Online Social Networks and Restrictions on College Athletes: Student Censorship?

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ONLINE SOCIAL NETWORKS AND RESTRICTIONS ON COLLEGE ATHLETES: STUDENT CENSORSHIP?

I. Introduction

Online social networks such as Facebook and Myspace allow members to communicate online, link themselves to friends, post photos, buy each other gifts, dedicate songs to each other, join social groups, and create a unique profile expressing their personal interests. But what happens when such an innovative, easily accessible network is used by college athletes in positions of leadership to showcase their social lives off the playing field?

In late 2005, University of Kentucky administration began using incriminating Facebook photos to convict its students of alcohol-related violations.¹ These investigative and disciplinary practices have caught on among thousands of colleges, universities, and even high schools across the world. In an attempt to alleviate the risk of losing their athletes as a result of such disciplinary proceedings, some athletic departments are finding ways to restrict or monitor student-athlete participation in online social networks.

In December 2005, Florida State administrators instructed coaches to randomly run Facebook searches on their student-athletes. The results shocked them into reform. Pictures of student-athletes attending parties where underage drinking was the theme and postings with reference to sex and partying were found on more than half the athletes' profiles. A meeting was held the following week, and athletes were given ten days to cleanse their profiles.²

Loyola University Chicago went further and completely banned its student-athletes from participation in Myspace and Facebook earlier that year, regardless of how clean their profiles appeared, citing as justification concerns over violations of their code of conduct resulting from statements and pictures available online.³

Kent State, DePaul University, and University of Minnesota have followed Loyola's lead and completely banned athletes from

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Facebook and Myspace, while others, such as University of Kentucky, and Baylor, have adopted a more lenient system, such as that of Florida State, to monitor student-athlete profiles and ensure usage of online networks in a proper manner.\footnote{Brady, supra note 2.}

Given the alarming number of participants belonging to these networks, over fifty million and growing by .6 percent daily,\footnote{http://midnightexcess.wordpress.com/2007/11/22/exercise-for-the-reader-facebook-member-stats/} there is a substantial amount of opposition to such restrictions. But do these restrictions, as alleged by some in opposition, rise to the level of student suppression running afoul to the First Amendment when implemented by state universities and public high schools?

This question requires an analysis of student-athletes, the First Amendment, and online social networks. This will begin with a discussion of student-athletes’ decreased expectations of privacy, as well as the institutions’ interests in the health, safety, and morals of its student-athletes. Next, the First Amendment should be defined and its interpretation explained so that we may see how it applies to Internet speech specifically. Then we will see what happens when student-athletes participate in Internet speech through online social networks by defining such networks and considering student-athletes’ right to free speech in order to determine whether a complete ban on participation results in student suppression in violation of the free speech guaranteed by the First Amendment of the United States Constitution.

II. STUDENT ATHLETES

Since athletic programs were introduced to high schools, colleges, and universities, student-athletes have held a unique position. This unique position is argued to justify additional monitoring of athletes’ behavior by administration in order to ensure athletes are fulfilling their contractual obligations and upholding the morals of the institution. These administrators argue that voluntary membership in an athletic program, usually involving some kind of contractual obligations by both parties, as well as athletes’ status as role models among their peers, justifies violating students’ fundamental rights to free speech and privacy.

The most effective argument advanced by institutions seeking to invade their athletes’ fundamental rights seems to be a justification based on the health, safety, and morals of those athletes, which is ar-
argued to require invasion in the form of monitoring athletes' behavior to ensure they don't endanger themselves or other athletes.

These justifications for privacy invasion will be considered in the following section, using *Vernonia School District 47J v. Acton.*

Vernonia involves a public grade school in Oregon, where Acton wished to play football but refused to consent to the random drug testing policy adopted by the school district to combat drug use by student-athletes and its effects on the educational environment, alleging intrusion upon his constitutionally protected right to privacy. These justifications and their analysis will then be carried over and applied to institutional invasions on free speech in later discussion.

A. Decreased Expectation of Privacy

Courts have held that public school children have lesser privacy expectations than the general population, as evidenced by medical examination and vaccinations requirements. Student-athletes, they have held, have even less legitimate privacy expectations, given their voluntary membership in extracurricular activities, as well as their status as role models among their school and community.

