noting that the Supreme Court has treated high school and college students differently, based on age and maturity level, in Establishment Clause jurisprudence).

⁸⁶ *McCauley v. Univ. of V.I.*, 618 F.3d 232, 242 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3d Cir. 2008); Gay, *supra* note 69, at 804 (“College students are more mature and their speech should not be restricted to the same extent as high school students.”); Hauer, *supra* note 51, at 422 (“[T]he Court has historically granted college students greater speech protection than high school students.”); Lindsay, *supra* note 69, at 1481 (“Students enrolled at public universities should have a greater degree of free-speech protection than high school and junior high students.”); Karyl Roberts Martin, Note, *Demoted to High School: Are College Students’ Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173, 200 (2003) (“What constitutes ‘material and substantial disruption’ may be different in the university, as opposed to the secondary school, setting. . . . [A] court could conclude that conduct which may disrupt teaching in a high school would not be disruptive in the college environment.”); Wirmani, *supra* note 81, at 780 (“[C]ourts have long recognized that First Amendment rights in public universities deserve greater protection than primary and secondary student speech.”).

⁸⁷ *McCauley*, 618 F.3d at 242; *see also* Wirmani, *supra* note 81, at 784 (noting that the *Tinker* test was “articulated with primary and secondary students in mind”).

⁸⁸ *McCauley*, 618 F.3d at 242; *DeJohn*, 537 F.3d at 316.

⁸⁹ Lindsay, *supra* note 69, at 1473 (arguing that the *Tinker* standard “should be restricted to K-12 stu-

Circuit has recognized that

At a minimum, the teachings of *Tinker* . . . and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. Any application of free speech doctrine derived from these decisions to the university setting should be scrutinized carefully, with an emphasis on the underlying reasoning of the rule to be applied.⁹⁰

For purposes of this analysis, this means that any restriction placed upon the speech and expression of intercollegiate student-athletes by a public university must *at least* satisfy the *Tinker* test, but quite possibly might be subjected to more searching inquiry based on the fact that the speech rights of college students are broader than those of high school students.⁹¹ With this background in mind, this Article now turns to an examination of the existing judicial precedents in this area.

d. Existing Case Law on the First Amendment Rights of College Student-Athletes

Notwithstanding the widespread media attention that the Missouri football players received for their boycott, activities of this sort are nothing new in the landscape of college football. As early as 1948, the white players on the Lafayette College football team voted to refuse an invitation to the Sun Bowl after learning that an African-American teammate would not be allowed to play.⁹² There were

dent speech, not extended to adults at the post-secondary level”); Wirmani, *supra* note 81, at 784 (asserting that *Tinker*’s substantial disruption test “should not be applied at the university level”); *cf.* Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 460 (2009) (acknowledging that “[t]hrough the college cases often relied on *Tinker*, free speech protection in public colleges and universities has been more robust and less subject to erosion than in high school”); *but see* Outspoken, *supra* note 36, at 513 n.9, 525–26, 543 & n.193, 546 (arguing that the *Tinker* test provides an inadequate framework in the context of college athlete speech rights because it is *not deferential enough* to university coaches and administrators, and advocating an analytical model similar to that employed by the Court in cases involving military personnel); *Tinkering with Success*, *supra* note 36, at 54–55 (same).

⁹⁰ *McCauley v. Univ. of V.I.*, 618 F.3d 232, 247 (3d Cir. 2010).

⁹¹ *See DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008).

⁹² Les Carpenter, *The forgotten story of . . . the Pennsylvania college that took on a southern bowl’s racism*, THE GUARDIAN (Dec. 23, 2015), <http://www.theguardian.com/sport/2015/dec/23/lafayette-sun->

“dozens, if not hundreds of disturbances within college football in the late 1960s and early 1970s,” often involving African-American athletes clashing with white coaches over ill-treatment, discipline, and lack of sensitivity to their needs.⁹³ For instance, at Syracuse University in 1970, several African-American football players staged a walkout during spring practice, demanding that the head football coach hire an African-American assistant as he had previously promised.⁹⁴ To solve the conflict, the head coach hired an African-American assistant, but then threw seven players who had participated in the walkout off of the team.⁹⁵ Around the same time, three African-American players at the University of Washington quit the football team in the middle of the season and then held a press conference denouncing the racial practices of the coaching staff.⁹⁶ In 1969, African-American players at Eastern Washington University protested, but did not boycott, the banning of the black power salute.⁹⁷ In 1988, University of Kentucky football players threatened to go on strike if the school did not remove A.B. “Happy” Chandler, a university trustee who had used a racist slur during a public meeting.⁹⁸ The players backed down after the governor of Kentucky expressed his support for Chandler.⁹⁹

Despite the long history of player unrest and expressive activity, the issue of the First Amendment rights of intercollegiate athletes has seldom been litigated in court.¹⁰⁰ “Historically, the courts have heard only a minimal amount of cases addressing the First Amendment whether generally or specifically as to freedom of speech and expression that concerned educational participants involved with athletics.”¹⁰¹ The jurisprudence that has been produced tends to reflect the

owl-forgotten-story.

⁹³ Strachan, *supra* note 35.

⁹⁴ Nicole Hemmer, *Missouri Football Players Took a Risky Stand Against Racism With Strike*, U.S. NEWS & WORLD REP. (Nov. 10, 2015), <http://www.usnews.com/opinion/blogs/nicole-hemmer/2015/11/10/missouri-football-players-took-a-risky-stand-against-racism-with-strike>.

⁹⁵ *Id.*; see also Strachan, *supra* note 35.

⁹⁶ Hemmer, *supra* note 94.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* Mr. Chandler was a former governor of Kentucky himself, as well as a United States Senator, and also served as the Commissioner of Major League Baseball from 1945-1951. *Happy Chandler*, NAT'L BASEBALL HALL OF FAME, <http://baseballhall.org/hof/chandler-happy> (last visited Feb. 14, 2016).

¹⁰⁰ Outspoken, *supra* note 36, at 549.

¹⁰¹ Heckman, *supra* note 58, at 48. Professor Penrose posits that the reason the issue is so infrequently

reality described above that student-athletes are subject to greater regulation than ordinary students.¹⁰² Where the courts have stepped in to protect the expressive rights of intercollegiate student-athletes, the expressions tended to “have value beyond the individual speaker.”¹⁰³ Cases involving “ordinary speech . . . seem[] to favor team over individual, coach over player, and state over citizen.”¹⁰⁴

i. *Hysaw v. Washburn Univ. of Topeka*¹⁰⁵

Hysaw is perhaps the most often-cited case involving the First Amendment rights of intercollegiate student-athletes. The plaintiffs in *Hysaw* were African-American scholarship athletes on the Washburn University football team.¹⁰⁶ Plaintiffs claimed that they were being treated in a racially discriminatory manner by the coaching staff and school administration. Specifically, plaintiffs alleged that the promises of their full scholarships had not been carried out and that lesser white players on the team had received better scholarships than some of the African-American players.¹⁰⁷ Dissatisfied with the school’s response to their concerns, plaintiffs boycotted several pre-season practices.¹⁰⁸ The athletic director warned plaintiffs that missing practice without a coach’s excuse was a violation of disciplinary rules and would be treated as an unexcused absence.¹⁰⁹ He informed them that they would only be allowed to keep their scholarships if they apologized to the team and school administration, participated in five early morning practices, sat out the first game of the season, and exhibited total commitment to the football program.¹¹⁰ After plaintiffs refused to comply with these conditions, they were re-

litigated is because intercollegiate student-athletes recognize the choice between receiving the various privileges associated with participation in intercollegiate athletics and receiving the full panoply of First Amendment rights. See *Outspoken*, *supra* note 36, at 526, 548–50. If a student-athlete chooses to be outspoken, he or she can accept the consequences and opt for speech over athletics. *Id.* at 523, 526. However, the vast majority of student-athletes find the experiences of participating in intercollegiate athletics well worth the limited sacrifice of receiving “a watered-down version of First Amendment rights.” *Id.* at 550.

