Free Expression versus Prohibited Speech: The First Amendment and College Student Sports Fans

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I. INTRODUCTION

Fans are an integral part of sports. Professional and school sports teams rely on fans for financial and emotional support as they push for wins and recognition. Unfortunately, some fans have taken their supporting roles to excessive levels as headlines across the nation recite alarming accounts of sporting events marred by disturbing fan behavior. Although most fans vigorously, yet respectfully, cheer on their favorite sport teams, a growing number of patrons have come to believe that their ticket stub is a license to say or do anything they please. However, fans do not have unrestricted rights once they enter the gates of a sporting event. They cannot sit anywhere they like, bring in their own food items, or legally rush onto the field during or after the game. But, can fans say anything they like while attending a sporting event?

Recent incidents in sport have called into question both fan and player behavior, which has changed from a focus on cheering for one's team, to doing as much as possible to verbally abuse opposing teams and players. For example, at a January, 2004, basketball game between the University of Maryland and Duke University at Maryland, Maryland students chanted "Fuck you, J.J.!" every time Duke guard J.J. Redick stepped to the foul line.[1] Additionally, dozens of students at the game sported T-shirts that read "Fuck Duke."[2]

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1. Eric Hoover, *Crying Foul Over Fans' Boorish Behavior*, THE CHRON. OF HIGH. EDUC., Apr. 9, 2004, at A1.

2. *Id.*

The University of Maryland incident is not an isolated event. At an increasing number of college campuses, the familiar chants of "air ball" and "brick" have been replaced with personal vituperative attacks directed at opposing players. For instance, in March, 2004, during a basketball game at the University of Kentucky, Kentucky students chanted "Matt is gay" at Matt Walsh, a forward on the visiting University of Florida team.[3] In December, 2003, "students at Florida taunted D.J. Strawberry, a guard for the University of Maryland at College Park, by referring to the drug problems of his father, Darryl Strawberry, a former professional baseball player."[4]

While this lack of civility is not restricted to college student fans,[5] this offensive behavior on college campuses goes against the type of civilized behavior society hopes a college education can help to foster. Moreover, a growing number of students believe that they have a Constitutional right to shout lewd, vulgar, abusive, and personal insults to members of an opposing school's athletic team while attending a collegiate sporting event.[6] In addition, some institutions fear potential litigation under the First Amendment[7] and consequently are reluctant to sanction students for their behavior.[8]

The primary legal authority cited by some university legal advisors for the proposition that vulgar, indecent, or lewd language[9] made by college students

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3. *Id.*

4. *Id.*

5. Richard Roeper, *Welcome Case of Civility Graces Crosstown Rivalry*, CHI. SUN-TIMES, June 30, 2004, at 11 (lack of civility among major league baseball fans); *Conduct Unbecoming*, WASH. POST, June 26, 2004, at A22 (profanity by government officials in attack on rival party); Dick Fleagler, *Annoyances That Rival Shrieking Babies; Other Readers Griped About Other Violations Of What We Used To Call Civility*, PLAIN DEALER (Cleveland), June 13, 2004, at H1 (discussing various instances of public incivility); Charles Babington, *McCain Defends Kerry's Record on National Security; Ariz. Senator Calls for More Civility in Debate*, WASH. POST, March 19, 2004, at A1 (calling for more civility in political campaigning).

6. *See* Erik Brady, *How Should Speech Be At Campus Games?*, USA TODAY, Feb. 6, 2004, at 1A.

7. U.S. CONST. amend. I.

8. Brady, *supra* note 6, at 1A (stating that the University of Pennsylvania does not discipline students at athletic events for foul language, St. Joseph's University of Philadelphia does eject students for naughty words, while the University of Maryland has not ejected students for chanting obscenities but will be looking into the legality of taking this action).

9. This language is also often referred to as "obscene." However, this article will avoid the use of the term "obscene" as the United States Supreme Court has legally defined obscenity as material appealing to the prurient interest in sex. Miller v. California, 413 U.S. 15 (1973). Nevertheless, the common usage of the term "obscene" language is understood, even by the courts, not to be limited to words that are only meant to appeal to a prurient interest in sex, but words that are lewd, vulgar, or indecent. *See, e.g.,* Robinson v. Montana, 82 P.3d 27 (Mont. 2003) (where the statements "mother fucker" and "Fuck off, asshole" were referred to by the court as obscenities).

attending athletic events cannot be prohibited[10] is the United States Supreme Court's 1971 decision in *Cohen v. California*.[11] In *Cohen*, the Supreme Court overturned the criminal conviction of a person for wearing a jacket bearing the words "Fuck the Draft" in a courthouse corridor. The Court found that the jacket's message was constitutionally protected speech. Thus, some schools have made the leap that the use of lewd or indecent words in verbal speech or written on a T-shirt cannot be proscribed without violating a student's right of Free Speech. Instead, these schools are focusing their efforts to control this vulgar behavior by moral suasion in hopes that students will listen to their requests for civility and sportsmanlike behavior.[12] Unfortunately, it is unlikely that merely asking students to be more civil and refrain from certain behavior will deter this unwanted behavior. For example, the University of Maryland spent $30,000 in the 2002-2003 school year on a campuswide sportsmanship program, but the continued student fan behavior had reached such vulgar levels in the 2003-2004 school year that the University requested the Maryland Attorney General's office research whether the school can eject students from games for chanting obscenities or for wearing T-shirts with obscenities imprinted on them.[13] Thus, with so many students feeling that they have a Constitutional right to say anything they want at athletic events and many universities wanting to prevent this escalating trend of incivility, this issue is unlikely to go away in the near future unless the United States Supreme Court rules on the matter.

College campuses represent a unique arena for the First Amendment. On the one hand, students do not check their rights at the school entrance gates, while on the other hand colleges need to carry out their primary mission of education and must make rules for students that may be more restrictive than the world outside of college. In the middle are courts who must balance student free speech rights with an institution's educational mission.

With vulgar fan behavior on the rise around the country, more players, coaches, and administrators are asking where the line should be drawn between a student's free expression rights and a university's ability to regulate this conduct. This article analyzes the First Amendment free speech issues

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10. Brady, *supra* note 6, at 1A.

11. 403 U.S. 15 (1971).

12. Brady, *supra* note 6, at 1A (stating that the President of the University of Maryland wrote a letter to the school newspaper asking for better student fan behavior and the University of North Dakota President met with the student senate to ask for its help in stopping hockey fans from shouting obscenities); Hoover, *supra* note 3, at A1 (stating that some colleges recommend that coaches talk to students at the beginning of the season to urge better student fan behavior).