1. Voluntary Membership

By voluntarily choosing to participate in athletic programs, either by trying out or signing up for team membership, students voluntarily subject themselves to a higher degree of regulation than that imposed on the general student body. These athletes are then required to acquire adequate insurance coverage or sign a waiver thereof, maintain a minimum grade point average, and comply with any other rules of conduct embodied in their player agreement.

These *Vernonia* holdings came about as a result of the institutions' observations of a drug problem of epidemic proportions infesting its high schools and causing increased disciplinary actions, classroom disruptions, and disciplinary reports, as well as faculty observation of drug use or the glamorization of drugs and alcohol by the student body.

As a result of the perceived need for institutional reform in that case, District officials developed a drug-testing program in an effort to combat the chaos resulting from student rebellion fueled by drug use.

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7. *Id.* at 657.
8. *Id.*
9. *Id.*
10. *Id.* at 663.
The Student Athlete Drug Policy requires athletes to sign a form consenting to the testing, as well as written consent of the athletes' parents. Officials targeted athletes as leaders of the drug culture, expressing particular concern with the increased risk these individuals posed if using drugs. Before implementing the new policy, District officials held a parent input night, which generated unanimous approval.

The procedure adopted to randomly test student-athletes for drug use was administered on a weekly basis. All athletes' names were placed in a pool from which a supervised student would draw the names of ten percent to be tested on that same day, if possible. Those chosen would identify any prescription medications prior to urinalysis and provide a copy of the prescription or doctor authorization. They would then be taken to an empty locker room, accompanied by an adult monitor of the same sex. Males were then required to provide a sample at a urinal while fully clothed, with their back to the monitor who listens for normal sounds. Females were allowed to use an enclosed bathroom stall with the monitor outside listening for normal sounds.

Acton and his parents refused to sign the testing consent forms, arguing the policy violated their Fourth Amendment right against unreasonable searches and seizures. The Fourth Amendment provides that the Federal Government shall not violate "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." and extends to searches and seizures by state officers through the Fourteenth Amendment.

The court held in *Skinner v. Railway Labor Executives' Assn.* that state-compelled collection and testing of urine constitutes a search subject to the requirements of the Fourth Amendment. The reasonableness of the governmental search, which is the ultimate measure of constitutionality, is judged by balancing the governmental intrusion on individuals' Fourth Amendment rights against governmental promotion of legitimate interests.

11. *Id.* at 650.
12. *Id.* at 649.
13. *Id.* at 650.
14. *Id.*
15. *Id.* at 651.
17. *Id.*
19. *Id.* at 617.
**Vernonia** involved a warrantless search, void of the typically necessary probable cause under the Warrant Clause of the Fourth Amendment. In order to justify such a search, the government must demonstrate a special need, wherein the requirement of a warrant would "unduly interfere with the swift and informal disciplinary procedures needed, and strict adherence to the requirement that searches be based upon probable cause would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools." The court has upheld suspicionless searches and seizures to conduct drug testing in a number of different "special needs" situations, including drug testing of railroad personnel involved in train accidents, random drug testing of federal customs officers who carry arms or are involved in drug interdiction, to maintain automobile checkpoints looking for illegal immigrants and contraband, and drunk drivers.

In evaluating the policy's constitutionality, the nature of the privacy interest intruded upon is the first factor for consideration. Because the students subject to the policy were children committed to the temporary custody of the State as public schoolmaster, the court in **Vernonia** held unemancipated minors lack some fundamental rights as subject to the control of their parents or guardians. The educational environment requires close supervision of schoolchildren, in addition to the enforcement of rules regulating schoolchildren's conduct, even if that equates to permissible adult conduct.

The degree of governmental intrusion in **Vernonia** depended on the manner in which the urinalysis was collected and since this case involved no less privacy than the amount typically encountered in public restrooms, the privacy concerns were viewed as negligible. Furthermore, the locker room in which student-athletes suit up is far less private than a traditional public restroom, with no individual dressing rooms, no curtains or separating partitions between showers, and an inherent element of communal undress.

