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Work, Play, Tweet: Public University Regulation of Employed Student-Athlete Social Media Use

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COMMENT

WORK, PLAY, TWEET: PUBLIC UNIVERSITY REGULATION OF EMPLOYED STUDENT-ATHLETE SOCIAL MEDIA USE*

DARIUS LOVE**

I. INTRODUCTION

Since the official formation of the National Collegiate Athletic Association (NCAA) in 1910, member-schools and student-athletes have experienced extraordinary success on and off the courts.[1] The athletic prowess of student-athletes has enabled their respective colleges and universities to attain elusive national championships and unprecedented amounts of revenue derived from national sponsorship and media deals.[2] However, as many student-athletes have come to discover, everything that glitters does not always lead to championship gold. Recently, student-athletes around the nation have raised multiple concerns surrounding their legal rights.[3] Most of the legal unrest found

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1. *See, e.g.*, Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12–21 (2000); *NCAA Tournament: 5 Best "Cinderella" Runs*, CBS L.A. (Mar. 14, 2015), http://losangeles.cbslocal.com/2015/03/14/ncaa-tournament-5-best-cinderella-runs/; Daniel D. Zillmer, *The 50 Greatest College Football Programs All-Time Statistically Ranked*, FANSIDED, http://fansided.com/2014/10/18/50-greatest-college-football-programs-time-statistically-ranked/ (last visited June 9, 2016).

2. *See generally* Eric Fisher, *StubHub Becomes Sponsor of UNC Athletics*, TRIANGLE BUS. J. (Nov. 1, 2010), http://www.bizjournals.com/triangle/news/2010/11/01/stubhub-becomes-sponsor-of-unc-athletics.html.

3. *See* Patrick Vint, *Ranking the NCAA's 5 Biggest Legal Battles, from Least to Most Threatening*,

in today's business of intercollegiate athletics centers around possible violations of antitrust law by the NCAA, as many student-athletes feel that they are being exploited for their talents and not receiving a rightful share of profits.[4] Additionally, former Northwestern football player Kain Colter and other Wildcat football players, under the guise of the College Athletes Players Association, raised one of the most significant and recently litigated issues affecting intercollegiate student-athletes.[5] In addition to the apparent implications of labor and employment law, the question of student-athlete recognition as university employees also strikes at the foundation of free speech rights granted by the First Amendment of the U.S. Constitution.

The advent and widespread popularity of social media applications such as Facebook, Twitter, Instagram, and Tumblr have drastically revolutionized the communication process in the twenty-first century. The sweeping advantages of social media have been accompanied by a host of First Amendment implications and other potential free speech illegalities. The free speech concerns associated with the regulation of student-athlete social media use permeate throughout almost every facet of today's society, including the academic institution of intercollegiate athletics. It has been strongly implied, through case law and public policy, that intercollegiate student-athletes enjoy a substantially diminished right to free speech, which extends to the relatively new communication platforms of social media.[6] Although the bulk of case law precedent involving a student's diminished right to free speech focuses on the claims of high school students, the courts' reasoning in these cases indicates that similar standards apply to intercollegiate student-athletes because of their status as "student" athletes.[7] Yet, despite the National Labor Relation Board's (NLRB) unfavorable decision in the Northwestern unionization case applying

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SBNATION (Mar. 20, 2014), http://www.sbnation.com/college-football/2014/3/20/5528032/ncaa-law-suits-obannon-kessler-union.

4. *See* Associated Press, *NCAA Files Appeal of O'Bannon Ruling*, ESPN (Aug. 21, 2014), http://espn.go.com/college-football/story/_/id/11387865/ncaa-files-intent-appeal-obannon-decision; *see also* Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014), http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model; Associated Press, *Shawne Alston Suing NCAA, Others*, ESPN (Mar. 5, 2014), http://espn.go.com/college-football/story/_/id/10558893/ncaa-conferences-sued-scholarship-value.

5. Tom Farrey, *Kain Colter Starts Union Movement*, ESPN (Jan. 28, 2014), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.

6. *See generally* Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007).

7. *See id.* at 587–601.

Section 2(3) of the National Labor Relations Act (NLRA), the First Amendment may afford employed student-athletes a higher degree of protection against university regulation of social media use.[8] In the absence of relief for student-athletes seeking employee status under the NLRA, one can certainly foresee the enactment of state-adopted legislation recognizing student-athletes at public universities as employees.

This Comment will analyze the application of First Amendment free speech rights to the regulation of intercollegiate student-athlete social media use by public universities, if student-athletes were granted employee status under state laws. Part II provides an abbreviated historical analysis of the free speech rights granted to student-athletes under the First Amendment and examines how colleges currently apply these rights with respect to social media as a form of free speech. Part III provides a comprehensive look into recent changes in intercollegiate athletics—with an emphasis on the *Northwestern* decision—that have the potential to limit university rules such as the regulation of social media use by student-athletes. Part IV discusses the regulation of social media use of public-sector employees, and given the influence of the *Northwestern* unionization case on the conferral of employee status to student-athletes, how the institution of more favorable state labor laws would apply to student-athletes attending public universities. Finally, Part V addresses whether the conferral of employee status will affect the degree of social media regulation that a public university can impart upon an employed student-athlete.