13. *Id.*

involved in university student fan behavior at athletic events. First, those United States Supreme Court cases that provide guidance in deciding First Amendment free speech cases with respect to schools are examined. Next, other related Supreme Court rulings are applied to the context of student speech at athletic events, followed by discussion of the college athletic event venue in regard to forum decisions by the Supreme Court. Finally, the Supreme Court's guidance is applied to the regulation of certain behavior and remarks made by student fans at college sport events to determine whether the First Amendment prohibits universities from regulating student fan behavior.

II. OVERVIEW OF THE FIRST AMENDMENT AND STUDENT FREE SPEECH

The First Amendment to the United States Constitution provides limited guidance for the courts in deciding free speech cases. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free 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."[14] Thus, it primarily has been up to the United States Supreme Court to provide more detailed guidance on this important but somewhat amorphous right.

As noted herein, schools represent a unique setting in First Amendment jurisprudence. While students are citizens and schools are charged with educating students on our Constitution and the principles and values it stands for, to accomplish its educational mission a school must have the power to control speech that is disruptive to its educational mission or that may intrude on the rights of others at the school. Some control by school administration over student speech is clearly necessary, but unbridled control is not. Thus, there is a question of how to determine when school administrators go to the extent of abridging First Amendment rights to accomplish its proffered goals. Therefore, the Supreme Court's panoply of First Amendment free speech cases must be examined to provide specific guidance to analyzing free speech issues in educational institutions.

While the Supreme Court had previously made it clear that students are entitled to some Constitutional protection,[15] the Court first established

14. U.S. CONST. amend. I. The First Amendment is made applicable to the states by the Fourteenth Amendment.

15. *See, e.g.,* Meyer v. Nebraska, 262 U.S. 390 (1923) (finding that the state may not forbid the teaching of a foreign language to students); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (finding

standards for analyzing whether school administrators were encroaching on the First Amendment rights of students in *Tinker v. Des Moines Independent Community School District*.[16] The *Tinker* Court noted that the "problem lies in the area where students in the exercise of First Amendment rights collide with the rules of school authorities."[17]

In *Tinker*, school administrators suspended high school and junior high school students for wearing black armbands to school to protest the hostilities in Vietnam. The school authorities had adopted a policy a few days earlier that any student wearing a black armband to class would be asked to remove it and if the student refused, the student would be suspended until he or she returned to school without the black armband. The Supreme Court found that the wearing of black armbands in the circumstances of this case was "pure speech" and since it did not involve any actual or potentially disruptive conduct by the participating students, it was subject to the comprehensive protections of the First Amendment.[18] The Court further found that there was no evidence that the school administrators had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students or that the prohibition was necessary to avoid material or substantial interference with discipline.[19] Additionally, the Court noted that the symbol of black armbands was singled out for prohibition by the school authorities.[20] Thus, the Court held that the prohibition of armbands in this case violated the students' rights of free speech under the First Amendment.[21]

The Supreme Court reaffirmed *Tinker* and applied it to state colleges and universities in *Healy v. James*.[22] *Healy* involved a suit by a group of college students whose request for official recognition for their local chapter of Students for a Democratic Society as a campus organization was rejected by the college president. While freedom of association is not specifically mentioned in the Constitution, the Supreme Court has recognized this right as deriving from the First Amendment rights of freedom of speech and assembly

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that while the state may prescribe reasonable education standards, it may not require that all children be educated in public schools); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (finding that school students could not be compelled to salute the flag in violation of their religious beliefs).

16. 393 U.S. 503 (1969).
17. *Id.* at 507.
18. *Id.* at 505-506.
19. *Id.* at 509.
20. *Id.* at 510-511.
21. *Tinker*, 393 U.S. at 510-511.
22. 408 U.S. 169 (1972).

as well as the right to petition.[23] Therefore, although the circumstances in *Healy* did not directly deal with specific speech, the Court noted that the effect of official recognition would have permitted the group to place announcements regarding meetings, rallies, or other activities in the student newspaper, to use various college bulletin boards, and to use the campus facilities for meetings.[24] The Supreme Court concluded that First Amendment free speech analysis was appropriate.[25]

The *Healy* Court first framed the additional problem it faced:

> As the case involves the delicate issues concerning the academic community, we approach our task with special caution, recognizing the mutual interest of students, faculty members and administrators in an environment free from disruptive interference with the educational process. We also are mindful of the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order. Where these interests appear to compete the First Amendment, made binding on the States by the Fourteenth Amendment, strikes the required balance.[26]

The Court went on to find that the denial of official university recognition to the group based on a disagreement with the group's philosophy violated the First Amendment.[27] However, the Court also found that a proper basis for non-recognition would have been acceptable under the First Amendment by a showing that the group refused to comply with a rule requiring them to abide by reasonable campus regulations.[28] Thus, the Supreme Court concluded that because the record was not clear as to whether the college had such a rule and, if so, whether the student group intended to observe it, that the case be remanded to resolve these issues.[29]

Shortly after *Healy*, the Supreme Court was faced with another university student free speech case in *Papish v. Board of Curators of the University of Missouri*.[30] In *Papish*, a state university graduate student was expelled for distributing on campus an outside newspaper that included a political cartoon depicting a policeman raping the Statue of Liberty and the Goddess of Justice

23. NAACP v. Alabama, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963).
24. *Healy*, 408 U.S. at 176.
25. *Id.* at 170.
26. *Id.* at 171.
27. *Id.* at 187.
28. *Id.* at 193-194.
29. *Healy*, 408 U.S. at 194.
30. 410 U.S. 667 (1973).

with a caption that stated "With Liberty and Justice for All." The same newspaper issue also contained an article, reproduced from another paper, which was titled "Motherfucker Acquitted," that discussed the trial of a leader of an organization called "Up Against the Wall, Motherfucker." The student was expelled for violating a school regulation that required students to observe generally accepted standards of conduct and prohibited indecent conduct or speech.