22. Id. at 651 (quoting **New Jersey v. T.L.O.**, 469 U.S. 325, 340-41 (1985)).
23. Id. at 653 (quoting **Skinner**, supra, at 617).
24. Id. (quoting **Treasury Employees v. Von Raab**, 489 U.S. 656, 665 (1989)).
25. Id. (quoting **United States v. Martinez-Fuerte**, 428 U.S. 543, at 560-561 (1976)).
26. Id. (quoting **Michigan Dept. of State Police v. Sitz**, 496 U.S. 444, 452 (1990)).
27. **Vernonia**, supra, at 652.
29. **Vernonia**, supra, at 647.
30. Id. at 657.
The Actons further alleged the policy at issue was more intrusive than the purely physical aspect by requiring student-athletes to identify in advance of testing any prescription medications they were taking. The court previously addressed this issue in *Skinner*, holding that requiring advance disclosure of medications is not a significant invasion of privacy.\(^{31}\) The Actons distinguished their situation from *Skinner*, arguing that disclosure to teachers and coaches, those who know the student personally, is a greater invasion of privacy than the situation in *Skinner*, where disclosure went only to medical personnel collecting the sample.\(^{32}\)

The general authorization form said the information would be released to the Vernonia School District and to the parents or guardians of the student and nowhere required a school official to take medical information from the student, though that was the usual practice.\(^{33}\) Furthermore, the court held that if medication was to be disclosed, confidential procedures could be taken in providing the doctor’s authorization to the medical personnel testing the urinalysis.\(^{34}\) In light of these procedures, the court held the invasion of privacy at issue was not significant.

2. **Student-Athletes as Role Models**

The court in *Vernonia* supported the District’s suspicionless searches based, in part, on the status of student-athletes as role models, reasoning that the drug problem fueled by athletes would be effectively addressed by making sure athletes do not use drugs.\(^{35}\) The Actons argued less intrusive means were available, particularly testing based on individualized suspicion of drug use, but the court refused to declare that only the least intrusive means available would survive the reasonableness test set forth under the Fourth Amendment.\(^{36}\)

The court reasoned that the alternative suggested by the Actons would impair other policies important to the institution, such as parental support of the policy in place at the time, risk of arbitrary testing imposed on troublesome students, the expense of defending law suits alleging arbitrary imposition, and adding the new function of spotting and reporting suspected drug abuse to ill-prepared teachers.\(^{37}\)

\(^{31}\) Id. at 659 (quoting *Skinner*, supra, at 626.)

\(^{32}\) Id. at 659.

\(^{33}\) Id. at 660.

\(^{34}\) Id.

\(^{35}\) Id. at 663.

\(^{36}\) *Skinner*, supra, at 629.

\(^{37}\) *Vernonia*, supra, at 664.
3. Institutions' Interests in the Health, Safety, and Morals of Their Athletes

The second factor for consideration in evaluating the constitutionality of the Vernonia policy was the nature and immediacy of the governmental concern and the efficacy of the means used to meet it. Compelling interests have been recognized in cases of preventing railway accidents, and ensuring fitness of customs officials to handle firearms and interdict drugs. In the absence of individualized suspicion, Vernonia must demonstrate a compelling need for the program, argued in this case to be deterring drug use.

Evidence of this compelling need was presented in the form of the effects of drug use in a student's school years when the physical, psychological, and addictive effects on the individual are the most severe, and the entire student body, faculty, and educational process is disrupted. Furthermore, for athletes in particular, impairment of judgment, slowed reaction times, lessened perceptions of pain, and physical responses to specific drugs such as amphetamines, marijuana, and cocaine, pose substantial physical risks to student-athletes.

B. Drug Testing for College Athletes

Drug testing for college athletes pose a different invasion, since the students in attendance at the institution seeking to supervise them and thereby intrude upon their fundamental right of privacy, are not children, but free adults. Without the justification of authorities acting in loco parentis, with the power and duty to "inculcate the habits and manners of civility," institutions seeking to intrude upon fundamental rights must rely on a different legal relationship.

For public institutions, the Colorado Supreme Court held random, suspicionless drug testing of student-athletes violated the Fourth Amendment and the Colorado Constitution. The University of Colorado applied the "special needs" analysis set forth in Skinner, to defend its program, pointing to the diminished expectation of privacy for student-athletes, including the regulation of off-campus behavior.