II. A BRIEF HISTORY OF THE REGULATION OF STUDENT-ATHLETE FREE SPEECH

The legal issues surrounding the right to speak freely, as established by the First Amendment of the U.S. Constitution, have permeated throughout every facet of society since the ratification in 1791.[9] As many student-athletes have experienced, the world of intercollegiate athletics is not immune to the oftentimes bizarre disputes arising from this grey area of the law. The beacon of light that has shakily guided student-athletes through the haze of free speech limitations originates from the exercise of the freedom of expression by high school students.[10] In the twenty-first century, advances in social media have

8. *See generally* Office of Pub. Affairs, *Board Unanimously Decides to Decline Jurisdiction in Northwestern Case*, NLRB (Aug. 17, 2015), https://www.nlrb.gov/news-outreach/news-story/board-unanimously-decides-decline-jurisdiction-northwestern-case.

9. *About the First Amendment*, FIRST AMEND. CTR., http://www.firstamendmentcenter.org/about-the-first-amendment (last visited June 9, 2016).

10. *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

further complicated the freedoms of speech and expression for student-athletes.

A. Constitutional Origins of Student-Athlete Free Speech Regulation

The First Amendment of the U.S. Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[11] Also contained within the First Amendment's free speech clause is the freedom of expression, which affords every individual the right to express opinions without governmental hindrance and to seek, receive, and communicate information and ideas through any media source, regardless of boundaries.[12] The tenets of the First Amendment free speech and expression clauses extend to every member of the public, including student-athletes enrolled in public high schools, colleges, and universities. In fact, the seminal case of *Tinker v. Des Moines Independent Community School District* established the extent of power that a public institution holds over the regulation of free speech and expression exhibited by students.[13]

In *Tinker*, two public high school students and one junior high student wore black armbands to school in opposition of the United States' involvement in the Vietnam War.[14] School officials warned the students that wearing the armbands, and refusing to remove them, would prompt suspension until the students returned without the armbands.[15] The district court and the U.S. Court of Appeals for the Eighth Circuit ruled for the school board, reasoning that the school board's actions were constitutional and reasonable to prevent disturbance of school discipline.[16] On appeal, the U.S. Supreme Court reversed and ruled for the students.[17] The Supreme Court determined that the students' act of wearing black armbands was more akin to pure speech protected by the First Amendment and did not present a "substantial disruption of or material interference with school activities."[18] For over forty-six years, the Supreme Court's adoption of the "substantial disruption or material interference" standard established in *Tinker* has defined the free speech limitations placed not

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11. U.S. CONST. amend. I.

12. *See id.*; *see also Freedom of Expression*, FREEDOM HOUSE, https://freedomhouse.org/issues/freedom-expression#.VQXSyhFFDmI (last visited June 9, 2016).

13. *See generally* 393 U.S. 503 (1969).

14. *Id.* at 504.

15. *Id.*

16. *Id.* at 504–05.

17. *Id.* at 514.

18. *Id.* at 513–14.

only on public high school students, but intercollegiate student-athletes as well.[19]

B. Current University Regulation of Student-Athlete Free Speech Rights with Respect to Social Media

Moving into the modern-day realms of social media and intercollegiate athletics, the regulation of free speech rights has become complex and ambiguous. Although the foundational rule of substantial disruption or material interference, as established in *Tinker*, still applies, the novelty of social media and the non-custodial relationship between university officials and intercollegiate student-athletes has muddied the application of the *Tinker* standard.

Currently, the NCAA does not have a policy, bylaw, or recommendation mandating that member-schools monitor student-athletes' social media use.[20] Instead, the NCAA has left this decision up to the discretion of its member-institutions.[21] Although the demarcation of social media regulation can very likely blur into the violation of a student-athlete's free speech rights, many private and public universities have elected not to ignore the issue due to the considerable risks associated with inappropriate social media use by student-athletes.[22] For example, in the controversial investigation involving the University of North Carolina at Chapel Hill (UNC) during the summer of 2011, the NCAA Enforcement Staff had reportedly been made aware of various violations by UNC's football program through tweets found on two UNC football players' Twitter accounts.[23] The role that social media played in the heavy penalties imposed upon the UNC football program demonstrates the utility of student-athlete social media regulation by university officials.[24]

In August 2010, UNC adopted an express policy addressing student-athlete social networking and media use.[25] The policy calls for each sporting team to

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19. *See generally id.*; *see also* Lowery v. Euverard, 497 F.3d 584, 592 (6th Cir. 2007).

20. Michelle Brutlag Hosick, *Social Networks Pose Monitoring Challenge for NCAA Schools*, NCAA.ORG (Feb. 14, 2013), http://fs.ncaa.org/Docs/NCAANewsArchive/2013/february/social%2Bnetworks%2Bpose%2Bmonitoring%2Bchallenge%2Bfor%2Bncaa%2Bschoolsdf30.html.