In *Papish*, the Supreme Court initially noted that the outside newspaper had been distributed on campus for four years under an authorization by the university business office.[31] The Court went on to hold that the state university's action in expelling the student because of her distribution of the allegedly indecent newspaper cannot be justified under the First Amendment as a nondiscriminatory application of the school rules governing conduct where the student was expelled because the university disapproved of content of the newspaper rather than the time, place, or manner of its distribution.[32]

In *Widmar v. Vincent*,[33] a state university trying not to violate the establishment clause of the First Amendment found that in doing so it violated the free speech clause of the First Amendment. The university made its facilities routinely available for registered student organizations. However, it excluded a student group that wanted to use its facilities for religious worship and religious discussion. The school based its decision on a university regulation that prohibited use of the buildings and grounds for religious worship or teaching. However, the Supreme Court held that the university's exclusionary policy violated the fundamental principle that a regulation of speech should be content-neutral.[34] The Court found that religious worship and discussion are forms of speech protected by the First Amendment and that the university must justify any discriminations and exclusions under applicable constitutional scrutiny.[35]

The Supreme Court distinguished *Tinker* and added to its student free speech analysis in *Bethel School District No. 403 v. Fraser*.[36] In *Fraser*, a high school student delivered a speech laden with obvious sexual metaphors nominating another student for student government. The speech was given at a high school assembly with students and teachers in attendance. The student

31. *Id.* at 667.
32. *Id.* at 670.
33. 454 U.S. 263 (1981).
34. *Id.* at 267-268.
35. *Id.* at 269-270.
36. 478 U.S. 675 (1986).

was subsequently suspended for violating a school disciplinary rule which prohibited the use of obscene, profane language or gestures. The trial and appellate courts relied on *Tinker* to hold that the school's sanctions violated the First and Fourteenth Amendments.[37] The Supreme Court reversed, upholding the suspension and distinguishing *Tinker* from the circumstances in *Fraser*.[38] The Court held that the First Amendment did not prevent the school authorities from suspending the student in response to his speech because the penalties were unrelated to any political viewpoint and the First Amendment does not prevent school officials from determining that to permit such vulgar and lewd speech by a student would undermine the school's basic educational mission.[39]

The Supreme Court was faced with another First Amendment free speech issue involving a high school newspaper in *Hazelwood School District v. Kuhlmeier*.[40] *Hazelwood* involved a school-sponsored student newspaper that was written and edited by a journalism class as part of the school's curriculum. The teacher in charge of the paper, pursuant to the school's practice, submitted page proofs to the principal for review. The principal objected to an article describing student pregnancy because the pregnant students, although not named specifically, could be identified from the text. The principal also objected to a divorce article because the proofs identified a student by name who complained of her father's conduct and the father had not been given the opportunity to respond or to consent to the article's publication.

The *Hazelwood* Court reaffirmed the Court's conclusions in *Tinker* that students do not shed their rights at the schoolhouse gates and their conclusions in *Fraser* that the First Amendment rights of students in public schools are not coextensive with those of adults in other settings.[41] The *Hazelwood* Court held that a school need not tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school.[42] The Court found that the school newspaper in this case could not be characterized as a forum for public expression.[43] The Court held that educators are entitled to exercise control over school-sponsored publications, theatrical productions and other

37. *Id.* at 679.
38. *Id.* at 685-686.
39. *Id.*
40. 484 U.S. 260 (1988).
41. *Id.* at 266.
42. *Id.*
43. *Id.* at 267.

expressive activities that people might reasonably believe to bear the imprimatur of the school.[44] The Supreme Court concluded that a school does not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as the school's actions are reasonably related to legitimate pedagogical concerns.[45] The Supreme Court did note that it did not nor need it now decide whether the same degree of deference is appropriate for school-sponsored expressive activities at the college level.[46]

In *Lamb's Chapel v. Center Moriches Union Free School District*,[47] the Supreme Court relied on its holding in *Widmar* to find that a school district violated the Free Speech Clause of the First Amendment by not allowing a local church to show a film series solely because it appeared to be church related. The Court noted that the although the school district did not have to allow use of its facilities when not in use for school purposes, it did so provided that the function was for social, civic, and recreational purposes and that it was open to the general public.[48] Religious use was specifically excluded. The Court noted that there was no dispute that the film series met all of the criteria.[49] Thus, the Supreme Court concluded that the school board unconstitutionally applied viewpoint discrimination against a religious view in violation of the Free Speech Clause of the First Amendment.[50]

In *Rosenberger v. Rector and Board of Regents and Visitors of the University of Virginia*,[51] the Supreme Court extended its holding in *Widmar* to find that a state university violates the Free Speech Clause not only by denying access to its facilities to student religious organization but by excluding funding for a student religious organization's magazine from a program of support for student publications. The Court noted that the university authorized payments from a student activities fund to outside contractors for the printing costs of a variety of publications made by approved student groups and that the fund obtained its money from mandatory student fees.[52] The university withheld authorization for payments to an outside printer

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44. *Id.* at 271.
45. *Hazelwood*, 484 U.S. at 273.
46. *Id.* at 273 n.7.
47. 508 U.S. 384 (1993).
48. *Id.* at 391.
49. *Id.* at 393-394.
50. *Id.* at 394.
51. 515 U.S. 819 (1995).
52. *Id.* at 823-824.

because the student publication violated the student activity fee guideline that prohibits publications that promote a particular religion or belief. The Supreme Court found that the university guideline violated the free speech guarantee of the First Amendment because the government regulated speech based on its substantive content.[53] The *Rosenberger* Court concluded that the university's viewpoint discrimination was impermissible as it was directed against speech that was otherwise within the guidelines of a neutral funding program.[54]

The Supreme Court again looked at student funding as a First Amendment free speech issue in *Board of Regents of the University of Wisconsin System v. Southworth*.[55] In *Southworth*, some students alleged that the portion of a state university required student activity fee that supported student organizations engaged in political and ideological expression was offensive to their beliefs and violated their First Amendment rights. The Court held that a student may be required to pay the student fee as long as the program of funding is viewpoint neutral.[56] The Court reasoned that if a university determines that its mission is well served by students engaging in dynamic discussion on a broad range of issues, it may impose a mandatory fee to sustain such dialogue.[57] However, the Court held that a standard of viewpoint neutrality in allocating such fees is necessary to protect students' First Amendment rights.[58]

III. CAN A UNIVERSITY REGULATE LEWD, INDECENT, OR OFFENSIVE STUDENT FAN BEHAVIOR?

The aforementioned Supreme Court cases indicate that students do not shed their First Amendment rights at the front gates of the schoolhouse. However, these rights are not absolute and must be balanced with the interest of the school in accomplishing its primary mission of education free from disruption.

Before analysis can begin, the most basic issue regarding the First Amendment is whether the Constitution and its protection even applies to

53. *Id.* at 828.

54. *Id.* at 840.

55. 529 U.S. 217 (2000).

56. *But cf.* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 850 (1995) (O'Connor, J., concurring) (noting the possibility that a student fee is subject to a Free Speech Clause challenge by an objecting student so that the student cannot be compelled to pay for speech which she disagrees).

57. *Id.* at 233.