38. Id. at 660.
39. Id. at 661 (quoting Skinner, supra, at 628).
40. Id. at 661 (quoting Von Raab, supra, at 670).
41. Id. at 661.
42. Id. at 661.
43. Id. at 662.
44. Id. at 665 (quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, at 681 (1986)).
They further asserted their interest in promoting fair competition and detection of drug abuse to outweigh the intrusion, but the court refused to characterize student-athletics as a pervasively regulated industry to find such a diminished expectation since prohibited participation could jeopardize scholarships and injure future coaching careers of student-athletes.\(^{46}\)

For private institutions, the California Supreme Court held in *Hill v. National Collegiate Athletic Assn.*\(^{47}\) that the NCAA drug testing program for college athletes at Stanford, requiring a urine sample be provided in the presence of a same sex monitor, did not violate the athletes’ right of privacy under the California Constitution due to both a diminished expectation of privacy, demonstrated by the close regulation of student-athletes’ physical fitness and bodily condition, as well as interests in integrity, health, and safety.\(^{48}\) The court distinguished itself from *Derdeyn* based on their private nature, stating “the pervasive presence of coercive government power in basic areas of human life typically pose greater dangers to the freedoms of citizenry than action by private persons.”\(^{49}\)

### III. Free Speech

The First Amendment provides that “Congress shall make no law respecting an establishment of religion or prohibiting the exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”\(^{50}\) Speech is of special value in the educational system, as it encourages diverse thoughts and the marketplace of ideas.

In this section, we will look at how the First amendment is interpreted in the school setting, and then look to its application to speech occurring on the Internet to determine whether a ban on athletes’ participation in online social networks by institutional officials violates the Free Speech Clause of the First Amendment.

#### A. The First Amendment Interpreted and Applied

The First Amendment prevents government from proscribing speech because of disapproval of the ideas expressed.\(^{51}\) But the right

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\(^{46}\) Id. at 959.

\(^{47}\) 865 P.2d 633 (1994).

\(^{48}\) Id. at 637.

\(^{49}\) Id. at 656.

\(^{50}\) U.S. Const. amend. I.

\(^{51}\) Id.
of freedom of expression is not absolute at all times and under all circumstances; speech can be regulated if it is likely to inflict unacceptable harm, including fighting words, types of defamatory speech, and true threats. Courts in First Amendment cases are typically required to consider and balance the constitutional right of the student with the preservation of order and a proper educational environment.

In order to prohibit speech and punish a student for speech, the school must sustain its burden of establishing that the student speech materially disrupts class work, creates substantial disorder, invades the right of others, or it is reasonably foreseeable that the speech will do so. Speech communicated on-campus requires consideration of several factors, including the form of speech, the effect of the speech, the setting in which the speech is communicated, and whether the speech is part of a school-sponsored expressive activity.

The Supreme Court has expanded First Amendment protections against content and viewpoint regulation, as well as created and expanded a series of doctrines permitting the government to regulate speech incidentally. The Court has permitted the government to regulate certain categories of speech in order to control the "secondary effects" of that speech, created an exception to general content-regulation rules according to which the government may restrict (or prohibit altogether) speech on government property, speech by government employees, or speech by those accepting government funds, allowed local communities to prohibit speech of a sexual nature based on sexual mores significantly more repressive than those of the urban communities that define the standard for sexual behavior in much of the country, and devised a standard for regulating the time, place, and manner of otherwise protected speech.

Furthermore, certain types of speech can be regulated if likely to inflict unacceptable harm and are categorized as unprotected

52. Id.
53. Id.
54. Id.
55. Id.
57. Id. at 183 (quoting Renton v. Playtime Theatres, 475 U.S. 41 (1986)).
58. Id. at 183 (quoting International Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992)).
59. Id. at 184 (quoting Miller v. California, 413 U.S. 15 (1973)).
60. Id. at 184 (quoting Ward v. Rock Against Racism, 491 U.S. 781 (1989)).
speech. Unprotected speech includes fighting words, obscenity, certain types of defamatory speech, and true threats.

One of the often-argued secondary effects of speech otherwise protected is the immediate incitement of illegal conduct, as was the case in Brandenburg v. Ohio. In that case, the court held where a statement amounts to nothing more than advocacy of illegal action at some indefinite future time, it is protected by the First Amendment as it was not an immediate incitement.

Another consideration in determining whether speech can legally be regulated is whether there was a true threat made through such speech, as was the case in J.S. v. Bethlehem Area School District. That case involved an eighth grade student who created a website, entitled “Teacher Sux,” on his home computer and posted it on the Internet.