21. *Id.*

22. *Id.*

23. Jerry R. Parkinson, *The Impact of Social Media on NCAA Infractions Cases*, 1 MISS. SPORTS L. REV. 37, 46–47 (2012).

24. *See id.*

25. THE UNIV. OF N.C. AT CHAPEL HILL, DEP'T ATHLETICS, POLICY ON STUDENT-ATHLETE SOCIAL NETWORKING AND MEDIA USE (Apr. 2012), http://studentathletes.web.unc.edu/files/2012/07/Social-Networking-Policy-updated.pdf.

"identify at least one coach or administrator who is responsible for having access to, regularly monitoring the content of, and/or receiving reports about team members' social networking sites and postings," also referred to as a "Team Monitor."[26] The policy permits UNC's Department of Athletics to contract with an outside vendor to serve as the Team Monitor.[27] As stated within the policy, UNC's Department of Athletics does not mandate student-athletes to provide their social media passwords to the Team Monitor, and the Team Monitor may not independently access the student-athlete's social media account.[28] Furthermore, the policy subjects student-athletes to internal sanctions for a violation of the policy which "may include, but not be limited to, notice to remove the posting or photo, dismissal from the team, and/or reduction, cancellation, or non-renewal of athletics grant-in-aid."[29]

UNC's social media policy is an example of a public university's active stance with respect to the regulation of student-athlete social media use. Although the policy makes no mention of internal sanctions imposed upon a student-athlete for "substantially disrupting or materially interfering with" school activities, the language of the policy guidelines does leave some room for ambiguity concerning what constitutes "[d]erogatory or defamatory language" within the context of "disrespectful comments and behavior online."[30] Thus, UNC's social media policy contains just enough wiggle room for university officials to combat a student-athlete's potential allegation of free speech infringement.

Another example of a public university's regulatory methods with respect to student-athletes' social media use is the University of California at Los Angeles' (UCLA) Code of Conduct.[31] Unlike UNC's stand-alone social media policy, UCLA's social media guidelines are contained within the UCLA student-athlete handbook.[32] Similar to UNC's policy, UCLA's Code of Conduct warns student-athletes about the risks associated with social media and provides student-athletes with specific instructions on what not to post to social

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. UCLA DEP'T INTERCOLLEGIATE ATHLETICS, 2015–16 STUDENT-ATHLETE HANDBOOK & DAY PLANNER 16–17 (2015–16), http://www.uclabruins.com/fls/30500/pdf/SA-Handbook.pdf?DB_OEM_ID=30500.

32. *See id.*

media websites.[33] One of the most ambiguous limitations found within the Code of Conduct that arguably falls within the grey area of free speech states that student-athletes cannot post "[d]erogatory or defamatory language about anyone, including coaches, officials, opponents, UCLA Athletics, UCLA, the Pac-12 or the NCAA."[34] Further, referring explicitly to the athletic department's process of monitoring, the Code of Conduct states, "Coaches, Athletic Department administrators, the NCAA, faculty, staff, residential life, employers, alumni, the media and the UCLA Police Department can and do review these websites."[35] Finally, similar to the UNC policy, the UCLA Code of Conduct states that social media postings associated with a student-athlete's profile can lead to "suspension or expulsion, with the reduction or cancellation of financial aid" if found to violate the Code of Conduct.[36]

UNC's social media policy and UCLA's Code of Conduct both exemplify the high level of attention that social media has garnered in the intercollegiate athletics context. The general methods of monitoring utilized by UNC and UCLA's athletic departments appear to be in accordance with the expected course of supervision undertaken by most colleges and universities. The potential free speech encroachments that lie within the UNC and UCLA social media guidelines stem from the vagueness associated with derogatory and defamatory language. If classified as university employees, it is likely that student-athletes would be able to speak more freely on social media sites regarding issues of public concern, even if the student-athlete's opinion is in opposition to their university–employer. How would student-athletes achieve such a level of increased autonomy? The first step would be the acquisition of federal and state employee status.

III. RECENT CHANGES IN INTERCOLLEGIATE ATHLETICS WITH THE POTENTIAL TO LIMIT UNIVERSITY RULES CONCERNING THE REGULATION OF STUDENT-ATHLETE FREE SPEECH

Recently, a number of legal claims brought by student-athletes and other interested parties involving possible violations of federal antitrust and labor laws have plagued the NCAA and its member-schools. These legal claims strike at the very heart of amateurism, the core principle that the NCAA clings to in defense of its current governance and structure.[37] From a linear perspective, if

33. *Id.*

34. *Id.* at 16.

35. *Id.* (emphasis omitted).

36. *Id.* at 17.

37. J. Freedley Hunsicker Jr., *A Significant Attack on the NCAA's Principle of Amateurism*, LEGAL

the NCAA is subject to antitrust and labor laws, public and private institutions that hold membership in the NCAA may also be individually subject to antitrust and labor laws.