58. *Id.* at 233-234.

students at college athletic events. The First Amendment applies to federal government action and is applicable to the states through the Fourteenth Amendment.[59] Thus, state colleges and universities are subject to the Free Speech Clause of the First Amendment. However, private colleges and universities are not generally subject to the First Amendment and have much more freedom in regulating student speech. The ultimate issue is whether the alleged infringement of First Amendment rights by a private school is "fairly attributable to the State."[60] The relevant question is not whether a private school is serving a public function but whether the function has been traditionally the exclusive prerogative of the state.[61]

Athletic events conducted by private colleges and universities, much like a privately owned sports venue, are not attributable to the state and traditionally have not been a public function under the exclusive prerogative of the state. Thus, private schools have much more control over restricting speech that occurs at athletic events under its control. Therefore, this article will focus on state colleges and universities, as free speech rights are directly subject to the First Amendment through the Fourteenth Amendment.

A. College Sport Venues and First Amendment Public Forum Analysis

When determining what type of regulations a government entity can make regarding First Amendment speech at college athletic events, the first step is to consider who owns the venue used for the college sports event. If a private property is leased to a school for the limited purpose of holding athletic events, and the control and operation of the property/facility remains in the hands of the private owner, then the venue is not state property and the private owner can regulate the behavior of the fans with greater freedom. This typically is detailed in the contract between the university and the private owner for use of the facility. If a state school owns the property/facility, the First Amendment is applicable through the Fourteenth Amendment.

Nevertheless, just because property is owned by the state, does not mean that it is open to any and all forms of speech. The right to assert one's views in public is a fundamental right in our society, but it is not an absolute right and it is subject to certain forms of regulation. The type of government regulation that is permissible under the First Amendment depends to a certain extent on the nature of the public property and its dedicated use.

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59. *Lamb's Chapel*, 508 U.S. at 387.

60. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

61. *Id.* at 842.

Public property exists for a variety of purposes and serves various functions. The government needs to limit use of this property to serve its intended use. However, some public property is so historically associated with free speech that it cannot be totally closed to free expression. Public streets and parks have traditionally been regarded as public forums from colonial times. The United States Supreme Court explained:

> Wherever the title to streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[62]

The Supreme Court, in *Perry Education Association v. Perry Local Educators' Association*,[63] recognized three forum classifications of public property that are utilized for evaluating a state regulation under the First Amendment Free Speech Clause. These categories range from the historically open public forum to public forums that have been created by the government for specific purposes and historically have not been associated with open expression by the public.

The first category noted by the *Perry* Court is the traditional public forum. "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."[64] This is the "quintessential" public forum where "the government may not prohibit all communicative activity."[65] These include the public streets and parks that have historically been used for communication and discussion of public issues between citizens. Regulation of these places is carefully scrutinized.

Nevertheless, even a traditional public forum is subject to some regulation, which even includes regulation of content. The *Perry* Court stated the standard for First Amendment analysis in this quintessential public forum: "For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[66] Of course, the Court also noted that "[t]he State may also enforce regulations of the time, place, and manner of

62. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

63. 460 U.S. 37 (1983).

64. *Id.* at 45.

65. *Id.*

66. *Id.*

expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[67]

The second forum category "consists of public property which the State has opened for use by the public as a place for expressive activity."[68] The First Amendment "forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place."[69] In the case of schools, examples of this forum category consist of school property that is opened up for meetings or other events when not in use for its primary educational purpose.[70]

However, the state is not required to keep a forum as an open public forum when creating it, but as long as it does, it is bound by the same First Amendment standards of review as for an open forum. The *Perry* Court held that:

> Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.[71]

The Supreme Court found that this type of forum was created in *Widmar v. Vincent*.[72] In *Widmar*, a state university refused to grant a student religious group access to university facilities generally open to other student groups. The denial was based solely on the religious content of the group's intended speech. The Supreme Court went on to find that:

> Through its policy of accommodating meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a

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67. *Id.*

68. *Id.*

69. *Id.*

70. Widmar v. Vincent, 454 U.S. 263 (1981) (university student organization meetings); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (community group events).

71. *Perry Educ. Ass'n*, 460 U.S. at 46.

72. 454 U.S. 263 (1981).

> forum generally open to the public, even if it was not required to create the forum in the first place.[73]

Similarly, in *Lamb's Chapel v. Center Moriches Union Free School District*,[74] the Supreme Court found a designated public forum was created by the school district. In *Lamb's Chapel*, a local school district permitted use of school premises outside of school hours provided the use was for social, civic, or recreational meetings that were open to the public. Religious use was prohibited. A local church was denied use of the property for showing a six-part film series dealing with family and child rearing issues based on the reason that the film appeared to be church related. There was no dispute that the film series did not meet the other criteria. The Court initially noted that the school district, "like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated" and "need not have permitted after-hours use of its property for any of uses" permitted by state law. [75] However, the Court stated:

> [A]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum. . . or if he is not a member of a class of speakers for whose especial benefit the forum was created. . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.[76]

The *Lamb's Chapel* Court concluded that the film series involved a subject otherwise permissible and that "its exhibition was denied solely because the series dealt with the subject from a religious standpoint," thus the government violated the First Amendment by regulating speech that favors some viewpoints at the expense of others.[77]

The third category of forum consists of "[p]ublic property which is not by tradition or designation a forum for public communication."[78] In this case, the state has the same right of control as a private owner of property to reserve the property under its control for the use to which it is dedicated.[79] The *Perry*

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73. *Id.* at 267-68.

74. 508 U.S. 384 (1993).

75. *Id.* at 391.

76. *Id.* at 394 (quoting Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985)).

77. *Lamb's Chapel*, 508 U.S. at 394.

78. *Perry Educ. Ass'n*, 460 U.S. at 46.

79. *Id.*

Court explained: "We have long recognized that the 'First Amendment does not guarantee access to property simply because it is owned or controlled by the government.'"[80] In regard to this type of forum, the Court held that "[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.[81]

In *Perry*, the Supreme Court found that an internal mail system among schools within a district is not a public forum.[82] The Court noted that it would have been a relevant consideration if "by policy or practice" the school district had "opened its mail system for indiscriminate use by the general public, then" it could have been justifiably argued that "a public forum had been created."[83] However, the Court added that even if the schools allowed some outside organization access, "selective access does not transform government property into a public forum."[84]

The Supreme Court also found this type of forum in *Lehman v. City of Shaker Heights*.[85] In *Lehman*, the Supreme Court found that a city's refusal to accept political advertising on a city owned mass transit system while accepting other advertising did not violate the First Amendment. The Court noted that "[w]ere we to hold to the contrary display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician."[86] The Court concluded: "No First Amendment forum is here to be found."[87]

It is in this third category of public property that collegiate athletic sports venues fall for purposes of First Amendment free speech analysis. As the Supreme Court stated in *Grayned v. City of Rockford*,[88] the Court has "nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate

80. *Id.* (quoting United States Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981)).