While the website contained a page referring to the student’s algebra teacher captioned “Why Should She Die,” included a request for donations to pay for a hitman, and caused the teacher to fear for her life, resulting in stress, anxiety, loss of appetite, loss of sleep, loss of weight, loss of well being, short-term memory loss, inability to leave her house, headaches, and inability to return to school, the court held statements made by J.S. did not constitute a true threat.

The standard applied by the court in determining whether the statements constituted a true threat, developed in Lovell v. Poway Unified School District, was whether a reasonable person in the student’s position would foresee that the statement would be interpreted as a serious expression of intent to harm or assault.

So where does the speech made available through online social networks fit in? Can it be restricted under any of these doctrines? Can all athletes’ speech be restricted as a result of one of their expressions fitting into a category of unprotected speech? These questions require an analysis of the secondary effects resulting from the kind of speech communicated by student-athletes over Facebook and Myspace. The secondary effects alleged by most institutions concern athletes’ status

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62. Id. at 855 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942)).
63. Id. at 854 (quoting Miller, supra, at 93).
64. Id. at 854 (quoting New York Times v. Sullivan, 376 U.S. 254 (1964)).
65. Id. at 854 (quoting Watts v. United States, 394 U.S. 705 (1969)).
67. Id. at 450.
68. J.S., 807 A.2d at 850-51.
69. Id. at 870.
70. 90 F.3d. 367 (1996).
71. J.S., supra note 61, at 858 (quoting Lovell, supra note 70, at 372).
as role models. Institutional administrators argue that when other students view an athlete’s profile and see hints of drug and alcohol abuse, or sexually explicit content, the entire institution suffers as a result of poor reputation. But a decline in the morals of the student population does not rise to the level of secondary effects justifying any limitation on student speech.

May the government prohibit the speech because it takes place on governmental property, is made by government employees, or made by those accepting government funds? Because many athletes receive federal funds as part of their scholarship, this question requires further consideration. The Court in *Rust v. Sullivan*\(^72\) upheld restrictions on speech by those accepting federal funds.\(^73\)

The challenged statute in *Sullivan* prohibited recipients of government funds from engaging in abortion counseling, referral, and provision of information regarding abortion as a method of family planning.\(^74\) The Supreme Court held that the statute did not violate the First Amendment free speech rights of recipients, their staffs, or their patients by impermissibly imposing viewpoint-discriminatory conditions on government subsidies because the government, in issuing regulations, did not discriminate on the basis of viewpoint, but simply chose to fund one activity to the exclusion of another.\(^75\) Furthermore, the regulations were implemented to ensure that appropriated funds were not used for activities, including speech, that are outside the scope of the federal program.\(^76\)

Does this holding extend to a public university’s restrictions on student-athletes’ speech on Myspace and Facebook based on scholarships awarded to these individuals? It seems that such institutions may be successful in making such an argument, but what about those individuals receiving scholarships for academics or other reasons? Do they have to be censored as well, or can the institution make an argument that only the funds initially awarded to athletes are better used by others in activities within the scope of such a scholarship program?

Is the speech at issue of a sexual nature, requiring prohibition by local communities based on sexual mores? The majority of cases dealing with sexually explicit speech concern material of a much more obscene nature than anything allowed on Facebook or Myspace. Since these sites have their own filtering devices in order to comply with

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\(^{73}\) *Id.* at 173.
\(^{74}\) *Id.* at 176.
\(^{75}\) *Id.* at 176.
\(^{76}\) *Id.* at 176.
Internet obscenity laws they would not likely offend the average person, applying contemporary community standards.\textsuperscript{77} Finally, is the kind of speech taking place on these online social networks likely to inflict unacceptable harm? While it is possible that some of that speech may fit into the category of fighting words, defined as those inherently likely to provoke violent reaction,\textsuperscript{78} defamation, obscenity, or even a true threat, courts have repeatedly held, in cases involving speech suppression, that the freedom of expression of all may not be limited based on a finding of unprotected speech by some. Such a prohibition is over-inclusive by regulating more than those it seeks to regulate, which has repeatedly been struck down as unconstitutional by courts.