¹⁰² *Outspoken*, *supra* note 36, at 545.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 690 F. Supp. 940 (D. Kan. 1987).

¹⁰⁶ *Id.* at 942.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 942–43.

¹⁰⁹ *Id.* at 943.

¹¹⁰ *Id.*

moved from the football team, but continued to receive financial aid for the remainder of the academic year.¹¹¹ Plaintiffs subsequently filed suit, claiming violation of their free speech, liberty, and property rights, as well as breach of their contracts with the school.¹¹²

The court granted summary judgment to the school on a number of plaintiffs' claims, including their claims for violation of their property rights and liberty interests, and their claim for breach of contract.¹¹³ Plaintiffs had neither a property right, liberty interest, nor contractual right in playing college football.¹¹⁴ Their only interest was in their scholarships, and defendants had made all disbursements under those agreements.¹¹⁵ However, the court still had to consider plaintiffs' contention that the school "violated their first amendment right to free speech by removing them from the team after they protested racial mistreatment."¹¹⁶ The school defendants argued that the dismissal was justified as a reasonable time, place, and manner restriction under *Tinker*, because "the boycott severely disrupted the football team and infringed upon the rights of others participating in the football program."¹¹⁷

The court accepted *Tinker* as the applicable framework, but held that defendants were not entitled to summary judgment under its standard. The head football coach had testified that if a player missed practice in order to protest racial mistreatment, he would be excused.¹¹⁸ The court determined that if this was, in fact, the policy, the application by the coaching staff of its own policy could not possibly cause a substantial disruption to the team.¹¹⁹ The court also adopted a narrow reading of "infringing upon the rights of others," holding that this restriction on speech "was meant to apply only to activity which could result in tort liability for the school."¹²⁰ Plain-

¹¹¹ *Hysaw*, 690 F. Supp. at 943.

¹¹² *Id.* at 942.

¹¹³ *Id.* at 944–47.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 945–46; *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir. 1996) ("The government may not 'deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech'—even though the person has no right to the valuable government benefit and 'even though the government may deny him the benefit for any number of reasons.'" (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972))).

¹¹⁷ *Hysaw*, 690 F. Supp. at 946.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* (citing *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368 (8th Cir. 1986)).

tiffs' boycott may have made practice more difficult and hurt team morale and game play, but the team's rights had not been infringed upon.¹²¹ The court refused to "place the interests of participants in a university extracurricular activity above the rights of any citizen to speak out against alleged racial injustice without fear of government retribution."¹²² Because genuine issues of fact remained, summary judgment for defendants on plaintiffs' freedom of speech claim was inappropriate.¹²³

ii. *Williams v. Eaton*¹²⁴

This case saw fourteen African-American football players at the University of Wyoming march into the office of head coach Lloyd Eaton, requesting that they be allowed to wear black armbands during the school's game against BYU the following afternoon in silent protest against the policy of the Church of Jesus Christ of Latter-Day Saints, which operated BYU, that prohibited African-American men from entering its priesthood.¹²⁵ Eaton had a team rule that football players could not participate in demonstrations or protests.¹²⁶ Rather than granting permission, Eaton dismissed the players from the team, allegedly telling them that they could go play for a historically black

¹²¹ *Id.*

¹²² *Hysaw*, 690 F. Supp. at 946.

¹²³ *Id.* The court also denied defendants summary judgment as to plaintiffs' claim under 42 U.S.C. § 1981, on the basis that factual issues remained as to whether defendants had provided white players with equal or lesser abilities than African-American players more beneficial scholarship agreements and participation opportunities. *Id.* at 944.

¹²⁴ 443 F.2d 422 (10th Cir. 1971).

¹²⁵ *Id.* at 424; see also Sean Keeler, 'We were villains': how Wyoming's Black 14 blazed the trail for Missouri protests, THE GUARDIAN (Nov. 11, 2015), <http://www.theguardian.com/sport/2015/nov/11/we-were-villains-how-wyomings-black-14-blazed-the-trail-for-missouri-protests>; Adam Kilgore, *Echoes of the 'Black 14' still resonate*, WASH. POST (Nov. 11, 2015), available at 2015 WLNR 33491976; Strachan, *supra* note 35; Clinton Yates, *Before Concerned Student 1950 at Missouri, there was the Black 14 at Wyoming*, WASH. POST (Nov. 10, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/11/10/before-theconcerned1950-at-missouri-there-was-the-black-14-at-wyoming/>. The armbands were also in protest of certain unsportsmanlike acts allegedly perpetrated by BYU football players in previous contests. See *Williams*, 443 F.2d at 424.

¹²⁶ *Williams*, 443 F.2d at 424, 425. Eaton had arrived at Wyoming in 1962 and built the program into a powerhouse over the course of the 1960s. Keeler, *supra* note 125; Yates, *supra* note 125. The team had won three straight Western Athletic Conference titles, achieved back-to-back 10-win seasons in 1966 and 1967, and was coming off of a Sun Bowl victory over Florida State the season before. Keeler, *supra* note 125; Kilgore, *supra* note 125; Yates, *supra* note 125. As a national program, Wyoming had African-American players from all over the nation. Yates, *supra* note 125. Entering the contest against BYU, Wyoming was undefeated and ranked twelfth in the nation. Keeler, *supra* note 125.

college program instead.¹²⁷ After the university board of trustees sustained the dismissals, plaintiffs filed a civil rights action, alleging that their suspension from the football team for wearing the armbands as a peaceful and symbolic demonstration violated, *inter alia*, their First Amendment rights.¹²⁸

Following the district court's dismissal of the action, the Tenth Circuit considered "whether the complaint stated any claim for relief under the First Amendment and Federal constitutional decisions on freedom of expression."¹²⁹ The court applied *Tinker* in analyzing the plaintiffs' First Amendment claim.¹³⁰ The court interpreted the district court's dismissal as a grant of summary judgment to the defendants and held that "[i]n the light of the principles of the *Tinker* case and similar authorities, we cannot say that the complaint fails to state a claim on which relief could be granted or that summary judgment was proper."¹³¹ Specifically, the court found no showing that plaintiffs' conduct "likely would produce any disturbance interfering with school discipline or the interests which the authorities are entitled to protect, under the principles of the *Tinker* case."¹³² The statements and findings relied upon by the district court simply did not establish "that there was or would have been any material disruption of class work, substantial disorder or invasion of the rights of others as to justify a summary judgment against the plaintiffs."¹³³ Thus, the case was reversed and remanded.