The NCAA's litigation portfolio currently consists of a voluminous number of antitrust cases brought by student-athletes, as well as other interested parties.[38] These cases include claims that the NCAA and EA Sports have improperly used the likenesses of student-athletes in video games without sharing the profits[39] and allegations that the NCAA conferences and member-schools have unlawfully fixed prices to limit the amount of scholarship money a student-athlete can be awarded.[40]

In addition to the aforementioned antitrust claims affecting the future of intercollegiate athletics, one of the most significant labor law claims recently examined involved the Northwestern Wildcats football program and the players' rally to unionize as statutory employees under the NLRA.[41] The decision of the Region 13 NLRB, in which the Regional Director found that Northwestern football players receiving grant-in-aid scholarships should be considered employees under Section 2(3) of the NLRA, had the potential to drastically alter several defining aspects of the relationship between student-athletes and the universities that they attend, including the regulation of student-athlete social media use.[42] In the initial case, Northwestern failed to prove that grant-in-aid scholarship football players should have been excluded from consideration as employees under the NLRA.[43] Instead, the Regional

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INTELLIGENCER, June 30, 2014 (archived on LexisAdvance).

38. *See* Vint, *supra* note 3.

39. Steve Berkowitz, *Judge Releases Ruling on O'Bannon Case: NCAA Loses*, USA TODAY (Aug. 8, 2014), http://www.usatoday.com/story/sports/college/2014/08/08/ed-obannon-antitrust-lawsuit-vs-ncaa/13801277/. The O'Bannon ruling in favor of the class-action plaintiffs is currently on appeal by the NCAA. *See generally* Jon Solomon, *NCAA Relies Heavily on Supreme Court Case to Appeal Paying Players*, CBS SPORTS (Nov. 15, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24810277/ncaa-relies-heavily-on-supreme-court-case-to-appeal-paying-players.

40. Zac Ellis, *What Does the Kessler Antitrust Lawsuit vs. the NCAA Mean? Michael McCann Explains*, SI (Mar. 17, 2014), http://www.si.com/college-football/campus-union/2014/03/17/ncaa-anti-trust-lawsuit-jeffrey-kessler. It should be noted that the NCAA's "Big Five" Conferences (ACC, SEC, Big Ten, Big 12, and Pac-12) recently passed autonomous legislation that allows colleges and universities to cover the full cost of attendance for scholarship student-athletes. *See* Mitch Sherman, *Full Cost of Attendance Passes 79–1*, ESPN (Jan. 17, 2015), http://espn.go.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-be-gins.

41. Nw. Univ., No. 13-RC-121359, 2014-15 NLRB Dec. (CCH) ¶ 15,781 (N.L.R.B. Mar. 26, 2014).

42. *Id.* at 1 n.1.

43. *Id.* at 13.

Director found that Northwestern's scholarship football players were employees under the NLRA for six primary reasons: (1) scholarship football players perform services for the benefit of the employer (university) for which they receive compensation, not financial aid; (2) scholarship football players are subject to the university's control in the performance of their duties as football players; (3) scholarship football players are not primarily students, but rather athletes; (4) the athletic responsibilities of scholarship football players do not constitute a central element of their educational degree requirements; (5) the athletic duties of scholarship football players are not supervised by academic faculty; and (6) scholarship football players are not temporary employees as defined by the NLRA.[44]

Although the decision of the Regional Director was appealed and later dismissed in favor of the NCAA and Northwestern by the NLRB,[45] the case brought national attention to an issue that the NCAA and its member-institutions will likely be forced to revisit: under what circumstances could student-athletes be deemed employees. The underlying tenets of the *Northwestern University* unionization case support the assertion that if student-athletes were able to acquire recognition as university employees under applicable state laws, regulation of their social media use by university officials would likely implicate a heightened degree of free speech rights.[46] However, as a federal statute, the NLRA applies only to employers within the private sector.[47] As the language suggests, "Congress enacted the National Labor Relations Act . . . to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."[48] Thus, for student-athletes at public universities to receive recognition as employees, despite the shortcomings of their private school counterparts, the interpretation of employees under state labor laws would need to include intercollegiate student-athletes.[49]

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44. *Id.* at 14–21.

45. Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html?_r=0.

46. *See generally* Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65 (2014) (analyzing whether college athletes should be considered employees).

47. *National Labor Relations Act*, NLRB, http://www.nlrb.gov/resources/national-labor-relations-act (last visited June 9, 2016).

48. *Id.*

49. *See Frequently Asked Questions: Is My Employer Subject to the National Labor Relations Act (NLRA)?*, NLRB, http://www.nlrb.gov/resources/faq/nlrb#t38n3208 (last visited June 9, 2016).

IV. REGULATING FREE SPEECH OF PUBLIC-SECTOR EMPLOYEES

The degree of autonomy with respect to an employee's exercise of his or her First Amendment free speech rights differs in scope and legal governance depending on the setting in which the employee works. Employees are classified as either private-sector or public-sector employees.[50] This distinction extends to the classification of employees who work for private or public universities. Accordingly, if granted employee status, whether a student-athlete attends a private or public university plays a major role in the extent to which university officials would be permitted to regulate the employed student-athlete's social media use.