\textbf{B. Internet Speech}

Since the advent of the Internet, questions have been raised as to appropriate speech therein, especially since use of the Internet has become so common among children. The question often raised is whether the advent of the Internet changes First Amendment analysis in favor of greater restrictions on the content of antisocial speech, specifically that antisocial speech that encourages illegal conduct. Those advocating increased limitations point to cases involving violent acts learned through the Internet, crimes facilitated by contact through chatrooms or on sites such as Facebook and Myspace, the dissemination of information regarding the use or manufacturing of destructive devices, and, with respect to college athletes, encouragement of underage drinking.

But the standard of immediacy is the same for Internet speech as it is for that spoken in public protests, as in \textit{Brandenburg v. Ohio}.\textsuperscript{79} The speech, whether political in nature or not, must constitute an immediate incitement of illegal conduct, not merely at some indefinite future time.\textsuperscript{80}

It is easy to see why some concern exists as to the availability and limited restrictions on access to websites containing information regarding violent or even terrorist acts. In order to obtain the Terrorist's Handbook and learn how to make and use bombs that could kill thousands of people, one need only spend a few minutes waiting for the contents to download. Proponents of online speech regulation ar-

\textsuperscript{77} \textit{Miller, supra} note 59, at 19.
\textsuperscript{78} \textit{Chaplinski, supra} note 62, at 582.
\textsuperscript{79} 395 U.S. 444.
\textsuperscript{80} \textit{Id.} at 450.
gue the rise in Internet use directly correlates with the increasing number of explosive devises found.  

To justify regulations on Internet communication, proponents point to the increasing dangers posed as the communications media become more democratic, allowing individuals and groups to circumvent traditional gatekeepers in disseminating and obtaining dangerous information. But the argument in favor of restricting this kind of speech cannot rest on the impossible assumption that these dangerous ideas can be eliminated.

The government has consistently rejected such an approach, along with its justification, reasoning that the democratic concept of virtually unconstrained free speech, as articulated by Holmes and Brandeis depends on rational self-constraint, a product of a system allowing individuals the right to decide personally what information to endorse and renounce.

Terrorism aside, there are a number of other sites argued to foster illegal acts. The Simon Wiesenthal Center has advocated stricter scrutiny of hate speech on the Internet, pointing to the proliferation of sites run by white supremacist groups. While the United States is still reluctant to abandon our democratic conception of free speech without a compelling reason, governments in countries with no First Amendment protections have the legal authority to shut down these sites under general hate speech laws, and Germany and France have made the providers of Internet service subject to prosecution if they provide service to hate speech sites.

But the nature of the speech has not changed merely by placing it on the Internet. The increase in transmission of such information more easily, and to more people, can only justify increasing restrictions on speech over the Internet if this ease of communication created conditions placing cyber speech outside the factual context in which First Amendment protections have been applied.

The government has made many attempts to zone cyber speech in order to protect individuals against indecent communications, as was the case in *Reno v. ACLU.* The Child Decency Act at issue prohib-

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81. Gey, supra note 56, at 186.
82. Id. at 188-89.
83. Id. at 188 (quoting Whitney v. California, 274 U.S. 357, 376-77 (1927)).
84. Id. at 188 (quoting Mark Mueller, Hate Groups Spewing Venom on the Net, Boston Herald, Sept. 15, 1996, at 1).
85. Id. at 188 (quoting Elizabeth G. Olson, As Hate Spills Onto the Web: A Struggle Over Whether, and How, to Control It, N.Y. Times, Nov. 24, 1997, at D11).
86. Id. at 188.
ited the transmission of patently offensive or indecent communications over the Internet. The Court held this Act to be unconstitutional as a violation of free speech, but the concurring opinion argued that the underlying intent to create adult zones on the Internet can be constitutionally sound, if adults are still able to obtain the regulated speech through gateway technology using adult verification numbers or credit cards to access such sites, as well as tagging websites containing regulated speech.

So do adult students need to be protected from indecent sexual comments posted on online social networks? Do photos of underage partying incite immediate illegal conduct? Given the strict scrutiny applied in previous cases, one can definitively say no. So how is it that higher learning institutions can restrict their student-athletes’ access to communication through these sites?

IV. When Student-Athletes Engage in Internet Speech

Sites like Facebook and Myspace have hundreds of millions of users globally. Many of these users are college students. The main function of these networks is communication, allowing users to message each other through instant messaging, traditional email, and bulletin postings. This section will analyze online social networks and determine whether student-athlete participation can constitutionally be banned by institutional administrators.