After the case was brought to trial on remand, the district court again ruled in favor of the defendants.¹³⁴ The district court reasoned that the armband display by student-athletes at a state university would violate state and federal constitutional provisions mandating complete neutrality on religious matters by expressing opposition to

¹²⁷ *Williams v. Eaton*, 443 F.2d 422, 424–25 (10th Cir. 1971); Kilgore, *supra* note 125; Strachan, *supra* note 35; Yates, *supra* note 125.

¹²⁸ *Williams*, 443 F.2d at 424, 425.

¹²⁹ *Id.* at 426–27.

¹³⁰ *Id.* at 430.

¹³¹ *Id.* at 431, 432.

¹³² *Id.* at 431.

¹³³ *Id.* at 431 n.6. The court further found that plaintiffs would suffer irreparable harm from their dismissal from the team "in that their ability to promote their careers, practice and perform their skills has been denied them," and they had lost "their chance to be observed by scouts as potential professional football players during the 1969 season," which had resulted in "emotional and mental stress and anxiety," regardless of whether their scholarship agreements "had been continued in force subject to further review." *Id.* at 431–32.

¹³⁴ Keeler, *supra* note 125.

the religious beliefs of the Church of Jesus Christ of Latter-Day Saints.¹³⁵ This time, the Tenth Circuit upheld the district court's ruling, finding that the defendants' actions constituted a reasonable regulation of expression under *Tinker*.¹³⁶ The court emphasized that its holding was not based "on the presence of any violence or disruption. There was no showing or finding to that effect and the trial court's conclusions of law state that the denial of the right to wear the armbands during the game ' . . . was not predicated upon the likelihood of disruption, although such a demonstration might have tended to create disruption.'"¹³⁷ Rather, the trustees' decision was lawful under *Tinker* because

Their decision protected against invasion of the rights of others by avoiding a hostile expression to them by some members of the University team. It was in furtherance of the policy of religious neutrality by the State. It denied only the request for the armband display by some members of the team, on the field and during the game. In these limited circumstances we conclude that the Trustees' decision was in conformity with the *Tinker* case and did not violate the First Amendment right of expression of the plaintiffs."¹³⁸

iii. *Green v. Sandy*¹³⁹

In this matter, plaintiff received an athletic scholarship to participate on the women's soccer team at Eastern Kentucky University.¹⁴⁰ During her junior year, plaintiff became concerned with the team's

¹³⁵ *Williams v. Eaton*, 468 F.2d 1079, 1080, 1083 (10th Cir. 1972).

¹³⁶ *Id.* at 1084.

¹³⁷ *Id.*

¹³⁸ *Id.* While Coach Eaton and the university experienced success in the courtroom, the incident had a significantly negative effect on their fortunes on the football field. Eaton was fired after going 1-9 in 1970 and ended up as a scout for the Green Bay Packers. Keeler, *supra* note 125; Kilgore, *supra* note 125. The program lost its ability to recruit African-American players. Kilgore, *supra* note 125. After playing in five bowl games and never posting a losing record from 1950-1969, Wyoming produced only four winning seasons and one postseason appearance from 1970-1986. Keeler, *supra* note 125. Even almost fifty years later, the program still has not matched the heights it reached in the late 1960s. Kilgore, *supra* note 125.

¹³⁹ No. 5:10-cv-367-JMH, 2011 U.S. Dist. LEXIS 114718 (E.D. Ky. Oct. 3, 2011).

¹⁴⁰ *Id.* at *3.

management and retention rate.¹⁴¹ After an unsatisfactory meeting with her coach, plaintiff presented her complaints and recommendations to the school athletic director, who promised to investigate.¹⁴² Plaintiff was subsequently dismissed from the soccer team, although she continued to receive financial aid during her senior year.¹⁴³ Plaintiff filed suit, claiming that she had been removed from the team in retaliation for exercising her First Amendment right to free speech when she had expressed her concerns regarding the soccer coach's handling of internal team matters, including player attendance, retention, and study requirements.¹⁴⁴

In dismissing plaintiff's claims, the court appeared to apply the *Tinker* standard, without actually citing *Tinker*.¹⁴⁵ The court recognized that "a student-athlete's expression of dissatisfaction with her team or coach causes great harm to team unity and therefore constitutes a disruption and disturbance which school officials have a right to prevent."¹⁴⁶ Nor are schools and coaches "obligated to wait until a student-athlete's complaints would create disruption," or "required to actually demonstrate it was certain the complaints would create disruption."¹⁴⁷ Schools and their coaches need only show that "it was reasonable for them to forecast that the complaints at issue would disrupt the team. . . . [Q]uestions of whether disruption actually occurred or whether the school could actually prove disruption are not questions that prevent dismissal as a matter of law."¹⁴⁸ As long as a student-athlete's regular education is not impeded, she may continue her campaign against the coach, but she is not free to "continue to play the sport for that coach while actively working to undermine the coach's authority."¹⁴⁹ Because the coach and school administrators could reasonably have forecast that the plaintiff's criticisms of the coach's methods and decisions would disrupt the soccer team, they

¹⁴¹ *Id.*

¹⁴² *Id.* at *3-4.

¹⁴³ *Id.* at *5-6. The athletic department investigation of the women's soccer team did not reveal any improper conduct by the head coach. *Id.*

¹⁴⁴ *Id.* at *13-14.

¹⁴⁵ The court relied on a Sixth Circuit decision, *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007), which, as seen *infra*, applied the *Tinker* standard. See *Green*, 2011 U.S. Dist. LEXIS 114718, at *15-16.

¹⁴⁶ *Green*, 2011 U.S. Dist. LEXIS, at *15.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *15-16.

¹⁴⁹ *Id.* at *16.

were “well within their rights” to dismiss her from the team.¹⁵⁰

iv. *Marcum v. Dahl*¹⁵¹

In *Marcum v. Dahl*, plaintiffs received athletic scholarships and participated on the University of Oklahoma women’s basketball team during the 1977-78 school year.¹⁵² At some point during the basketball season, a split developed within the team, with the scholarship players disapproving of the head coach based on her lifestyle and “shoving aside” of a better and more competent assistant coach, to the detriment of the team.¹⁵³ The plaintiffs took their grievances to the athletic department administration during the season.¹⁵⁴ After the last game of the season, plaintiffs commented to the press that if the head coach returned the following year, they would not play.¹⁵⁵ The women’s athletic director subsequently notified plaintiffs that their scholarships would not be renewed for the upcoming year, based upon their attitude and behavior.¹⁵⁶ Plaintiffs filed suit, claiming the decision not to renew their scholarships was motivated by their constitutionally-protected statements to the press, and thus violated their First Amendment rights.¹⁵⁷

Unlike *Hysaw*, *Williams*, and *Sandy*, which all applied the *Tinker* test, the Tenth Circuit in this case analogized plaintiffs to government employees and applied the test set forth in *Pickering v. Board of Education of Township High School District 205*,¹⁵⁸ which concerns the discharge of public employees for exercising their First Amendment rights.¹⁵⁹ Under *Pickering*, the court upheld the district

¹⁵⁰ *Id.*

¹⁵¹ 658 F.2d 731 (10th Cir. 1981).

¹⁵² *Id.* at 733.