81. *Id.*

82. *Id.* at 47.

83. *Perry Educ. Ass'n*, 460 U.S. at 47.

84. *Id.*

85. 418 U.S. 298 (1974).

86. *Id.* at 304.

87. *Id.*

88. 408 U.S. 104 (1972).

environs for his unlimited expressive purposes."[89] In *Widmar v. Vincent*,[90] the Supreme Court explained further:

> A university differs in significant respects from public forums such as streets and parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its buildings or grounds.[91]

Most of a state university's facilities are for dedicated educational purposes. For example, a classroom would be for a dedicated educational purpose when a class or class activity is meeting. Therefore, students cannot arbitrarily speak on whatever subject or topic they feel like during class. A library also has its own dedicated purpose and loud or disruptive speech (or behavior) can be prohibited.

Similarly, a college athletic venue is not a public forum. When used for a collegiate sports event a state university sports facility is for the dedicated purpose of conducting a school athletic event. There is no tradition in the United States of college sports venues being used for purposes of assembly, communicating thoughts between citizens, or discussing public questions. Additionally, it is not a designated public forum during the event, even though it may become a limited designated public forum during the times it is not used for an official school athletic event when the school opens it to other uses. A school athletic event is the dedicated government purpose. The facility is not open at that time for any indiscriminate use by the public. State owned or operated property does not become a public forum simply because the public is allowed to come and go at will.[92] Thus, a university athletic venue remains a nonpublic forum when used for official college athletic events regardless of its permitted use at other times.

If a university athletic event forum is subject to the First Amendment standard under nonpublic forums, any regulation of speech must: (1) be reasonable in light of the purpose served; and (2) not be an effort to suppress expression merely because public officials oppose the speaker's view.[93] The

89. *Id.* at 117-18.

90. 454 U.S. 263 (1981).

91. *Id.* at 267 n.5.

92. United States v. Grace, 461 U.S. 171, 177 (1983).

93. *Perry Educ. Ass'n*, 460 U.S. at 46.

policy "need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the Constitution,"[94] but "need only rationally further a legitimate state purpose."[95] Thus, in *Lehman*, the Supreme Court, in finding that a city could ban all political advertising on its public transit vehicles while permitting other advertising, concluded that "[t]he city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."[96]

In *Perry*, after finding that an internal mail system among schools within a district is not a public forum,[97] the Supreme Court went on to hold that it is reasonable to provide differential access based on status because it is wholly consistent with the school district's legitimate interest in preserving the property for the use to which it is lawfully dedicated.[98] The Supreme Court explained:

> Implicit in the concept of nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.[99]

Thus, a university may proscribe expression in the nonpublic forum of a college athletic facility based on subject matter which includes lewd, indecent, or personally offensive speech. A university athletic forum has a primary purpose of conducting college athletic events. It is not a forum for student fans to vent their lewd, indecent, or personally offensive speech about the other school or its athletes, which may disrupt or annoy the players or the other fans attending to watch the event. Therefore, it is reasonable to prohibit this type of expressive behavior in light of the purpose the property serves. Additionally, the underlying purpose of college athletics is to provide an extracurricular educational experience for the student athletes. The educational mission of the school is advanced by encouraging sportsmanlike

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94. *Id.* at 54.
95. *Id.*
96. *Lehman*, 418 U.S. at 304.
97. *Perry Educ. Ass'n*, 460 U.S. at 47.
98. *Id.* at 50-51.
99. *Id.* at 49.

behavior from the student athletes and fans alike. Thus, it is clearly reasonable to have regulations that attempt to maintain a civil environment for college athletics from both a participant and fan perspective.

These regulations are consistent with the Supreme Court's finding in *Cohen v. California*.[100] In *Cohen*, the Court held that Cohen's conviction might have been justified "as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the message [his opposition to the military draft] it conveys."[101] The Court went on to conclude that "the First and Fourteenth Amendments have never been thought to provide absolute protection to every individual to speak whenever and wherever he pleases, or to use any form of address in any circumstances he chooses."[102] Thus, *Cohen* does not stand for the proposition that lewd, indecent, or vulgar language can be used at any place and at any time.

The Supreme Court recites several facts that tend to distinguish the basis of Cohen's conviction with an interpretation that *Cohen* prohibits a restriction on lewd, indecent, or vulgar language as a violation of the First Amendment. The Court noted the peculiar facts leading to the arrest:

> It is illuminating to note what transpired when Cohen entered the courtroom building. He removed his jacket and stood and folded it over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge refused to do so and Cohen was arrested by the officer only after he emerged from the courtroom.[103]

The Court also added that the California appellate court found that the defendant did not make any loud or unusual noise.[104]

Additionally, the Supreme Court found that Cohen's conviction did not rest on a portion of the statute that is concerned with the plight of a captive audience being powerless to avoid his conduct.[105] The Court first noted that people have a more "substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park."[106] However, the Court stated:

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100. 403 U.S. 15 (1971).
101. *Id.* at 19.
102. *Id.*
103. *Id.* at 19 n.3.
104. *Cohen*, 403 U.S. at 16.
105. *Id.* at 21-22.
106. *Id.* at 21.

> [W]e do not think some unwilling 'listeners' in a public building may have been briefly exposed to it [the message on Cohen's jacket] can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive audience, but, instead, indiscriminately sweeps with its prohibitions all 'offensive conduct' that disturbs 'any neighborhood person.'[107]

The only person who seemed to object to the message on Cohen's jacket was the police officer who arrested Cohen. Thus, Cohen's conviction seems to turn more on the nature of the specific statute applied to the specific facts. The statute and California courts were silent as to establishing that the purpose of statute was to protect a captive audience from being subjected to indecent language. The fact that no one was offended, including the judge in whose courtroom Cohen brought the jacket, added to the elimination of the captive audience or decorum purpose justifying the conviction under the statute.

It is likely that had Cohen been wearing his jacket with his message showing, then sat in the courtroom directly in front of an audience that included a young child, and then there were complaints, the judge may have asked him to remove or cover the jacket. Cohen might well have been held in contempt of court if he had refused and the Supreme Court may well have upheld the contempt charge based on a captive audience[108] or the decorum rationale. Likewise, a college athletic event venue is often a place where families, including those with young children, come, and a regulation prohibiting lewd, indecent, or vulgar would seem to be reasonable in light of the purpose served by the forum.