It is well-established that fundamental rights granted by the U.S. Constitution, such as free speech, are substantially lessened, if at all applicable, by the legitimate interests of private employers.[51] As applied to the context of private universities and the hypothetical of employed student-athletes, this lack of constitutional deference permits private university officials and athletic administrators to broadly define what constitutes disruptive speech and enforce vague policies that disallow the expression of unpopular opinions that are not favored by the university.[52] For example, Northwestern University's Athletic Department (a division of a private university) employs an online social networking policy that "educat[es] and protect[s]" student-athletes from the dangers of posting information via social media that may constitute inappropriate behavior, including posts addressing controversial topics or opinions.[53] In effect, the Northwestern Athletics' social networking policy subjects student-athletes to sanctions for failure to agree and adhere to a policy

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50. Jared Lewis, *What Is the Meaning of Public Sector Employment vs. Private?*, CHRON, http://smallbusiness.chron.com/meaning-public-sector-employment-vs-private-32297.html (last visited June 9, 2016).

51. *See* Douglas E. Lee, *NLRB Bolsters Private-Employee Speech*, FIRST AMEND. CTR. (Sept. 14, 2011), http://www.firstamendmentcenter.org/nlrb-bolsters-private-employee-speech; Martin Berman-Gorvine, *Employer Ability To Silence Employee Speech Narrowing in Private Sector, Attorneys Say*, BLOOMBERG BNA (May 19, 2014), http://www.bna.com/employer-ability-silence-n17179890580/.

52. *See* Harvey A. Silverglate, David French & Greg Lukianoff, *Free Speech Rights on Private College Campuses: Free Speech and the Private University*, KNOW MY RTS., http://www.know-myrights.org/index.php?option=com_content&view=article&id=44:free-speech-rights-on-private-college-campuses&catid=18&Itemid=123 (last visited June 9, 2016).

53. NORTHWESTERN UNIVERSITY ATHLETICS 2015–2016 10 (2015), http://sidearm.sites.s3.amazonaws.com/nusports.com/documents/2015/10/19/2015_2016_Student_Athlete_Handbook.pdf?id=13625; *see also id*. at 11 (depicting the social media decision process that student-athletes should adhere to as recommended by Northwestern Athletic Department).

that has the contractual power to restrain the student-athletes' free speech rights.[54]

Despite the broad powers afforded to private employers with respect to the regulation and limitation of employee free speech rights, the NLRA provides private employees with a legally grounded means of protection against the employers' absolute regulation in this area.[55] Under Section 7 of the NLRA, private employees have the right to use free speech when engaging in concerted activity for the mutual aid and protection of the collective unit.[56] As such, if student-athletes at Northwestern were to have been granted employee status, they would have been able to utilize social media to discuss controversial topics or opinions for the mutual aid and protection of the collective student-athlete population under the security of the NLRA.[57]

The recent NLRB decision, which dismissed the petition for recognition as statutory employees filed by football players receiving grant-in-aid scholarships at Northwestern University, implicates many privileges afforded to student-athletes, including free speech rights.[58] However, as mentioned earlier, a decision in favor of the Wildcat football players would have applied only to private universities and colleges.[59] In the interest of equality and competitive balance amongst student-athletes across the nation, it is highly plausible that student-athletes attending public universities or colleges will seek to achieve employee status as well. With the exception of Michigan, and likely Ohio, the labor laws of many states do not expressly prohibit student-athletes from acquiring recognition as public employees.[60] Accordingly, many student-athletes attending public universities around the nation could make a strong case for state-based employee status based on the definition and interpretation of the term "employee" as found within the states' labor law statutes.[61]

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54. *See id.* at 10.

55. *See* Staughton Lynd, *Employee Speech in the Private and Public Workplace: Two Doctrines or One?*, 1 INDUS. REL. L.J. 711, 753–54 (1977).

56. *Id.* at 753; *see also* National Labor Relations Act, 29 U.S.C. § 157 (2016).

57. 29 U.S.C. § 157.

58. *See generally* Office of Pub. Affairs, *supra* note 8.

59. *See National Labor Relations Act*, *supra* note 47.

60. *See* Christian Dennie, *Michigan Governor Signs Law Excluding Student-Athletes from the Definition of Public Employee for the Purposes of Collective Bargaining*, BARLOW GARSEK & SIMON, LLP (Jan. 7, 2015, 3:39 PM), http://www.bgsfirm.com/college-sports-law-blog/michigan-governor-signs-law-excluding-student-athletes-from-the-definition-of-public-employee-for-the-purposes-of-collective-bargaining; Sara Ganim, *Some Ohio Lawmakers Don't Want College Athletes Unionized*, CNN, http://www.cnn.com/2014/04/08/us/ohio-athletes-union-ban/ (last updated Apr. 8, 2014).