¹⁵³ *Id.* On the other hand, the non-scholarship players fully supported the head coach. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Marcum*, 658 F.2d at 733, 734.

¹⁵⁸ 391 U.S. 563 (1968).

¹⁵⁹ See *Marcum*, 658 F.2d at 734. The *Pickering* test requires a court to balance “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 765 (9th Cir. 2006) (quoting *Pickering*, 391 U.S. at 568). However, in order to warrant such balancing, the public employee’s speech must touch upon a matter of public concern. *Id.* at 766. “[A] public employer may constitutionally suppress an employee’s speech addressing ‘matters only of personal interest’—such as personnel matters pertaining to the speaker’s job performance or terms and conditions of employment—in order to promote an efficient

court's holding that plaintiffs' comments to the press were not constitutionally protected by the First Amendment because they "did not involve matters of public concern."¹⁶⁰ Rather, "[t]he problems created by the controversy between the scholarship and non-scholarship players were internal problems Such matters are not of general public concern and the plaintiffs' comments to the press did not invoke First Amendment protection."¹⁶¹ Plaintiffs' participation in the controversy and statements to the press resulted in disharmony and disruption among the team and provided a sufficient basis for the non-renewal of their scholarships.¹⁶² Thus, "the plaintiffs' First Amendment rights were not violated by the defendants' refusal to renew the plaintiffs' athletic scholarships."¹⁶³

v. Richard v. Perkins¹⁶⁴

In *Richard*, plaintiff received an athletic scholarship from the University of Kansas to participate as a horizontal jumper on the men's track team.¹⁶⁵ Following plaintiff's freshman year, his coach decided not to renew his scholarship based on an alleged act of disrespect.¹⁶⁶ Plaintiff appealed that decision and the school reversed the coach's decision and reinstated plaintiff's scholarship for the upcoming school year.¹⁶⁷ However, prior to plaintiff's sophomore season, his coach excluded him from the team picture, expelled him from the team, and barred him from using the team's training facilities.¹⁶⁸ Plaintiff alleged that his successful appeal of the initial non-renewal

workplace and the effective delivery of public services." *Id.* (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)). Only employee speech touching on matters of public concern is entitled to First Amendment protection. *Id.* In light of the uncertainty over whether a college student-athlete constitutes a university employee, several cases and commentators have criticized the application of the *Pickering* test to the unique setting of college athletics. See e.g., *Pinard*, 467 F.3d at 766 n.16 (finding the relationship between students and public school officials insufficiently similar to that between a government employer and employee to justify imposition of the *Pickering* test); *Outspoken*, *supra* note 36, at 541; but see *Lowery v. Euverard*, 497 F.3d 584, 597 (6th Cir. 2007) (analogizing the greater restrictions imposed on student-athletes to the greater restrictions imposed on government employees and determining that "legal principles from the government employment context are relevant to the instant case").

¹⁶⁰ *Marcum*, 658 F.2d at 734.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 734–35.

¹⁶⁴ 373 F. Supp. 2d 1211 (D. Kan. 2005).

¹⁶⁵ *Id.* at 1215.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

decision constituted an exercise of his First Amendment rights, and his subsequent expulsion constituted retaliation for this constitutionally-protected conduct in violation of the First Amendment.¹⁶⁹

Unlike *Marcum*, the court declined to apply the *Pickering* test, since it did not consider plaintiff, as a student-athlete, to be an employee of defendants.¹⁷⁰ Instead, the court applied the test set forth in *Worrell v. Henry*¹⁷¹ for dealing with First Amendment retaliation claims.¹⁷² Pursuant to the *Worrell* test, “plaintiff must allege that (1) he engaged in constitutionally protected activity; (2) defendants caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) defendants’ action was substantially motivated by his exercise of constitutionally protected conduct.”¹⁷³

Plaintiff failed to establish the first prong of the analysis. While free speech is clearly a constitutionally-protected right, plaintiff had to “show that his speech or petition touched upon matters of public concern.”¹⁷⁴ Plaintiff’s appeal of the decision not to renew his scholarship merely sought redress for his private rights.¹⁷⁵ Therefore, because plaintiff was not engaged in a constitutionally-protected activity, he could not state a First Amendment retaliation claim, and defendants were entitled to judgment on the pleadings.¹⁷⁶

B. Freedom of Speech in the Context of Interscholastic Athletics

Because the regulation of speech by intercollegiate student-athletes may very well be subject to a different standard than the regulation of speech by interscholastic student-athletes, *see supra* at 12-16, cases arising in the high school context may be of limited precedential value to situations such as the one at Missouri.¹⁷⁷ Still, because the results of these cases tend to be consistent with the college cases in upholding “a school’s right to prohibit and punish speech that causes dissension or disruption on the team,” they may offer some guidance

¹⁶⁹ *Id.* at 1215–16.

¹⁷⁰ *Richard*, 373 F. Supp. 2d at 1217. None of the parties alleged that plaintiff’s scholarship contract with the university established an employment relationship. *Id.* at 1217 n.2.

¹⁷¹ 219 F.3d 1197 (10th Cir. 2000).

¹⁷² *Richard*, 373 F. Supp. 2d at 1217.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See Tinkering with Success, supra* note 36, at 53–54.

on the subject.¹⁷⁸ Several of the leading high school cases are discussed below.

1. *Boyd v. Bd. of Dirs. of McGehee Sch. Dist. No. 17*¹⁷⁹

In *Boyd*, twenty-five African-American high school football players walked out of a pep rally and refused to participate in the game scheduled for that night in protest of an act of racial discrimination in the selection of the school's homecoming queen.¹⁸⁰ The white head football coach had allegedly manipulated the election so that a white candidate, rather than an African-American candidate, won.¹⁸¹ The players were subsequently suspended from participating on the football team for the remainder of the season.¹⁸² One of the suspended players subsequently brought a claim under 42 U.S.C. § 1983, claiming that his suspension constituted an infringement of his First Amendment right to freedom of expression.¹⁸³ The defendants countered that plaintiff had not been suspended for exercising his First Amendment rights, but rather for the violation of an unwritten team rule mandating the suspension of any player who missed a game or practice without good cause of proper excuse.¹⁸⁴

The court applied *Tinker's* substantial disruption standard without citing *Tinker* itself.¹⁸⁵ The court found that plaintiff and his African-American teammates "had reasonable grounds to believe" that the coach had purposely manipulated the election for homecoming queen in order to preclude the African-American candidate from winning, based on her race and color.¹⁸⁶ After appealing unsuccessfully to both the coach and school board, "the black players were left without any recourse other than what Americans, from the very inception of this Republic, regard as fundamental and basic in a democracy, namely, 'freedom of expression,' when peaceful and in good order,

¹⁷⁸ See *Outspoken*, *supra* note 36, at 545 n.199.

¹⁷⁹ 612 F. Supp. 86 (E.D. Ark. 1985).

¹⁸⁰ *Id.* at 89.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 88, 89. Another suspended player later intervened in the action as well. *Id.* at 90 n.4.

¹⁸⁴ *Id.* at 89–90.