In addition to the regulation of the manner of Cohen's speech, the Supreme Court indicated that his conviction might have been supported "on the ground

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107. *Id.* at 22.

108. Additionally, a college athletic event may be broadcast on television or radio into people's homes and especially at times when young children are very likely to be watching, so that indecent language at the event may result in concerns relating to the broadcast audience. Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 116 (1996) (holding that for purposes of the free speech guarantee of the First Amendment, the protection of children from exposure to indecent material is a compelling government interest); FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding that it is not unconstitutional for the FCC to impose sanctions on a broadcast licensee as a result of the broadcast of indecent language at time when children may be in the audience). More recent events, such as the Janet Jackson Super Bowl halftime show fiasco and the Howard Stern Show sanctions, have indicated that FCC regulation of this behavior is still viable.

that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested."[109] However, the Court found that Cohen's criminal conviction must fail in this instance because of the "absence of any language in the statute that would put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places."[110] The Court concluded, "no fair reading of the phrase 'offensive conduct' could be said sufficiently to inform the ordinary person that distinctions between certain locations [in the courthouse] are thereby created."[111]

Nevertheless, because the athletic facility is a nonpublic forum, a university may exclude certain types of speech altogether. For example, a university may prohibit all political signs in the athletic venue under a similar rationale as *Lehman*. Political signs could be prohibited while signs relating to the sporting event (as long as not lewd or indecent) could be allowed. Of course, the university could prohibit all signs as disruptive and interfering with viewing the event or affecting fan safety.

The *Perry* Court noted another factor that deals with the reasonableness of the limitations on expressive activity in a nonpublic forum, the availability of alternative channels that remain open to the communication.[112] The *Perry* Court held that there was no showing that the ability to communicate with teachers was "seriously impinged by the restricted access to the mail system."[113] The Court found that the variety and type of alternative modes available to access the teachers compared favorably to other nonpublic forum cases where restrictions have been upheld.[114]

Offensive speech that touches upon civic issues that involve the athletic event or the participants, may be of particular concern to courts. For example, where students want to speak out against a member of a school's athletic team who was allegedly taking drugs, the availability of nearby alternative places for expression may be important. In the case of athletic event venues, there are alternatives for offensive speech that implicate First Amendment rights. For instance, student fans can protest outside of the venue as long as they are not interfering with the safety of others.

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109. *Cohen*, 403 U.S. at 19.

110. *Id.*

111. *Id.*

112. *Perry Educ. Ass'n*, 460 U.S. at 53.

113. *Id.*

114. *Id.* at 53-54.

Most of the behavior universities are trying to prevent does not involve a particular viewpoint but rather the nature or form of comments. However, in the instance where student fan expression involves speech regarding issues of public concern, such as an alleged rape by student athletes or even recruiting violations of a school, the university may have to insure that it is not restricting speech merely because public officials oppose a particular speaker's viewpoint.[115] Thus, regulations and enforcement of those regulations must not discriminate against one speaker's viewpoint. If a regulation prohibits lewd or indecent language, it must not be enforced only against those whose viewpoints are opposed by school officials.

B. Time, Place, and Manner Regulations

Even if a college sports venue was considered a public forum or limited public forum, the university could institute reasonable time, place, and manner regulations. These regulations do not violate the constitution even in quintessential public forums such as parks and streets. In *Hague v. Committee for Industrial Organization*,[116] the United States Supreme Court outlined the basic limits of free speech in public forums. The *Hague* Court found that the "privileges of a citizen of the United States to use streets and parks for the communication of views on national questions may be regulated in the interest of all."[117] The Court explained that these privileges are "not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order."[118]

In fact, shortly after *Hague* was decided, the Supreme Court in *Schneider v. State*,[119] stated that "[m]unicipal authorities, as trustees for the public, have a duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated."[120] The Court noted that prohibiting certain conduct, such as standing in the middle of a crowded street or throwing of leaflets in the streets, "would not abridge the constitutional liberty since such activity bears no

115. Brady, *supra* note 6, at 1A (noting that Illinois fans singled out University of Iowa basketball player Pierre Pierce calling him a rapist and chanted "No means no!" referring to accusations that Pierce sexually assaulted a woman. Pierce had plead guilty to a misdemeanor charge of assault causing injury; he originally had been charged with felony sexual assault.)

116. 307 U.S. 496 (1939).

117. *Id.* at 515-16.

118. *Id.*

119. 308 U.S. 147 (1939).

120. *Id.* at 160.

reasonable relationship to the freedom to write, speak, print or distribute information or opinion."[121]

The Supreme Court, in *Cox v. New Hampshire*,[122] specifically promulgated the rationale for "time, place, and manner" regulations of even the traditional public forum of a public street. The *Cox* Court stated:

> Civil Liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means for safeguarding the good order upon which they ultimately depend.[123]

Thus, reasonable regulations of time, place, and manner are not only allowable in a public forum, but are required to protect the rights of others in our society.[124]

However, a time, place, and manner restriction may not be based on the content of the speech unless the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[125] The state may enforce time, place, and manner regulations of expression "which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample channels of communication."[126]

In *Grayned*, the Supreme Court even upheld a noise regulation that affected the area immediately around a school, including adjacent private property, as well as quiet sidewalk picketing while a school was in session.[127] The Court found that the area immediately around a school during school sessions may be closed to expressive activity that disrupts or is about to

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121. *Id.* at 160-61.

122. 312 U.S. 569 (1941).

123. *Id.* at 574.

124. It would be difficult to think of any public forum that would not have some regulation that affects the broad area of what we consider speech or expressive conduct. *See, e.g.,* Texas v. Johnson, 491 U.S. 397 (1989) (finding that flag burning in public was expressive conduct permitting the defendant to invoke the First Amendment); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (a city ordinance that regulated the volume of amplified sound at a city park band shell was unsuccessfully challenged under the First Amendment).

125. *Perry Educ. Ass'n*, 460 U.S. at 45.

126. *Id.*

127. Grayned v. City of Rockford, 408 U.S. 104, 106 (1972).

disrupt normal school activities.[128] The Court held that although school property may not be declared off limits for expressive activity by students and that the public sidewalk adjacent to the school grounds may not be declared off limits for expressive activity by the public, "in each case, expressive activity may be prohibited if 'it materially disrupts classwork or involves a substantial disorder or invasion of the rights of others.'"[129] Thus, even in traditional public forums, the Court will consider the nature of the state as educator in defining what time, place, and manner regulations are not prohibited by the First Amendment.