A. Online Social Networks

Myspace and Facebook are the two most frequently used online social networks. Online social networks are collections of personal pages, created by individual users who post information about themselves. These individual users are the only persons with access to determine what information will be posted on their profile. Individual profiles on Myspace can be viewed by the public as a default, while Facebook limits viewers to those within the individuals’ network. Individuals using either network have the option of limiting their privacy settings to only those they accept as friends.

When users register, they must agree to the site’s terms of service and privacy policies, including how and when the sites may collect in-

88. Id. at 846.
89. Id. at 886-91 (O’Connor, J., concurring).
formation, how the sites track usage, and how they use the information collected from individual profiles. These policies must be accepted by the user attempting to register before they can gain access to the networks.

Privacy issues arise from these networks' default settings. In the school setting, parents and students are concerned with the increase in disciplinary actions resulting from material posted on individual students' profiles, claiming violations of privacy when the information was posted off-campus. But do student-athletes' decreased expectations in privacy authorize administration to view their private profiles, if they have increased privacy settings, and use the information obtained through such a search to limit or prohibit student-athlete speech therein?

In October 2005, Penn State University's football team won a dramatic game against Ohio State University, resulting in students rushing onto the field, creating a chaotic near-riot. University police officers were unable to make more than two arrests at the time of the incident, but later used pictures posted by students on Facebook to identify and refer around fifty more alleged offenders to the appropriate authorities for punishment.92

As discussed above, university police are using these websites to charge students with underage drinking and noise violations at George Washington University, Northern Kentucky University, and the University of Kentucky.93 In determining whether these privacy invasions are constitutional, courts have acknowledged the special problems presented by Internet communication, holding that analogies to other physical objects, such as dresser drawers or file cabinets, do not make sense in light of search and seizure laws applied to such communications.94

In considering the reasonableness of a user's expectation of privacy, the court will first consider whether the individual had an actual expectation of privacy. The ultimate question is whether the individual has shown that he seeks to preserve something as private.95 Much debate exists as to whether posting information on what has been compared to a bulletin board in terms of restricted access by third parties, even if additional privacy measures have been taken, is sufficiently private to obtain constitutional protection when the individual

94. Id. at 101 (quoting United States v. Walser, 275 F.3d 981, 986 (2001)).
has chosen to publicize such information. Furthermore, the Supreme Court has consistently held that an individual has no legitimate expectation of privacy in information turned over to a third person.

The next question in determining whether a privacy interest exists is whether society is prepared to recognize an expectation of privacy in that material. Because online social networks are such a new media, originating less than five years ago, little public opinion as to the privacy interest expected therein is available since the Supreme Court has yet to deal with this issue.

But even if Facebook and Myspace communication by individuals is not afforded privacy, aren't those accessing such information afforded the right to receive information, consistent with the First Amendment as articulated in Bd. of Educ. V. Pico? Furthermore, isn't that right enhanced in the privacy of one's home as in the case of Stanley v. Georgia? The court in Stanley emphasized that a man in his own home has the right to read or watch whatever he chooses, without the State interfering. Under this reasoning, schools would not have the authority to regulate what their student-athletes view or read while accessing online social networks from their home computers.

**B. Student-Athlete Participation**

We again return to the question of how it is that, given the collection of constitutional analysis discussed in the previous sections, institutions can restrict student-athlete participation in online social networks such as Myspace and Facebook. Most do so through their initial agreement with athletes signing on to play at their institution. Others do so unchallenged. For those agreeing to restrictions, there is no basis for challenging the institution since they freely gave up that right as consideration for the privilege to play, a concept firmly grounded in the principles of contract law.

But what if such a restriction came about after a player signed on, without such a condition agreed to in their contract? The contract would have to be modified and, if agreed to by the athlete, no issue would be raised. If the athlete refused to the modified agreement, the

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96. Hodge, supra note 93, at 101.
97. Id. at 104.
98. Katz, supra note 95, at 351.
99. Kevin Coughlin, The User Friendly Web Site Teens Can't Resist: Myspace.com is Fast Becoming the Online World's Place to Be, Star Ledger, December 5, 2005.
100. Hodge, supra note 93, at 104.
103. Id. at 565.
institution could possibly take away his or her privilege to play under another contract provision. If another provision could not be found, and the institution felt strongly enough to pursue the restriction, athletes could file suit for First Amendment violations, so long as restrictions were placed on them by a state actor.