¹⁸⁵ *Boyd*, 612 F. Supp. at 92. Instead, the court relied on *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), a Fifth Circuit decision itself quoted in *Tinker*. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (quoting *Burnside*, 363 F.2d at 749); *Boyd*, 612 F. Supp. at 92 (quoting same language from *Burnside* quoted in *Tinker*).

¹⁸⁶ *Boyd*, 612 F. Supp. at 91.

to communicate views on questions of group interest.”¹⁸⁷ The players’ actions in walking out of the pep rally and refusing to participate in a scheduled game were “without any substantial intrusion of the work and discipline of the school.”¹⁸⁸

Moreover, the court refused to accord the coach’s unwritten team rule requiring suspension of players who missed practices or games without good cause or excuse precedence “over a student’s right of free expression.”¹⁸⁹ Such a subjective policy “can neither frustrate nor chill the First Amendment rights of students. . . . Peaceful protest by students . . . may not be contingent upon the controlled will of the head coach.”¹⁹⁰ Thus, plaintiff had established that his conduct was constitutionally protected and the motivating factor in his suspension from the team.¹⁹¹

2. *Seamons v. Snow*¹⁹²

In this case, the plaintiff football player was assaulted by five teammates in the locker room in some sort of hazing incident.¹⁹³ After plaintiff reported the incident to school administrators and other authorities, the football coach accused him of “betraying the team” and demanded that plaintiff apologize to the team.¹⁹⁴ When plaintiff refused to apologize, the coach dismissed him from the team.¹⁹⁵ Plaintiff sued, claiming the school defendants violated his First Amendment right to freedom of speech by removing him from the team “because he refused to apologize for informing authorities of the incident.”¹⁹⁶

In reversing the district court’s dismissal of the First Amendment claim, the Tenth Circuit applied the *Tinker* standard.¹⁹⁷ The court found plaintiff’s speech “responsibly tailored to the audience of school administrators, coaches, family and participants who needed

¹⁸⁷ *Id.* at 92.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 92–93.

¹⁹¹ *Id.* at 92. The court awarded plaintiff nominal damages for deprivation of his federal rights, as well as punitive damages based on the coach’s “willful, malicious and conscious indifference” to plaintiff’s federal constitutional rights, as well as the coach’s “invidious racial discriminatory action toward the black players.” *Id.* at 94.

¹⁹² 84 F.3d 1226 (10th Cir. 1996).

¹⁹³ *Id.* at 1230.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1236.

¹⁹⁷ *Id.* at 1237.

to know about the incident.”¹⁹⁸ Plaintiff’s speech “neither disrupted classwork nor invaded the rights of other students.”¹⁹⁹ There was “no overriding school interest in denying [plaintiff] the ability to report physical assaults in the locker room.”²⁰⁰ At most, the school had shown “fear of a disturbance stemming from the disapproval associated with [plaintiff’s] unpopular viewpoint regarding hazing in the school’s locker rooms,” which, under *Tinker*, “is not a sufficient justification to punish [plaintiff’s] speech in these circumstances.”²⁰¹ Therefore, plaintiff had stated a claim for violation of his First Amendment rights.²⁰²

3. *Pinard v. Clatskanie Sch. Dist.* 6J²⁰³

In *Pinard*, the plaintiff basketball players found their head coach “verbally abusive and highly intimidating.”²⁰⁴ Following one game, the coach “told the players that if they wanted him to quit, they should say so, and he would resign.”²⁰⁵ The players took him up on his offer, typed up a petition requesting that the coach resign, and delivered it to him prior to the next game.²⁰⁶ The players subsequently refused to board the bus for that night’s away game.²⁰⁷ Although the coach resigned, the school permanently suspended the players from the team.²⁰⁸ Plaintiffs brought suit, alleging that they had been punished for complaining about the coach in violation of the First Amendment.²⁰⁹

After the district court granted summary judgment to defendants, the Ninth Circuit reversed in part, finding that the district court had improperly applied the *Pickering* test to plaintiffs’ speech, when *Tinker* constituted the proper standard for analyzing student speech.²¹⁰ Under *Tinker*, the district court should have focused on the effect of plaintiffs’ speech on school activities and the rights of

¹⁹⁸ *Seamons*, 84 F.3d at 1238.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 1237.

²⁰³ 467 F.3d 755 (9th Cir. 2006).

²⁰⁴ *Id.* at 760.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 760, 761.

²⁰⁷ *Id.* at 762.

²⁰⁸ *Id.*

²⁰⁹ *Pinard*, 467 F.3d at 763.

²¹⁰ *Id.* at 765.

others, not whether it touched upon a matter of public concern.²¹¹ Finding *Tinker* to be a flexible standard, the Ninth Circuit examined the totality of the circumstances, focusing not just on plaintiffs' actions, but also on all of the circumstances facing the defendant school officials at the time.²¹² This examination revealed that plaintiffs' petition "neither disrupted school activities nor impinged on the rights of other students."²¹³ Therefore, plaintiffs' speech was protected by the First Amendment.²¹⁴

The court, however, reached a different conclusion as to plaintiffs' refusal to board the bus for the away game. Even if that conduct constituted expressive speech, the court found that the boycott of the game "substantially disrupted and materially interfered with a school activity."²¹⁵ Specifically, the boycott materially disrupted the operation of the varsity basketball team.²¹⁶ The court noted that "school districts spend much time and money scheduling and hosting extracurricular activities—part of the school's educational program—which involve the coordination of multiple school officials, students, parents and often times volunteers, referees and bus drivers."²¹⁷ The boycotted game was a regularly scheduled out of town game and plaintiffs had refused to board the bus only a few hours before the game was to begin.²¹⁸ The last minute boycott by virtually every member of the team forced the school to either find replacement players or cancel the event.²¹⁹ Based on the totality of the circumstances, plaintiffs' conduct in refusing to board the bus interrupted school activities and intruded on the school's affairs.²²⁰ Under *Tinker*, the school defendants could properly discipline plaintiffs for this

²¹¹ *Id.* at 766–67 & n.18. Even if the plaintiffs' speech were required to touch upon a matter of public concern, the court found this standard met, since plaintiffs' criticisms of their coach "were related to various issues of 'concern to the community,' including the school's performance of its duties to supervise its teachers, monitor extracurricular activities and provide a safe and appropriate learning environment for its students." *Id.* at 767 n.18.

²¹² *Id.* at 768 (citing *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *Karp v. Becken*, 477 F.2d 171, 174 (9th Cir. 1973)).

²¹³ *Pinard*, 467 F.3d at 768.

²¹⁴ *Id.*

²¹⁵ *Id.* at 769.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Pinard*, 467 F.3d at 769–70. The school ultimately used junior varsity players in place of the boycotting varsity players, and lost the game by more than 50 points. *Id.* at 762.