The *Grayned* Court found that the nature of a place and its normal activity pattern dictate the kinds of time, place, and manner regulations that are reasonable.[130] The Supreme Court concluded that "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[131] In the case of university grounds, the nature of a college athletic venue makes regulations that prohibit lewd, indecent, vulgar, and extremely offensive personal behavior reasonable.

C. "Fighting Words" and Lewd, Indecent, Vulgar and Offensive Language

The United States Supreme Court has held that certain classes of offensive words have no First Amendment protection even in public forums. These are words that have no social value and offer little in the way of traditional free speech value. In *Chaplinsky v. New Hampshire*,[132] the United States Supreme Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words - - those which by there very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

128. *Grayned*, 408 U.S. at 110-111.

129. *Id.* at 118 (quoting Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969)).

130. *Id.* at 116.

131. *Id.*

132. 315 U.S. 568 (1942).

> derived from them is clearly outweighed by the social interest in order and morality.[133]

Many of these classes of speech are interrelated. Insulting or "fighting" words often involve lewd, obscene, profane, or libelous words. Therefore, although *Chaplinsky* is mainly associated with the "fighting words" doctrine, modifications and clarifications of this doctrine have often involved Supreme Court findings in these other classes of speech.

The *Chaplinsky* Court sustained a criminal conviction under a state statute that prohibited "any offensive, derisive, or annoying word" addressed to any person who is legally in a public place "with the intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."[134] The Court found that the statute did not violate the First Amendment as it did no more than "prohibit face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker."[135] The Court responded to the allegation that the statute was vague and indefinite by finding that the statue was "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace."[136]

Thus, the *Chaplinsky* Court established the "fighting words" doctrine, which offers no First Amendment protection to this class of speech. However, in subsequent decisions the Court has often focused more on whether the statute was "narrowly drawn and limited" in finding that the statute was prohibited by the Constitution. In *Terminiello v. Chicago*,[137] the Supreme Court did not reach the "issue of whether petitioner's speech was composed of derisive, fighting words, which carried it outside the scope of constitutional guarantees."[138] Instead, the *Terminiello* Court found that the ordinance in question as construed by the trial court "permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest."[139] The Court concluded that "[a] conviction resting on any of those grounds may not stand."[140] The statute was not as "narrowly

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133. *Id.* at 571-72.
134. *Id.* at 569.
135. *Id.* at 573.
136. *Id.*
137. 337 U.S. 1 (1949).
138. *Id.* at 3.
139. *Id.* at 5.
140. *Id.*

limited" as the one in *Chaplinsky*, and therefore, violated the Constitution as proscribing some protected speech.

The *Terminiello* Court stated that "freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantial evil that rises far above public inconvenience, annoyance, or unrest."[141] This raises the standard for what constitutes fighting words, at least in public forums. However, while noting that freedom of speech is not absolute, the Supreme Court explained:

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[142]

Thus, the standard for what constitutes "fighting words" is very high when speech serves this historically important purpose of pressing for acceptance or discussion of different ideas or points of view in public places.

Nevertheless, even if speech serves to convey political opinions, the state may make and enforce laws where a clear danger of disorder is threatened as long as it is not based on the content of the speech. In *Feiner v. New York*,[143] a speaker on a city street made an inflammatory speech about public officials and urged the African American population to rise up in arms against the white population. A mixed crowd became restless, blocking the sidewalk and overflowing into the street, with at least one threat against the speaker. After observing the situation for some time without interference and in order to prevent a fight, police officers repeatedly requested that the speaker get off the box and stop speaking. After the speaker refused for the third time, and after speaking for thirty minutes, the police arrested the speaker and he was convicted under a state law that forbids incitement of a breach of the peace.

The Supreme Court first noted in *Feiner* that:

> [T]he officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to the

141. *Terminiello*, 337 U.S. at 4.

142. *Id.*

143. 340 U.S. 315 (1951).

> claim that the acts of the petitioner were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for the making or content of his speech.[144]

Thus, the motivation for the statute and its enforcement was not to favor or disfavor certain views, but to keep order.

Nevertheless, the *Feiner* Court noted: "We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officers complete discretion to break up otherwise lawful public meetings."[145] However, the Court felt that it was not faced with such a situation, and stated:

> [I]t is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.[146]

The *Feiner* Court did not limit the power of the state to enforce its laws only to situations when there is a clear and present danger of riot, but also extended enforcement to situations when there is a danger of "disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."[147] Thus, *Feiner* instructs us to examine the state's purpose for the regulation.

Because *Feiner* does not involve a personal verbal abuse directed toward a specific person who was present, *Feiner* is often referred to as a "hostile audience" case.[148] However, whether the Supreme Court upholds a First Amendment challenge to a speaker's arrest in a "hostile audience" case often turns on the type of "words" the speaker is using.[149]

Beauharnais v. Illinois,[150] soon followed the *Feiner* case. In *Beauharnais*, the Supreme Court upheld a defendant's conviction for distributing racist

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144. *Id.* at 299-300.

145. *Id.* at 320.

146. *Id.* at 321.

147. *Id.*

148. *Cohen*, 403 U.S. at 20.

149. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963) (finding that state convictions violated the defendants' First Amendment rights of speech where the defendants sang patriotic and religious songs and peaceably were expressing their views with no threat of violence).

150. 343 U.S. 250 (1952).

leaflets on the streets of Chicago.[151] The state court had construed the statute as a form of criminal libel law where truth of the utterance was not a defense unless the publication was made with good motives and for justifiable ends.[152] The Supreme Court initially cited *Chaplinsky* for finding that libel was one of the "'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'"[153] However, the *Beauharnais* Court went on to conclude that:

> Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.[154]

Thus, the *Beauharnais* Court held that in the well-defined classes where First Amendment protection is not applicable, which include libel and obscene speech, as well as lewd, profane, and insulting words, there is no requirement that a clear and present danger exist for these words to be proscribed.[155] *Beauharnais* is often categorized as a group libel case. However, it does involve offensive speech that may also be considered fighting words when personally directed at a specific individual or group.

The Supreme Court clarified the "fighting words" doctrine in *Cohen v. California*.[156] The *Cohen* Court defined "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction."[157]

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151. *Id.* at 266.

152. *Id.* at 243-254.

153. *Id.* at 255-56 (quoting Chaplinsky v. Chicago, 315 U.S. 568, 571-72 (1942)).

154. *Beauharnais*, 343 U.S. at 266.