61. Jaime Miettinen, *Could Michigan Be Starting a New Trend by Excluding Public University*

For instance, Section 810.2 of the California Government Code defines employee as "an officer, judicial officer as defined in Section 327 of the Elections Code, employee, or servant, whether or not compensated, but does not include an independent contractor."[62] Section 811.4 of the Code further defines a public employee as "an employee of a public entity."[63] Additionally, Section 811.2 of the Code defines a public entity as including "the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State."[64] Because California's definition of a public employee does not explicitly exclude student-athletes at public universities from consideration, the student-athletes could very well assert their status as employees given sufficient supporting evidence.[65]

Illinois statutory law provides another example of state law under which public university student-athletes could be considered public employees. Chapter 5 of the Illinois Compiled Statutes defines a public employee or employee as "any individual employed by a public employer."[66] The statute further defines a public employer or employer as meaning "the State of Illinois . . . authorities including departments, divisions, bureaus, boards, commissions, or other agencies of the foregoing entities."[67] Similar to California public-sector labor laws, student-athletes attending public universities in Illinois could be considered public employees, should the relevant statutory language be interpreted broadly.[68]

In light of the shifting atmosphere surrounding the idea of unionization for intercollegiate student-athletes, at least one state legislature has entertained the possibility of expressly allowing student-athletes to be deemed public employees for collective bargaining purposes.[69] House Bill 6783, which has

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Student-Athletes from Being "Public Employees"?, SPORTS L. BLONDE (Mar. 2, 2015), http://www.sportslawblondes.com/blog/2015/3/2/could-michigan-be-starting-a-new-trend-by-excluding-public-university-student-athletes-from-being-public-employees.

62. CAL. GOV'T CODE § 810.2 (2016).

63. *Id*. § 811.4.

64. *Id*. § 811.2.

65. *See* Miettinen, *supra* note 61.

66. 5 ILL. COMP. STAT. 315/3(n) (2016).

67. *Id*. 315/3(o).

68. *See* Miettinen, *supra* note 61.

69. *See* Daniela Altimari, *Lawmakers Discuss Study Bill Allowing Student-Athletes to Join a Union*,

been introduced to the Connecticut legislature, and if passed, will authorize the state's labor commissioner to lead a study regarding the unionization of intercollegiate student-athletes at public universities and colleges in Connecticut.[70] If the outcome of the commissioner's unionization study were to lead to the recognition of college student-athletes as public employees, Connecticut could potentially spark a wave of legislation in favor of student-athletes across the nation.

If established, the conferral of employee status to student-athletes attending public universities would catapult the issue of necessary revisions to free speech rights granted to these employed student-athletes, with an emphasis on the ever-expanding realm of social media. Although the argument has been made that the NLRA and First Amendment provide an almost identical degree of free speech protection to private and public employees, the broader scope of free speech rights guaranteed under the First Amendment seems to provide public employees with a more generous bundle of rights to levy against the employer.[71]

In contrast to private employers and free speech rights under the NLRA, rules and policies instituted by public-sector employers that regulate the free speech of public employees fall within the purview of the U.S. Constitution and applicable state laws.[72] The hallmark case of *Pickering v. Board of Education*, decided by the U.S. Supreme Court in 1968, sets out the standard by which a public employer may regulate the free speech of its employees.[73] In *Pickering*, the defendant, the Board of Education, terminated the plaintiff, a public school teacher, for sending a written letter to the local newspaper criticizing the Board and superintendent's management of a tax proposal intended to raise revenue for the local schools.[74] As a public employer, the Board's actions against the teacher for his opinion expressed within the letter fell within the scope of the First Amendment's free speech clause.[75] On appeal, the Illinois Supreme Court ruled in favor of the Board of Education, reasoning that the teacher's dismissal was appropriate because his adverse opinion of the Board's actions, as

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HARTFORD COURANT (Feb. 26, 2015), http://www.courant.com/politics/capitol-watch/hc-bill-in-connecticut-would-study-whether-to-allow-studentathletes-to-unionized-20150226-story.html.

70. *Id.*

71. *See* Lynd, *supra* note 55, at 711.

72. Christopher Raines, *Private Sector vs. Public Sector Employee Rights*, CHRON, http://smallbusiness.chron.com/private-sector-vs-public-sector-employee-rights-47957.html (last visited June 9, 2016).

73. Pickering v. Bd. of Educ. 391 U.S. 563 (1968).

74. *Id.* at 564.