²²⁰ *Id.* at 770.

disruptive expressive conduct.²²¹

4. Lowery v. Euverard²²²

Plaintiffs in this case were members of their high school football team who became dissatisfied with their coach's alleged verbal and physical abuse over the course of the season.²²³ Plaintiffs typed up a petition stating that they hated their coach and did not want to play for him, circulated the petition to other players to sign, and intended to present the petition to the school principal after the season in order to get the coach replaced.²²⁴ The coach, however, learned of the petition during the season, and attempted to question the players.²²⁵ When plaintiffs proved uncooperative in response to the coach's questioning, they were dismissed from the team and encouraged other players to leave with them.²²⁶ Plaintiffs sued, contending that their First Amendment rights were violated when they were dismissed from the team for circulating the petition.²²⁷

In reviewing the district court's denial of defendants' motion for summary judgment, the Sixth Circuit applied the *Tinker* test, but recognized that school officials do not have to wait for a disruption of school activities to actually occur before restricting student speech.²²⁸ Nor does *Tinker* require certainty that the disruption will occur; rather, "only that the forecast of substantial disruption be reasonable."²²⁹ Accordingly, defendants "were not obligated to wait until the petition substantially disrupted the team before acting, nor are they now required to demonstrate that it was certain that the petition would substantially disrupt the team."²³⁰ All they had to show was

²²¹ *Id.*

²²² 497 F.3d 584 (6th Cir. 2007).

²²³ *Id.* at 585. The coach allegedly "struck a player in the helmet, threw away college recruiting letters to disfavored players, humiliated and degraded players, used inappropriate language, and required a year-round conditioning program in violation of high school rules." *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 586.

²²⁶ *Id.*

²²⁷ *Id.* at 587.

²²⁸ *Lowery*, 497 F.3d at 591–92 ("*Tinker* does not require school officials to wait until the horse has left the barn before closing the door."); see also *Pinard*, 467 F.3d at 767 n.17 ("*Tinker* does not require school officials to wait until disruption or interference actually occurs before suppressing student speech...").

²²⁹ *Lowery*, 497 F.3d at 592.

²³⁰ *Id.* at 593.

that “it was reasonable for them to forecast that the petition would disrupt the team.”²³¹

The court determined that the defendants had made the required showing. The petition circulated by plaintiffs “was a direct challenge to [their coach’s] authority, and undermined his ability to lead the team.”²³² It also threatened team unity.²³³ Accordingly, “it was reasonable for Defendants to believe that the petition would disrupt the team, by eroding [the coach’s] authority and dividing players into opposing camps.”²³⁴ The court found this belief bolstered by plaintiffs’ insubordinate and disruptive acts when questioned about the petition.²³⁵ Because defendants reasonably forecasted that plaintiffs’ petition would cause substantial disruption to the football team, their speech was not protected under *Tinker* and defendants did not violate plaintiffs’ First Amendment rights by removing them from the team.²³⁶

II. APPLICATION OF PRECEDENTS TO MISSOURI SITUATION

Applying the legal background and relevant precedents to the situation at Missouri, it appears quite unlikely that the University of Missouri would have been able to penalize the football players for their boycott. Based on existing case law—particularly *Hysaw* and *Williams*—a court would likely analyze plaintiffs’ speech under the *Tinker* test, as opposed to the *Pickering* test,²³⁷ even though highly

²³¹ *Id.*

²³² *Id.* at 594.

²³³ *Id.*

²³⁴ *Id.* at 596.

²³⁵ *Lowery*, 497 F.3d at 596.

²³⁶ *Id.* The court concluded its analysis by observing that “*Tinker* does not . . . require coaches to surrender control of the team to players.” *Id.* at 601; *see also* *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 769, 772 (8th Cir. 2001) (upholding summary judgment for defendants on plaintiff girls’ basketball player’s First Amendment claim based on her dismissal from team for refusing to apologize for circulating letter to teammates asking them to unite in defiance of the coach).

²³⁷ Courts continue to struggle with the issue of whether student-athletes constitute employees of their schools. *See, e.g.,* *Berger v. Nat’l Collegiate Athletic Ass’n*, No. 1:14-cv-1710-WTL-MJD, slip op., at 18 (S.D. Ind. Feb. 16, 2016) (concluding that plaintiffs’ participation on their school’s athletic teams did not make them employees of the school for purposes of the Fair Labor Standards Act); *Nw. Univ.*, 362 N.L.R.B. No. 167, at 3 (Aug. 17, 2015) (declining to determine whether scholarship players constitute statutory employees). However, even if a court were to apply the *Pickering* test, the players’ speech here concerning race relations on campus would likely be construed as touching upon matters of public concern, rather than the internal team problems that justified restrictions on athletes’ speech in cases such as *Marcum*, and would therefore be protected. *See* *Marcum v. Dahl*, 658 F.2d 731, 734–35 (10th Cir. 1981).

persuasive reasons exist for subjecting the speech of college student-athletes to a more deferential analysis than that accorded high school athletes under *Tinker*.²³⁸ Accordingly, any discipline imposed on the Missouri football players for their speech must meet the *Tinker* standard *at a minimum*, and could be subjected to a standard more deferential to student speech. If the discipline could not survive even the *Tinker* standard, then there would be no reason to speculate whether it could survive some alternative standard more favorable to college students.

Given the reasons for the boycott, the Missouri situation seems more akin to the situations where the student-athletes' speech has "value beyond the individual speaker," and thus more likely to be constitutionally protected.²³⁹ The case most analogous to the present situation is *Hysaw*, which also involved a boycott of practice by football players in order to protest racial injustice. Key to the *Hysaw* court's holding was the deposition testimony by the head football coach which stated that absences from practice in order to protest racial mistreatment would be excused.²⁴⁰ The court reasoned that an absence sanctioned by the coaching staff could not be construed as materially disruptive or substantially interfering with the operation of the team under *Tinker*.²⁴¹

This consideration is even stronger at Missouri, where the head football coach, Gary Pinkel,²⁴² remained unequivocally supportive of his players throughout the entire process. The day after the players announced the boycott, Pinkel gave them his full backing, tweeting the following: "The Mizzou Family stands as one. We are united. We are behind our players. #ConcernedStudent1950 GP."²⁴³ At a

²³⁸ See *supra* pp. 12–16.

²³⁹ See *Outspoken*, *supra* note 36, at 545.

²⁴⁰ *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 946 (D. Kan. 1987).

²⁴¹ *Id.*

²⁴² Mere days after the players ended their boycott, Pinkel announced his resignation as head football coach due to health issues. *Gary Pinkel has lymphoma, is resigning from Missouri*, ESPN (Nov. 13, 2015), http://espn.go.com/college-football/story/_id/14122405/coach-gary-pinkel-resigning-missouri-tigers-health-reasons-cited. The current head football coach at Missouri is Barry Odom, who served as defensive coordinator for the team in 2015. Tod Palmer, *Barry Odom will succeed Gary Pinkel as Missouri's football coach*, KANSAS CITY STAR (Dec. 3, 2015), <http://www.kansascity.com/sports/college/sec/university-of-missouri/article47884155.html>.