155. In the instance where criminal penalties exist for speech advocating violence or the use of force, the doctrine of fighting words, while appearing similar, is not how these cases are analyzed. Advocacy of violence cases usually do not involve the type of face-to-face insults that invoke the fighting words classification, although it may result in a hostile audience reaction by the addressees or the onlookers. Those cases that involve the criminalizing of speech advocating unlawful action are not one of a specific well-defined class of speech that is exempt from First Amendment protection, but are analyzed based on the nature of the evil and the immanency of the unlawful action actually occurring, as this speech may have clear traditional First Amendment implications. Brandenburg v. Ohio, 395 U.S. 444 (1969) (finding that for purposes of determining whether the constitutional guarantees of free speech are violated, the mere abstract teaching of the moral necessity for a resort to violence is not the same as preparing a group for violent action and steeling it to such action).

156. 403 U.S. 15 (1971).

157. *Id.* at 20.

While the Court also noted that "[w]hile the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion," it went on to distinguish its use in this case, finding that "in this instance it was clearly not 'directed to the person of the hearer.'"[158] The Court found that:

> No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction.[159]

The Supreme Court concluded that there was "no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result."[160] Therefore, the "fighting words" doctrine (and "hostile audience" doctrine) was substantially clarified and narrowed to avoid intrusion onto speech protected by the First Amendment.

In *Gooding v. Wilson*,[161] the Supreme Court briefly discussed the "fighting words" doctrine before reversing a conviction on the grounds that the statute was overly broad in prohibiting speech protected by the First and Fourteenth Amendments. The state statute made it a misdemeanor for any person to use "opprobrious words or abusive language, tending to cause a breach of the peace."[162] The *Gooding* Court specifically reaffirmed the *Chaplinsky* Court's holding that the state has power "constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression."[163] However, the Court found the words "opprobrious" and "abusive" were not by definition or by construction by the state courts limited to utterances that constituted fighting words.[164] Therefore, as the statute was neither narrowly drawn nor construed, the Supreme Court found it to be unconstitutionally overbroad and vague on its face.[165] In light of *Gooding*, a number of cases were remanded for reconsideration.[166]

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158. *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 309 (1940)).

159. *Cohen*, 403 U.S. at 20.

160. *Id.*

161. 405 U.S. 518 (1972).

162. *Id.* at 518.

163. *Id.* at 523.

164. *Id.* at 524-25.

165. *Id.* at 518.

166. *See, e.g.,* Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Lewis v. City of New Orleans, 408 U.S. 913 (1972); Brown v. Oklahoma, 408 U.S. 914 (1972).

In a more recent case, *R.A.V. v. City of St. Paul*,[167] the Supreme Court rejected an overbreath claim based on the state court's construction that the ordinance reached only those expressions that constitute "fighting words" within the meaning of *Chaplinsky*."[168] However, the Supreme Court found that the ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[169]

The Supreme Court found that the ordinance applied "only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"[170] The Court noted that "[d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics," while "[t]hose who wish to use 'fighting words' in connection with other ideas - - to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality - - are not covered."[171] Thus, the Court went on to conclude that "the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination."[172]

Despite the fact that the Supreme Court has severely limited the application of the fighting words doctrine by closely scrutinizing statutes on vagueness and overbreadth grounds to protect against chilling effects on the First Amendment, the fighting words doctrine remains viable. In a recent case, *Robinson v. Montana*,[173] the Supreme Court denied a writ of certiorari where the petitioner was arrested for disturbing the peace by yelling unprovoked profanities at a police officer on a crowded street.[174] The Montana Supreme Court held that the defendant's indecent and profane words to the police officer constituted "fighting words" and therefore were not protected speech under the United States and Montana Constitutions.[175]

Thus, the fighting words doctrine remains valid albeit with careful drafting and application. The fighting words doctrine would appear especially applicable at a college sports event where student fans yell offensive profanities at players and fans from other schools. As in the case with J.J.

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167. 505 U.S. 377 (1992).

168. *Id.* at 381.

169. *Id.* at 381.

170. *Id.* at 391.

171. *R.A.V.*, 505 U.S. at 391.

172. *Id.*

173. 124 S. Ct. 2106 (2004).

174. Montana v. Robinson, 82 P.3d 27 (Mont. 2003), *cert. denied*, 124 S. Ct. 2106 (2004).

175. *Id.*

Redick, these highly offensive words are usually directed face-to-face to a player or team and would seem to be extremely likely to cause a breach of the peace. It would not be surprising if comments such as screaming "Fuck You" directed at an opposing player, team, or fan resulted in a physical response. In fact, it may even be expected.[176]

IV. CONCLUSION

The right of freedom of expression as provided by the First Amendment of the Constitution is a fundamental right in our society. That basic right is not absolute. We must balance our right to expression with the rights of others in society. Our colleges and universities represent a unique challenge. As the marketplace of new ideas colleges should embrace the importance of the concept of free speech. Nevertheless, colleges have a responsibility to teach students the value of civility. Colleges also have to conduct their primary function of education without disruption. Thus, balancing the rights of free speech with other rights is especially difficult on a college campus. State universities have a particularly difficult undertaking as the First Amendment has its full force in protecting citizens from governmental control. Much of the behavior that schools want to regulate is not the type that the founding fathers were concerned about when the First Amendment was created. However, we must be always vigilant that excessive regulation may chill protected speech.

This article provides a framework of how to approach this delicate balancing task. It relies on United States Supreme Court precedent as a guide to determining how to analyze potential regulations of personal vituperative behavior on campus. The sports venue represents a particularly difficult challenge because athletic contests bring out the best and the worst in people. The increasing lack of civility in sports not only concerns athletes but also is increasingly affecting fans. Instilling societal values of civility and responsibility on college students can only make them better citizens. Colleges should not abrogate their responsibilities simply to avoid complicated legal issues involving First Amendment jurisprudence. The Constitution was

176. Michelle Kessler & Erik Brady, *Fan Involvement Nothing New,* USA TODAY, Sep. 15, 2004, at 1A (listing past instances of player-fan violence resulting from speech and conduct: Albert Belle who threw a ball at a heckling fan hitting him in the chest; Houston Rockets' Vernon Maxwell who attacked a fan for heckling him about his deceased daughter; Los Angeles Dodgers players who brawled with Chicago Cubs fans near the bullpen in Wrigley after a fan allegedly struck a Dodgers catcher and took his hat; Toronto Maple Leafs' Tie Domi who wrestled with a fan in the penalty box after dousing him with water; and Texas Rangers pitcher Frank Francisco who tossed a chair into the stands, breaking a woman's nose after being taunted with indecencies during the game).

established to protect rights and should not be used as an excuse to violate the rights of others.

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