The first consideration the court would be required to make is whether the regulation is subject to the First Amendment. In order to fall within this category, the regulation must be one by a state actor, in an attempt to restrict an individual's freedom of speech. Assuming the institution being challenged were public, administrators would be considered state actors for the purpose of constitutional analysis.

Then the court must consider whether the speech sought to be restricted is traditionally subject to First Amendment protection. So long as the speech does not fit into an unprotected category, and its secondary effects do not lead to an immediate incitement of illegal conduct, the speech will fall within the protection of the First Amendment. Unprotected speech includes fighting words,\textsuperscript{104} obscenity,\textsuperscript{105} certain types of defamatory speech,\textsuperscript{106} and true threats.\textsuperscript{107}

Next, the court must consider the institutions' interests sought to be protected by such a restriction and balance it against the individual student-athletes' fundamental right to freedom of speech. In most cases, as previously stated, the institutions' stated interests have been in the health, safety, and morals of its athletes, as well as upholding the reputation of the institution through those in highest regard, its role model athletes.

Absent proof that speech communicated through such networks actually causes the harms sought to be protected against, a legitimate interest cannot be recognized. Furthermore, upholding the institutions reputation is clearly insufficient to result in student suppression.

Because the court has not dealt with this issue, inferences must be made from related areas, such as restrictions by institutions of student participation in other social networks, primarily, membership in the Greek system. Fraternities and sororities have been around since higher education came about, and provide important social networking for their members. But the behavior sought to be suppressed in those cases, mainly underage drinking and violent acts resulting therefrom, is similar to that of online social networks.

\textsuperscript{104} Chaplinsky, \textit{supra} note 62, at 571.
\textsuperscript{105} Miller, \textit{supra} note 59, at 93.
\textsuperscript{106} Id. at 856 (quoting \textit{New York Times v. Sullivan}, 376 U.S. 254 (1964)).
\textsuperscript{107} Id. at 856 (quoting \textit{Watts v. United States}, 394 U.S. 705 (1969)).
The Court held in *Gott v. Berea College*\(^{108}\) that rules forbidding membership in Greek-letter fraternities or other secret societies are within the power of college authorities to make and enforce, whether the institution is public or private.\(^{109}\) Another court later expanded on this holding, and further held that a resolution of the board of trustees of a state university banning social organizations having an affiliation with any national or other organization outside the university does not violate any federal constitutional rights of the members and affiliates of national fraternities and sororities.\(^{110}\)

But those arguing that such a holding has no bearing on those involved in online social networks need only point to the fact that the interests in health and safety of its student body asserted by institutions in those cases where social organizations are meeting in person do not exist in cases where the social organization is online, an argument that may not be accepted since those who communicate online through social networks often meet in person as well and therefore, the legitimate concerns justifying a ban on the Greek system still stand.

### V. Conclusion

As participation in online social networks such as Myspace and Facebook increases, so do concerns regarding the dangers posed by such a far-reaching network. From privacy concerns to free speech, users face a growing need to protect themselves when using such networks. With increased participation in the general population comes increased participation by student-athletes, many of whom join before reaching college athletics. With increased concern over the dangers posed comes increased concern for student-athletes by their athletic departments. Whether these departments seek to restrict the information that can be placed on a student-athlete’s profile or to eliminate the creation of a student-athlete’s profile all together, their concerns and justifications raise further concern in student-athletes, students, parents of students, and the general population.

In order to minimize concern by those opposed to online social network limitations and restrictions, it seems that athletic departments are taking the appropriate measures by communicating their regulations in initial players’ contracts so that no claim of student censorship can later be made by student-athletes. Whether this is enough to

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\(^{108}\) 161 S.W. 204 (1913).
\(^{109}\) *Id.* at 208.
shield them from lawsuits remains a mystery given the infancy of online social networks and the lack of precedent that exists regarding such limitations and restrictions.

It is my inclination that, regardless of whether such a contract exists at the time the student-athlete signs on, courts will be reluctant to consider these regulations by athletics departments to be constitutional violations, in light of previous holdings regarding bans on membership in other social organizations.

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