²⁴³ Michael McLaughlin, *Missouri Football Coach Backs Away From Student Activists*, HUFFINGTON POST (Nov. 10, 2015), available at 2015 WLNR 33468030; Winsor, *supra* note 3; see also Maese & Babb, *supra* note 6. Pinkel included with his tweet a group photo of football players and coaches locked arm in arm. Maese & Babb, *supra* note 6. While Pinkel remained steadfast in his support of his players, he subsequently distanced himself from ConcernedStudent1950, the student activist group be-

news conference on Monday, November 9, 2015, Pinkel stated, “[The players] had tears in their eyes and asked if I would support them and I said I would—it’s about supporting my players when they needed me. I did the right thing and I would do it again.”²⁴⁴ The team itself maintained a united front, again making it difficult to see how the actions could cause a substantial disruption.²⁴⁵ Finally, the athletic department itself took a very deferential stance, releasing a statement that “[w]e must all come together with leaders from across our campus to tackle these challenging issues and we support our student-athletes’ right to do so.”²⁴⁶ In light of the above considerations, it is unlikely that a court would deem the players’ speech and conduct in boycotting practice likely to constitute a material and substantial disruption. Nor is there any evidence the players’ actions would infringe upon the rights of others under the narrow construction of this consideration set forth in *Hysaw*.²⁴⁷ The players’ speech would, therefore, be entitled to protection under the First Amendment, and they could not be removed or suspended from the team, have their scholarships terminated or not renewed, or otherwise be penalized by the school for exercising their constitutional rights.

A final issue is the proper scope of inquiry for purposes of finding a substantial disruption. Many of the cases speak in terms of whether the challenged speech had or was likely to cause a material disruption on the particular team of which the plaintiff was a member. For

hind the campus demonstrations. He claimed that the hashtag included with his tweet, which had suggested he was supportive of the group, had been wrongly inserted by the assistant who helps manage his Twitter account. See McLaughlin, *supra* note 243. Pinkel stated that he did not support the group, and refused to comment on President Wolfe’s resignation, maintaining that he had only acted to support his players. *Id.* (“This was strictly about me supporting my players and nothing else.”).

²⁴⁴ Ferner, *supra* note 1; McLaughlin, *supra* note 243.

²⁴⁵ This is in sharp contrast to the situation at Wyoming in *Williams*, where the plaintiffs had no support from any of the white players or coaches on the team. Kilgore, *supra* note 125. However, there did appear to be some cracks in the seemingly united front. An anonymous player informed ESPN on the second night of the boycott that the entire team was not, in fact, united over the decision to stop practicing. McMurphy, *supra* note 1. According to this player, “As much as we want to say everyone is united, half the team and coaches—black and white—are pissed... If we were 9-0, this wouldn’t be happening.” *Id.* The player continued, “Not everyone agrees with the decision [to stop all football activities]... Most people are pissed, including the black guys [on the team].” *Id.* (brackets in original); see also Cindy Boren, *Missouri player says many players, coaches don’t back boycott of practices*, WASH. POST (Nov. 9, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/11/09/missouri-player-says-many-players-coaches-dont-back-boycott-of-practices/>. If these assertions were in fact true, it would significantly increase the likelihood of a court finding a substantial disruption in the operation of the football team and permit the school to discipline the student-athletes under *Tinker*.

²⁴⁶ Maese & Babb, *supra* note 6.

²⁴⁷ See *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 946 (D. Kan. 1987).

instance, *Hysaw* and *Lowery* discussed whether the plaintiffs' speech caused a material disruption to their particular program.²⁴⁸ As discussed above, based upon the complete public support of the head coach and other players, as well as the deference shown by the athletic department, it is unlikely that the players' conduct constituted a material disruption of the Missouri football team.

On the other hand, *Williams* and *Pinard* speak in terms of the interruption and intrusion caused by plaintiffs' conduct on the activities and affairs of the school as a whole.²⁴⁹ Even if there was no disruption to the team itself, the boycott was part of a larger movement of campus-wide demonstrations, which one could argue caused a substantial disruption to the operations of the university as a whole. However, *Pinard* noted that the school defendants could not discipline the plaintiffs for their petition unless they could have "forecast substantial disruption of or material interference with school activities' as a result of the petition or complaints."²⁵⁰ Thus, it seems plausible that a causation standard may be read into the *Tinker* test. At least as to situations in which a disruption has actually occurred, student-athlete speech may only be punished if it, in fact, caused the disruption.²⁵¹ In this case, the campus-wide protests of the administration's response to the ongoing racial issues on campus were underway long before the players began their boycott. Thus, any material disruption to school activities was not a result of the players' speech.

In sum, even conceding that *Tinker* supplies the proper analytical framework, the Missouri football players' speech and conduct is likely protected under the First Amendment, since it is not reasonable to forecast a material disruption or substantial interference with either the operations of the team itself or the school under the circumstances of this case. Since the speech is protected even under the constitutional floor of *Tinker*, the school similarly would not be able to penalize the players under any even more deferential standard that may

²⁴⁸ See *id.* at 946; *Lowery v. Euverard*, 497 F.3d 584, 594 (6th Cir. 2007).

²⁴⁹ *Williams v. Eaton*, 443 F.2d 422, 431 n.6 (10th Cir. 1971); *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 770 (9th Cir. 2006).

²⁵⁰ *Pinard*, 467 F.3d at 764 (emphasis in original).

²⁵¹ Obviously, since schools do not have to wait for the disruption to occur, and may restrict speech under *Tinker* as long as it is reasonable to forecast a material disruption, *Lowery v. Euverard*, 497 F.3d 584, 592 (6th Cir. 2007), it may not always be feasible to conceive of causation in connection with *Tinker*. Even so, it appears difficult to reasonably forecast a boycott as causing a substantial disruption on campus when that substantial disruption is already underway.

be more appropriate to speech cases arising in the college setting.

III. FUTURE IMPLICATIONS

Finally, attention must be given to the implications of the Missouri situation on college sports in general, and—given its economic significance—college football in particular. Had the game against BYU been canceled, Missouri would have owed BYU \$1 million pursuant to the schools' contract.²⁵² But the significance of the players' actions resonates far beyond the economic impact of a single game. The campus demonstrations had been underway for some time. However, once the football players became involved, the momentum of the protests rapidly grew, and the school president resigned within two days.²⁵³ It makes sense that this should be so, given that the athletic department is the most powerful institution at the school,²⁵⁴ and the football team its most powerful sport.²⁵⁵

Nor are the Missouri players the only ones who have protested in recent years. In March 2015, University of Oklahoma football players walked out of spring practice and engaged in a silent march through campus after a video surfaced showing members of a university fraternity singing a song containing racial slurs.²⁵⁶ In 2013, football players at Grambling State University staged a weeklong boycott over a variety of issues, including rundown facilities, unhealthy locker room conditions, improperly cleaned uniforms, long bus trips to road games, and coaching changes.²⁵⁷ A majority of the players refused to board the bus to a road game against Jackson State

²⁵² Maese & Babb, *supra* note 6; George Schroeder, *How the Missouri football boycott could become a catalyst for more*, USA TODAY (Nov. 9, 2015), <http://www.usatoday.com/story/sports/ncaaf/2015/11/09/missouri-football-players-boycott-college-athlete-power-gary-pinkel-mack-rhoades/75489518>.

²⁵³ Schroeder, *supra* note 252.

²⁵⁴ The Missouri athletic department took in revenue of \$83.7 million in 2014, and made a \$3.5 million profit. Strachan, *supra* note 35.

²⁵⁵ *Id.*

²⁵⁶ Schroeder, *supra* note 252; Travis Waldron, *How The Mizzou Protests Demonstrate The Power of College Athletes*, HUFFINGTON POST (Nov. 10, 2015), http://www.huffingtonpost.com/entry/missouri-protests-college-athletes_us_5641fde6e4b0411d3072713d.