75. *See id.* at 573.

expressed within the letter, were injurious to the interests of the school system.[76] However, the U.S. Supreme Court reversed the lower court's decision and held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[77] Thus, *Pickering* stands for the proposition that a public employee may exercise his free speech rights when opining on issues of public concern, as long as the speech does not injure the employer's business or hinder the efficiency of its operations.[78] Because social media has transformed the means by which private and public sector employees communicate, the legal principle of *Pickering* must now be applied to employee speech taking the form of Twitter tweets, blog posts, and Facebook comments.[79]

Pickering addresses one of the most common methods of regulation that an employee may be subjected to by his or her employer with respect to free speech: simply "monitoring" the employee's expressions and opinions voiced through writing, tweets, online posts, and comments. Other public and private employers have gone so far as to mandate that employees relinquish their usernames and passwords to social media networks, emails, and the like.[80] This more intrusive approach to social media regulation has prompted many states to adopt legislation expressly forbidding employers from asking employees to turn over their social media usernames and passwords.[81] Currently, twenty-two states have either introduced or considered legislation that would prevent an employer from acquiring the username or passwords of employees.[82] A minute number of states have also enacted legislation that entirely prohibits academic institutions from requesting or mandating a student to divulge his or her social media usernames or passwords.[83]

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76. *Id.* at 565.

77. *Id.* at 574.

78. *See id.*

79. *See id.*

80. Associated Press, *Employers Ask for Facebook Password*, BUS. INSIDER (Mar. 21, 2012), http://www.businessinsider.com/empoyers-ask-for-facebook-password-2012-3.

81. *Access to Social Media Usernames and Passwords*, NAT'L CONF. ST. LEGISLATURES (Oct. 29, 2015), http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx.

82. *Id.*

83. *Employer Access to Social Media Passwords: 2012 Legislation*, NAT'L CONF. ST. LEGISLATURES (Jan. 17, 2013), http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords.aspx.

The following laws, enacted by the California's legislature, illustrate examples of state legislation that completely prohibits an employer from intruding upon an employee or student's free speech rights through the invasion of social media accounts. Assembly Bill 1844 applies to employers as follows:

> Prohibit[s] an employer from requiring or requesting an employee or applicant for employment to disclose a username or password for the purpose of accessing personal social media, to access personal social media in the presence of the employer, or to divulge any personal social media. . . . [P]rohibits an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by the [violating] employer . . . .[84]

Senate Bill 1349 includes language regarding social media policies for postsecondary institutions:

> [P]rohibit[s] public and private postsecondary educational institutions, and their employees and representatives, from requiring or requesting a student, prospective student, or student group to disclose . . . personal social media . . . information . . . . [P]rohibit[s such] institution[s] from threatening . . . or taking [certain] actions for refus[al of a] demand [for such information] . . . .[85]

The Senate Bill also requires these institutions to ensure compliance with these provisions and to post their social media privacy policies on their web sites.[86]

The enactment of these state laws governing social media regulation indicates that even without the conferral of employee status to intercollegiate student-athletes, states are gradually beginning to take progressive measures to protect the free speech rights of both public employees and students.[87] The *Pickering* "matter of public concern" test, which governs the limitations that an

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84. Assemb. B. 1844, 2012 Leg., Reg. Sess. (Cal. 2012).

85. S.B. 1349, 2012 Leg. Reg. Sess. (Cal. 2012).

86. *Id.*

87. *See Employer Access to Social Media Passwords: 2012 Legislation*, *supra* note 83.

employer may place on a public employee's free speech rights, and state-specific legislation governing student and employee rights to withhold social media usernames and passwords both demonstrate the current legal atmosphere surrounding the First Amendment in the public sector.

V. REGULATING FREE SPEECH, VIA SOCIAL MEDIA, OF EMPLOYED STUDENT-ATHLETES AT PUBLIC UNIVERSITIES

In the quest for answers concerning how the conferral of employee status would alter public university regulation of employed student-athletes with respect to free speech rights, the following suppositions have been contemplated: (1) student-athletes at public universities may be more likely to seek employee status under state laws in the wake of the national attention advanced by the NLRB's decision to dismiss the unionization efforts put forth by Northwestern football players receiving grant-in-aid scholarships, and (2) in the absence of express state-law language stating otherwise,[88] student-athletes at public universities could organize and lobby to be recognized as public employees. Despite the existence of the possibility of employee status for student-athletes attending public universities, the probability that these student-athletes will actually be deemed employees depends largely on two factors: (1) whether the state in which the public university or college is located has expressly prohibited, by law, student-athletes from consideration as public employees, and (2) whether the applicable labor laws of the state support an interpretation that enables student-athletes to be considered as public employees.[89] Thus, it follows that not every scholarship athlete attending a public university will be eligible for employee status.

If student-athletes at public universities do acquire employee status, the legal standard used to determine the degree of protection afforded to the student-athlete's free speech would present a complex question. Should courts apply the substantial disruption or material interference with school activities standard from *Tinker*, or the matters of public concern standard enumerated by the court in *Pickering*?[90] *Snyder v. Millersville University* provides persuasive insight as to how the free speech rights of publicly employed student-athletes

88. *See generally* Dennie, *supra* note 60.

89. *See generally* Marc Edelman, *21 Reasons Why Student-Athletes Are Employees and Should Be Allowed to Unionize*, FORBES (Jan. 30, 2014), http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/.

90. *Compare* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969), *with* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 574 (1968).

would be assessed.[91] Although *Snyder* was decided by the U.S. District Court for the Eastern District of Pennsylvania, the reasoning of the court with respect to the free speech standard that should govern student employees at public institutions is sound.[92]

In *Snyder*, the plaintiff was a participant in the Student Teaching Program of Millersville University.[93] As a requirement for the successful completion of the program, the plaintiff served as a student-teacher in English at a local high school.[94] During her tenure as a student-teacher at the high school, the plaintiff posted a disrespectful and inappropriate MySpace message inviting her students to befriend her on the social network, and allegedly referred to her teaching program superiors as "problems."[95] A photo of the plaintiff wearing a pirate hat and holding an alcoholic beverage accompanied the post.[96] The district court determined that the plaintiff's MySpace post triggered the *Pickering* matter of public concern standard because the plaintiff made the post with respect to and during the practice of her role as a teacher and not as a student in the traditional sense.[97] Thus, the court's decision of the applicable standard in *Snyder* indicates that the free speech of student-athletes who are also public employees will be afforded protection under the First Amendment when the speech concerns public matters.[98]

The plaintiff's social media post in *Snyder* concerned a personal matter as opposed to a matter of public concern;[99] however, there may very well be other circumstances where an employed student-athlete's social media speech would trigger a *Pickering* standard. For example, consider if the athletic department of a public university adopted a social media policy similar to the UCLA Code of Conduct under which student-athletes are not allowed to post "[d]erogatory or defamatory language about anyone, including coaches, officials, opponents, [University] Athletics, [the University], the [Conference] or the NCAA."[100] Now consider if the university's athletic department experiences an unfortunate scenario in which a coach is found to have committed acts of domestic violence against his spouse and children. Should an employed student-athlete under the

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91. Snyder v. Millersville Univ., No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008).

92. *See id.*

93. *Id.* at *1.

94. *Id.* at *2–3.

95. *Id.* at *5.

96. *Id.* at *6.

97. *Id.* at *14–15.

98. *Id.* at *16.

99. *Id.*

100. *See* UCLA DEP'T INTERCOLLEGIATE ATHLETICS, *supra* note 31, at 16.

coach's tutelage decide to make a Facebook post expressing his fervent disappointment and aversion for the coach's actions, the argument could be made that the athlete's speech constitutes a matter of public concern.[101] Although the student-athlete's social media post could reasonably be seen as substantially disruptive and to materially interfere with the activities of the athletic department under the *Tinker* standard,[102] his speech would likely be protected under the First Amendment because of his standing as a public employee.

The hypothetical explained above may seem like a stretch of the imagination to some, but with the shifting climate of intercollegiate athletics, the conferral of employee status to student-athletes at public universities grows more plausible. If student-athletes were to be recognized as public employees, the oppressive *Tinker* standard would no longer mute their freedoms of speech and expression. Employed student-athletes would have greater liberty to openly discuss matters of public concern that may present views in opposition of the university or athletic department. As the wave of social media continues to expand, employed student-athletes would have a number of social media channels to voice their opinions when appropriate.

VI. CONCLUSION

Currently, no uniform guidance exists that mandates the regulation of college athletes' social media use by university officials. However, with the potential negative impact that speech voiced through social media outlets can have on a university's image, some university athletic departments have unilaterally enacted social media policies to monitor the speech of student-athletes.[103] Despite having the autonomy to enact customized social media policies aimed at policing student-athlete tweets, comments, and posts, public university officials must still adhere to the parameters of the First

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101. *See* Sandra Horley, *Opinion: Why Domestic Violence Is Never a Private Issue*, CNN, http://www.cnn.com/2013/06/19/opinion/opinion-domestic-violence-not-private-issue/ (last updated June 19, 2013).

102. The employed student-athlete's post may substantially disrupt or materially interfere with the activities of the athletic department if other student-athletes or athletic officials decided to voice their opinions, decided not to play for the coach, or decided to transfer to another institution as a direct result of the student-athlete's initial Facebook post.

103. Rex Santus, *Social Media Monitoring Widespread Among College Athletic Departments, Public Records Survey Shows*, STUDENT PRESS L. CTR. (Mar. 16, 2014), http://www.splc.org/article/2014/03/social-media-monitoring-widespread-among-college-athletic-departments-public-records-survey-shows.

Amendment free speech clause. If college athletes were to attain employee status under applicable state laws, the extent of their First Amendment free speech rights would be reasonably expanded.

In a public university setting, employed student-athletes would possess more freedom to express their views using social media, even if the student-athlete's opinion is not supported by the university or its officials, as long as the athlete's speech pertains to a matter of public concern. Under the *Pickering* public concern standard, instead of being subjected to almost automatic regulation of their social media messages, the context of an employed student-athlete's social media use would be balanced against the legitimate objectives of the public university.[104] Although employed student-athletes would enjoy more formidable free speech rights with respect to social media use as a result of a the public employer-employee status, the university would still possess authority to regulate the student-athlete's social media content.

104. *See Pickering*, 391 U.S. at 574.