²⁵⁷ Othor Cain, *A United Front: Grambling State University football players send strong message*, MISS. LINK (Oct. 24, 2013), <http://themississippilink.com/wp-content/uploads/2012/01/October-24-2013.pdf>; *Jackson St. to pursue legal action*, ESPN, Oct. 23, 2013, http://espn.go.com/college-football/story/_/id/9864598/jackson-state-pursue-litigation-grambling-state-following-forfeit [hereinafter Jackson St.]; Associated Press, *SWAC to punish Grambling*, ESPN (Nov. 13, 2013), <http://espn.go.com/espn/print?id=9971404> [hereinafter SWAC].

University, forcing the school to forfeit.²⁵⁸ The players finally ended their boycott on the advice of their former head coach, who put them in contact with a local businessman who promised he would help fund updated facilities.²⁵⁹ The university president indicated that the players would face no repercussions for the boycott, as the national attention had helped publicize the school's funding plight.²⁶⁰ Even in the immediate aftermath of the Missouri protests, the men's basketball team at William Paterson University, a Division III school, walked off the court during pregame warmups—leaving their warmup shirts in a pile at the free throw line—to protest their long-time head coach being forced out by the school administration, resulting in a forfeit loss.²⁶¹

If the Missouri situation demonstrates anything, it is the power of student-athletes, particularly those in high profile sports, to affect social and political change on campus. In the aftermath of the boycott, Charles Harris, a sophomore defensive end on the Missouri football team, stated, "Let this be a testament to all of the athletes across the country that you do have power. It started with a few individuals on our team and look what it's become. Look where it's at right now. This is nationally known, and it started with just a few."²⁶² This power is based on the economic impact student-athletes have on their universities. Millions of dollars are invested in the labor of student-athletes.²⁶³ As student-athletes, the players themselves are unable to make money, "but they . . . have the ability to make sure the school doesn't either, should they refuse to play any given Saturday."²⁶⁴

²⁵⁸ Cain, *supra* note 257; *Jackson St.*, *supra* note 257. The canceled game was Jackson State's homecoming, and the school claimed Grambling State's failure to show up cost it and the city of Jackson millions of dollars. *Jackson St.*, *supra* note 257. The Southwestern Athletic Conference, of which both Grambling State and Jackson State are members, ultimately fined Grambling State an amount believed to be \$20,000, required Grambling State to pay Jackson State an undisclosed amount from its future distributions, and required Grambling State to play at Jackson State the next three years in a row. SWAC, *supra* note 257.

²⁵⁹ David Brandt, *Grambling Ends Boycott With No Regrets*, PITTSBURGH POST-GAZETTE (Oct. 22, 2013), available at 2013 WLNR 26490370.

²⁶⁰ Cain, *supra* note 257.

²⁶¹ Jerry Carino, *William Paterson players walk off court to support fired coach*, ASBURY PARK PRESS (Nov. 26, 2015), <http://www.app.com/story/sports/college/2015/11/24/william-paterson-players-walk-off-court-protest/76353268/>. Because Division III schools do not offer athletic scholarships, the players had no scholarships to lose by refusing to play, *id.*, although they still could have been suspended or dismissed from the team.

²⁶² Schroeder, *supra* note 252.

²⁶³ *Id.*

²⁶⁴ Strachan, *supra* note 35. Louis Moore, an associate professor of history at Grand Valley State Uni-

Given the power of intercollegiate student-athletes and the economic stakes involved, the Missouri boycott may very well become a catalyst for similar actions by other college teams.²⁶⁵ If this is the case, one of the key factors in deciding whether the players' speech is constitutionally protected will be the attitude of the coaching staff. As the court noted in *Hysaw*, it is hard to conceive how actions undertaken with the complete support of the coaches can cause a material disruption to the team.²⁶⁶ On the other hand, actions that do not have the support of the coaching staff are more likely to be reasonably forecast to cause a material disruption, and less likely to receive constitutional protection.

However, in further reflection of the true power of student-athletes, at least in revenue sports like football and basketball, coaches may have no realistic choice but to support their players should a substantial number of them choose to engage in social or political activism. Some coaches, like Coach Pinkel, may genuinely support their players. But even a coach that did not support his players' efforts would have to tread very lightly. Taking a stand in opposition to the players may cause a coach to lose current players to transfer, and, if the protest concerns racial issues like at Missouri, the coach could lose his ability to effectively recruit African-American players in the future, all of which could lead to diminished results and ultimately cost the coach his job. For a cautionary tale, one need look no further than the impact on the Wyoming football team in the aftermath of *Williams v. Eaton*. The school and coach may have won the litigation, but it proved to be a Pyrrhic victory. The football program lost its ability to recruit African-American players, the coach soon lost his job, and a once successful team spent decades mired in mediocrity.²⁶⁷

In sum, the Missouri situation has provided intercollegiate student-athletes a glimpse into their true power. As this Article has shown, intercollegiate student-athletes at state schools who advocate for social and political change on their particular campus or in the broader world will know that in doing so, their coaches and schools

versity agrees with this assessment, stating "So much is invested in [the athletes'] labor, we're talking millions of dollars. They have power." *Id.*

²⁶⁵ Schroeder, *supra* note 252. Indeed, in September 2015, before the Missouri boycott had even occurred, the commissioner of the Big XII Conference had indicated that he would not be surprised if intercollegiate student-athletes decided to strike in the near future. Waldron, *supra* note 256.

²⁶⁶ See *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 946 (D. Kan. 1987).

²⁶⁷ See Keeler, *supra* note 125; Kilgore, *supra* note 125.

are unlikely to be able to constitutionally penalize them for exercising their First Amendment rights to freedom of speech, unless, at a minimum, those officials can reasonably forecast a material disruption. Moreover, the student-athletes may recognize the reality that coaches and school administrators may not even be willing to attempt to impose such sanctions in light of the consequences it may have on the program in the future.

IV. CONCLUSION

The recent boycott by football players at the University of Missouri in protest of the school administration's failure to adequately respond to issues of campus racism is the latest and perhaps most-publicized incident in a long history of student-athletes exercising their constitutional right to express themselves on social and political issues. Among the issues discussed in the ensuing media firestorm were the power of student-athletes to bring about change on their campuses, as well as what student-athletes' growing self-awareness of this power may mean for the future of intercollegiate athletics. Lost in the background of this discussion, is whether a school or coach may penalize intercollegiate student-athletes for speaking out in this manner. Fortunately for the football players at Missouri, they had the complete support of their head coach. However, even if the university had sought to punish the student-athletes for their activity (perhaps along the lines of the bill proposed in the Missouri legislature), it is unlikely that such actions would withstand constitutional scrutiny. True, student-athletes are subject to greater restrictions on their speech than typical college students. But even under the constitutional floor provided by the *Tinker* test for analyzing the speech of high school students, the activity of the Missouri football players would likely be constitutionally protected in the absence of causing a material disruption. Certainly, then, the activity would be similarly protected under a more deferential standard that arguably should apply when analyzing the speech of college students vis-à-vis high school students. Knowledge of the legal framework may embolden intercollegiate student-athletes to continue to advocate for social and political change, knowing that their coaches and schools face significant constitutional hurdles in penalizing them for the exercise of their First Amendment rights, and may not even have the will to attempt such action.